IN THE INDUSTRIAL RELATIONS COURT OF NEW SOUTH WALES

Matter: 20214/211169

State Wage Case 2024

FBEU submissions in reply

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Introduction

1. In an attempt at efficiency, the FBEU has not replied to every matter in which it takes a different view. Instead, these submissions address the major points of disagreement between it and the other parties.

2. As a perhaps unsurprising result, the reply is principally directed at the submissions of the Industrial Relations **Secretary** and **L**ocal **G**overnment **NSW**.

3. Additionally, with these submissions the FBEU has filed a slightly amended version of its proposed wage fixation principles, which fix some formatting errors and make some minor drafting corrections.

1. Retention?

All parties

4. At first glance, the FBEU's answer to Question 1 – whether the wage fixation principles should be retained in whole or in part – looks radically different to every other party. Properly understood, this is not so.

5. There is a critical distinction between the question of:

    a. whether the IRC ought to retain centrally determined wage fixation principles *at all*; and

    b. if it should retain *these particular* wage fixation principles as presently drafted, with minor amendments.

6. Everyone agrees that wage fixation principles should be retained as a *concept*. It additionally seems to be common ground that these should function as guidelines, outlining the ordinary approach the IRC will take without being understood as a strict fetter on the Commission's powers.

7. It does not follow that the current *drafting* should be retained. Although every participant but the FBEU proposes retaining much of the language, this appears to be a result of merging the two questions above into one. There is no real indication that any participant has considered the question of redrafting.

8. Notably, to the extent that several parties have called up the historic language of the wage fixation principles '*having served the Commission and the parties well'*[1] and which provide a '*framework for the good conduct of Industrial Relations in this jurisdiction'*[2] it should be observed that:

   a. although Unions NSW made the latter submission in 2009 in less than 12 months it – quite correctly, in the circumstances – revised its position entirely and sought '*radical change'* to the wage fixing principles;[3]

   b. in all of the cases cited the parties and Commission were talking about the *principle* of having principles, not suggesting that they endorsed their fixation in stone for all time; and

   c. when the Full Bench in the 2010 State Wage case described the existing wage fixation principles as having so served, it was in a valedictory sense – it then proceeded to substantively re-write them.[4]

9. There is nothing that requires the Commission to retain the current drafting, or even that really suggests it is a good idea. Wage fixation principles as a concept should be retained, but a fresh start – based on a century of developing jurisprudence – embraced.

2. The onus

The Secretary

10. At [7] the Secretary contends that requiring applicants to '*rebut a presumption that existing awards set fair and reasonable conditions of employment'* is consistent with the provisions of the IR Act.

11. This is an expression of the error highlighted at [41] of the FBEU's principal submissions: it takes the statement of the Full Bench at [114] in *Re Pastoral Industry*[5] too far, mostly by reading it out of context.

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[1] See, e.g. Unions NSW at [31] quoting the Full Bench. In the State Wage Case 2010 at [87

[2] LGNSW at [38], quoting a Unions NSW submission at [8] of the *State Wage Case 2009* [2009] NSWIRComm 120

[3] State Wage Case 2010 at [68]

[4] State Wage Case 2010 at [87]-[88]

[5] *Re Pastoral Industry* [2001] NSWIRComm 27 at [114]

12. In *Re Pastoral Industry,* the Bench was confronted with an application from employer groups to remove protective conditions based on changes to a Federal counterpart award. The true contest there was whether:

    a. the AWU, in resisting the application, bore an '*onus'* of demonstrating that the State award should no longer have counterpart status; or

    b. ABI needed to satisfy the Commission, on the evidence, that the award it proposed satisfied the requirements of s.10,

    the latter position ultimately being adopted.

13. The Full Bench's comments as to onus are made in that light. The true statement is found at [77]: *'in a contested case, the onus falls on the applicant to make out a case for an alteration to an award, which will otherwise remain undisturbed'*.

14. The difference between this – that is, a persuasive onus that a variation or new award is necessary to maintain or establish fair and reasonable conditions of employment – and the concept of a 'rebuttable presumption' is subtle. The difficulty with the latter is it is apt to be misunderstood and applied as though there is a requirement to go beyond simply making out a case. The latter is inconsistent with the legislation, inconsistent with the ordinary civil standard of proof and ought not be imported into the Wage Fixation Principles.

LGNSW

15. Two additional observations may be made about LGNSW's submissions, which otherwise accord with the Secretary's.

16. **First**, at [46], the idea that *definitionally* awards set fair and reasonable conditions of employment because s.10 sets this as the task for the Commission illustrates the foundational problem with the proposition of a '*rebuttable presumption'*. It unfairly tilts the ledger toward a party seeking the maintenance of the status quo, and distracts the Commission from its true task under s.10: a broad evaluative exercise on the material before it.

17. **Second,** in any event, [49] demonstrates how meaningless the concept is. *'An applicant seeking a case for change must make out a case for change'* via the various methods suggested is an unremarkable, but completely different, proposition. If a '*rebuttable presumption'* is a different concept to this, it has no statutory basis. If it is a restatement of the same idea, it ought be eschewed as apt to mislead.

3. Real value of wages?

The Secretary

18. The Secretary's position in respect of a real wages principle appears to distil to the proposition that:

    a. she is supportive of the Commission having regard to the need to maintain the real value of wages; but

    b. considers that this should not find voice in the wage fixing principles because the Commission can do so regardless,

    or alternatively that this should not be '*mandat[ed]*' (at [10]) or involve '*locking in a process'* (at [13], quoting the 2010 State Wage Case.

19. The entirety of the Secretary's opposition is thus apparently based on a misunderstanding on what the Wage Fixation Principles are; i.e. that they are rules rather than guidelines. The objection accordingly falls away. It reflects further the need to draft the principles in a manner which exposes what they truly are.

LGNSW

20. Similarly, LGNSW's opposition seems to be based on the propositions that:

    a. the Fair Work Commission will take these matters into account already for the purposes of the state wage case awards, and

    b. these matters are, in respect of the active awards, '*best considered in any annual increase'* (at [66]).

21. The first only has force if there is general access to the flow-on of the Federal increases. There is of course no such access, meaning that it necessarily falls away.

22. The second assumes that the wage fixation principles will have no role to play in determining annual increases of awards; that is, that the current broken dichotomy will persist. This course should not be adopted. In any event, the practical reality is that many unions are having to resort to arbitration to *achieve* annual wage increases; the presumption that this will occur automatically by Government fiat is no longer good (if it ever was).

6. Special case principle

The Secretary

23. The Secretary's submissions contain, at [23]-[32], a useful summary of what the special case principle is (to the extent that it can be defined).

24. Her position as to why it is appropriate to retain it is not however actually explained; [33] simply contains an assertion that no change should occur.

25. If the IRC is minded to retain the concept of a special case, it ought to be explained in the principles. However, the proposed amendments contain three troubling matters:

    a. **first**, at 8.4(d), an assumption that a work value case must also be established as a special case is imported, is not consistent with the current principles and introduces a further restriction on wage growth without justification;

    b. **second**, at 8.4(f), it assumes that annual wage increases other than those agreed between the parties must be dealt with as a special case, which cannot be reconciled with the historical approach to wage fixation and maintains a currently unjustifiable restriction; and

    c. **third**, at 8.4(b), the language of the *'restrictive considerations imposed generally by the principles of wage fixation'* is a historical phrase taken out of context, in that these restrictions were never intended to apply

outside a mechanism for ensuring ordinary wage growth and maintenance.

26. This demonstrates the danger in picking up, piece-meal, language from a different era describing a different structure. The Commission should not adopt the same approach now.

LGNSW

27. Notwithstanding its earlier strongly worded submissions that no substantive change is warranted (at [31]-[33], repeating almost word for word its largely rejected submissions to this effect in the State Wage Case 2010 (extracted at [84]), LGNSW has proposed that not only should the special case principle be retained but it should be made *more* restrictive.

28. Its amendments would require an applicant to establish that:

    a. the circumstances are 'out of the ordinary' or otherwise necessary to ensure fair and reasonable terms and conditions of employment, *and*

    b. the granting of the application is in the public interest,

    see [79]-[80].

29. The reason for the interpolation of an express public interest test is unexplained. It is a significant change. The expression '*in the public interest'* classically imports an evaluative exercise which is confined only by what is conveyed by the subject matter, scope and purpose of the enactment: *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216. That it is said to be *additional* to the considerations imposed by s.10 suggest an additional, amorphous hurdle without any attempt at justification. It is a higher bar than what is imposed by s.146(2), which makes it a consideration rather than a restriction.

7 & 8 – attraction and retention, and fiscal outlook

The Secretary and LGNSW

30. The Secretary and LGNSW share a position in respect of questions 7 and 8 which is internally irreconcilable. 7 and 8 are the same question, asked twice:

> *The Act has been amended to require the IRC to have regard to [consideration x]. Should this consideration be referred to in the Principles?*

31. Views may differ as to what the answer is, but it fundamentally cannot be yes for one and no for the other.

32. The Secretary's justification for this is opaque. The reasoning as to why attraction and retention should not be referred to specifically is equally applicable to the question of fiscal outlook, and vice-versa. If the point of the preamble is to give an indication as to what will be considered, why would a matter deemed significant by the legislature be omitted?

33. Placing one in the preamble and not the other is suggestive of greater weight being assigned to one matter – notably, the matter which is likely to favour the employer – and which will only entrench, rather than repair, the existing imbalance.

34. In addition, the analysis in respect of attraction and retention – notably the idea that it is not necessary to include this because the current principles already permit it – again appears to misunderstand the role of the principles as being binding decision rules rather than guidelines. Their function in providing guidance is best served by exposing what will likely be taken into account.

9. Productivity and Efficiency

The Secretary

35. The Secretary's submissions on this question are curious. What it says about the notoriously complex concept of public sector productivity (at [58]-[67]) is drawn from a document prepared by unnamed sources in Treasury, attached to the affidavits filed by the Secretary. It is a summary of expert opinion, not a submission that can be made by lawyers.

36. Having been notified that the FBEU sought to test this evidence, and faced with an application for the underlying documents, the Secretary has elected not to rely on this material at hearing[6].

[6] See affidavit of Joseph Kennedy dated 30 September 2024.

37. There are very good reasons for the principles which surround the manner in which expert witness evidence is to be given. Those principles cannot be avoided, at least not in a successful way, by seeking to rely on such opinion as a submission.

38. The submissions accordingly fall away; they are either unsourced or sourced in such an unfair manner that they ought not be entertained. In particular:

    a. there is no justification for the claim that small improvements are not productivity improvements, at [67];

    b. the basis for a need for ‘substantial’ contributions or improvements (at [64] is not sourced from any *economic* concept but is a historical relic of the balancing act that the Wage Fixation Principles *used* to reflect; and

    c. the analysis at [62] of how productivity is measured is highly contestable in a public sector context.

39. The Secretary’s proposed amendments at 8.3 similarly are unjustified, as is the retention of the ‘significance’ threshold in the existing text. Additionally, the submissions are so vague as to be productive only of disputation. What is for example a ‘small’ improvement or a ‘relatively large’ reduction?

LGNSW

40. LGNSW appears to propose the wholesale deletion of 8.3. It is unclear from the submissions as to why this should be so, in the context of its support for the retention of the rest of the structure. It would seem to further remove an avenue for employees to pursue non-annual wage increases, and it is hard to see how it is justified.

10. Negotiating principles

The Secretary

41. The Secretary has proposed some minute amendments to the current Negotiating Principle to reflect the existence of mutual gains bargaining. It does not involve any engagement with the significance of that change to the IR Act,

or address the notorious difficulties arising in contemporary public sector bargaining.

42. Her major change involves a proposed model no extra claims clause, said to be mandatory unless there are ‘exceptional circumstances’ justifying a departure. This involves:

    a. a boilerplate restriction on the making of in-term extra claims; and

    b. a chausette explaining that the parties can continue to discuss matters and advance consent claims.

43. The second part is largely pointless: the first half expressly does not preclude discussion. The limitation in the NSW system imposed by extra claims is on their being pressed: see *Electrical Trades Union of Australia, New South Wales Branch v Nationwide News* (unreported, Cahill VP, Maidment J, Kelly CC, 28 April 1995). However, the FBEU has no inherent objection to an avoidance of doubt clause, noting in particular the tendency to interpret extra claims clauses in awards as covering the field rather than being limited to matters dealt with: c.f. the Federal system approach in *CFMEU v Wagstaff Piling* (2012) 203 FCR 371; *AMWU v Nestle Australia* (2005) 139 IR 475.

44. The difficulty, from the FBEU’s perspective, is the persisting presumption that this will be a default position. This imports an again unwarranted fetter on the Commission’s discretion and will, for the reasons set out in the FBEU’s principal submissions, fetter the productive progression of ongoing award reform.

45. This is not the moment for such a restriction. Instead, at this particular time and in light of the major reform projects before the Commission, the approach set out in the FBEU’s proposed Principles should be adopted.

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