

**IN THE APPLICATION BY THE AUSTRALIAN MUNICIPAL,
ADMINISTRATIVE, CLERICAL AND SERVICES UNION AND OTHERS
FOR AN EQUAL REMUNERATION ORDER IN THE SOCIAL AND
COMMUNITY SERVICES INDUSTRY**

NEW SOUTH WALES MINISTER FOR FINANCE AND SERVICES

FINAL SUBMISSIONS

1. This submission is made pursuant to the leave given by the Tribunal in the hearing of this matter on 12 April 2011. That leave was sought after a change of government in New South Wales following the election on 26 March 2011. The Minister is grateful for the opportunity to make this further submission. These submissions replace earlier submissions filed in the name of the former Minister for Industrial Relations on 6 August 2010 and on 2 March 2011.
2. New South Wales has a long commitment to the principle of equal pay for work of equal or comparable value. This is the first case to test the equal remuneration provisions of the *Fair Work Act 2009* (Cth) (FW Act). The Minister contends that FWA should adopt a cautious and careful approach in this matter in relation to the manner in which it exercises its jurisdiction and assesses the evidence before it, particularly in the light of the precedent value of this case. The outcome of these proceedings has the potential to impact significantly on the budgetary position in New South Wales.
3. These submissions address the following issues:
 - a. The potential budgetary impact on New South Wales of any order, if granted;
 - b. The proper construction of the equal remuneration provisions of Part 2.7 of the *Fair Work Act 2009*;
 - c. An analysis of the evidentiary case presented by the Applicants.

The Minister contends that even if the Applicants' approach to the construction of Part 2.7 of the FW Act is accepted, the Applicants have failed to make out their case.

New South Wales Budgetary Impact

4. The previous Minister called evidence from Mr. Michael Gadiel, Principal Advisor in the Fiscal Strategy Branch of the NSW Treasury in relation to the budget cost impact for the State of New South Wales of increases in the rates applicable to the employees in the SACS sector associated with the Application before FWA. In light of the short time-frames associated with the making of these additional submissions, there has been no opportunity to review that evidence to consider whether it requires updating.¹
5. Mr. Gadiel's evidence suggested that assuming no change in service provision, including no productivity improvement, and that the State bore the full additional cost above 2.5 per cent per annum, the budget impact of the Application was highly dependent on the mechanism by which employees translated from the grades and pay points in their current New South Wales specific instrument to the grades and pay points in the Modern Award.
 - a. Adopting the "Union Translation Table" (MG-1), the impact of the Application on the New South Wales budget would be \$998 million over five years: \$53 million in 2011-12, \$117 million in 2012-13, \$189 million in 2013-14, \$272 million in 2014-15 and \$367 million in 2015-16.
 - b. If a simple "grade-to-grade" translation were to occur then the budget impact reduces to \$390 million over five years: \$22 million in 2011-12, \$48 million in 2012-13, \$75 million in 2013-14, \$106 million in 2014-15 and \$140 million in 2015-16.
6. The 2010-11 Half-Yearly Review is the most recent update of the State's finances and estimates budget surpluses of \$167 million in 2010-11, \$176 million in 2011-12, \$432 million in 2012-13 and \$129 million in 2013-14. The application would considerably reduce these operating surpluses bringing the state closer to an operating deficit in the medium term.
7. If FWA were to grant the Application in the terms sought by the Applicants, productivity improvements in the NGO sector would be sought to cover the additional increases.
8. Historically, the New South Wales government has provided annual increases to agencies for most expenses, including grants to non-government organisations, generally at about 2.5 per cent per annum. Should any equal remuneration order be made, the Government has already indicated its intention to seek efficiencies in non-government organisation service delivery. Such an approach

¹ In particular, it is noted that the evidence and the following submissions on budgetary impact do not take account of or address in any way the amended application made by the Applicants on 15 April 2011, posted on the FWA Equal Remuneration website on 19 April 2011.

would be consistent with the Government's wages policy which requires wage increases greater than 2.5 per cent per annum to be funded by employee related cost savings.

9. It is the Minister's submission that, should any equal remuneration order be made, it should be framed, in accordance with s 304 of the Act, in terms that would permit it to be implemented in a staged manner, preferably over five years. The evidence of Mr Gadiel was based on an assumption that there would be five year phasing, in accordance with the Heads of Agreement entered into between the Applicants and the Commonwealth. On this basis, five years would seem to be the appropriate phasing in period and would assist the New South Wales government to ensure the feasibility of any increase granted. Such phasing would allow time, for example, for efficiency offsets to be made in NGOs to help offset the additional cost.
10. If the New South Wales government were to bear the full cost of increases above 2.5 per cent, there would be a permanent impact on NSW public finances. Lower budget surpluses means that more of the state's infrastructure spending would have to be financed from debt. Net debt and net financial liabilities would rise. Higher financial liabilities would increase the burden on future generations of New South Wales taxpayers as well as undermine the state's capacity to maintain service delivery in the face of cyclical reductions in revenue levels. The New South Wales government's policy responses to offset this balance sheet deterioration would be to choose from any or a combination of the following: cutting expenditure on existing government services, foregoing recurrent or capital expenditure directed at enhancing service delivery, and increasing taxation revenue and risking harm to the State's economy.

Proper Construction of the Equal Remuneration Provisions in Part 2.7 of the Fair Work Act 2009

11. The Minister submits that the Applicants have advanced a construction of Part 2.7 of the FW Act which is inconsistent with the plain words of s 302 of the FW Act.
12. The Applicants contend, at paragraph 44 of their Submission filed on 7 June 2010 and at paragraph 61 of the Applicants' Final Submissions filed on 28 February 2011 that the "correct approach" is for FWA to follow the approach taken in the earlier Queensland and New South Wales pay equity decisions. So, they contend that s 302(5) of the FW Act requires the Tribunal to consider the following questions:
 - i. Is the SACS industry female-dominated?

- ii. Is the work in the SACS industry undervalued?
 - iii. Is the undervaluation referable to the SACS industry being a female dominated industry?
13. The approach adopted by the Applicants expressly eschews the use of a male or male-dominated comparator group. It also eschews the need to conduct any comparison in order to establish jurisdiction to grant relief under the Part. The Minister submits that this is not the correct approach.
 14. The Minister adopts and endorses paragraphs 18 to 47 of the Submissions of the Minister for Employment and Industrial Relations for the State of Victoria filed on 21 March 2011 as to the proper construction of Part 2.7 of the FW Act.
 15. In particular, the Minister submits that the plain words of s 302(2) of the FW Act requires a comparative analysis of the work value of the work performed by female and male workers.
 16. In short, the Minister submits that s 302(5) of the FW Act requires the Tribunal to be satisfied that the SACS sector workers do not have equal remuneration for work of equal or comparable value. Section 302(2) expressly refers to equal remuneration for men and women workers for work of equal or comparable value. The expressions 'equal' and 'comparable' should be given their ordinary meanings. The expression 'equal' means the same or equivalent and 'comparable' involves marking or pointing out the similarities and differences. This exercise cannot be done by considering the SACS sector workers alone. The use of these expressions necessarily requires comparisons to be made about the value of work done. The expression 'value' should also be given its ordinary meaning, namely 'the material or monetary worth of a thing; the amount at which it may be estimated in terms of some medium of exchange or other standard of a similar nature'.
 17. The identification of the group for the purpose of comparison is prescribed by the FW Act. Section 302(2) specifically refers to men and women workers. Section 302(2) does not permit the Tribunal to compare workers with characteristics other than gender. It does not and is not concerned with the comparison of the value of work done, for example, by older or younger workers, Australian citizens and non-citizens, private sector or public sector workers, or between workers residing in different States. While it is possible to select a number of different characteristics of workers and compare the value of their work, Part 2.7 of the FW Act is specifically concerned with comparison based on sex.²

² The requirement for a male comparator is supported by the Explanatory Memorandum to the Fair Work Bill 2009 - see paragraph 44-46 of the Submissions of the Minister for Employment and Industrial Relations for the State of Victoria filed on 21 March 2011.

18. As to the question – “is the undervaluation referable to the SACS industry being a female dominated industry” - the Applicants contend that undervaluation may be discerned by considering whether the indicia or elements referred to in the New South Wales Pay Equity Report are in existence. Those indicia were referred to, as follows:

On the basis of the selected industries and occupations, it would seem that a profile which, prima facie, could indicate the possibility, or even the probability, of an undervaluation of work based on gender, would include the following elements:

- *female dominated;*
 - *female characterisation of work;*
 - *often no work value exercise conducted by the Commission;*
 - *inadequate application of equal pay principles;*
 - *weak union;*
 - *few union members;*
 - *consent award/agreements, and large component of casual workers;*
 - *lack of, or inadequate recognition of, qualifications (including misalignment of qualifications);*
 - *deprivation of access to training or career paths;*
 - *small workplaces;*
 - *new industry or occupation;*
 - *service industry;*
 - *home based occupations.*
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19. The Minister notes that the indicia may be relevant to a consideration of the history and current features of an industry which is the subject of an application for an equal remuneration order. As Justice Glynn observed an assessment of evidence directed to each of these elements may point to the *possibility*, or in some cases the *probability*, of an undervaluation of work based on gender³. A consideration of the evidence may disclose a causal nexus between undervaluation and gender but that is one step (not the only step) in satisfying the test posed by s 302(5) of the FWA.
20. Section 302(5) of the FW Act requires the Tribunal to be *satisfied* of a negative proposition – there is no equal remuneration. It is not enough to establish the possibility of undervaluation within a female dominated industry. Given the test proposed by s 302(5), the Tribunal cannot avoid undertaking a comparison

³ Industrial Relations Commission of NSW 1998b Vol 1, pp 46-7; Vol 2 p267ff.

between men and women workers in appropriate circumstances. The Tribunal cannot be satisfied if the assessment of the evidence discloses no more than a possibility or probability of undervaluation of the work done by SACS workers because of sex. Rather, the Tribunal must be satisfied on the evidence that there is in fact an absence of equal remuneration because of sex.

The Applicants' Comparator Case

21. The Applicants filed a substantial amount of evidence from witnesses working within the SACS industry. Much of that evidence went to comparing the work performed by the relevant witness with their alleged counterparts in various state public sector roles throughout Australia.

22. At the directions hearing held on 24 September 2010, the Applicants sought orders for the conduct of what were described as "comparator site inspections." Counsel for the Applicants, said that:

"the intention is to identify sites in New South Wales and Victoria only where there are, we say, where there is comparable work being performed."

[our emphasis]. [PN171]

23. Also at the hearing of 24 September 2010, in response to a query about the term "comparator site inspection" from his Honour the President, the Applicants' counsel said::

JUSTICE GIUDICE: - - - what's intended by the reference to comparator site inspections?

MS LOWSON: Your Honour, I don't have the detail as yet available, but your Honour would be aware that we have filed material from both worker witnesses and also from union secretaries. The union secretaries - for example, in Victoria - have included positions descriptions from local government sector workers. Those secretaries have identified from their own experience the comparability of the work in particular areas with SAT [sic]s industry work.

[PN178, PN179]

24. Subsequent to the scheduling of those site inspections, the ACTU filed, a Statement of Steve Turner dated 3 November 2010 (Exhibit ASU23). In that statement, Mr Turner expressed views about the comparability of work performed by employees in public sector roles and private/NGO roles in the SACS industry in New South Wales.

25. In its final Submissions filed on 28 February 2011, the Applicants described the evidence it had adduced in the proceedings thus (at paragraph 521):

“...the applicants adduced evidence from union officials from both the applicant unions and from comparator unions attesting to the comparability of the work in the SACS industry and in state or local government jobs.”

26. The significance of that evidence was described in the following way (at paragraph 522):

“...The comparators cover a majority, but not all, of the positions about which evidence has been given in these proceedings. As the purpose of the comparator evidence is to provide a framework, or context, for the Queensland rates, it was unnecessary to establish exactly matched comparators for every position. At the same time, the level of comparability at some positions is sufficient to indicate the relevance of the comparators to a consideration of equal remuneration based on equal or comparable work.”

27. In final submissions on 11 April 2011, the ACTU’s representative submitted that two comparisons should be made in the case – one to the public sector and one to the ‘work performed in Queensland in this same sector’ (T 11.04.2011 PN 5671). He went on to provide three reasons why these two comparisons were appropriate.

28. However, the Applicants sought to downplay their reliance on the public sector comparisons in their final submissions. Counsel for the Applicant said that because the Applicants did not ‘seek payment of salary at the public sector rates’ the evidence was put forward ‘in order to contextualise or provide a framework for the rates that are sought’ (PN 5802). There was no further elaboration on the relevant context or framework with respect to the language and the proper construction of Part 2.7 of the FW Act,

29. Counsel for the Applicants then submitted:

The emphasis is on the comparison between SACS industry workers across Australia and SACS industry workers in Queensland, but the public sector salaries are contextual.

(PN 5831)

30. The Minister notes and supports the submissions made by Counsel for the Minister for Employment and Industrial Relations for Victoria in response to the Applicants' final submissions at **PN 6203 – PN 6208**.

Public Sector comparator evidence relevant to New South Wales

31. In light of the Applicants' submission that the public sector comparisons are contextual, the Minister makes some brief submissions about the evidence directed to comparisons with the work performed within certain parts of the New South Wales public sector.

Mr Steve Turner

32. The ACTU filed a Statement of Steve Turner, the Assistant Secretary of the Public Service Association of New South Wales, on 5 November 2010 (**Exhibit ASU 23**).
33. Mr Turner said:
“The PSA has members who carry out work which is similar to work in the non-government social, community and disability services industry, as defined in the Equal Remuneration Order.”
34. Mr Turner went on to identify seven examples of work performed by PSA members. They were:
- “a. Child protection work carried out by Caseworkers employed by Community Services NSW;*
 - b. Youth Work carried out by Youth Officers, Juvenile Justice Officers, Counsellors and Mentors employed by NSW Juvenile Justice;*
 - c. Residential support work carried out in Group Homes by Residential Support Workers employed by Ageing, Disabilities and Home care (ADHC);*
 - d. Client service work carried out by Client Service Officers employed by Housing NSW;*
 - e. Alcohol and other Drug counselling and other welfare work carried out by Alcohol and other Drug Officers, Welfare Officer and Accommodation Support Officers employed by Corrections NSW;*
 - f. Work carried out by Psychologists employed by ADHC, Community Services NSW, Corrective Services NSW and NSW Juvenile Justice;*

g. Legal services carried out by the Legal Aid Commission of NSW.”

35. There is no dispute that members of the New South Wales public service carry out work which is similar in some respects to that carried out by persons sought to be covered by the Application. That fact alone is, in the Minister’s submission, of limited utility to the Tribunal if it is to consider the comparative value of the work undertaken by each group.

36. Mr Turner did not suggest that the work performed by his members in the public sector was identical to that referred to in the witness statements filed by the Applicant to which he referred. In his oral evidence, Mr Turner said:

“...Paragraphs 5 and 6 are more about the general type of work that our members do within the public sector that seem to be in line with the type of work that was being talked about in the statements. Further in my statement I talk more specifically about comparing similar work to that mentioned in the statements.”

(PN 2322)

37. So far as Mr Turner made reference to the work of psychologists and the provision of legal services (at paragraphs 6f. and 6g.), he did not make reference to any statement tendered by the Applicant unions, nor did he make any detailed reference to the skills, responsibilities and incidents of the work performed by persons in those professions working within the public sector.

38. Mr Turner’s opinion as to the similarity of work performed by members of the New South Wales public service and employees of NGOs in the SACS industry appeared to be one formed from having undertaken a consideration of those roles at a high level of generality. It is a fair conclusion that Mr Turner’s opinions were not based on any detailed analysis and comparison of the duties and responsibilities of the respective categories of workers he identified as examples to illustrate his general proposition about similarity of work. He said:

“Would it be a fair statement to say that the examples that you’ve used in paragraph 6 are examples that you’ve looked at, at a high level of generality, rather than looking at the detail or specific of work that might be done in a given case?---It’s from my knowledge of having worked with our members in community services and I have a reasonable knowledge of the day-to-day stuff they’ve carried out but I haven’t specifically gone to an NGO agency and looked at the work they carried out and compared exactly, no.”

(PN 2328)

39. Mr Turner readily conceded, in cross-examination, the significant differences between public sector and NGO roles generally.
- “Would you agree with me that members of the New South Wales public service have a number of obligations that my (sic) be imposed by statute which don’t necessarily apply to those employed in the public sector?---Yes, that would be correct.”*
- (PN 2329)
40. Those differences were canvassed with Mr Turner. The differences included:
- a. The requirement under the *Public Sector Employment Management Act 2000* (NSW) (“the PSEM Act”) that a member of the New South Wales public service be a citizen or permanent resident; (PN 2330/31)
 - b. The requirement under section 58 of the PSEM Act that a member of the New South Wales public service to declare to their employer their bankruptcy; (PN 2333)
 - c. The requirement that a member of the New South Wales public service not take other paid work without having permission of their departmental head; (PN 2336)
 - d. The level of public scrutiny and accountability associated with public service as a result of freedom of information legislation; (PN 2338-40)
 - e. The exposure of New South Wales public servants to the possibility of investigation by the Independent Commission Against Corruption in relation to the performance of their duties; (PN 2343)
41. Mr Turner also accepted one further critical difference in the work performed. He accepted as a general proposition that a non-government agency could choose to turn away a particular client; such an option was not open in the public sector (PN2373).
42. Mr Turner referred to a number of specific examples, where he compared the work performed by New South Wales public servants with work described in other witness statements filed by the Applicants.
43. For example, in paragraph 20, Mr Turner compared the work described in the statement of Ms Narelle Clay with respect to Supported Accommodation and Housing for Young People with work “*which was once carried out by employees of the Department of Community Services.*” [our emphasis]. No description of the work *currently* performed by officers of the Department of

Community Services was given. As a consequence the evidence is of limited value in undertaking any comparative analysis of the value of the respective types of workers.

44. Mr Turner went on to compare the work described in paragraphs 26 and 27 of the Statement of Ms Narelle Clay with work carried out by Youth Workers employed by Juvenile Justice who are covered by the *Crown Employee (Department of Juvenile Justice – Detention Centres) 2005 Award*. Mr Turner accepted that youth workers employed by the Department of Juvenile Justice perform their work within a custodial setting (T 02.02.11, PN 2347). Mr Turner accepted that some of the particular incidents of the work required to maintain order within the detention centre (PN 2348), include the use of force from time to time as required (PN 2349-50), the requirement to carry out searches for contraband (PN 2353), and the carrying out of mandatory checks on overnight shifts (PN 2354).
45. In relation to his comparison, when it was suggested that there are significant differences between the roles to which he referred, Mr Turner appeared to suggest that he was referring to non-custodial roles. He stated:

“When I read Ms Clay’s statement, the work that she was describing for the youth officer part seemed similar to the work carried out by juvenile justice youth workers, and I’m referring to that part of it I suppose to – because there’s various roles within juvenile justice and there are youth workers who don’t have the level of intervention as the custodial type of roles.”

(PN 2356)

“Well, my statement there is only referring to what I read in Ms Clay’s statement and then equating it to that appropriate area of work that’s carried out in juvenile justice.”

(PN 2357)

46. However, Mr Turner did not identify clearly the role to which he referred. In those circumstances, Mr Turner’s evidence rose only slightly above the general proposition discussed above, and did not assist in undertaking any assessment of comparative work value.
47. Mr Turner also compared the work described by the ASU witness W26, and that performed by Aboriginal Caseworkers employed under the New South Wales government’s “Brighter Futures” program. Mr Turner expressed the view that the work performed by the Caseworkers is “similar”. However, Mr Turner conceded the existence of a general requirement, (not applied to Aboriginal

Caseworkers) that caseworkers in Community Services hold tertiary qualifications (PN 2361).

48. Further, Mr Turner conceded that child protection employees in Community Services NSW exercise responsibilities of the Director-General under the *Children and Young Persons (Care and Protection) Act* on a delegated basis (PN 2364/5). He accepted that those duties are unique to those in government roles (PN 2370). Those duties include:
 - a. The removal of children; (PN 2366)
 - b. The making of applications to the Children’s Court in relation to the care of children and young persons, including giving evidence in those proceedings and prosecuting them (PN 2368/9)
49. Mr Turner also gave evidence, in response to questions from Counsel for the Minister and Counsel for the AFEI as to the most recent negotiations of public sector wages in New South Wales. Mr Turner related how the PSA commenced a major industrial case in the New South Wales Industrial Relations Commission in 2008, seeking wages increases due to productivity improvements in the public sector (PN 2396).
50. Ultimately, those proceedings were resolved following conciliation between the parties. Importantly, Mr Turner described how the claim was ultimately resolved for a wages increase of 4% after a process to identify employee cost-savings was settled (PN 2406, 2408). Those cost-savings were designed to make up the difference between the 2.5% being offered by the New South Wales Government and the 4% increase. They included annual leave liability reduction, better management of workers compensation and rehabilitation and flexible working hours (PN 2407)

Ms Sally McManus

51. Ms McManus, the Branch Secretary of the New South Wales and Australian Capital Territory Branch of the Australian Services Union also gave evidence making a comparison between work performed by employees of non-government organisations in the social and community services sector and that performed by New South Wales public servants. That evidence appears at paragraph 142 to 149 of Ms McManus’ statement dated 7 June 2010, which became **Exhibit ASU 34**.
52. At paragraph 142, Ms McManus identified five awards which covered employees in the New South Wales public service. She asserted that the awards apply to “*persons performing the same or similar work as performed in the SACS industry in New South Wales.*”

53. At paragraph 144, Ms McManus identified six New South Wales government agencies which, she asserted employ “*employees engaged to perform social and community services type work, as well as other comparable work.*”
54. Ms McManus did not undertake an analysis of particular roles in each sector; rather, the comparison was made at a high level of generality. It was not surprising that this is so. As Ms McManus conceded, she had no experience observing SACS work being by New South Wales public servants. (PN 2980). Ms McManus accepted that Mr Turner was in a better position to comment on that work than she was, and in particular, to comment on the particular responsibilities and conditions of work of those employees. (PN 2981; 2982).
55. Ms McManus conceded that New South Wales public servants have responsibilities and obligations which are unique to them by reason of the legislation under which they are employed (PN2983-2985). She also accepted that there are obligations which rest upon New South Wales public servants which arise from the particular legislation covering their area, the instance of child protection work being one example of that general proposition (PN2986).

Conclusion to be drawn from the public sector comparator evidence

56. The Minister submits that the relevance of the comparison evidence, even for the purpose of ‘context’ or ‘framework’ is not clear. The Applicants have not provided a sound or reliable basis for making the comparisons in the areas nominated by Mr Turner and Ms McManus.
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57. As noted above, if Part 2-7 of the FW Act operates by reference to a comparator group, then the basis upon which the comparator group have been selected should be clear. Further, the manner in which the comparison is to be undertaken should also be clear. The Minister submits that it is not sufficient (or reliable) to set a few tasks or duties and assert that the tasks or duties are either ‘the same’ or ‘similar’. It would be preferable that the comparison be undertaken using job and skill evaluation methods and based on an objective assessment of the respective jobs and skills.
 58. Notwithstanding that both Mr Turner and Ms McManus conceded in cross-examination the existence of various differences between SACS employees in the non-government sector, and their proposed comparators in public sector roles, no attempt was made in the evidence led by the Applicants to undertake any detailed analysis of the extent and work value of those differences.

59. Further, there has been no attempt by the Applicants to address the effect of significant differences between the work of SACS employees and the areas identified as comparators in the New South Wales public sector.

Conclusion

60. To the extent the Applicants have sought to advance a claim for an equal remuneration order by undertaking a comparison between either:
- workers in the SACS industry and workers in similar public sector roles; or
 - workers in the SACS industry under the Modern Award and workers in the SACS industry in Queensland

the Applicants' case must fail.

61. The Applicants' case proceeds on the basis of a fundamental misconception about the proper construction of Part 2.7 of the Act. The Tribunal must be satisfied on the evidence that there is in fact an absence of equal remuneration. This necessarily requires a comparison of the value of work performed by female and male workers.
62. Alternatively, the Applicants have failed, in the comparative evidence adduced, to undertake a sufficiently rigorous analysis to establish that the nominated comparator roles were of "equal or comparable value" to SACS industry roles.
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63. While the Minister strongly supports the principle of equal remuneration for men and women of equal or comparable value the Minister contends that the Tribunal must still be satisfied that, before making an equal remuneration order, the Applicant(s) has met the statutory and evidentiary requirements that have been set out in this submission.
64. If however FWA considers that the Applicant(s) has made out a case for an equal remuneration order then the Minister submits that in accordance with s304 of the Act that order should be implemented in stages over a five year period.

Dated: 27 April 2011


Kate Eastman

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