Matter No.: 2024/211169

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The Secretary's Reply Submissions

A: Introduction

1. These submissions respond to the Submissions filed on behalf of:

   1.1 Local Government NSW (**LGNSW**) dated 3 September 2024;

   1.2 The Australian Paramedics Association (NSW) (**APA**) dated 3 September 2024;

   1.3 Unions NSW dated 3 September 2024;

   1.4 Fire Brigade Employees Union (**FBEU**) dated 3 September 2024.

2. The Secretary refers to his Submissions also dated 3 September 2024, and the terms defined therein. The Secretary also submits that the NSW Treasury "Productivity Considerations" Position Paper, dated 23 August 2024 should be treated as a submission.

B: Response to the matters identified by the Commission at [17] of the Directions

(1) Whether to retain Wage Fixing Principles in whole or in part

3. It is apparent that, in large part, the interested parties to these proceedings, other than the FBEU, share the Secretary's underlying position that the current iteration of the WFP ought to be retained in whole (subject to discrete alterations variously proposed, which are addressed in these submissions).[1]

4. The FBEU contends "*that only a wholescale rebuild is workable*".[2] The Secretary disagrees with this proposition and maintains that the current iteration of the WFP generally provides a sound and rational framework for the conduct of wage fixation proceedings. Any "*wholescale rebuild*" would likely undermine the substantive body of industrial jurisprudence that has assisted parties, and the Commission, in such proceedings[3] and cause uncertainty for industrial practices.

[1] LGNSW Submissions [44]; Unions NSW Submissions [37]-[38]; APA Submissions [10].
[2] FBEU [36].
[3] *State Wage Case 2020 (No 2)* [2021] NSWIRComm 1079 at [166].

5. In advocating for comprehensive reform, the FBEU principally contends that the current iteration of the WFP is "*fundamentally not fit for purpose*" and unduly imposes restrictions on parties seeking improvements to awards.[4] The Secretary disagrees with this characterisation. The current iteration of the WFP, consistent with s.51 of the *Industrial Relations* ***Act*** *1996* (NSW), is ultimately designed to guide the exercise of the Commission's discretionary powers to vary awards. They have not operated (and ought not operate) as rigid rules which constrain the Commission's authority but rather assist with the discharging of the Commission's obligations under the Act. In this regard, the current iteration of the WFP "*are in the nature of guidelines. They do not have the force of statute, and cannot add to and do not detract from the Commission's jurisdiction under the Act*."[5] These principles have ensured "*consistency of approach*"[6] and promoted predictability in industrial dealings. The nature of the change sought by the FBEU would thereby cause significant disruption.

(2) Whether to retain the onus on applicants seeking different conditions or rates of pay to rebut a presumption that existing awards set fair and reasonable terms and conditions of employment

6. Contrary to the Secretary's position, Unions NSW, the APA and FBEU contend that the onus on applicants seeking different conditions or rates of pay to rebut a presumption that existing awards set fair and reasonable conditions of employment ought not be retained. LGNSW, on the other hand, agrees that the presumption should be maintained.

7. In advancing this position, principally, these parties argue that:

   7.1 "*in circumstances where the environment is not in total stasis*"[7] awards inevitably and almost immediately may start becoming unfair;[8]

   7.2 the rationale for the onus is lacking given that, historically, the Commission's power to set fair and reasonable conditions of employment was hindered by the operation of the *Industrial Relations (Public Sector Conditions of Employment)* ***Regulation*** *2011* (NSW);[9] and

[4] FBEU Submissions [35].
[5] *Applications for Variations to Crown Employees (Police Officers – 2017) Award and Paramedics and Control Centre Officers (State) Award* [2021] NSWIRComm 1040 at [29].
[6] *State Wage Case 2010* [2010] NSWIRComm 183 at [87].
[7] APA Submissions [11].
[8] Unions NSW Submissions [40]-41].
[9] Unions NSW Submissions [43]-[45].

7.3 the onus is apt to distract from the Commission's underlying statutory task per s.10 of the Act.[10]

8. The Secretary submits that it should be remembered that the 'onus' with which this principle is concerned is an evidentiary onus or burden of persuasion. This appears to be recognised by the FBEU,[11] by Unions NSW (as a practical matter),[12] and by LGNSW.[13] The long-standing approach of the Commission in a contested case is that the onus falls on the applicant to make out a case for an alteration to an award, which otherwise will usually remain undisturbed.[14] There must be information placed before the Commission which allows it to be satisfied that the proposed award changes, if made, will provide just and reasonable rates and conditions.[15] The onus requires an applicant to provide "*some positive demonstration*"[16] as to why a change proposed to an award should be made. Unions NSW appears to accept this proposition about the evidentiary onus,[17] but contends that there is a 'conceptual' difference between the evidentiary onus and the presumption, without developing any argument as to how that difference would have practical content and render the evidentiary burden more onerous.

9. Unions NSW submits that the rationale for the presumption is lacking because of the operation of the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011*. Whilst this submission has superficial attraction in the limited case of determination of Award variation applications in respect of Awards that were last made or varied whilst that Regulation was in force, the proper focus in these proceeding is the appropriateness *in futuro* of retaining the presumption. The Unions NSW submission that the Regulation enabled '*the former Liberal-National Party government's artificial and arbitrary wages cap*', articulates a basis upon which in a particular case, it might be argued that the presumption has been rebutted, rather than a sound basis for permanently discarding the presumption *in futuro*, when s146C does not apply.

10. Indeed, the presumption has utility in providing a framework for the effective resolution of industrial disputes (and has been of assistance to the Commission for an extended period of time, including *prior* to the implementation of the Regulation on 20 June 2011).

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[10] Unions NSW Submissions [48], [50].
[11] FBEU Submissions [41]
[12] Unions NSW Submissions [42]
[13] LGNSW Submissions [49]
[14] *Re Clerical and Administrative Employees (State) Award* (No 2) (2005) 148 IR 56 at [158];
[15] *Transport Industry – General Carriers Contract Determination* [2016] NSWIRComm 3 at [35]
[16] *Re Pastoral Industry Award* [2001] NSWIRComm 27; (2001) 104 IR 168 at [114].
[17] Unions NSW Submissions [42]

Significantly, the onus does not impact the standard of proof required but rather just directs the Commission's attention to the underlying enquiry. This was captured in *Re Crown Employees (Correctional Officers, Department of Corrective Services) Award 2007 for Kempsey, Dillwynia and Wellington Correctional Centres (No 2)* [2015] NSWIRComm 38 at [76]:

> "*The starting point is the presumption that the existing award sets fair and reasonable conditions. The question is whether there is* ***now*** *evidence before the Commission to support a conclusion, on a basis other than equivalence, that* [the Award] *does not do so*" (emphasis added).

11. Accordingly, as noted in the Secretary's Submissions at [9], the Secretary submits that the retention of the presumption provides a clear guideline for an applicant (and the Commission) to deal with matters in an orderly and efficient manner, and thereby advances the objects of the Act.

(3) Whether and to what extent there ought to be a principle addressing increases to maintain the real value of award rates of pay having regard to the rate of inflation and changes in the cost of living for employees, and if so, whether it should apply generally or be limited to employees on low wages.

12. Contrary to the Secretary's position, Unions NSW, the APA and FBEU each contend that there ought to be a distinct principle which explicitly addresses the maintenance of the real value of award rates of pay having regard to the rate of inflation and changes in the cost of living for employees.[18] Unions NSW refers to an 'imperative' to ensure the maintenance of the real value of award rates of pay, and seeks the adoption of a principle (clause 8.3) using the language of 'imperative'. FBEU submits that as a general proposition, rates of pay in existing awards should be increased annually at a level that ensures their real value is restored if it can be demonstrated to have been eroded since the last annual increase.

13. The Secretary reiterates his position in his Submissions at [10]-[13] and maintains that such a distinct principle ought not be adopted, for the following reasons:

14. *Firstly*, the Commission's power to make WFP is found in s.51 of the Act. Section 51(1) explicitly states, among other things, that any principle made is to be "*consistent with the objects of this Act*". By implementing an explicit principle that mandates adherence to an objective of real wage maintenance by reference to the rate of inflation and changes in the cost of living for employees, the Commission may be exceeding its remit under s.51. This was observed by a Full Bench of the Commission in *State Wage Case 2020 (No 2)* [2021]

[18] Unions NSW Submissions [54]; APA Submissions [38]; FBEU Submissions [44].

NSWIRComm 1079 at [190] when considering an identical contention by Unions NSW in 2020:

> "*Further, such a sub-principle would constrain the powers of the Commission in a way that the legislature has not seen fit to do. Pursuant to s 10 of the IR Act, the Commission is empowered, subject to Pt 1 of Ch 4, to make awards setting fair and reasonable conditions of employment. If the legislature thought it appropriate and/or necessary for the real value of award rates of pay to be maintained over time having regard to changes in the costs of living for employees, it would have said so.*"

15. The above passage is apposite in this State Wage Case given that the recent amendments to the Act also did *not* extend to the Commission having mandatory regard to the rate of inflation and changes in the cost of living for employees. Whilst such a position could have been adopted, evidently the legislature chose not to do so.

16. *Secondly*, implementing an explicit principle that mandates adherence to an objective of real wage maintenance by reference to the rate of inflation and changes in the cost of living for employees may also conflict with other sections of the Act. Section 146(2) of the Act requires the Commission to take into account the public interest by having regard to a confluence of factors, being the objects of the Act (as set out in s.3), which includes promoting efficiency and productivity in the economy of the State; the state of the economy of NSW and the likely effect of the Commission's decision on the economy; and for the exercise of a function about public sector employees, the fiscal position and outlook of the Government and the likely effect of the exercise of the Commission's function on the position and outlook. The Act thereby requires the Commission to adopt a flexible and evidence based approach when considering wage fixation and the balance of various economic considerations.

17. *Thirdly*, there is no statutory 'imperative' or mandate to ensure the maintenance of the real value of award rates of pay. Whilst the Secretary is supportive of the maintenance of the real value of award rates of pay over time, that support does not extend to creating an inflexible 'principle' which mandates (or prioritises) the maintenance of real wages when fixing wages, when the statute itself requires consideration of other matters. Such a principle would undermine the important function of the Commission involving the evaluation of multiple considerations, based on the evidence before it.

18. For example, at a given time and in light of particular circumstances, the maintenance of real wages may not, necessarily, "*promote… productivity in the economy of the State*" (s.3(b)) or align with the "*fiscal position and outlook of the Government*" (s.146(2)(c)). This possible discord was considered by the Fair Work Commission (**FWC**) (Expert Panel) in its Annual Wage Review in 2017:

> "*As the Panel has observed in previous Review decisions, there is often a degree of tension between the economic, social and other considerations which the Panel must take into account. No particular primacy is attached to any of these considerations. For example, a substantial wage increase may better address the needs of the low paid and improve the relative living standards of award-reliant employees, but it may (depending upon the prevailing economic circumstances) also reduce the capacity to employ the marginalised and hence not promote social inclusion through increased workforce participation.* ***It is this complexity that has led the Panel to reject a mechanistic or decision rule approach to wage fixation, such as the adoption of real wage maintenance****, and, more recently, to reject the adoption of a medium-term target for the NMW*" (emphasis added).[19]

19. The Secretary submits that the Commission should similarly proceed with caution for the range of considerations it is required to take into account under the Act (much like the FWC's role) calls for the "*exercise of broad judgment*".[20] The Secretary reiterates that such an exercise would be undermined if an explicit principle that seeks to maintain real wages is introduced.

(4) Whether and to what extent Principle 7 (Minimum Wage for Award/Agreement Free Employees) ought to be amended, or some other mechanism introduced to set an appropriate minimum rate of pay to be applied to low wage employees at a base grade in an award.

20. The Secretary's position that there ought not be any amendments to principle 7 is shared by Unions NSW[21] and the FBEU.[22] LGNSW contends that the principle should be removed for, in the local government sector, there are no award/agreement free employees.[23]

[19] *Annual Wage Review* [2017] FWCFB 3500 at [129].
[20] *Annual Wage Review* [2013] FWCFB 4000 at [10].
[21] Unions NSW Submissions [97].
[22] FBEU Submissions [48].
[23] LGNSW Submissions [67].

21. The Secretary reiterates that whilst the application of this principle may be very limited, the NSW Government may employ at least some award/agreement free employees, and therefore it would be sensible to maintain the principle.

(5) Whether there ought to continue to be a separation of general work value considerations from increases to wages based on gender-based undervaluation.

22. The Secretary's position that there ought to continue to be a separation of general work value considerations (per sub-principle 8.2) from claims for alterations to wage rates or conditions based on gender-based undervaluation (per principle 11) is shared by all interested parties.[24]

23. Unions NSW goes further to contend that principle 11 ought to be amended, including by removing clauses 11.2, 11.6 – 11.11 and 11.13, which it contends are an elaborate series of provisions which constrain addressing undervaluation based on historical or current gender biases and prejudices. The provisions are criticised as having potential to entrench rather than ameliorate discrepancies in award rates based on gender-based undervaluation. Unions NSW cites the decision of the FWC in *Aged Care Award* 2010 [2022] FWCFB 200 at [42] and [758], as exposing that wage-fixing principles can and have historically reproduced gender inequalities. It is true that in the *Aged Care Award* case the FWC accepted expert evidence to the effect that barriers and limitations to the proper assessment of work value in female dominated industries and occupations included procedural requirements such as the direction in wage-fixing principles that assessment of work value focus on changes in work value and tribunal interpretation of this requirement.

24. The FWC also accepted that the approach taken to the assessment of work value by Australian industrial tribunals and constraints in historical wage fixing principles have been barriers to the proper assessment of work value in female dominated industries and occupations. It referred to the requirement for tribunals to make an adjustment to minimum rates based only on a change in work value. It also accepted that the capacity to address the valuation of feminised work has also been limited by the requirement to position that valuation against masculinised benchmarks. For example, work value comparisons continued to be grounded by a male standard, that being primarily the

[24] LGNSW Submissions [69]-[75]; APA Submissions [45]-[46]; FBEU Submissions [52]; Unions NSW Submissions [82].

classification structure of the metal industry awards and to a lesser extent a suite of building and construction awards.

25. The Secretary submits that the changes proposed by Unions NSW are unnecessary. Clause 11.2 does not create risks of the type identified by the FWC in the *Aged Care Award* case. Clause 11.6 exists to avoid the likelihood of leapfrogging, but Unions NSW has not addressed the issue of leapfrogging. Clauses 11.7 and 11.8 of the existing principle appears to be entirely in keeping with addressing (and not entrenching) gender-based undervaluation. Clause 11.9 provides for, but does not mandate, phasing in of any increases in wages. It also provides for absorption of award increases in over-award payments. It is difficult to see how absorption of award increases in over award payments could be criticised as prone to entrench gender-based undervaluation. Clause 11.10 is intended to avoid double counting as between former work value adjustments, except to the extent that undervaluation is established. Clause 11.11 provides for a solution where only some persons in a classification have been subject to undervaluation. Unions NSW has not demonstrated why these provisions are not 'fit for purpose' in the context of a gender based undervaluation claim.

26. The current construction of principle 11, as considered in the jurisprudence, clearly establishes the requirements that an applicant must meet to succeed in a gender-based undervaluation claim. For the purposes of certainty, consistency and predictability, this principle ought remain in its current form.

(6) Whether to retain a Special Case principle, and if so whether the circumstances that establish a Special Case ought to be better defined (Principle 8.4).

27. The Secretary' position is that the special case principle should be maintained as it provides the necessary flexibility to deal with unforeseen circumstances where cases have 'special attributes' or are 'out of the ordinary'. The Secretary does not agree with the FBEU proposal to abolish the special case principle.

28. In response to the LGNSW's Submissions at [78]-[80], the Secretary agrees that the Special Case principle ought to be retained and better defined. Further, the Secretary generally agrees with the proposition at [58] of the FBEU Submissions as to the substance of the principle. However, the Secretary submits that the special case definition should comprehensively reflect the established jurisprudence of the Commission in *Re*

Operational Ambulance Officers (State) Award [2001] NSWIRComm 331 at [165]-[168] and the cases referred to in that case.

29. In response to [84] of the Unions NSW Submissions (and [54] of the FBEU Submissions), the Secretary opposes any modification of the special case principle that removes the requirement for there to be 'special attributes' or be 'out of the ordinary' so as to take the matter outside the restrictions which otherwise apply under the WFP as required by *Social and Community Services Employees (State) Award* [2001] NSWIRComm 247 at [24] ; *Operational Ambulance Officers (State) Award* [2001] NSWIRComm 331; (2001) 113 IR 384 at [166].

30. The WFP made under s 51(1) of the Act, are guidelines only as to the exercise of the Commission's discretion under s 10 of the Act to make Awards which set fair and reasonable conditions of employment.[25] The other principles in the WFP seek to comprehensively define the types of considerations that the Commission may have regard to when exercising its wage fixing function. The very utility of the WFP is in providing certainty and predictability to parties on the Commission's approach to the exercise of its discretion[26] so that parties can prepare for bargaining and arbitration in a disciplined fashion. The Special Case Principle, quite rightly, should not be a case relying on *any other factor* to circumvent these principles but a case properly presenting special attributes or being out of the ordinary.

31. There is sufficient flexibility in the Commission's jurisprudence of what constitutes 'special attributes' or being 'out of the ordinary' to ensure its statutory task of setting fair and reasonable conditions of employment is not impinged. In *Appln by Health Secretary for Broken Hill Health Employees' (State) Award, Re* [2021] NSWIRComm 1000 at [78], factors that were considered 'special attributes' or 'out of the ordinary' included:

    31.1 The history of industrial regulation in Broken Hill, particularly with respect to health employees;

[25] *Applications for Variations to Crown Employees (Police Officers—2017) Award and Paramedics and Control Centre Officers (State) Award* [2021] NSWIRComm 1040 at [23] and [29].
[26] *State Wage Case 2010* [2010] NSWIRComm 183 at [87]. Most recently cited and endorsed in *Crown employees (NSI4I Police Force Special Constables) (Security) Award 2023* [2024] NSWIRComm 1034 at [28]-[29].

31.2 The possibility of employees being left without Award coverage following the termination of the Industrial Agreement;

31.3 The fact that there was consensus that a new Award should be made.

32. In *Crown Employees (NSW Police Force Special Constables) (Security) Award 2023, Re* [2024] NSWIRComm 1034 at [193] it was observed that historical or intrinsic undervaluation of work is relevant to whether the matter possesses special attributes. In *Applications for Variations to Crown Employees (Police Officers - 2017) Award and Paramedics and Control Centre Officers (State) Award* [2021] NSWIRComm 1040, the Commission found that COVID-19 caused "a material change to the work practices and risks – both physical and psychological" for Paramedics and Control Centre Officers such that there was a Special Case. Similarly in *New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utility Union v Kiama Municipal Council* [2021] NSWIRComm 1080 at [24], the Commission found that COVID-19 and its impact on local government was found to be 'out of the ordinary'. On the other hand, in *Fire and Rescue NSW Firefighting Staff Awards 2021* [2021] NSWIRComm 1062 at [86]-[93], the Commission found that a funding arrangement which had its origin in the *Fire Brigades Act 1909* was not 'out of the ordinary'.

(7) Whether and to what extent Principle 8 (Arbitrated Case) ought to be amended, or some other mechanism introduced to permit the consideration of claims based on the attraction and retention of skilled staff where there are skill shortages and having regard to the effective and efficient delivery of services.

33. For the reasons set out in his Submissions at [41]-[45], the Secretary agrees with the LGNSW that the recruitment and retention of employees is a complex matter and is a matter that is not solely related to the Award rates of pay which apply to an employee's position.

34. The Secretary agrees with LGNSW and Unions NSW that there should be no stand-alone mechanism to permit consideration of claims based on the attraction and retention of skilled staff where there are skill shortages and having regard to the effective and efficient delivery of services.

35. In response to the APA Submissions and Unions NSW Submissions that subprinciple 8.5.1 should be amended to remove the exclusion of 'attraction and retention' issues from the arbitrated case principle, the Secretary acknowledges that the new object in

s 3(i) of the Act is to encourage *strategies* to attract and retain skilled staff where there are skill shortages so as to ensure effective and efficient delivery of services. Accordingly, the Secretary now supports the removal of the exclusion of attraction and retention issues in sub-principle 8.5.1 such that these issues can be ventilated more broadly under principle 8 in appropriate cases.

(8) Whether and to what extent one or more of the Principles ought to be amended in light of the Commission's obligation to have regard to the fiscal position and outlook of the Government and the likely effect of the exercise of the Commission's function on the fiscal position and outlook.

36. The Secretary agrees with the submission of the LGNSW that the obligation on the Commission in s146(2)(c) of the Act to have regard to the fiscal position and outlook of the Government and the likely effect of the exercise of the Commission's function on the fiscal position and outlook should not form part of any standalone Principle but rather be included in the Preamble to the WFP. The draft 'reformulated' WFP proposed by Unions NSW also refers to the Commission's obligation in the preamble (paragraph 1.3.1(c)).

37. In response to the APA Submissions and Unions NSW Submissions, the Secretary acknowledges that the Commission is bound to have regard to the fiscal position and outlook of the Government and the likely effect of the exercise of the Commission's function on the position and outlook under s 146(2)(c) of the Act. That does not mean that this important public interest consideration should not be referred to in the WFP.

38. Rather, it is appropriate to amend the Preamble to include reference to this important addition to s146 of the Act, and there is a substantial measure of agreement on this proposal (see Unions NSW at [89] and FBEU at [62]).

(9) Whether and to what extent sub-principle 8.3 (Productivity and Efficiency Considerations) ought to be amended, or some other mechanism introduced to expand, clarify and/or refine the concept of public sector productivity and efficiency and, in particular, the relevance of and relationship between improvements in the quality of public sector services and employee-related costs

39. The Secretary agrees with the LGNSW that paragraph 5.2.3 of the *NSW Government Fair Pay and Bargaining Policy 2023*, as prepared by Industrial Relations, Premier's Department provides good guidance on what constitutes productivity measures in the public sector

for the purposes of fixing wage increases. However, the Secretary considers that the additional guidance provided by his proposal, including as to what matters should not be considered productivity measures for the purposes of allowing wage and condition increases, will be beneficial to the Commission and the parties.

40. In response to [93] of the Unions NSW Submissions, the Secretary submits that the productivity of public sector services can be measured at the enterprise level via indicators relating to the inputs and outputs of the agency. The Secretary strongly opposes any proposal that removes '*in seeking to become more competitive and/or efficient'* from sub-principle 8.3 (see Unions NSW proposed sub-principle 8.4) This phrase provides an important qualification to the type of productivity and efficiency measures, namely those directed at the attainment of the objectives of the employer in seeking to become more competitive or efficient, which may form a basis for increases in wages or conditions. Consistent with object 3(b) of the Act, the purpose of this sub-principle is to allow for wage increases where employees have substantially contributed to providing a *better* service with the same inputs or have been able to *reduce inputs* and maintain the same level of service. The concepts of becoming more competitive or efficient ensures this is captured.

41. In response to [95] of the Unions NSW Submissions, the Secretary agrees that productivity and efficiency are distinct – but related – concepts. The Secretary does not oppose the use of the word 'or' rather than 'and' to describe the sub-principle (i.e. 'Productivity or efficiency measures').

42. The Secretary opposes Unions NSW's proposed amendment to include '*societal benefits….of work performed'* in the definition of the sub-principle. 'Societal benefits' is an amorphous term. It does not assist in linking a worker's input to outputs that deliver on the relevant objectives of the employer. Given that the Commission is required to take into account the public interest in the exercise of its functions, and the Act has specifically identified matters that the Commission must have regard to for that purpose (s146(2)), there is no merit in seeking to impose further considerations that are not sanctioned by the Act.

43. In response to [60]-[61] of the APA Submissions, the Secretary does not agree there is a circularity in the WFP current definition of productivity and efficiency measures. While it is acknowledged that the Principle itself does not explain how such improvements are to be measured, the Commission has only acted on cogent and reliable evidence. The

Secretary's proposed definition of productivity measures, which would include, for example, improvements in service with the same inputs or large improvements in service quality or quantity with a relatively small increase of inputs, would capture such improvements in the service of saving lives or any other kind of public service.

44. In response to [62]-[63] of the APA Submissions, the Secretary acknowledges and supports disclosure by parties of relevant information for each key interest and any common criteria which will be used to evaluate options during the bargaining process as set out at 5.2.3 of the *NSW Government Fair Pay and Bargaining Policy*. However as will be explored further below, it is unnecessary for this to be translated into sub-principle 8.3 or elsewhere in the WFP.

45. In response to [64] of the APA Submissions, the Secretary does not support the addition of "and/or provide better service" in the definition of Productivity and Efficiency Measures. That is because it does not link the achievement of a better service to the quantity of inputs required. Improving productivity or efficiency involves improving outputs relative to the inputs. Providing a better service with a proportionate or relatively large increase in inputs, such as workers or labour hours, is not an increase in productivity or efficiency.

46. The Secretary strongly disagrees with the removal of the requirement for employees to make a 'substantial contribution' in the definition of Productivity and Efficiency measures. Improvements in the quality of service, or the reduction of inputs while maintaining the quality of service, can arise from a range of factors in the ordinary course of providing services. The proposal would mean that any capital led productivity improvements such as investment in new technology or machinery could constitute a productivity measure for which increases to wages and conditions may be sought. Ensuring that only those improvements that employees have substantially contributed towards are considered when awarding wage and condition increases avoids this unmeritorious outcome.

47. In response to [63] – [64] of the FBEU Submissions, the Secretary submits that improvements in outcomes or service delivery, on their own, do not necessarily constitute productivity or efficiency improvements as they may be achieved due to greater resources, including Government investment, having been dedicated to achieve them. Indeed, it is possible for better services to be delivered in a way that lowers productivity in practice which is clearly in conflict with the objectives of principle 8.3.

Similarly, FBEU proposed principle 17 which lists a range of factors for the Commission to consider is too broad a concept. Specifically, it does not ensure a) that only those improvements that employees have substantially contributed to are considered, and b)that inputs are considered in relation to outputs which is essential to whether productivity or efficiency have improved.

(10) Whether and to what extent Principle 9 (Negotiating Principles) ought to be retained or revised in light of the mutual gains bargaining provisions in the Act. The Commission is particularly interested to receive submissions addressing the appropriateness and operation of "no extra claims" clauses in agreements in light of the mutual gains bargaining scheme and whether there ought to be a model "no extra claims" clause.

A) Principle 9 (Negotiating Principles)

48. The Secretary agrees with the LGNSW Submissions at [87]-[88], Unions NSW Submissions at [62] and the APA Submissions at [71], that there is merit in retaining the Negotiating Principles, which have guided negotiations between the parties for many years.

49. In response to [64] of Unions NSW Submissions, while the Secretary accepts that the principles envisaged by current Principle 9 are distinct from the mutual gains bargaining principles in Chapter 2A of the Act, this does not mean Principle 9 cannot be amended to refer to this additional process which also aims to resolve disputes without the need for arbitration. For the reasons set out in the Secretary's Submissions at [73], the introduction of mutual gains bargaining principles into the Act is significant and ought to be encouraged by the Commission in the WFP.

50. In response to the proposals from APA and Unions NSW for Principle 9 to incorporate the provision of government information relating to matters that may reasonably relate to an award claim, the Secretary notes that 5.2.3 of the *NSW Government Fair Pay and Bargaining Policy* already provides for this as do the compulsory mechanisms of the Act including a summons for information under s 165 of the Act. In those circumstances, it is unnecessary to incorporate these proposed amendments into the WFP.

51. The adoption of an obligation to disclose 'information relating to matters that may reasonably relate to an award claim' is nebulous and overly broad. It would place an onerous, costly and undue burden on Government employers without sufficient precision in the obligation. An obligation to provide economic, financial and demographic information for employees covered by the proposed award is similarly onerous and broad. The time and resourcing required for central agencies to coordinate data requests of the nature proposed by unions would likely be significant, as would the time required by individual agencies to compile relevant data and provide quality assurance.

52. The Secretary notes that guided by the principle of transparency, some data is publicly available already, including:

    52.1 Aggregate fiscal and economic data available in Budget related publications (typically released in June with a half-yearly update in December every year) and published on the NSW Budget website.

    52.2 The NSW Public Service Commission (PSC) workforce participation publications on its website. This includes:

        52.2.1 the Workforce Profile Report which provides analysis on workforce issues and characteristics, and supporting data tables from the past 20 years,

        52.2.2 the State of the NSW Public Sector Report which provides an assessment of the key factors that influence the shape, performance and behaviours of public sector agencies and the people who work in them, and

        52.2.3 the results of the People Matter Employment Survey, an annual employee opinion survey undertaken across the public sector.

    52.3 Workplace policies and circulars are also available online.

53. A key intention of the *Government Information (Public Access) Act 2009* (**GIPA**) is to encourage proactive public release of government information by NSW public sector agencies. It balances the presumption of the release of information with other key considerations, including public interest, privacy of individuals, the disclosure of information that has been provided in confidence, and the effective exercise of the

agency's functions under s 14 of the GIPA Act. Agencies are required to process GIPA requests within defined timeframes: GIPA Act, s 57.

54. The FBEU's proposal at [71] of its Submissions has some merit in a) identifying the Commission's commitment to facilitating mutual gains bargaining. However, the Secretary does not agree that introducing reforms 'piecemeal' via awards without no extra claims clauses or with leave reserved in respect of outstanding issues via negotiation or arbitration best promotes harmonious industrial relations throughout the life of an Award. As set out at [75]-[76] of the Secretary's Submissions, a NEC clause is vital for ensuring industrial peace throughout the life of an Award. The Secretary's model NEC clause allows continued negotiation on matters with changes by consent throughout the life of the Award and for changes achieved through arbitration to take effect after the Award has ended.

B) A model "no extra claims" clause

55. The Secretary 's view is that NEC clauses are an important part of a disciplined wage fixing system and that there is no reason why a model clause should not be inserted into all awards. The LGNSW at [88] also supports this.

56. However, the Secretary supports the model NEC clause set out at [80] of his Submissions. The Secretary's model NEC is fair in so far as it does not allow State Government employers to reduce wages through the life of an Award either and provides for a mechanism of continued collaboration throughout the life of the Award with consent changes made during the life of the Award and non-consensual changes to be arbitrated and then take effect after the Award has expired.

57. In response to [69] of Unions NSW Submissions, it is correct that in *Rail, Tram and Bus Union of New South Wales & ors v Secretary for Transport* [2017] NSWIRComm 1032, Commissioner Newall observed at [16] that no extra claims clauses do not and cannot of themselves oust the Commission's jurisdictional power to vary an award under s 17(1) of the Act. However, Commissioner Newall went on to say at [17] that 'such clauses, rather, fall to be considered in the context of the public interest test prescribed in subs. 17(3).

58. For the reasons outlined in [75] – [79] of the Secretary's Submissions, there is considerable public interest in having a NEC clause in an Award to maintain industrial harmony throughout the life of an Award. Further, the Secretary's model NEC Clause expressly states at the outset "other than as provided for in the *Industrial Relations Act 1996*" and therefore no inconsistency with the Act can arise.

(11) Whether the following Principles ought to be removed from the Wage Fixing Principles: Principle 10 (Superannuation); and (b) Principle 12 (Economic Incapacity).

A) Principle 10 (Superannuation)

59. In response to [90] of the LGNSW Submissions, Principle 10 provides that applications for superannuation allowances over and above what is statutorily required under the *Superannuation Guarantee (Administration) Act 1992* (Cth) will be dealt with under the Special Case sub-principle (principle 10.1).

60. For the reasons outlined at [86] of the Secretary's Submissions, the additional parts of Principle 10 also remain valuable by providing for the inclusion of 'pro forma' or other provisions in awards that assist employees and employers to understand their entitlements and obligations regarding superannuation, respectively (principle 10.2); and setting out the circumstances by which the 'pro forma' provisions will be departed from in favour of other provisions setting out employees' and employers' entitlements and obligations (principle 10.3 – 10.7).

61. In response to [80] of the APA Submissions, the Secretary does not support a model clause creating an Award entitlement to superannuation benefits under the *Superannuation Guarantee (Administration) Act 1992* (Cth) for the purpose of enabling enforcement in the Commission or Industrial Court. The Commission is already empowered to make awards dealing with superannuation as Principle 10 acknowledges. The parties can negotiate or invoke the arbitration powers of the Commission to pursue the inclusion of such clauses in their Awards as they see fit. Moreover, section 368 of the Act already provides a specific enforcement mechanism in respect of superannuation contributions which an employer is required to make under an Award.

B) Principle 12 (Economic Incapacity)

62. The Secretary agrees with the LGNSW that Principle 12 (Economic Incapacity) ought to be retained to ensure State Government and Local Government employers can appropriately respond to unforeseen and drastic financial circumstances.

63. In response to [81] of the APA Submissions, the fact that historically the Economic Incapacity Principle had relevance to industries subject to terms of trade fluctuations and natural disasters does not mean the principle will no longer have application to current and future unforeseen circumstances.

64. In response to [73(b)] of the FBEU Submissions, that s 146 of the Act requires the Commission to consider the NSW economy does not mean that Principle 12 has been 'subsumed'. The WFP are guidelines as to the Commission's exercise of statutory discretion, in this case, either to set fair and reasonable employment conditions under s 10 of the Act or vary or rescind an award under s 17(3)(c) of the Act where it is not contrary to the public interest and there is significant reason to do so. The Economic Incapacity Principle makes clear that in the exercise of the Commission's discretion there can be cases - although rare- that justify reducing, postponing and/or phasing in the application of any increase in labour costs.

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