IN THE FAIR WORK COMMISSION

Matter No. ADM2017/6 - Application to correct obvious error in relation to FWC decision

Community and Public Sector Union (CPSU)
Applicant

Water NSW
Respondent

APPLICANT'S WRITTEN SUBMISSIONS

1. The *Water NSW Amendment (Staff Transfers) Act 2016 No. 22*, amended the *Water NSW Act (NSW) 2014* inter alia by introducing s.28A to the latter Act. Section 28A provides as follows:

> **28A Transfer of departmental staff to Water NSW**
>
> **Note:** This section operates concurrently with Part 6-3A of the *Fair Work Act 2009* of the Commonwealth which provides that certain terms and conditions of employment of a State public sector employee are transferred when the employee is transferred to the employment of a national system employer such as Water NSW.
>
> (1) The Minister may, by order in writing, transfer to Water NSW any person employed in the Department who is designated by the Secretary of the Department to be a person required for the purposes of enabling Water NSW to exercise its functions (a *transferred employee*).
>
> (2) A transfer under this section does not require the consent of the transferred employee.
>
> (3) On the day specified in the order (the *transfer day*):
>
> (a) the employment of the transferred employee in the Public Service is terminated, and
>
> (b) the transferred employee becomes an employee of Water NSW.
>
> (4) On and from the transfer day for a transferred employee:
>
> (a) the transferred employee is entitled to continue as a contributor, member or employee for the purposes of any superannuation scheme in respect of which the transferred employee was a contributor, member or employee (as an employee in the Public Service) immediately before the transfer day and remains so entitled subject to any variation to that entitlement made either by agreement or otherwise in accordance with law, and

(b) Water NSW is taken to be an employer for the purposes of any superannuation scheme in respect of which the transferred employee continues as a contributor, member or employee pursuant to an entitlement under this section, and

(c) the continuity of the transferred employee's contract of employment is taken not to have been broken by the transfer of employment, and service of the employee in the Public Service (including service deemed to be service with Water NSW) that is continuous service up to the time of transfer is taken for all purposes to be service with Water NSW, and

(d) the transferred employee retains any rights to sick leave, annual leave or extended or long service leave accrued or accruing immediately before the transfer day (except accrued leave for which the employee has, on ceasing to be employed in the Public Service, been paid the monetary value in pursuance of any other entitlement of the employee).

(5) A transferred employee is not entitled in respect of the same period of service to claim a benefit under this section and another law or instrument.

(6) The Secretary of the Department may, in connection with the transfer of a transferred employee's employment under this section, give a certificate in writing as to the extent of the accrued rights to annual leave, sick leave or extended or long service leave that are retained by the employee under this section, and such a certificate is evidence of the matters certified.

(7) In the event that Part 6-3A of the *Fair Work Act 2009* of the Commonwealth does not apply to a transferred employee, Water NSW is nevertheless required to provide the transferred employee with the same entitlements to which the employee would have been entitled under that Part had it applied to the employee.

(8) The following provisions apply in relation to the transfer of a transferred employee's employment under this section:

(a) the transfer has effect despite the *Government Sector Employment Act 2013*, the *Industrial Relations Act 1996*or any other law, contract or instrument under a law,

(b) the termination of the employee's employment in the Public Service by operation of this section does not preserve, or give rise to, any entitlements or rights other than those provided for by the *Fair Work Act 2009* of the Commonwealth and this section,

(c) the transferred employee is not entitled to any payment or other benefit by reason only of having ceased to be an employee in the Public Service as a result of the transfer,

(d) the Crown is not required to make any payment to the transferred employee in relation to the transferred employee's accrued rights in respect of annual leave, sick leave or extended or long service leave,

(e) the transfer does not affect the transferred employee's appointment (if any) under section 390 of the *Water Management Act 2000* as an authorised officer for the purposes of that Act.

2. Section 28A commenced on the date of assent of the Amendment Act, namely 1 June 2016.

3. Subsequently the Minister made an order pursuant to s.28A(1) in respect of employees who had been designated by the Secretary. The day specified in the Order as the transfer day was 1 July 2016.

4. As provided for in the *Water NSW Act (NSW) 2014*, Water NSW is a state owned statutory corporation and the *Fair Work Act 2009* ("the Act") applies to it.

5. As a consequence of the transfer described above, by operation of Part 6-3A of the Act a number of Awards and Agreements made under the *Industrial Relations Act (NSW) 1996* became copied State instruments. The Awards and Agreements that became copied State instruments are identified in the Order pursuant to s.768BB(1)(b) of the Act dated 29 August 2017 wherein the Fair Work Commission (constituted by DP Booth) ordered that the applicant is covered by the copied State instruments identified therein.

6. Copies of DP Booth's Decision and Orders dated 29 August 2017 are **attached** to these Submissions.

Variation of Copied State Awards

7. The applicant adopts paragraphs [13] to [16] of the Statement issued by the President of the Fair Work Commission in these proceedings on 1 November 2017, and notes in particular that variations to copied State awards can occur in annual wage reviews as contemplated by s.768AW(c), in part 3-A of the Act.

8. Further, noting that Part 5 of Schedule 9 to the *Fair Work (Transitional; Provisions and Consequential Amendments) Act 2009 (Cth)* ("the Transitional Act") applies in relation to copied State awards in the same way as it does to Division 2B state awards, it is clear that an order varying a copied State award made pursuant to 768AW of the Act is not a decision made under Part 2-6 of the Act. This is further emphasised by the fact that Item 20(2) of Schedule 9 to the Transitional Act applies only Division 3 of Part 2-6 of the Act to copied State Awards – the balance of Part 2-6 does not apply. It is incontrovertible that the decision affecting copied State awards is not a decision made under Part 2-6.

9. Accordingly, there is nothing in s.603 of the Act that prevents s.602 of the Act being utilised in these proceedings to correct an obvious error in the *Annual Wage Review 2016-2017* [2017] FWCFB 3500 ("the 2017 decision").

10. Section 602 provides as follows (including Notes):

> (1) The FWC may correct or amend any obvious error, defect or irregularity (whether in substance or form) in relation to a decision of the FWC (other than an error, defect or irregularity in a modern award or national minimum wage order).
>
> Note 1: If the FWC makes a decision to make an instrument, the FWC may correct etc. the instrument under this section (see subsection 598(2)).
>
> Note 2: The FWC corrects modern awards and national minimum wage orders under sections 160 and 296.
>
> (2) The FWC may correct or amend the error, defect or irregularity:
>
> (a) on its own initiative; or
>
> (b) on application.

11. The issue identified by the applicant in its Application concerning paragraph [699] of the 2017 decision is an "obvious error" within the terms of s.602. The "obvious error" is ascertained by reference to two facts:

(i) First, the Expert Panel (hereafter, "the Commission"[1]) in the 2017 decision intended to amend copied State awards in a manner "consistent with the **approach** set down in previous Review decisions[664]" (emphasis added). Although the Commission cites four "previous Review decision" at footnote 664, it is only in the first of these – the *Annual Wage Review 2012-2013* [2013] FWCFB 4000 ("the 2013 decision)" – that the Commission took "an approach" to the amendment of copied State awards. In the other three decisions between the 2013 Review decision and the 2017 Review decision the Commission purported to adopt the approach taken in the 2013 decision. Importantly, there is no suggestion in the 2014, 2015, 2016 or 2017 decisions either that any party suggested a different approach to the one adopted in the 2013 Review decision, or that the Commission of its own motion considered any different approach to the one adopted in the 2013 Review decision. Accordingly there can be no

[1] As described at s.282 of the Act, the Commission is constituted by the Expert Panel; accordingly the Expert Panel can exercise powers under s.602.

doubt that the Commission, in the 2017 Review decision, intended to adopt the approach in the 2013 Review decision.

(ii) Second, the approach taken by the Commission in the 2017 decision is not the same as the approach taken in the 2013 decision. Accordingly the Commission has made an obvious error in that the content of the first dot point in paragraph [699] of the 2017 Review decision does not give effect to the intention of the Commission.

12. There are two relevant aspects of the **approach** adopted by the Commission in the 2013 Review decision. First, it was a **tiered approach** in awarding pay increases to copied State instruments **to avoid "double dipping"** that might otherwise occur if copied State awards had been subject to an increase from the state industrial jurisdiction in the 12 months previous to any federal Annual Wage Review coming into effect.

13. Second, in the 2013 decision the Commission targeted the impact of state wage increases with reference to state wage increases taking effect in the 12 months immediately prior to the effective date of the national wage order which was the predominant consideration of the Annual Wage Review. Whether or not copied State awards were to be increased by the 2013 decision depended on whether the copied State award had been increased by a state wage order in that 12-month period. If not, the copied State Award was to be increased by the full percentage amount; if so, then the increase would be halved (for copied State awards that had been increased by a state wage order taking effect in the first half of that 12 month period) or reduced to zero (if the state wage order on the copied State award took effect in the six months immediately prior to the effective date of the 2013 decision).

14. The approach set out above is the approach that the Commission intended to adopt in the 2017 decision, but in error it failed to do so.

15. The table below highlights the error in the first dot point of paragraph [699] of the 2017 Review decision.

	Paragraph [560] of the 2013 Annual Wage Review (delivered on 3 June 2013)	**Paragraph [699] of the 2017 Annual Wage Review (delivered on 6 June 2017)**
Tier 1	an increase of 2.6 per cent applies to wage rates in copied State awards that were not the subject of a state minimum wage decision that commenced **after 1 July 2012 and before 1 July 2013;**	an increase of 3.3 per cent applies to wage rates in copied State awards that were not the subject of a state minimum wage decision that commenced **on and before 1 July 2016.**
Tier 2	an increase of 1.3 per cent applies to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced after 1 July 2012 and before 1 January 2013; and	an increase of 1.65 per cent applies to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced after 1 July 2016 and before 1 January 2017; and
Tier 3	no increase applies to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced on or after 1 January 2013 and before 1 July 2013	no increase applies to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced on or after 1 January 2017 and before 1 July 2017.

16. The tiered approach in the 2013 decision contemplates two distinct groups of employees:

Group One (identified in Tier 1) – those covered by copied State awards where the wage rates had NOT been increased by a state minimum wage decision in the 12 months prior to the date on which the increase in the national minimum wage was to take effect.

Group 2 (identified in Tiers 2 and 3) – those covered by copied State awards where the wage rates HAD been increased by a state minimum wage decision in the 12 months prior to the date on which the increase in the national minimum wage was to take effect.

17. In the 2017 Review decision, the wording used for Group One is such that the 2017 Review decision is silent (and thus makes no provision for an increase) for copied State awards with wage rates that have NOT been increased by a state wage decision that commenced after 1 July 2016 and before 30 June 2017. This result is anomalous

and could not have been intended, and further does not reflect what was intended having regard to the opening words of paragraph [699] of the 2017 Review decision.

18. Further, the wording in the 2017 Review decision for Group One applies so that an increase of 3.3% only applies if the wage rates in the copied State award has NOT been increased by a state wage decision that commenced prior to 1 July 2016. Part 6-3A of the Act dealing with copied State instruments, including copied State awards, was only introduced into the Act in December 2012. Unless ended earlier, copied State awards last for five years. It is highly unlikely that any copied State award that existed as at 7 June 2017 had not had an increase courtesy of a state minimum wage decision that came into effect prior to 1 July 2016. In its current wording, Tier One has no practical effect at all. This is also anomalous and contrary to the stated intention in paragraph [699] of the 2017 review decision.

19. Where the decision does not conform with the intention of the decision-maker, s.602 is an appropriate tool by which to amend the error. In *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 2)* [1982] HCA 59 the High Court (dealing with an application for interest on judgment sum) noted that where the slip rule is invoked, the court has a discretion as to whether or not to correct the error.

> 11. Third, we would observe that an order under the slip rule is not available as a matter of course. There is a discretion in the court to refuse an order if something has intervened which would render it inexpedient or inequitable that it be made (see Tak Ming (1973) 1 WLR, at p 306; (1973) 1 All ER, at p 572 ; and the cases there cited).

20. In this case there is no "intervening matter" that militates against the Commission exercising its discretion to amend paragraph [699] in the way sought by the applicant. The nature of copied State awards means that ongoing monitoring of their operation does not occur. The 2017 review decision specifies that "There is no requirement to publish the variations [to copied State Awards]" (at [700] citing the Transitional Act).

21. As the President identifies in the Statement in these proceedings, "...it is unclear how many copied State awards exist..." (at [12]). Although it appears that the error sought to be corrected in the 2017 Review decision first arose in the 2014 Review decision, the absence of any application under the slip rule prior to this application does not amount to an "intervening event" that would prevent the discretion being exercised in

circumstances where there is simply no evidence that the error has been relevant to any copied State award prior to the 2017 Review decision.

22. Conversely, the applicant has acted promptly to raise the matter:

    a. making application for representation rights in relation to the employees within weeks of the 2017 Review decision (see **attached** decision of DP Booth); and

    b. making this application within weeks of obtaining representation rights in relation to the affected employees.

23. The Commission should amend paragraph [699] of the 2017 decision so that it conforms with the approach in the 2017 Review decision, as stated by the Commission as its intention in paragraph [699].

Patricia Lowson
Counsel for the Applicant
8 Garfield Barwick Chambers
Tel: 02 8239 3299
Email: plowson@chambers.net.au

16 November 2017

DECISION

Fair Work Act 2009
s.768BB - Application for an order about coverage for employee organisations under a state instrument

CPSU, the Community and Public Sector Union
(AG2017/2556)

DEPUTY PRESIDENT BOOTH SYDNEY, 29 AUGUST 2017

S 768BB – Application for an order about coverage for employee organisations under a state instrument

[1] This decision concerns an application made by the Community and Public Sector Union (CPSU) pursuant to s. 768BB of the *Fair Work Act 2009* (the Act).

[2] s. 768BB of the Act provides as follows:

FWC orders about coverage for employee organisations

(1) The FWC may make an order that:

(a) a copied State instrument for a transferring employee that would, or would be likely to, cover an employee organisation (the first employee organisation) in relation to the transferring employee because of subsection 768AN(2) does not, or will not, cover the organisation; and

(b) another employee organisation (the second employee organisation) is, or will be, covered by the copied State instrument in relation to the employee.

(2) When making an order under subsection (1), the FWC must consider whether the second employee organisation is a federal counterpart (within the meaning of section 9A of the Registered Organisations Act) of the first employee organisation.

(3) The regulations may:

(a) prescribe circumstances in which the FWC may make an order for the purposes of subsection (1); and

(b) otherwise make provision in relation to the making of the order.

(4) An order under subsection (1) must be made in accordance with any regulations that are made for the purposes of subsection (3).

[3] Regulation 6.03A of the *Fair Work Regulations 2009* states as follows:

> **FWA orders about coverage for employee organisations**
>
> For paragraph 768BB(3)(a) of the Act, a circumstance in which FWA may make an order mentioned in subsection 768BB(1) of the Act is that the order is to be made:
>
> (a) on FWA's own initiative; or
>
> (b) on application to FWA by a transferring employee, or a person who is likely to be a transferring employee; or
>
> (c) on application to FWA by the new employer, or a person who is likely to be the new employer; or
>
> (d) on application to FWA by an employee organisation that is entitled to represent the industrial interests of an employee mentioned in paragraph (b).

[4] On 7 June 2016 the NSW Government passed the Water NSW Amendment (Staff Transfers) Act 2016 No. 22 (NSW), allowing the Minister to direct that employees be transferred from the Department to Water NSW. Over 100 employees were transferred from the Department of Primary Industries to Water NSW on 1 July 2016.

[5] Pursuant to Part 6-3A, Division 3 of the Act, upon this transfer, a number of state awards and agreements became copied state awards and copied state instruments.

[6] The relevant copied state instruments are as follows:

(a) Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009
(b) Crown Employees (Administrative and Clerical Officers - Salaries) Award 2007
(c) Crown Employees (Department of Industry, Skills and Regional Development) Professional Officers Award
(d) Crown Employees (Departmental Officers) Award
(e) Crown Employees (Public Sector - Salaries 2016) Award
(f) Miscellaneous Professional Officers, Department of Water Resources Agreement No. 2535 of 1991
(g) Laboratory Attendants, trainee Technical Officers (Scientific), Technical Officers (Scientific), Various Departments; Agreement No. 2369 of 1982
(h) New South Wales Trade & Investment Flexible Working Hours Agreement 2013

[7] During a teleconference held on 25 July 2017, attended by the CPSU and Water NSW, it was agreed that I make my decision in relation to this application on the papers. Water NSW advised me that they do not oppose the application.

[8] The purpose of the application is for the CPSU to be covered by the copied State awards and the copied state instruments so it may represent the industrial interests of its members who have transferred to Water NSW.

[9] This is necessary because the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales (PSA NSW) is the state registered employee organisation covered by the state instruments and it is not a registered organisation for the purposes of the Fair Work (Registered Organisations) Act 2009.

[10] The CPSU is the federal counterpart for the PSA NSW, pursuant to Schedule 1A to the Fair Work (Registered Organisations) Regulations 2009. I am satisfied that the CPSU is eligible to represent employees in Water NSW in accordance with its rules.

[11] I consider that the provisions of ss.768BB (1), (2) and (3) of the Act are satisfied and in particular that in accordance with s.768BB (3), regulation 6.03A of the *Fair Work Regulations 2009* is satisfied. Therefore I consider that I may make the order sought.

[12] In the circumstances that 100 employees of the Department of Primary Industries have been transferred to Water NSW, the CPSU is eligible to represent these employees and Water NSW do not oppose the application I consider that I should grant the order sought.

[13] Accordingly I will grant the order sought by the CPSU.

[14] An order will issue with the decision.

DEPUTY PRESIDENT

Printed by authority of the Commonwealth Government Printer

<Price code A, PR595691>

PR595692

ORDER

Fair Work Act 2009
s.768BB - Application for an order about coverage for employee organisations under a state instrument

CPSU, the Community and Public Sector Union
(AG2017/2556)

DEPUTY PRESIDENT BOOTH SYDNEY, 29 AUGUST 2017

S 768BB – Application for an order about coverage for employee organisations under a state instrument

A. Pursuant to s. 768BB(1)(a) of the Fair Work Act 2009 (the Act), the Fair Work Commission orders:

The Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales will not be covered by each of the following copied state instruments:

1. Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009
2. Crown Employees (Administrative and Clerical Officers - Salaries) Award 2007
3. Crown Employees (Department of Industry, Skills and Regional Development) Professional Officers Award
4. Crown Employees (Departmental Officers) Award
5. Crown Employees (Public Sector - Salaries 2016) Award
6. Miscellaneous Professional Officers, Department of Water Resources Agreement No. 2535 of 1991
7. Laboratory Attendants, trainee Technical Officers (Scientific), Technical Officers (Scientific), Various Departments; Agreement No. 2369 of 1982
8. New South Wales Trade & Investment Flexible Working Hours Agreement 2013

B. Pursuant to s. 768BB(1)(b) of the Act, the Fair Work Commission orders:

The Community and Public Sector Union is covered by each of the following copied state instruments:

1. Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009

2. Crown Employees (Administrative and Clerical Officers - Salaries) Award 2007
3. Crown Employees (Department of Industry, Skills and Regional Development) Professional Officers Award
4. Crown Employees (Departmental Officers) Award
5. Crown Employees (Public Sector - Salaries 2016) Award
6. Miscellaneous Professional Officers, Department of Water Resources Agreement No. 2535 of 1991
7. Laboratory Attendants, trainee Technical Officers (Scientific), Technical Officers (Scientific), Various Departments; Agreement No. 2369 of 1982
8. New South Wales Trade & Investment Flexible Working Hours Agreement 2013

DEPUTY PRESIDENT

Printed by authority of the Commonwealth Government Printer

<Price code A>