IN THE INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

AT SYDNEY

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State Wage Case 2024

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FBEU Outline of Submissions

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Introduction

1. The **F**ire **B**rigade **E**mployees **U**nion is a party to awards of the Commission including, relevantly, the:

   a. *Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2023*; and

b. *Crown Employees (Fire and Rescue NSW Retained Firefighting Staff) Award 2023*.

2. It currently has applications before the Commission for replacement awards which include significant alterations to wages and conditions, set to be heard early next year. It has a direct and immediate interest in what wage fixation principles the Commission determines will apply following the State Wage Case 2024.

3. In short, and with regard to the specific questions posed by the Commission in *State Wage Case 2024* [2024] NSWIRComm 1, the FBEU contends that the current wage fixation principles[1] are not fit for purpose, and have not been for some time. Further, although some parts remain theoretically utile, the obsolete or inchoate aspects are so integral to the overall structure that addressing the difficulty requires a fundamentally new approach.

4. The FBEU's proposal involves a complete rewrite of the wage fixation principles, to modernise them and to reflect the contemporary challenges and opportunities facing the Commission and its stakeholders. It is not, however, wholesale abandonment of the ideas of the past. It additionally is intended to avoid the circumstance whereby a statement of principle becomes, impermissibly, a binding decision rule outside of the actual strictures of the *Industrial Relations Act 1996* (Cth).

The current wage fixation principles

The Accord, and related matters

5. The current wage fixation principles have a long history. Their contemporary genesis[2] is found in the Federal decision giving force to the original Prices and Incomes Accord achieved by the Hawke government in 1983.[3] In the 1983 Decision the primary principle was that awards would be varied on a six-monthly basis to achieve full CPI 'repair' indexation.[4] A secondary principle was established mandating the Commission to consider, on application, the inclusion of an additional amount to reflect productivity (with the latter delayed to 1985 in anticipation of economic recovery from the existing stagflation crisis).[5]

6. The tradeoff for this was that *other* wage movement would be sharply restricted. This was achieved in a variety of ways but relevantly included:

[1] As most recently determined in *State Wage Case 2022* [2022] NSWIRComm 1081 (**2022 Wage Fixation Principles**).
[2] It is possible to go back further, but of limited practical utility in the context of the present proceeding.
[3] *National Wage Case – September 1983* (1983) 4 IR 429 (**1983 Decision**)
[4] 1983 Decision at 450
[5] 1983 Decision at 451

a. a 'no extra claims' requirement, in that access to the above increases was only granted where unions undertook not to pursue additional claims outside the principles;[6]

b. a restoration on the limitation on claims for increases based on work value to circumstances involving a '*strict test*' requiring a '*significant net addition*'[7] to work value and requiring the Commission to '*guard against contrived classifications and the overclassification of jobs*;[8] and

c. limitations on claims based on correcting anomalies or inequities, including emphasising that increases would not be justified on the basis of '*the doctrines of comparative wage justice or the maintenance of relativities*'[9] and that '*there must be no likelihood of flow-on'.*[10]

7. These principles were adopted without alteration by a Full Court of the Industrial Relations Commission in Court Session, which then proceeded to vary awards accordingly (including by the insertion of a no extra claims clause).[11]

8. What these principles reflect is the fundamental task for any tribunal engaged in a wage fixation exercise, or generally in determining '*fair and reasonable'* conditions of employment: ensuring a balance between on the one hand guaranteed wage growth and on the other hand the need for control and restraint. It was an opt-in system: the restrictive principles bound unions via the no extra claims clause that was the price of access to the national wage increase.

9. This approach was replicated, albeit with more force, in the 1989 National Wage Case,[12] which (following the 1988 case which had required agreement to cooperatively review awards to achieve structural efficiency)[13] made access to the wage increases in part conditional on the structural efficiency principle having been properly implemented in the subject awards.[14] This was again adopted by this body.[15] The point is the same: the limitations on wage movements otherwise imposed by the Principles applied, and were

[6] 1983 Decision at 451
[7] 1983 Decision at 454; 2022 Wage Fixation Principle 8.2(a)
[8] 1983 Decision at 454; 2022 Wage Fixation Principle 8.2(j)
[9] 1983 Decision at 458 2022 Wage Fixation Principle 8.5.1 (albeit with some amendment). See also the commentary in the *Potato Marketing Board Case* (1976) CAR 16 at 17, in the context of the previous re-introduction of indexation in 1975 (abolished in 1981).
[10] 1983 Decision at 458; cf '*wage leapfrogging*' at 2022 Wage Fixation Principle 8.2(b). *'Leapfrogging'* is an older term with a frankly mutable meaning, but which was at the time directed at the need to avoid double-counting in what were described as 'catchup' cases – see, e.g., *Re Rubber Plastic and Cable Baking Award* (1976) 175 CAR 243 per Gaudron J. Increasingly it shifted to a term to describe the need to maintain wage parity with comparator relativities, which is how it is now used in this jurisdiction: *Crown Employees (NSW Police Force Special Constables (Security) Award 2023* [2024] NSWIRComm 1034.
[11] *State Wage Case 1983* (1983) 5 IR 1
[12] *National Wage Case August* (1989) 30 IR 81
[13] *National Wage Case August 1988* (1988) 25 IR 170 (**1989 National Wage Case)**; adopted by the NSWIRC in *State Wage Case August 1988* (1988) 26 IR 24
[14] 1989 National Wage Case at 90, 101
[15] *State Wage Case August 1989* (1989) 30 IR 107

only ever intended to apply, in circumstances where the application of the principles was otherwise leading to a wage increase.

Changes to the IR Act

10. The above decisions have to be understood in light of the historical position in the underpinning legislation. The *Industrial Arbitration (Adjustment of Awards) Amendment Act 1988* (NSW) amended the *Industrial Arbitration Act 1940* (Cth) to provide for, per the Explanatory Note, '*the adjustment of the wages and working conditions of employees under State awards following general decisions of the* ***A****ustralian* ***C****onciliation and* ***A****rbitration* ***C****ommission such as those made in proceedings commonly known as the national wage case'*.

11. The *Industrial Relations Act 1991* (NSW) contained, at time of commencement, similar provisions at s.14. It required the Full Commission (distinct from the Industrial Court) to order (a power it then had) unless satisfied there were good reasons not to do so, the adoption of Commonwealth decisions setting general principles and ordering wage increases. The Industrial Registrar was then compelled per s.14(4) to, subject to contrary order of the Full Commission, vary existing awards consistently. The ongoing effect of the order in precluding inconsistent awards being made was provided by s.14(5).

12. With the enactment of the current IR Act, a new structure emerged. It introduced Part 3 of Chapter 2, in functionally the same terms as it currently exists (albeit that the name of the Federal tribunal has been updated). This structure deals with two types of decision:

    a. a '*national decision'* i.e. one made by the Fair Work Commission or its Minimum Wage Panel that is likely to generally effect Federal system award employees in NSW; and

    b. a '*state decision'*, being one made by a Full Bench of this Commission that generally effects, or is likely to generally effect, the conditions of employment of state-system award employees.

13. A strong history of comity in approach between the two jurisdictions, however, initially persisted: see *State Wage Case – August 1997* (1997) 73 IR 200 at 220-221. An example of this can be seen in *State Wage Case 2005* [2005] NSWIRComm 212, in which *inter alia* the Statement of Principles set out in *Safety Net Review – Wages 2005* [PR002005] was substantially adopted.

The impact of Federal system reform

14. However, a major turning point occurred following the introduction of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), which removed the wage fixation

function of the AIRC to a new, quite different, body – the **A**ustralian **F**air **P**ay **C**ommission - which did not operate in line with the established wage fixation principles.

15. The impact of this was considered in *State Wage Case 2006* [2006] NSWIRComm 67 in which the Commission set out the divergence in purpose between the two acts. Ultimately, in *State Wage Case 2006 (No 6)* [2006] NSWIRComm 204, the existing (slightly modified) principles were adopted as a State decision, and appropriate annual wage increases considered separately by the Commission. This was, as the Full Bench noted at [2], the first time (at least under contemporary legislation) that the State tribunal had been required to consider wage fixation absent an intervening national decision.

16. The AFPC was abolished after its second decision in 2007, with wage fixation returned to the AIRC. In 2010, following a transitional period, the ***F**air **W**ork **Act** 2009* (Cth) provided the newly-established **F**air **W**ork **C**ommission with an annual obligation to review both the minimum wage and minimum award wages. In both cases (ss.284 and 135 respectively) the statute *itself* set out mandatory considerations for the Commission.

17. The first minimum wage review occurred in 2010. The FWC did not, and has not since then, adopted the kind of enumerated list of principle that could (as opposed to the result) be conveniently 'adopted' by this Commission. There were increasing questions about whether the Principles, in whole or in part, retained contemporary use, and a general review was planned for 2010: see *Re State Wage Case 2009* [2009] NSWIRComm 120 at [157]-[158].

18. In *State Wage Case 2010* [2010] NSWIRComm 183, the Full Bench:

    a. identified the purpose of the Principles as being '*a coherent set of rules that ensures consistency of approach by the wage fixing tribunal and certainty and predictability in respect of the fixation of wages';*

    b. recognised that the public sector now made up the bulk of the jurisdiction,and that as such the majority of awards were now paid rates awards;

    c. observed further that the principles as established required *'refinement'* given they were at that point 27 years old; and

    d. provided a draft set of principles for further comment.

19. The purpose set out above must be read in its context: it assumes a tribunal playing an active role in setting actual wages for employees, with no other external source imposing consistency. At this point, the NSW Government had implemented a wages policy capping annual wage increases at 2.5% absent identifiable cost trade-offs. It had not however implemented s.146C. In other words, the Tribunal's wage fixation function had

not yet been crippled; principles governing its exercise remained at least potentially relevant. The principles were drafted on the same assumption that had informed every previous iteration: that the Commission would retain a central role in wage fixation.

20. The principles as finalised were promulgated in *State Wage Case 2010 (No 2)* [2011] NSWIRComm 29, issued on 25 March 2011, and were intended to be reviewed in 2012. They were set to operate from 4 April 2011.

21. Section 146C came into effect on 17 June 2011. This had two effects:

    a. first, the Commission's ability to set wages it considered fair and reasonable, or indeed adopt Federal decisions, was handcuffed; and

    b. second, in practice, the Commission's substantive role in wage fixation reduced effectively to nil, with the overwhelming majority of awards being made by consent containing the state wages policy increases.

22. Unsurprisingly, the wage fixation principles received little attention from this point.

23. However, this is where the present difficulty truly emerged. At this stage, they had lost their intended function - balancing wage growth with wage restraint – and began to act only as an arbitrary, self-imposed fetter on the Commission's jurisdiction.

2020 and beyond

24. In *State Wage Case 2020 (No 2)* [2021] NSWIRComm 1079, the Commission concluded a review of the State Wage Fixation Principles. The amendments to the principles from 2011 to 2020 are helpfully summarised at [55]-[60]; these are fairly described as of limited significance.

25. In that review, the Full Bench expressly rejected a claim by Unions NSW to amend principle 4.2 to allow the State Wage Case adjustment to flow onto awards generally, and amended the Principles to limit access to 4.2 to 13 relevant awards.

26. It should be observed that the rationale behind this – that these are paid rates awards and minimum rates increases ought not be applied to them – is perhaps questionable. For example, while it is correct per [41] that in 1993 the annual increase was not flowed on to paid rates awards, this was a (contested) decision confined to a particular year, not the establishment of a general practice. In *State Wage Case – December 1994* (1994) 57 IR 1, by way of illustration, paid rates awards were able to be varied under the wage adjustment principles in exactly the same way as minimum rates awards. Similarly, as to [42], the determination in *State Wage Case – June 1998* (1998) 79 IR 416 was plainly directed at avoiding double-dipping by absorbing increases into bargained increases in a context where the principles assumed wage growth, rather than endorsing

an exclusion of an award from access to automatic wage growth forever simply because rates its predecessor in 1992 had been varied other than via the Principles. This is however, by the by.

No longer fit for purpose

27. The point is, since their amendment in 2021, the 2022 Wage Fixation Principles:

    a. exclude all but 13 largely irrelevant awards from access to annual wage review increases, i.e. those directed at maintenance and growth; and

    b. maintain the restrictions introduced *in exchange* for access to such annual increases, without new justification.

28. They are profoundly unbalanced, and as such inimical to guide the fixation of fair and reasonable conditions of employment.

29. Additionally, the principles:

    a. do not recognise, let alone facilitate, the new focus in the Act on encouraging and facilitating mutual gains bargaining (notably because they skew so sharply in one direction); and

    b. are archaically drafted, retaining language (sometimes to the word) from a different century and a completely different legislative, economic and social context.

What is to be done?

The FBEU position

30. The first question for the Commission is, in truth: are wage fixation principles required at all? They have long since been abandoned at the Federal level. The reciprocal growth and control mechanisms they were once intended to protect and impose are no longer directly relevant, and in current form the Principles impose restriction with no trade-off. They are more a thicket of technicality than anything that assists or informs the parties or the public, and on one view are productive only of disputation. The out-of-control wage growth that was their genesis is long gone. It would be open to the Commission to abandon the practice entirely.

31. That said, there is a critical difference between the State and Federal system: the closed ecosystem, and the fact of a central employer. This makes central guidance more appropriate than it might otherwise be.

32. What the Principles cannot do is operate as a decision rule separate to the IR Act itself. The Commission was cautious in the 2022 review to be clear that the Principles did not

exceed the Commission's jurisdiction. It ought equally to guard against artificially limiting it.

33. Principles have a separate function: they operate, or should, as a public statement of intent. They should be drafted in a way which sets out the Commission's approach in a manner coherent to the average public servant, as well as guide practitioners. The current language does not achieve this: indeed most of it is borrowed, somewhat haphazardly, from a different age.

34. The FBEU's proposal perhaps looks more dramatic than it is. It is an attempt to redraft, in plain and (relatively) modern language, some of the substance of the existing principles, while implementing a number of key changes being:

    a. the facilitation of mutual gains bargaining via a new position on no extra claims clauses;

    b. introducing access to the state wage case decision for parties whose awards have not been increased in 12 months, in certain circumstances – largely, where bargaining is delayed or failing;

    c. introducing, in lieu of a presumption that all awards are fair and reasonable, the concept of 'properly fixed rates' as a guiding principle; and

    d. changing the focus from prohibitions and matters the Commission must guard against to explaining circumstances in which an award variation or replacement would be ordinarily entertained.

The Commission's questions

1. Retention in whole or in part?

35. The Principles cannot be retained in their current form. As set out above, they are fundamentally not fit for purpose. In particular, the restrictions they impose on parties seeking improvements to awards are no longer justified in the absence of presumptive access to annual wage increases.

36. They should not be retained in part. Although there is a degree of patchwork elegance to them as is, the reality of the drafting is that each part relies on, and presumes, the existence of the other, such that surgical (or even brute force) excision or redrafting is likely to create more problems than it solves. The foundations of the structure – that is, balance between growth and restraint – having been wholly eroded leads to a conclusion that only a wholescale rebuild is workable.

37. A question arises as to whether wage fixation principles are warranted at all. To a degree they are a creature of another era, reflecting in particular in the Federal sphere a process

of giving life to agreements reached between industry, employees and government at a high level. They have not been a feature of the Federal system for over a decade, and show no signs of returning. In circumstances where their adoption, and development, was until 2005 an expression of comity between the Federal and State systems, that same comity dictates at least a consideration as to whether the approach should be retained.

38. That said, the change in Federal approach reflects a profound change in the nature of that jurisdiction's wage fixation powers, which is an alteration which has it performing a very different task to which the NSW Industrial Relations Commission does. The Fair Work Commission's awards are its own creatures, as is the national minimum wage orders and, while it is obliged to hear from persons affected, it is fundamentally not resolving an industrial dispute between parties as this Commission will be. Accordingly a divergence of approach is justified, albeit that the general conclusions reached by the Fair Work Commission in its considerations remain instructive.

39. That does however draw attention to what the purpose of wage fixation principles is. They cannot permissibly operate as a decision rule to artificially fetter the Commission's jurisdiction – and obligations – under the IR Act. Correctly understood, as set out above, they were never intended to do so. Instead, in the contemporary context of the NSW system they are best developed as a centralised emanation of how the Commission proposes, as individually constituted, to approach common issues. There is some merit in that respect in having them drafted in a manner that is comprehensible in full and without reference to ancient authority.

2. Onus to rebut?

40. The current wage fixation principles do not expressly provide for an assumption that all wages and conditions prescribed by current awards are fair and reasonable unless proven otherwise.

41. To the extent such a principle emerges on the jurisprudence, it appears to have been the result of a gradual and unexplained mutation of a completely anodyne statement in *Re Pastoral Award* (2001) 104 IR 168 at [75]-[77] to the effect that:

    a. in making an award, the Commission is required to be satisfied that it sets fair and reasonable conditions of employment;

    b. an applicant seeking to vary a condition must make out a case to do so on the evidence; and

    c. a basis upon which this could occur is that the award no longer provided fair and reasonable conditions of employment,

to something closer to a need to demonstrate jurisdictional error in an earlier decision.[16]

42. It may be a difficulty more apparent than real. If in truth it means that an applicant must do no more than prove its case, then it is a statement of the obvious. The difficulty is that it is from time to time stated as more than that, and in that sense has the tendency to misdirect attention from the true task under the IR Act.

43. The FBEU's proposal accordingly does not include any such requirement.

3. Cost of living principle

44. There should be a principle directed at ensuring that, as a general proposition, the Commission will ensure that wages maintain their real value over time.

45. Money is only worth as much as it can buy, and it is difficult to see how wages will continue to be fair and reasonable if their actual value is eroded and not repaired. The need to maintain the real value of wages over time has been recognised in Australian jurisprudence on wage fixation since shortly after the *Harvester* judgement. Initially this was done through Higgins J (and his colleagues) re-evaluating the basic wage on the basis of the particular cost of various items until the 'automatic adjustment principle' was introduced by Powers J shortly thereafter, with the *Harvester* standard increasing by the previous quarter's inflation figures plus a margin.[17] Although there has been over the intervening decades some tussling about whether automatic indexation should apply,[18] the fundamental point remains a cornerstone of the approach both in the federal system and here.[19] The same can, or should, be said about wage growth and the importance of a share in national productivity gains.

46. A similar principle was proposed, and rejected, in the 2021 review. The rationale for that rejection at [185]-[190] turns on a proposition that this would improperly bind the Commission's hands, which appears to assume that the Principles operate, impermissibly, as a decision rule (which is how the principle being considered was drafted).

47. This ought not be so. The appropriate course is to instead include a rebuttable presumption that wages will be increased to:

    a. repair any erosion in real value since the last increase;

    b. include a protective component; and

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[16] *City of Sydney Wages/Salary Award 2014* [2014] NSWIRComm 49 at [14] cited in *Application for Crown Employees (**Public Sector – Salaries 2020**) Award (No 2)* [2020] NSWIRComm 1066 at [31](2)

[17] *The Fairest Method of Securing the Harvester Judgement Standard to the Workers* (1921) 16 CAR 830

[18] See *Basic Wage and Standard Hours Enquiry 1952-1953* (1953) 77 CAR 477; *Reasons for Decision 30 April 1975* (1975) 30 IRB 770 at 32-35; *National Wage Case 1981* (1981) Current Review [C116]; *National Wage Case – September 1983* (1983) 4 IR 429

[19] *Public Sector Salaries 2020*, at [157]

c. allow for real wage growth.

4. Principle 7 – minimum wages

48. The FBEU does not directly represent award/agreement free employees. It supports the inclusion of a principle setting a minimum rate of pay for these employees. The FBEU's draft proposes that this be done by reference to the Federal Minimum Wage Order, but it otherwise supports the position taken by Unions NSW.

5. Separation of work and gender-based undervaluation

49. There is undoubtably significant overlap between work value claims and wage claims based on historical gender based undervaluation: the point of the latter is, of course, that the true value of the work has not been properly recognised because of gender bias.

50. The reason for the current separation appears to be the maintenance of a requirement to identify *change*, and in particular a 'significant net addition' in work value to justify an alteration of wages, which has been abandonded in the Federal system for fifteen years.[20] This metric is not relevant to claims that work has been undervalued on the basis of gender (although in practice work value change may also have occurred since the last time wage rates were fixed).[21]

51. In the event that the Commission is minded to retain the 'significant net addition' test, or otherwise a need to identify point-in-time change, it would be necessary to retain the gender-based undervaluation principle.

52. That said, even if this is not retained, there is likely merit in preserving the separation. Gender-based undervaluation of work has historically arisen, at least in part, from unconscious bias and unexamined presumptions about the skill and responsibility required of particular work. Correcting it is a long-term project which requires direct focus, and the maintenance of a particular principle to this effect encourages this.

53. A similar example can be found in the response to the insertion of a requirement in s.134(a)(ab) of the FW Act directing attention to the '*need to achieve gender equality'* via a variety of means which, while not directly requiring anything to occur, has in fact led to a wide-scale review of a number of Federal awards in feminised industries.[22] Noting that wage fixation principles are, in part, a statement of intent, it is appropriate to retain a similar direct focus in this jurisdiction.

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[20] *Fair Work Act 2009* (Cth) s.157; *Re Pharmacy Award 2010* (2018) 284 IR 121 at [166]-[167]
[21] See, e.g. *Re Aged Care Award 2010* [2022] FWCFB 200 and subsequent decisions.
[22] *Statement – Gender Undervaluation Priority Awards Review* – [2024] FWCFB 280

6. Special case principle?

54. The special case principle ought not to be retained. Nor should a new definition be introduced. Instead, general guidance as to the matters which could justify a non-routine (i.e. other than a normal annual increase) variation should be included, as set out in the FBEU's draft. This is so for three reasons.

55. **First**, its historical justification has, as set out above, become lost: the relevant tradeoff has been expressly removed from the current wage fixation principles.

56. **Second**, it has a tendency to be treated by parties, and from time to time the Bench, as a faux-jurisdictional prerequisite not found in the IR Act: see, for example, the commentary in *Re Crown Employees (Administrative and Clerical Officers State) Award and other Awards (No 2)* (1993) 52 IR 243 at 377 about applicants being '*entitled to bring their case under the Special Case provisions'*. This is inherently undesirable.

57. **Third**, most significantly, as a concept it is inherently amorphous so as to be meaningless. So much is shown by reference to *Re Operational Ambulance Officers (State) Award* [2002] NSWIRComm 331 at [165]-[168].

58. In truth the special case principle is simply an expression of:

    a. the micro-level proposition that if a party seeks a change based on factors other than the established grounds it will need to persuade the Commission that this is warranted; and

    b. a more macro-level idea that the Commission will exercise its wage fixation powers in a manner which has regard to the need for structural stability and consistency, and

59. This is better done as an expression of principle in those terms, rather than elevating it to an obscure term of art.

7. Principle 8, and attraction and retention?

60. Principle 8 should be entirely re-written, with the rest of the principles, to simplify and modernise it, and to reflect the changed focuses of the IR Act. The FBEU's draft attempts this task.

61. In respect of the specific question as to the need to accommodate new s.3(i), 8.5 on its face is now inconsistent with the objects of the IR Act to the extent it prohibits claims based on attraction and retention. That said, when the cases it refers to are taken into account, it is less of an 'exclusion' of attraction and retention claims (or indeed the other matters 'excluded') as a statement that these cannot be brought unless they are

meritorious. This is not particularly helpful to anyone and illustrates the need to make a clean break from the current structure, while preserving the fundamental point.

8. Fiscal position and outlook

62. Given that the need to have regard to the fiscal position and outlook of the Government, and the effect of the exercise of award making powers, it is appropriate that this be expressed in the principles. The FBEU draft does this in the preamble, reflecting (as appropriate for an object) its status as an overarching consideration.

9. Principle 8.3 – productivity and efficiency considerations

63. Productivity is notoriously difficult to measure in the public sector. The conventional/simplistic mechanisms used to measure labor productivity (output value vs expenditure on labour) do not work in the context of public sector services.

64. Consider the fire brigade. Using a standard (crude) productivity measure, a sharp increase in fire call attendances per dollar of labour expenditure from one quarter to the next would ordinarily suggest a productivity gain. However, because like all public sector workers firefighters are performing a reactive service rather than producing a good, what this actually suggests is:

    a. a dramatic increase in the number of fire response incidents in the community, which suggests that something has in fact gone wrong in the prevention and protection goal of the agency; or

    b. a sudden decline in the number of firefighters, which is inconsistent with questions of recruitment and retention and gives rise to a concern about understaffing, itself linked to poorer quality outcomes,

    neither of which could be said to be truly an improvement in the agency's contribution to the economy and society as a whole.

65. Particular challenges include:

    a. the absence of market transactions, or high distortion of market transactions by subsidisation;

    b. the reality that public goods and services are often provided to correct or respond to market imperfections;

    c. the collective nature of the services leading to difficulty in identifying and benchmarking outputs at all; and

d. the focus on quality gain rather than output increasing, and the complexity associated with performance improvements.[23]

66. Current principle 8.3 does not adequately capture the complexity of public sector productivity, in particular because of its focus (driven, in turn, by previous policies) on direct and indirect cost savings, at the loss of the broader considerations that this complex area requires. The FBEU's proposal contains suggested alternative drafting.

10. Principle 9 – Negotiating Principles

67. Principle 9 as it currently stands contains a set of highly prescriptive 'negotiating principles' which have, it appears, never been enforced, and which had no real relevance during the period in which s.146C was operative. They are more focused on purported technical requirements than matters of substance. Many of the obligations said to be imposed are unenforceable, or if enforced involve the imposition of purported jurisdictional limits outside the scope of the IR Act (see, e.g. 9.3).

68. There is no need to interrogate their history, or consider whether the 'Bluescope Model' (also known as 'the arbitration you have when you're not having an arbitration') remains relevant. The reality is that the Commission presently finds itself confronted with a new landscape, presenting equal part challenge and opportunity:

    a. first, the introduction of a focus on mutual gains bargaining, and the need to facilitate this novel new approach; and

    b. second, a public sector award system which has in large part sat unreviewed for over a decade, and a complex reform project.

69. The reality of public sector bargaining, even when parties are not out of practice, is that it is a time-consuming process. The nature of the decision-making processes involved, and the scope of the process, make this almost invariably so. The bargaining for the FBEU awards, such as it was, is an example of the difficulties that can be faced.

70. The Commission must develop a mechanism which:

    a. allows these structural reforms to be negotiated between the parties; but

    b. disincentivises delay and otherwise encourages efficient participation in these processes; and

    c. in particular, does not require employees to forgo a fair and reasonable annual wage increase in order to participate in mutual gains bargaining.

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[23] *'Public Sector Productivity (Part 1) – Why is it important and how can we measure it'?* – Ravi Somani, Equitable Growth, Finance and Institutions Insight February 2021, World Bank Group

71. The FBEU's proposal addresses this via three steps:

a. first, identifying the Commission's commitment to facilitating mutual gains bargaining;

b. second, clarifying that these reforms can be introduced 'piecemeal' via awards without no extra claims clauses, or with leave reserved in respect of outstanding issues (whether to be negotiated or ultimately arbitrated); and

c. third, providing an express pathway for employees to access annual wage increases during bargaining, where sufficient time has elapsed – that is, where negotiations have proceeded for over a year without resolution.

72. This is more practical than statements of expectation as to good faith participation; although the FBEU has no objection to statements of this kind being included per se, it contends there is no particular utility to them.

11. Principles 10 and 12

73. Principle 10 and 12 ought to be removed from the Principles as:

a. Principle 10, while historically interesting, is no longer of any utility; and

b. Principle 12 deals with concepts directed at the micro enterprise level rather than the macro state economy, and is subsumed by the requirement to consider the impact on the NSW economy in any event.

74. Both in truth reflect the difficulty with attempting to amend, rather than rewrite, these principles. The current moment presents both an opportunity and a need for a deep reset, and the retention of language drafted in a different century is unlikely to achieve this goal.

Conclusions

75. For the reasons set out above, the current wage fixing principles ought to be rescinded and replaced with principles in the form of, or at least the manner of, the FBEU's proposal. To that end, it is acknowledged that the FBEU's proposed variation is one way of approaching the problem, and one style of drafting. It should be viewed, in light of its underlying substance, as a suggested way forward.

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