



STATE WAGE CASE 2024

2024/00211169

LOCAL GOVERNMENT NSW SUBMISSIONS ON ANNEXURE A – THE 2024/2025 AWARD MAKING PRINCIPLES

12 December 2024

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INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

2024/00211169

STATE WAGE CASE 2024

**LOCAL GOVERNMENT NSW SUBMISSIONS ON ANNEXURE A – THE 2024-2025
AWARD MAKING PRINCIPLES**

1. Local Government NSW (**LGNSW**) provides these brief submissions in accordance with the directions issued at [219] of *State Wage Case 2024 (No 3)* [2024] NSWIRComm 19 (the **Decision**).
2. LGNSW notes in the above-mentioned Decision, specifically at [219], that the Full Bench requests that the parties identify any “*unintended consequences and to address any infelicitous language*” in Annexure A - The 2024-2025 Award Making Principles (the **Principles**). To that end, LGNSW submits a marked-up version of its proposed edits to the Principles for the Full Bench’s consideration (**Annexure 1**).
3. The footnotes in Annexure 1 briefly explain the reasons and basis for the suggested amendments to the Principles as pressed by LGNSW.

Potential Unintended Consequences

Principle 11. Productivity and Efficiency Principle

4. The Full Bench at [154] of the Decision noted that in respect to this Principle “*in its current form has little to no practical application to Local Government awards*”.
5. LGNSW notes that subprinciples 11.2 and 11.3 are limited to public sector awards and do not extend to Local Government awards.
6. LGNSW is concerned that it might be exposed to claims pursuant to the subprinciples at 11.1 and 11.4 without any consideration of the matters contained in subprinciples 11.2 and 11.3.

7. LGNSW repeats its submission that the *Local Government (State) Award* (the **Award**) was established as a skills-based Award, with increases to wages and salaries tied to the acquisition and use of skill, as specified in subclause 8(iv) of the Award.
8. To now widen the scope of the Award to include productivity or efficiency measures would undermine the entire foundation upon which the skills-based Award was structured and established.
9. As such, LGNSW respectfully requests that the Full Bench specifically exclude Local Government awards from the operation of Principle 11 with the addition of the proposed new subprinciple at 11.5 (as outlined in Annexure 1).

Anthony Britt

Sir Owen Dixon Chambers

12 December 2024

ANNEXURE A – THE 2024-2025 AWARD MAKING PRINCIPLES

1. Preamble

1.1 These Principles guide the exercise of discretion when making or varying awards under **Part 1 of Chapter 2 of ss 10 and 17** the *Industrial Relations Act 1996* (the Act).¹

2. Mandatory considerations

2.1 When determining an application to make a new award or to vary an existing award, whether by consent or otherwise, the Commission must have regard to:

- (1) whether the terms of the award as made or varied will set fair and reasonable conditions of employment for employees; and
- (2) the public interest, and in that respect must have regard to:
 - (a) the objects of the Act, including the effect of the award as made or varied on:
 - (i) the promotion of productivity and efficiency;
 - (ii) the promotion of participation in industrial relations by employees and employers at an enterprise or workplace level;
 - (iii) the **prevention and** elimination of discrimination in the workplace, in particular ensuring equal remuneration for all persons doing work of equal or comparable value;²
 - (iv) **workplace reform and equitable, innovative and productive workplace relations;**³ and
 - (v) strategies to attract and retain skilled staff where there are skill shortages so as to ensure effective and efficient delivery of services;
 - (b) the state of the economy of New South Wales and the likely effect of the decision on that economy; and
 - (c) in respect of an award that will apply to public sector employees, the fiscal position and outlook of the Government and the likely effect of the award as made or varied on the position and outlook.

¹ Awards can be made or varied pursuant to ss 10, 17, 19(6) and 136(1)(b). The proposed amendment catches all of these provisions.

² More aligns with s 3(f) of the Act.

³ Including s 3(h) of the Act.

3. When an Award may be Varied or Another Award Made without the Claim Requiring Consideration as an Arbitrated Case

3.1 Provided it otherwise complies with the requirements of the Act, an award may be made or varied without the application needing to be considered as an Arbitrated Case under Principle 9:

- (1) in accordance with an express provision in an award that provides for its variation;
- (2) to incorporate test case standards, in accordance with Principle 5;
- (3) to adjust wages consistent with a State Wage Case decision, in accordance with Principle 6;
- (4) to adjust allowances and service increments, in accordance with Principle 7;
- (5) to adjust wages to ensure that they are not below the National Minimum Rates Order as made by the Fair Work Commission, in accordance with Principle 8; or
- (6) where the application is consented to by the parties.

4. No extra claims commitments

4.1 A consent application to make or vary an award may involve parties giving a no extra claims commitment in agreed terms. Such a commitment may take the form of an undertaking to the Commission not to pursue claims for different terms and conditions that would take effect during the nominal term of the award, with or without identified exceptions.

4.2 Absent extraordinary circumstances, the Commission will not entertain an application to vary or make an award that is inconsistent with a no extra claims commitment unless otherwise expressly permitted by the award or **by consent of the parties.**⁴

4.3 The Commission will not include in an award a clause that prohibits a party making an application under the Act or participating in proceedings under the Act.

⁴ The parties should be able to consent to a variation to an Award - s 17(3)(a) of the Act.

5. Test Case Standards

5.1 There is a presumption that test case standards established and/or revised by a Full Bench of the Commission will be incorporated into an award on application.

6. State Wage Case Adjustments

6.1 Following the completion of an Annual Wage Review by the Fair Work Commission, the Commission will issue a notice to show cause why that National decision should not be adopted wholly or partly and with or without modification for certain minimum rates awards and for paid rates awards that apply to the public sector, which will be determined at a State Wage Case hearing.

6.2 In the State Wage Case hearing the Commission will determine a **minimum rates adjustment** for the following awards:

- (1) Security Industry (State) Award (“Security Industry Award”);
- (2) Miscellaneous Workers – Kindergartens and Child Care Centres, &c. (State) Award;
- (3) Health, Fitness and Indoor Sports Centres (State) Award;
- (4) Transport Industry (State) Award;
- (5) Clerical and Administrative Employees (State) Award;
- (6) Local Government (Electricians) (State) Award;
- (7) Entertainment and Broadcasting Industry – Live Theatre and Concert (State) Award;
- (8) Local Government Aged Disability and Home Care (State) Award; and
- (9) Nurses’ (Local Government) Residential Aged Care Consolidated (State) Award 2021.

and vary them to give effect to that minimum rates adjustment, provided that each award contains the following clause:

“The rates of pay in this award include the adjustments payable under the State Wage Case for the relevant year. These adjustments may be offset against:

- (i) any equivalent over award payments, and/or
- (ii) award wage increases other than State Wage Case adjustments.”

6.3 In the State Wage Case hearing the Commission may determine a **paid rates adjustment** for paid rates awards that apply to the public sector.

Note: As provided in Principle 17, Transitional Provisions, Paragraphs 6.3 to 6.6 have no application before the 2025 State Wage Case, which will consider whether to make a paid rates adjustment and will also determine whether there should be any alteration to those paragraphs.

6.4 A paid rates adjustment will be determined having due regard to all the circumstances including:

- (1) the National Decision;
- (2) its application to paid rates awards;
- (3) the terms of the no extra claims undertaking required;
- (4) changes in the value of money since the last State Wage Case; and
- (5) the mandatory considerations in Principle 2, including the need to ensure that awards remain fair and reasonable and the fiscal position and outlook of government.

6.5 For the avoidance of doubt, the paid rates adjustment need not be the same as the minimum rates adjustment and need not equate to the rate of inflation over the previous 12 months.

6.6 Following the making of a paid rates adjustment, a public sector award may, on application, be varied to apply that adjustment and extend its nominal term for 12 months from the date the adjustment takes effect, having regard to:

- (1) the status of bargaining between the parties to the Award; and
- (2) the likelihood of that bargaining concluding in a timely fashion;

but only where:

- (3) the nominal term of the award has expired;
- (4) the award has not had an increase in rates for at least 12 months; and
- (5) each union which is a party to the award gives to the Commission a no extra claims undertaking in the following terms or in such other terms as the parties agree:

[Name of union] undertakes not to pursue any further claims in proceedings before the Industrial Relations Commission in respect of employees covered by the award that would take effect during its nominal term. Provided that this undertaking does not prevent:

- (i) participation in collaborative discussions to amend the award by means of mutual gains bargaining or otherwise;
- (ii) making an application to vary the award by consent;
- (iii) participation in a consent arbitration;

- (iv) participation in a s 19 review or other proceedings initiated by the Commission or another party that affects the award; or
- (v) pursuing and giving effect to claims under the Gender Based Undervaluation Principle during the nominal term

6.7 Applications to apply a paid rates adjustment will be dealt with expeditiously.

7. Adjustment of Allowances

7.1 Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect relevant changes in the level of such expenses.

7.2 If an order is made pursuant to Principle 6 for an adjustment to be made to the applicable award, that adjustment will also apply to existing allowances which relate to work or conditions which have not changed other than in line with whole of award salary adjustments, including shift allowances expressed as monetary amounts and service increments.

7.3 New allowances may be awarded to compensate for the reimbursement of expenses incurred where appropriate.

7.4 Otherwise, applications to increase existing allowances or create new allowances in the absence of consent will be determined in accordance with the Arbitrated Case Principle.

8. Minimum rate of pay

8.1 The Commission will vary an award on application or on its own motion to increase a rate of pay in an award which is below the minimum rate set by the National Minimum Rates Order as made by the Fair Work Commission from time to time.

9. Arbitrated Case

9.1 Other than as allowed elsewhere in these Principles, an application for increases in remuneration (including for new service increments or superannuation contributions higher than those mandated by Commonwealth legislation) or changes in conditions in awards, will be determined as an

Arbitrated Case and, unless otherwise allocated by the President, will be heard by a Full Bench of the Commission.

9.2 An Arbitrated Case may be granted if it meets one or more of the following criteria:

- (1) there has been a change in work value that meets the requirements of the Work Value Changes Principle;
- (2) there has been an increase in productivity or efficiency in respect of public sector awards that meets the requirements in the Productivity and Efficiency Principle;
- (3) the application addresses undervaluation on a gender basis in accordance with the Gender Based Undervaluation Principle;
- (4) a special case is established in accordance with the Special Case Principle; and
- (5) there has been a change in the value of money justifying a change in rates of pay and conditions for public sector employees that meets the requirements of the Value of Money Principle.

~~9.3 When determining an Arbitrated Case, the Commission will have regard to changes in the value of money since wage rates were last adjusted.⁵~~

9.4 Following determination of an Arbitrated Case the Commission will not include a no extra claims clause in the settled award, but may identify in the decision the extent to which it is open to parties to the award to make further claims that would take effect during the life of the resultant award.

9.5 Claims that are based substantially on comparative wage justice will not be countenanced other than to the extent contemplated by the Gender Based Undervaluation Principle.

9.6 There will be no double counting, provided however, that an Arbitrated Case may rely upon a cumulation of the factors referred to in these Principles.

9.7 In the following Principles the expression “the conditions under which the work is performed” relates to the environment in which the work is done.

⁵ This appears to be a doubling up of (5)(above) and hard to see how it would operate in respect to (1)-(3)(above).

10. Work Value Changes Principle

10.1 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.

10.2 In addition to meeting the test in 10.1, a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award structure but also against any external classification to which that structure is related. There must be no likelihood of wage leapfrogging arising out of changes in relative position.

10.3 The foregoing circumstances are the only ones in which rates may be altered on the ground of work value under this Principle and the altered rates may be applied only to employees whose work has changed.

10.4 In applying the Work Value Changes principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.

10.5 Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification, or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.

10.6 The time from which work value changes in an award should be measured is the date of operation of any adjustment arising from the last work value inquiry or the date of a consent award where the parties agreed that the wage increases in the consent award reflect or include increases in work value, whichever is the later.

10.7 Care should be exercised to ensure that changes that were taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this Principle.

10.8 Where the tests specified in 10.1 are met, an assessment will have to be made as to how that alteration should be measured in monetary terms. Such assessment will normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work or the date of a consent award in which the parties have agreed that the wage increases reflect increases in work value.

10.9 The Commission will guard against contrived classifications and over-classification of jobs.

11. Productivity and Efficiency Principle

11.1 Productivity or efficiency measures that have delivered substantial cost savings and/or productivity or efficiency improvements or which have made a substantial contribution towards the attainment of the objectives of the employer (including departments and agencies of the Crown) to achieve an improved quality of service, and/or become more competitive and/or efficient, to which employees have made a significant contribution, may constitute the basis for increases to wages and salaries or improvements in employment conditions, provided that the time from which such measures, savings or improvements are measured is the later of:

- (1) the date of the last adjustment awarded on account of productivity and efficiency; or
- (2) the date of a consent award in which parties have agreed that the wage increases incorporate an adjustment made under this Principle.

11.2 Productivity or efficiency improvements in the public sector could arise from:

- (1) delivering the same service (quality or quantity) with fewer inputs;
- (2) delivering a better service (quality or quantity) with the same inputs;
- (3) achieving a large reduction of inputs, with a relatively slight reduction in service quality/quantity; and/or
- (4) achieving a large improvement in service quality/quantity, with a relatively small increase of inputs.

11.3 The following are not productivity or efficiency improvements in the public sector:

- (1) gaining a small improvement in output with a proportionate or relatively large increase in inputs;
- (2) achieving a small reduction in inputs with a proportionate or relatively larger reduction in service quality/quantity;
- (3) gaining a small improvement in quality, with no extra inputs, but with a relatively large reduction in output;
- (4) slightly boosting output, with no extra inputs, but with a relatively large reduction in quality.

11.4 For the avoidance of doubt, it is not necessary to identify cost savings before an increase can be awarded under this Principle.

11.5 This Principle does not apply to Local Government awards.⁶

12. Gender Based Undervaluation Principle

12.1 Claims may be made for an alteration in wage rates or other conditions of employment on the basis that the work, skill and responsibility required, or the conditions under which work is performed, have historically been, or are presently, undervalued on the basis of gender.

12.2 Where such a claim is established, the Commission will seek to ensure that wage rates and conditions of employment properly reflect the value of the work, skill and responsibility required and/or the conditions under which the work is performed.

12.3 Where the undervaluation is sought to be demonstrated by reference to any comparator awards or classifications, the assessment is not to have regard to factors incorporated in the rates of such other awards which do not reflect the value of work, such as labour market attraction or retention rates or productivity factors.

12.4 The application of any formula, which is inconsistent with proper consideration of the value of the work performed, including where such formulas may themselves have been the result or product of gendered

⁶ This reflects the Decision at [154] and makes the exclusion abundantly clear.

conceptions of the value of the work the subject of the application, is inappropriate to the implementation of this Principle.

12.5 The assessment of wage rates and other conditions of employment under this Principle is to have regard to the history of the award concerned, including any historical gendered conceptions of the value of the work the subject of the application.

12.6 Where the requirements of this Principle have been satisfied, an assessment will be made as to how the undervaluation should be addressed in money terms or by other changes in conditions of employment, such as reclassification of the work, establishment of new career paths or changes in incremental scales. Such assessments will have regard to the wages and conditions of employment previously fixed for the work and the nature and extent of the undervaluation established.

12.7 In applying the previous paragraph, consideration is to be given to measures to address so far as possible, consistent with achieving the outcome in 12.2 above, a legitimate concern that changes in wage relativities, not only within the award in question but also against external classifications to which the award structure is related, will give rise to claims that would cause wage leapfrogging.

12.8 Any changes made to the award as a result of this assessment may be phased in and consideration is to be given, where relevant, to whether any increase in award rates can be absorbed in individual employees' over-award payments.

12.9 The Commission will guard against contrived classifications and over-classification of jobs.

12.10 Equal remuneration will not be achieved by reducing any current wage rates or other conditions of employment.

13. Special Case Principle

13.1 A new award or a variation to an existing award can be granted otherwise than under one or more of the preceding Arbitrated Case principles where an applicant can demonstrate that the matter has special attributes or is out of the

ordinary in a manner that warrants approval by the Commission despite the restrictive considerations imposed by these principles.

13.2 Care should be taken not to rely on factors already taken into account in establishing a predecessor award.

14. Value of Money Principle

14.1 The Commission can make a new award or vary an award to address changes in the real value of money having regard to:

- (1) the mandatory considerations in Principle 2 including the need to ensure that the award rates remain fair and reasonable;
- (2) the status of bargaining between the parties to the Award;
- (3) the likelihood of that bargaining concluding in a timely fashion; and
- (4) the terms of any no extra claims undertaking that relevant unions provide to the Commission in order to obtain the increase;

in circumstances where:

- (1) the award applies to public sector employees;
- (2) the nominal term of the existing award has expired;
- (3) the employees covered by that award have not had an increase in rates for at least 12 months;
- (4) no paid rates adjustment has been set pursuant to Principle 6; and
- (5) each union party to the award gives a no extra claims undertaking in the following terms, or in such other terms as the parties agree or the Commission considers appropriate in the circumstances:

[Name of union] undertakes not to pursue any further claims in proceedings before the Industrial Relations Commission in respect of employees covered by the award that would take effect during its nominal term. Provided that this undertaking does not prevent:

- (i) participation in collaborative discussions to amend the award by means of mutual gains bargaining or otherwise;
- (ii) making an application to vary the award by consent;
- (iii) participation in a consent arbitration;
- (iv) participation in a s 19 review or other proceedings initiated by the Commission or another party that affects the award; or
- (v) pursuing and giving effect to claims under the Gender Based Undervaluation Principle during the nominal term.

14.2 This Principle does not apply to Local Government awards.⁷

15. Negotiation Principle

15.1 When considering an application for a new award or the variation of an award, including the timetabling of such an application, the Commission will have regard to whether the parties have complied with the following.

15.2 In respect of the commencement of negotiations for a new award:

- (1) a party contemplating a major industrial case pursuant to Practice Direction 8A must notify the Commission and the other relevant parties at least three months before the nominal expiry date of the award that it is their intention to enter into negotiations for a new award in respect of claims justified under one or more of the Arbitrated Case criteria **or otherwise**⁸;
- (2) the parties to the award must begin negotiations as soon as is practicable after the notification has been given **but can also commence negotiations prior to such notification**.⁹ In this regard, once a written claim has been made by one party on another party, negotiations must begin within 28 days unless it is agreed by the parties to commence negotiations at a later time **or negotiations have commenced at an earlier time**;
- (3) prior to or at the outset of negotiations, a party can make a reasonable request to another party for relevant information to evaluate options or develop claims and that request will not be unreasonably refused;
- (4) disputes about these procedures will be dealt with in accordance with the dispute resolution procedures in the relevant award applying to the parties to the dispute.

15.3 In respect of any claim to alter existing wages and conditions, including to modernise or consolidate awards, each party is to bargain in good faith prior to any arbitration commencing. In particular, parties are to:

- (1) consider whether to enter into mutual gains bargaining under Chapter 2A of the Act;
- (2) attend meetings they have agreed to attend and be represented at the negotiations by persons capable of giving genuine consideration and reasoned responses to the proposals of other parties;
- (3) comply with agreed or reasonable negotiating or meeting procedures;
- (4) disclose relevant information for the purposes of negotiation;

⁷ This reflects the Decision at [99] and makes it abundantly clear the decision of the Full Bench.

⁸ In respect to the Local Government Award the parties have not historically commenced wage negotiations based upon arbitrated case criteria.

⁹ These changes reflect the historical approach adopted in respect to the Local Government Award-see Decision at [173] and would allow the parties to continue with this approach.

- (5) respond to each other's claims and/or counter claims in a reasonable and timely manner; and
- (6) to the extent that agreement is reached, apply by consent to the Commission to make a new award or vary an award to give effect to that agreement.

15.4 The good faith bargaining requirements do not require a party to:

- (1) make concessions during bargaining; or
- (2) reach agreement on the terms that are to be included in the agreement.

16. Economic Incapacity Principle

16.1 Any employer or group of employers bound by an award may apply, temporarily or otherwise, to reduce, postpone and/or phase in the application of any increase in labour costs determined under the Principles on the ground of very serious or extreme economic adversity. The merit of such an application will be determined on a case by case basis and any relevant material shall be rigorously tested. Significant unemployment or other serious consequences for the employees and employers concerned are important factors to be taken into account in assessing the merit of any application.

16.2 Such an application will be processed according to the Special Case Principle.

16.3 Any decision to temporarily reduce or postpone an increase will be subject to a further review, the date of which will be determined by the Commission at the time it decides any application under this Principle.

17. Transitional provisions

17.1 Other than as provided at 17.2, these Principles apply to:

- (1) any application to make or vary an award that is made on or after the date of commencement of these Principles; and
- (2) any such application filed prior to that time where the hearing of the matter has not commenced as at the date of the commencement of these Principles (directions hearings will not count for this purpose).

17.2 Paragraphs 6.3 to 6.6 have no application prior to the 2025 State Wage Case, which will consider whether to make a paid rates adjustment and whether there should be any alteration to those paragraphs.

18. Duration

18.1 These Principles will operate on and from 20 December 2024 until further order of the Commission.

The Commission makes the following order pursuant to s 51:

A. Minimum Wage for Award/Agreement Free Employees

A.1 [Draft provided for comment] Employees within the jurisdiction of the Act whose employment is not subject to the terms of an industrial instrument shall be paid not less than the rate prescribed by the National Minimum Wage Order as made by the Fair Work Commission from time to time.