IN THE FAIR WORK COMMISSION

Matter No ADM2017/6

Community and Public Sector Union
Applicant

APPLICATION TO CORRECT AN OBVIOUS ERROR IN RELATION TO AN FWC DECISION

OUTLINE OF SUBMISSIONS ON BEHALF OF WATER NSW

1. INTRODUCTION

1.1 The proceedings below were commenced by the Applicant (**CPSU**) lodging a application under s.602 of the *Fair Work Act* 2009 (**the FW Act**) to correct an obvious error in relation to the *Annual Wage Review 2016-2017* [2017] FWCFB 3500 (the **AWR 2017**).

1.2 Water NSW opposes the application on the basis that it does not consider that an obvious error exists in accordance with the law developed in relation to applications of this type.

1.3 Water NSW is a State Owned Corporation created under the *Water NSW Act* 2014. It is the combination of State Water (a State Owned Corporation), Sydney Catchment Authority (a previous NSW government agency transferred into State Water in 2014) and some employees transferred from the employment of the NSW Department of Primary Industries in 2016 pursuant to the *Water NSW Amendment (Staff Transfers) Act 2016* (**the Relevant Employees**).

1.4 Employees of Water NSW are covered by an enterprise agreement made under the FW Act (State Water employees), employees covered by a copied State Award from Sydney Catchment Authority and employees covered by copied State Awards from the Department of Primary Industries.

1.5 Bargaining has been conducted between Water NSW, employees and bargaining representatives (including the Applicant) for a unified enterprise agreement under the FW Act since early 2017. At the time of writing, an access period was open in relation to a proposed enterprise agreement, with a vote to occur over the period 6 December 2017 - 11 December 2017. The ASU as bargaining representatives does not support the proposed enterprise agreement and WaterNSW understands that the Applicant has remained neutral.

1.6 Water NSW does not dispute the background information with respect to the Relevant Employees and their transfer from employment in the public service as set out in paragraphs 1-6 of the Applicant's submissions.

2. JURISDICTION

2.1 Water NSW adopts paragraphs [13]-[16] of the *Annual Wage Review Decision Statement* issued in these proceedings by the Expert Panel on 1 November 2017 in relation to the ability of Annual Wage Reviews to vary the terms of copied State Awards.

2.2 The Application is made pursuant to s602(2)(b) of the FW Act. Section 602(1) of the FW Act deals with the power of the Fair Work Commission to correct or amend any obvious error, defect or irregularity in relation to a decision of the Fair Work Commission, but expressly excludes an error, defect or irregularity in a modern award or national minimum wage order.

2.3 Water NSW does not contend that the AWR 2017 as a whole is not able to be the subject of an application under section 602. However, Water NSW submits that if the Application was successful, the nature of the alleged error means that the "correction" would amount to a variation of the AWR 2017 and consequent wages outcome for those covered by copied State Awards.

2.4 Such variation is not allowed by section 603 of the FW Act which provides that the Commission may vary or revoke a decision, other than a decision referred to in subsection (3). Relevantly, subsection 3(d) provides that the Fair Work Commission must not vary or revoke a decision under Part 2-6. Part 2-6 deals with minimum wages and relevantly, under section 285, Annual Wage Reviews.

2.5 The Applicant contends that the AWR 2017 is not a decision made under Part 2-6 of the FW Act and is therefore able to be varied in its effect on copied state awards. This is not accepted by Water NSW. Item 20(2) of Schedule 9 of Part 5 Division 2 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)* (the **Transitional Act**) allows for Annual Wage Reviews to be applied Division 2B Awards (and therefore copied State Awards). Copied state awards are varied by determination, made pursuant to an Annual Wage Review decision. The Application in question is to vary the AWR 2017 which is clearly a decision issued under Part 2-6 of the FW Act.

2.6 To argue otherwise as the Applicant attempts to do is to say that employees covered by copied State Awards are otherwise excluded from the application of section 603(3)(d) in circumstances where the correction sought impacts upon the wages outcome in an Annual Wage Review decision. This flies in the face of the clear legislative intention to provide such employees with the benefits of the FW Act enjoyed by employees covered by modern awards from the date of transfer of employment.

2.7 In Water NSW's submission, the application of the AWR 2017 to the Relevant Employees is no different to any other and as such, variation is not permitted under the terms of section 603(3).

3. THE VARIATION

3.1 The Relevant Employees received a wage increase courtesy of a state minimum wage order on 1 July 2016 on the date of transfer of employment to WaterNSW.

3.2 The purported error appears in paragraph [699] of the AWR 2017. The Applicant seeks to vary the following words:

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

to read:

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~~ ***after 1 July 2016 and before 1 July 2017.***

3.3 This is a fundamental variation which would have the effect of granting an employee who received a state minimum wage increase on 1 July 2016 a 3.3% increase which they were not granted under the terms of the AWR 2017. This is because the state minimum wage decision for the Relevant Employees occurred on 1 July 2016 and not **after** 1 July 2016.

3.4 The Applicant submits that this is an error on the part of the Commission because despite the statement in [699] that *increases to these instruments should be consistent with the approach set down in previous Review decisions*, the Applicant states that the approach in the AWR 2017 (and therefore the 2013-2014 decision, 2015-2016 decision and 2016-2017 decision) was in fact not consistent with the Annual Wage Review 2012-2013 (**AWR 2013**) which was the first to deal with the issue. As it was not consistent, the Applicant maintains that this is an error which should be corrected.

3.5 The statement that *increases to these instruments should be consistent with the approach set down in previous Review decisions* appears in each of the Annual Wage review decisions from 2013-2014 to the AWR 2017[1]. That approach is to limit the impact of any "double-dipping" as a result of the relevant Annual Wage Review decision and minimum wage increases previously awarded by state Industrial Relations Commissions.[2]

3.6 The words as they appear in the relevant passage of the Annual Wage Review 2012-2013 (**AWR 2013**) are as follows:

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***[3]

3.7 In subsequent decisions, this terminology changed to state:

an increase of 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 2013*** (and so on for subsequent years)

3.8 In the AWR 2013, the Commission's stated purpose was to limit the impact of double dipping. This meant that a tiered approach was adopted with respect to the implementation of any increase to the national minimum wage. WaterNSW submits that this means the Commission intended the following to occur:

(a) If you were an employee who had **not** been granted a state minimum wage increase in the 12 months prior to 1 July 2013, you received the full national minimum wage increase;

---

[1] See [2013] FWCFB 4000 at para. 560; [2014] FWCFB 3500 at para. 572; [2015] FWCFB 3500 at para. 536; and [2016] FWCFB 3500 at para. 593.

[2] See [2013] FWCFB 4000 at para. 560

[3] [2013] FWCFB 4000 at [560]

(b) If you were an employee who **had** been granted a state minimum wage increase in the second half of the financial year prior to 1 July 2013, you received half of the national minimum wage increase;

(c) If you were an employee who **had** been granted a state minimum wage increase in the second half of the financial year prior to 1 July 2013 you did not receive any of the national minimum wage increase.

3.9 Although the national minimum wage increase applies prospectively, the Commission applies a retrospective assessment to the issue of double dipping and hence the approach adopted above.

3.10 However, the submission of WaterNSW is that whilst stating this was the approach, the precise language used by the Commission in the AWR 2013 meant that the effect on employees who received an increase **on** 1 July 2012 was precisely the opposite of the stated intention.

3.11 This is because the AWR 2013 states the full national minimum wage increase is passed on to employees covered by *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***. Accordingly, if an increase is granted effective 1 July 2012, the employee receives both the full state minimum wage increase for the financial year 2012-2013 **and** the full national minimum wage increase. An employee who received a state minimum wage increase one day later, on 2 July 2013, would only receive 50% of the increase. This is clearly contrary to the approach that was said to be adopted.

3.12 In the following year, the Annual Wage Review 2013-2014 (**AWR 2014**) the Commission granted:

(a) The full national minimum wage increase to employees who were **not** the subject of a state minimum wage decision that commenced on and before 1 July 2014;

(b) half the national minimum wage increase for employees who **had** been granted a state minimum wage increase in the second half of the financial year prior to 1 July 2014; and

(c) No national minimum wage increase for employees who **had** been granted a state minimum wage increase in the second half of the financial year prior to 1 July 2014.

3.13 By adopting different language through the insertion of the words "on or" for the first category of employees, the Commission gave effect to the stated approach. Accordingly, there is no error in the AWR 2017 as argued by the Applicant, but language which is consistent with the approach originally adopted by the Commission.

3.14 Given the Relevant Employees received a state minimum wage increase on 1 July 2016 the position of WaterNSW is that they are entitled to 50% of the national minimum wage increase, being 1.65%. This is because:

(a) the first bullet point deals with circumstances where no wage increase **on** 1 July 2016 which is not the case; and

(b) the second bullet point deals with circumstances where the wage increase commenced **after** 1 July 2016 would encompass a wage increase operative from 1 July 2016 yet commencing after that date (for example on the first pay period).

4. SECTION 602

4.1 In the event that the Commission does consider that the AWR 2017 as it applies to employees covered by State Awards is not a decision made under Part 2-6 of the FW Act and therefore not excluded from variation, Water NSW submits that the Application does not disclose an obvious error which is capable of correction. Further, the submissions on this matter should be taken into account if the Commission decides that the AWR 2017 as it applies to employees covered by State Awards is a decision made under Part 2-6 of the FW Act yet the proposed correction would not constitute a variation and is therefore permitted.

4.2 Section 602 is not intended to give the Commission general power to amend any of its decisions, but is intended to legislate the "slip rule" used by courts to correct a clerical mistake or error arising from an accidental slip in a judgment. This matter has been considered by the Full Bench in *RotoMetrics Australia Pty Ltd T/A RotoMetrics v AMWU and ors* [2011] FWAFB 7214 which determined at [29] that it must be applied with caution and only in circumstances in which the use of the "slip rule" is permissible:

» *"where there has been an unintentional omission in an Order or judgment of the Court;*

» *where an Order or judgment does not conform with the intention of the Court, and would have been made if the issue had been mentioned during the proceedings;*

» *where there are no material differences of opinion between the parties; it is not suitable to apply this rule where it concerns a matter of controversy; and*

» *where the error is manifestly clear; where an 'officious bystander would reply when asked if the amendment was appropriate: "Of course".*

4.3 The slip rule is intended to avoid injustice by allowing Courts to correct inadvertent mistakes[4]. Water NSW submits that there has been no inadvertent error given that any employee who has received a state wage increases on 1 July of the preceding year would be in the same position as the Relevant Employees and would not have received the wage increase under the relevant Annual Wage Review decision. Indeed each of the Annual Wage Review decisions subsequent to the AWR 2013 express an intention to apply the same "approach". The fact that each employee in the same position as the Relevant Employees has received the same result (that is, no wage increase) is evidence that this is not an error.

4.4 In addition, it is not sufficient to contend that an order should have been made or indeed would have been made had it been argued at the time. The slip rule does not give the Court power to re-open or reconsider the correctness of an order made or to

[4] *Currabubula and Paola v State Bank NSW, Currabubula v State Bank NSW* [2000] NSWSC 232 at [39]

vary the order in light of the circumstances or matters which have arisen subsequently[5].

4.5 While the Applicant and other unions may now argue that the wage outcome for the Relevant Employees is not just, this does not mean that it is an error. Indeed, it was open to the Applicant and the other unions to raise this issue in previous four Annual Wage Reviews. Despite this, there is no evidence that the unions raised this issue at all. However, it remains open for the Applicant and other unions to make submissions on the matter in the forthcoming Annual Wage Review 2018 and if the Commission considers that a different 'approach" is warranted, that is the appropriate forum for the matter to be determined.

4.6 That matters of controversy and debate are not appropriate matters to be remedied by the slip rule is articulated in the established case law:

Matters particularly apt for correction under the slip rule include matters about which there can be no real disagreement or controversy. It is not sufficient that the Court forms the view that had the matter been raised at hearing, the Court would on balance, have made the orders sought... the amendment cannot be one which would not automatically be made and cannot be one which requires the support of real argument in terms of the merits of competing submissions as to the order which ought to be made[6]

"*only matters of which there can be no real controversy and no real difference of opinion were proper candidates for the application of the slip rule*[7]

4.7 Given the consistency of wages outcomes for employees in the position of the Relevant Employees since 2013, it is clear in the submission of Water NSW, that this is a matter which requires consideration of competing submissions and therefore cannot be said to be in the category of an inadvertent error. A wage increase of 3.3% as opposed to 1.65% is not an order which would automatically be made.

4.8 In a decision of the Australian Industrial Relations Commission to vary or correct a term of the Timber and Allied Industries Award 1999, Justice Munro applied the principles of the slip rule. The application was simply to correct the reference to a regulation (Regulation 131) in the Award. Although the application was contested by interested employers, the fact that the reference to the regulation was incorrect and should have read "Regulation 131A", was agreed by all parties. It was not disputed that the context and surrounding circumstances of the clause meant that the only conclusion that could be drawn was that the Commission had intended it to read Regulation 131A. The only issue between the parties was the retrospective effect of such a correction order. In the circumstances, his Honour held that there was no controversy between the parties as to what was intended and therefore this was a matter where applying the slip rule was appropriate[8].

4.9 That case is clearly distinguishable from the Application before the Commission as the parties fundamentally disagree as to the intention of the Commission in drafting the relevant paragraph of AWR 2017. Water NSW submits that it was to reflect the outcomes for like employees in each of the four previous Annual Wage Reviews,

---

[5] Ibid at [51]
[6] Ibid at [51]
[7] *Elyard Corporation v DDB Needham Sydney* (1995) 61 FCR 385 at 390
8 PR93774 at [35].

whereas the Applicant would have the Commission adopt a different approach, thus providing a full wage increase to the Relevant Employees.

5. SUBMISSIONS OF THE ASU

5.1 In relation to the submissions filed by the Australian Services Union (**ASU**) on 16 November 2017, Water NSW notes:

(a) The employees covered by the Sydney Catchment Authority Award (now copied State Award) last received a state minimum wage increase on 1 July 2015. This meant that they received a 3.3% increase on top of the award rates in accordance with the AWR 2017; and

(b) as a result, these employees do not fall in the same category as the relevant Employees and are not affected by these proceedings nor the proposed variation sought in the Application.

5.2 It is Water NSW's position that the alleged error referred to in the Application cannot be said to fall within any of the accepted categories listed in 4.2 for correction by the slip rule and therefore the Application should be dismissed.

.....

K&L Gates

30 November 2017