New South Wales

ATTORNEY GENERAL
MINISTER FOR INDUSTRIAL RELATIONS

OIR No: 09DOC0342

Mr John Carter
Committee Secretary
Senate Education, Employment and
Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Carter

I am writing to you on behalf of the New South Wales Government concerning the current Senate Committee Inquiry into the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009.* I understand that on 19 March 2009 the Senate referred the provisions of this Bill to the Senate Standing Committee on Education, Employment and Workplace Relations for report by 7 May 2009.

The NSW Government welcomes the introduction of the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* into the Australian Parliament and the opportunity to further contribute to its analysis and development through the Senate Committee inquiry process. It should be observed that an earlier draft form of this Bill was the subject of productive consultation sessions involving the High Level Officers Group established by the Workplace Relations Ministers' Council, comprising State and Territory government representatives, held on 26-27 February 2009.

It is also a welcome development that the *Fair Work Act 2009* was passed by the Australian Parliament and received the Royal Assent on 7 April 2009.

You may recall that on the 12 January 2009 I wrote to you providing comments to the Committee in relation to the Senate Committee Inquiry into the then *Fair Work Bill 2008* on behalf of the NSW Government. One of the key observations made in the *Fair Work Bill 2008* submission was that a consideration of the highly successful NSW industrial relations framework and the principles that underpin it was a useful way for the Committee to approach the critical task of considering legislation that would shape an appropriate national industrial relations system.

The introduction of the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* represents substantial progress toward the goal of establishing this new system.

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For a full discussion of the NSW position on the *Fair Work Bill 2009* and an outline of previous NSW submissions to the Committee dealing with various federal industrial relations matters and related Commonwealth legislation, see the NSW Government submission to the Senate Standing Committee Inquiry into the Fair Work Bill 2009.

An important and guiding consideration for the NSW Government in this submission is that no national system employer or employee working in NSW should be disadvantaged as a consequence of the implementation of the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*.

The comments provided are thus directed to areas of particular concern to the NSW Government which have significant implications for NSW employers, employees and registered organisations participating in the national workplace relations system.

The 2009 transitional legislation:
The *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* establishes transitional arrangements that are a necessary step in building a new, viable and appropriately streamlined national industrial relations system. The Deputy Prime Minister in the Second Reading Speech described the Bill in the following terms:

> The legislation that I am introducing today sets out essential transitional and consequential changes which will ensure an orderly and fair transition to the new workplace relations system, while providing certainty in employment arrangements.

The NSW Government welcomes this approach to the formidable task of providing effective and workable transitional arrangements.

NSW also notes the complexity of the challenge posed by the task of framing the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* and commends the Commonwealth and others concerned for their considerable efforts. The Bill seeks to address transitional issues relating to the establishment of a new system that effectively has two commencement dates connected by what the Bill refers to as a bridging period.

As the Bill is not amending but repealing the principal workplace relations legislation it is required to provide comprehensive, detailed and practical stand alone arrangements for the continuing application of rules and instruments made under the *Workplace Relations Act 1996*.

In practical terms the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* repeals the current *Workplace Relations Act 1996* other than Schedules 1 and 10 (dealing with registered organisations) and renames it the *Fair Work (Registered Organisations) Act 2009* to accurately reflect its content. The bulk of the Bill will commence on 1 July 2009, although the National Employment Standards (NES) and modern awards and will not operate until 1 January 2010.

The *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* is designed to enhance the operational effectiveness of the *Fair Work Bill 2009* by establishing arrangements for moving employees, employers and industrial associations into the new national workplace relations system. It also addresses the important issue of how to preserve pre-commencement rights and obligations and reconcile to the extent practicable the rules governing *Workplace Relations Act 1996* instruments with the new Fair Work scheme of regulation.

In this respect it is noted that the Bill seeks to provide for the universal application of the safety net (including minimum wages) to all national system employees and makes available specific arrangements to facilitate enterprise bargaining through protected industrial action for employees on individual statutory agreements such as Australian Workplace Agreements.

Of significant interest to NSW is how employees formerly covered by NSW laws and instruments will be affected by the transitional arrangements. In this respect NSW is encouraged that the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* provides a mechanism for relevant employees to receive the benefits of the NES as minimum standards while retaining more favourable arrangements in their transitional instruments. This means, for example, that an employee, under a transitional instrument derived in part from NSW industrial relations legislation, can take annual leave which accrued under that instrument at their ordinary pay (including penalties and bonuses) and the corresponding less favourable provisions of the NES dealing with leave payment will not apply.

Award modernisation:
The NSW Government welcomes the establishment of transitional arrangements that enable the Australian Industrial Relations Commission to complete the task of award modernisation. To give effect to the outcomes of award modernisation the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* provides for transitional instruments (including preserved pay scales) to be revoked or varied by Fair Work Australia when modern awards are made which wholly or partly replace them.

The NSW Government also welcomes the provision requiring Fair Work Australia to conduct a review of modern awards after the first two years of their operation (that is, from 1 January 2012). This review, which is in addition to the four yearly reviews, will enable Fair Work Australia to assess important matters in determining the extent to which the modern awards objective is being met and the extent, if any, to which employees are being disadvantaged. These matters include whether modern awards reflect equal remuneration for work of equal or comparable value principles and the extent to which individual flexibility clauses are being used properly and not to alter industry standards on hours and work patterns.

It is noted that under the terms of the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* transitional arrangements in modern awards cannot be reviewed by Fair Work Australia unless the power is conferred by the terms of the relevant modern award. NSW believes that there is merit in also considering whether Fair Work Australia should also have the capacity to review all transitional arrangements in modern awards to determine whether they are operating effectively and fairly. This approach would be consistent with the view expressed by the Deputy Prime Minister, in the Bill's Second Reading Speech, that transitional

arrangements provided under the Bill should be fair. It also gives effect in part to the intention expressed in the Award Modernisation Request that award modernisation is not to disadvantage employees.

Take-home pay orders:
The *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* gives Fair Work Australia the capacity to order compensation where the take-home pay of an employee or outworker is reduced and the reduction is attributable to the award modernisation process. The NSW Government welcomes this development. It will be important to monitor the operation of these provisions, especially the circumstances in which Fair Work Australia declines to make an order where it is satisfied that an employee has been adequately compensated in other ways for the pay reduction, in order for governments to be assured that the intention of the provisions is achieved.

As with any other remedial mechanism designed to benefit or protect employees, consideration should be given to an anti-avoidance provision to ensure that an employer cannot alter an employee's position, or the terms of work, to evade the potential application of the remedy.

The role of transitional modern award arrangements:
The NSW Government considers that take-home pay protections must not be used in isolation from other measures necessary to protect employees during the transition to modern awards. They must complement and support appropriate transitional arrangements in modern awards. These arrangements represent a collective, industry-wide or occupational approach and can take into account industry specific circumstances and factors related to geographical location.

Transitional provisions for modern awards are designed to prevent or reduce the incidence of award modernisation outcomes which are disadvantageous to employees. It is noted that the Australian Industrial Relations Commission is able to undertake this task with regard to the objectives of the award modernisation process, the likely overall impact of transitional arrangements across industries and the requirements of the Award Modernisation Request.

Transitional arrangements in modern awards are an appropriate mechanism for addressing an important area of concern for the NSW Government. This concern relates to the position of many employees who were covered until March 2006 by the NSW industrial relations system. Some of these employees will likely not retain conditions and employment protections derived from NSW common rule awards once the relevant modern awards commence. These protections are based in part on test case standards determined by the NSW Industrial Relations Commission and developed in a collaborative way by industry stakeholders in line with NSW community standards.

In the NSW Government's February 2009 submission to the Australian Industrial Relations Commission in relation to the stage 2 draft exposure modern awards it was noted that the Commission had observed that some of the wage rates contained in preserved pay scales derived from NSW awards in the transport and waste collection industry were at the high end of the scale. The Commission has suggested that these rates may not be appropriate for inclusion in a modern safety net award. The position

of the NSW Government remains that the rates were properly fixed as minimum rates under the NSW Commission's wage-setting principles and statutory mandate.

The concern of the NSW Government is that employees covered by these industry rates and other arrangements derived from NSW awards will be disadvantaged in relation to the transition to a modern industry award. The potential availability of remedial take-home pay orders in relation to both modern awards and modern enterprise awards may not be able to successfully address this problem in the absence of appropriate modern award arrangements.

State-based differences in modern awards:
The Workplace Relations Act 1996 provides that a modern award must not include terms and conditions of employment (state-based difference terms) that are determined by reference to State or Territory boundaries or is not capable of having effect in each State and Territory (WR Act s 576T; *Fair Work Act 2009 s154*). Transitional modern award arrangements which expressly preserve NSW award rates and conditions would be authorised by provisions of the Fair Work legislation which allow for the phasing-out of the prohibited State-based difference terms over a five year period.

There continues to be a strong policy rationale for a need to give Fair Work Australia the capacity to include terms in modern awards that express such State-based differences. Such an approach is consistent with the federal character of the Australian polity and is an appropriate acknowledgement of the role of State governments as important stakeholders in any national industrial relations system. It also recognises the historic and contemporary role of State awards and other instruments with State-specific application (created by the Australian Industrial Relations Commission) in providing workers with comprehensive employment protections and basic entitlements.

The ability of modern awards to reflect particular state based economic or industrial circumstances also meets the need for modern awards to be relevant, flexible and responsive to the challenges presented by emerging local or regional industrial developments. This reflects the object contained in the Award Modernisation Request that requires modern awards to be economically sustainable, promote flexible modern work practices and the efficient and productive performance of work.

This approach is also compatible with the requirements of a fair safety net that applies to all employees. The disabilities associated with working in a particular geographical location or region may from time to time justify the establishment of such state-specific arrangements in the interests of fairness and addressing local disadvantage.

Modern enterprise awards:
The NSW Government welcomes the provisions of the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* establishing a process for the making of modern enterprise awards and their integration into the workplace relations system following the commencement of modern awards. It should be observed that in the NSW jurisdiction the forms of award regulation are diverse and include awards operating on an industry, occupational or enterprise specific basis.

The NSW Government recognises the important role of enterprise or consent awards in providing employment conditions tailored to the needs of a particular business and has sought to protect their terms and wage increases reflecting bargaining outcomes.

On 13 March 2006 the NSW Parliament passed a law which had the effect of converting consent (enterprise) awards into enterprise agreements (see Part 8A of Schedule 4 of the *Industrial Relations Act 1996*). This conversion took effect before the commencement of the Work Choices amendments, so these agreements then took life as preserved State agreements when relevant employees were moved into the Commonwealth system under the Work Choices amendments.

If the initiative had not been taken the Commonwealth law would have treated these instruments as notional agreements preserving State awards. The policy rationale for this NSW Government action was to protect wage arrangements which could not validly operate if the enterprise award became a notional agreement preserving State awards.

If a preserved State agreement contained provisions for future wage increases bargained between the parties, those future increases survived and were not over-ridden by the Work Choices rules relating to the content of Australian Pay and Classification Scales.

As enterprise-specific consent awards were very like enterprise agreements in substance if differing in name, the NSW Government regarded it as appropriate to protect any agreed future or programmed wage increases in such instruments by ensuring that they would be converted into preserved State agreements.

The *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* has identified these former NSW instruments as enterprise preserved collective State agreements for the purposes of facilitating their modernisation. While NSW is in agreement with the enterprise modern awards objective as set out in the Bill, it will be necessary to consider how the modernisation process proceeds and the way Fair Work Australia exercises its statutory discretion.

In particular it will be instructive to monitor how Fair Work Australia will compare the terms of enterprise instruments that have been tailored to the needs of the enterprise with safety net terms from the relevant modern award. Another issue of practical concern is how Fair Work Australia will apply on a case-by-case basis when considering modernising an instrument, the specified criteria relating to cost advantage/disadvantage and the impact on the competitive position of the particular enterprise and other enterprises in the industry.

It is submitted that it may be of assistance to those parties involved in this process if Fair Work Australia was expressly authorised to set down guiding principles in relation to the enterprise modernisation process consistent with the requirements of the Bill.

Recognition of state registered organisations

The NSW Government welcomes the union registration provisions in the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*, particularly the provisions which provide for ongoing recognition of State-registered organisations (Schedule 22 Part 2, Schedule 2). These provisions accord with the wishes of

industrial parties and will assist in minimising disruption to long-established coverage and representation arrangements.

However, the NSW Government has some concerns about the absence of provisions regarding peak councils and, in particular, State peak councils.

At present, the *Industrial Relations Act 1996* makes specific provision for the approval of State peak councils and other relevant matters at Chapter 5 Part 2. The approval of a particular body as a State peak council confers various rights on that body, such as the right to apply for the making, variation or rescission of an award (ss11 and 17), the right to make submissions to award reviews (s19), the right to sign enterprise agreements on behalf of industrial organisations (ss31(3) and 31(4)), and the right to apply for the making of a State decision (that is, a test case decision) (s51(2)).

Bodies approved as peak councils in the NSW jurisdiction are Unions NSW, Australian Business Limited, Australian Industry Group, and the Australian Federation of Employers and Industries. All of these organisations and their predecessors are long established in the NSW jurisdiction, and all play a continuing role in the smooth functioning of that jurisdiction.

No provisions commensurate with those currently existing in the NSW jurisdiction appear to have been included in the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*. Indeed, it is not clear whether State peak councils are capable of being registered or recognised by means of the Bill and the continuing provisions of Schedule 1 of the *Workplace Relations Act 1996*.

Both the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* and Schedule 1 provide for the registration or recognition of 'industrial organisations', and via cl 6 of Schedule 1, Schedule 10 of the *Workplace Relations Act 1996* deploys the definition of this term which appears in the *Industrial Relations Act 1996*. However, the latter Act distinguishes 'industrial organisation' on the one hand, and 'peak council' on the other.

Treatment of legacy instruments:
The NSW Government observes that one of the challenges involved in providing transitional measures that ensure certainty in employment arrangements is that a number of *Workplace Relations Act 1996* agreement-based instruments will continue to operate on a transitional basis in the new system. They can only be terminated by the parties, either by agreement or unilaterally, with the approval of Fair Work Australia. These instruments will be in effect the legacy of a previous workplace relations regime and will be subject to rules relating to prohibited content and other matters that restrict the bargaining choices of the parties and have not been benchmarked against minimum award standards. These rules will no longer apply under the Fair Work rules.

Some of these instruments will, notably, be individual employment agreements which are the legacy of Work Choices. These instruments were likely originally made in a statutory context where no award safety net protections applied and, unlike collective agreements, there was no means available for redressing a significant disparity in bargaining power that made the relevant employees vulnerable to exploitation.

As the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* does not apply a sunsetting provision (or termination date) to these instruments, the Committee is invited to consider whether provision could be made in the Bill for information to be sent to employees advising them of their rights and obligations under the relevant termination provisions and facilitating further opportunities for collective bargaining.

This proposed change would be consistent with the object of the *Fair Work Act 2009* (Chapter 1, Division 2) which is to achieve productivity and fairness through an emphasis on enterprise level collective bargaining. The object also states that the Bill is effectively designed to ensure that a guaranteed safety net of fair, relevant and enforceable minimum conditions can no longer be undermined by the making of statutory individual employment agreements.

Long services leave arrangements:
It is noted that the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* permits enterprise agreements to prevail over a State or Territory law dealing with long service leave to the extent of any inconsistency. This will apply during the bridging period from 1July 2009 to 31 December 2009. The provision is a departure from the *Fair Work Act 2009* interaction rules which would otherwise apply. Under these rules the terms of enterprise agreements are to operate subject to non-excluded State laws, including those dealing with long service leave (see s 29(2) *Fair Work Act 2009*).

The NSW Government is concerned that State long service leave legislation, such as the NSW *Long Service Leave Act 1955*, which have historically provided workers with their long service leave entitlements will be overridden even where State law provides a more beneficial entitlement.

The role of State Commissions:
It is noted that the Fair Work institutions, in particular Fair Work Australia, will bear a heavy workload during the transition phase and beyond. This is particularly the case as the members of Fair Work Australia and the Australian Industrial Relations Commission will be appointed to both tribunals and both tribunals will essentially have the same composition.

In this regard it is further noted with concern that under the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* members of a prescribed State industrial authority who hold secondary appointments as members of the Australian Industrial Relations Commission are not taken to be automatically appointed as members of Fair Work Australia.

The NSW Government believes that the members of the Australian Industrial Relations Commission who are members of State industrial authorities such as the Industrial Relations Commission of NSW should be appointed to Fair Work Australia. State tribunals are valuable repositories of industrial expertise and arbitral experience and can advantageously be used in the transition period and beyond, including the work of the Australian Industrial Relations Commission in developing transitional award terms which may involve State specific arrangements.

Concluding comments:

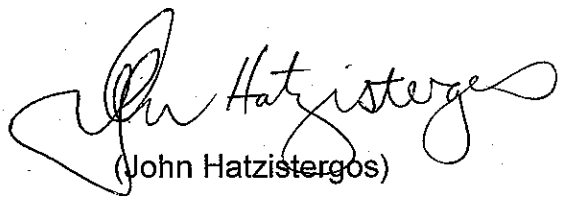
This letter serves to inform the Committee about the views of the NSW Government on selected aspects of the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*. It is not intended to be a detailed or exhaustive analysis of the Bill's provisions.

The *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*, of course, does not represent the culmination of the process to establish a new national workplace relations framework. It is noted that a further Bill is scheduled to be introduced into the Australian Parliament in the week commencing 25 May 2009 which will provide for further consequential amendments to Commonwealth legislation and deal with any amendments consequential upon state referrals of power completed at that time.

The NSW Government stands ready to participate in and contribute to any further consultative arrangements in relation to the development of a fair national workplace relations system.

Should any further information or detail be required by the Committee, officers of the Office of Industrial Relations would be happy to assist. Please contact Mr Don Jones, Executive Director, Office of Industrial Relations on (02) 9020 4511.

Yours sincerely



(John Hatzistergos)