NSW Government submission to the Commonwealth Senate Inquiry into the Fair Work Amendment Bill 2014

The proposed Bill

The Bill makes amendments to the *Fair Work Act 2009* by responding to ten of the outstanding recommendations from the 2012 Fair Work Review and implementing part of the Federal Government's 2013 election commitments.

As a significant partner in the national workplace relations system, the NSW Government welcomes the timely reforms included in the Bill. As the State with the largest labour force and economy, we have a vested interest in ensuring the Fair Work Act is operating efficiently and is responsive to the needs of employers and employees in NSW.

Greenfields agreements

The Bill intends to extend good faith bargaining provisions to the negotiation of single-enterprise greenfields agreements, and will enable an employer to take a proposed agreement to the Fair Work Commission (FWC) for approval where agreement with a union has not been reached within three months of the notified negotiation period. In such cases, the FWC will be required to be satisfied that the agreement passes the Better Off Overall Test and provides for pay and conditions that are nationally consistent with those within the relevant industry for equivalent work.

The NSW Government supports these amendments and the positive impact they will have on business in NSW, by reducing administrative and delay costs for employers and driving investment in major projects in our State. The NSW Government is aware that investment funding is often contingent upon stable labour arrangements being in place and believes the amendments will provide confidence and certainty to investors.

The proposed amendments are timely given NSW's infrastructure construction pipeline of approximately $85 billion over the next five years. Current greenfields bargaining arrangements have meant employers have had to delay or abandon the commencement of projects when agreement has not been reached, or in some circumstances been forced by unions to agree to excessive wage claims that are economically unsustainable.

The NSW Government welcomes amendments to reduce the time to negotiate greenfields agreements and to ensure that bargaining is carried out in good faith.

Right of entry

The Bill intends to tighten the threshold for union entry to workplaces to the effect that a union will need to be covered by an enterprise agreement that applies to work performed on the premises or be invited by a member or prospective member in order to enter that workplace for discussions. The Bill will also repeal the changes that required employers to provide union officials with travel and accommodation to remote sites and make the lunch room the default meeting venue.

The NSW Government supports these amendments to restore balance to facilitating union entry to workplaces which are not overly intrusive and allow employers and employees to carry out their work without undue disruption. Recent amendments to the Fair Work Act broadened the right of entry provisions, allowing for excessive workplace visits by some unions and disputes between unions over eligibility to represent employees.

The proposed amendments should decrease the costs and red tape issues associated with facilitating excessive right of entry visits and related requirements, including the provision of transport/accommodation at remote sites, and thereby have a positive impact on productivity.

Individual Flexibility Arrangements (IFAs)
The Bill intends to amend the IFA framework for both modern awards and enterprise agreements. In respect of enterprise agreements, the proposed amendments will prevent unions from making IFAs that are restricted to one or two workplace conditions. Instead, the amendments will require enterprise agreement flexibility terms to permit IFAs to deal with all matters listed in the model flexibility term set out in the Fair Work Regulations.

IFAs in modern awards will be altered by making it abundantly clear that non-monetary benefits may be taken into account when assessing if the Better Off Overall Test has been met. However, importantly, the employer will also be required to obtain a statement from the employee stating why they believe the IFA is more beneficial. Apart from extending the notice to terminate requirements, the Bill would provide a defence to an alleged contravention of a term of an IFA where the employer reasonably believes the requirements were complied with when the arrangement was made.

The NSW Government supports these amendments, particularly those which have the scope to ameliorate the current rigidity evident in many workplaces and therefore enhance productivity rates. The current legislative arrangements have made it difficult for employers and employees to negotiate mutually beneficial workplace arrangements.

Flexibility in the workplace is fundamental to improving workplace productivity and efficiency, by helping maintain a motivated workforce with reduced staff turnover and absenteeism. To this end, amendments which encourage employers and employees to vary the terms of modern awards and enterprise agreements to meet their needs are welcomed.

Protected industrial action
The Bill intends to prohibit industrial action unless bargaining has commenced, which will mean that industrial action cannot be the first step in the bargaining process.

As noted in the 2012 Fair Work Review Report, the former Labor Government's industrial relations policy document stated that protected industrial action would be 'available during good faith collective bargaining' and that 'industrial action outside good faith bargaining processes' would not be protected. The Explanatory Memorandum contains similar statements suggesting industrial action was to be limited to circumstances when bargaining had commenced.[1]

The NSW Government supports this amendment and believes restoring a balanced approach to enterprise bargaining is necessary. The NSW Government welcomes provisions which eliminate unnecessary and costly industrial action and promotes a balanced and harmonious approach to enterprise bargaining.

Transfer of Business
The Bill intends to clarify transfer of business rules covering employees who voluntarily seek to transfer to an associated entity of their current employer. Under the proposed changes, the terms and conditions of employment at the new employer will automatically apply to a transferring employee.

The NSW Government supports these amendments and the consequent reduction in administrative red tape for employers. Under the current provisions, businesses have had to allocate time and finances to prepare applications to the FWC to prevent the relevant industrial instrument transferring with a particular employee. The proposed changes should

[1] See Towards more productive and equitable workplace relations – an evaluation of the Fair Work legislation p175

encourage greater mobility for employees between entities and reduce cost burdens for business.

Other amendments

The Bill also intends to include other amendments including changing annual leave loading provisions to ensure it is not payable on termination unless a modern award or enterprise agreement expressly provides for such an entitlement. It further intends to repeal provisions to ensure employees cannot accrue or take annual leave or any other type of leave while absent from work and in receipt of workers' compensation.

The NSW Government supports both of these amendments and the clarity they will provide to NSW workplaces. Employers, who prior to the introduction of the Fair Work Act did not have to pay annual leave loading on an employee's termination of employment, have incurred an additional cost by virtue of an interpretation of the Annual Leave NES provisions in the Fair Work Act. The restoration of the long standing position that employees are only entitled to annual leave loading when their employment ends, if it is expressly provided for in their award or workplace agreement, will alleviate the confusion currently experienced at workplaces.

Similarly, the NSW Government is supportive of removing the exception that allows employees in a few jurisdictions who are receiving workers' compensation while absent from work to accrue or take leave. This will ensure that employees on workers compensation across the country are treated consistently.

The Bill also intends to introduce a statutory requirement for an employer to discuss any request from an employee to extend their unpaid parental leave for a further period of up to twelve months. The second reading speech to the Bill makes it clear that the discussion does not have to be face to face and the employer will still be able to refuse a request on reasonable business grounds.

According to the 2012 Fair Work Review Report requests for additional unpaid parental leave are rare. However, the NSW Government supports the amendment as it will assist in the retention of staff, thereby promoting a skilled and experienced workforce with consequent positive impacts on participation rates.