



IN THE INDUSTRIAL RELATIONS COMMISSION
OF NEW SOUTH WALES

2024/211169

STATE WAGE CASE 2024

Submissions of Unions NSW on draft award making principles

1. Unions NSW makes the following submissions about the proposed terms of the draft award making principles set out in Annexure A to the Full Bench's decision in *State Wage Case 2024 (No 3)* [2024] NSWIRComm 19 (SWC).

Draft principle 3

2. Draft sub-principle 3.1(4) refers to the 'National Minimum Rates Order' as made by the Fair Work Commission. This should be changed to refer to the 'National Minimum Wage Order', which is the term defined in s 12 to the *Fair Work Act 2009* (Cth) to mean the national minimum wage order made in an annual wage review, being the review conducted by the Fair Work Commission under Division 3 of Part 2-6 of the FW Act.

Draft principle 4—no extra claims commitments

3. Sub-principle 4.1 is facultative and sets out what the parties can do in giving no extra claim commitments. The proposed wording currently uses the phrase 'different terms and conditions', which departs from the typical terminology of 'no extra claims' and "no reduced terms and conditions". This departure introduces potential ambiguity.
4. The word 'different', like the words 'extra' and 'reduced', invite comparison. An issue may arise as to whether an Award clause that uses the word "different" is to be assessed or measured against the terms and conditions set by the Award itself, or terms and conditions that existed at the time the Award is made or varied (whether provided by the Award or otherwise).
5. Current jurisprudence gives emphasis to the words 'extra' or 'reduced', so that a claim for an Award term that merely reflected the agreed terms and conditions that existed at the time the Award was made but were not included in the Award itself (for example, in resolution of a dispute arising from the unilateral withdrawal of an extra-Award benefit), was not an 'extra' claim see for example, *Crown Employees (Roads and Traffic Authority of New South Wales Salaried Staff) Award* [2011] NSWIRComm 1017 at [21] – [24]; *Australian Paramedics Association (NSW) v Health Secretary in respect of New South Wales Ambulance (Virtual*

Clinical Care Centre Clinicians) [2024] NSWIRComm 1066 at [131]; *Re Crown Employees (Teaches in Schools and Related Employees) Salaries and Conditions Award* (2008) 181 IR 245 at [16].

6. So long as the Full Bench makes clear in its ultimate decision that ‘different’ terms and conditions means different when measured against the terms and conditions that existed at the time the Award was made or varied, whether by virtue of the Award terms or in some other way, then there is no ambiguity. Otherwise, it is submitted the word ‘different’ in clause 4.1 should be replaced with the more typical existing terminology of ‘extra or reduced’.
7. Sub-principle 4.2 includes the phrase ‘will not *entertain an application to vary or make an award*’. Historically, the prohibition imposed by a no extra claims provision has been on the date of operation of any extra/reduced term or condition, not the consideration of the application itself (thus permitting applications at a time reasonably proximate, but nonetheless prior to the nominal expiry, of the relevant Award: see *Re Crown Employees (Teaches in Schools and Related Employees) Salaries and Conditions Award* (2008) 181 IR 245). There is nothing in the reasoning of the Full Bench that would suggest an intended departure from this position.
8. The meaning of the sub-principle is clear without the words ‘*entertain an application to*’. It is submitted the revised sub-principle 4.2 should read as follows:

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.~~

Draft principle 6—State Wage Case adjustments

9. Proposed sub-principle 6.6 concerns the circumstances where a paid rates adjustment to a public sector award may occur by variation to the award. Sub-principles 6.6(3)-(5) detail condition precedents to the making of such adjustments, with sub-principle 6.6(5) dealing with a ‘no extra claims’ undertakings to be given by relevant unions. The terms of the undertaking may, by sub-principle 6.6(5) be otherwise agreed by the parties.
10. The baseline or usual undertaking is framed as requiring relevant unions to commit to ‘not pursue *any* further claims’ in respect of employees covered by the award during its nominal term.

11. As framed, undertaking may be construed as extending to *all claims* in circumstances where the variations contemplated by the sub-principle are will relate only to rates of pay. As framed, the undertaking would preclude a union from bringing non paid rate related claims, including claims relating to non-financial matters or claims relating to reimbursements for allowances.
12. The usual undertaking should be amended to provide that the relevant union(s) undertake not to pursue paid rates related claims that will take effect during the term of the nominal award of the award as follows:

[Name of union] undertakes not to pursue any further paid rates related claims in proceedings before the Industrial Relations Commission in respect of employees covered by the award that would take effect during its nominal term.

Draft principle 8—Minimum rate of pay

13. The reference to National Minimum Rates Order should, for the reasons detailed at [2] above, be amended to refer to the ‘National Minimum Wage Order’.

Draft principle 11—Productivity and efficiency

14. SWC [148]-[151] make clear that the matters set out in proposed principles 11.2 and 11.3 are non-exhaustive examples of what may and may not constitute productivity or efficiency improvements in the bespoke situation of public sector employment.
15. In order to make this pellucid, the phrase ‘but are not limited to’ should be included at the end of the chapeau to principle 11.2 and the phrase ‘matters that may not be’ should be inserted into principle 11.3. The chapeaus to each sub-principles should be amended to read as follows:

11.2 *Productivity or efficiency improvements in the public sector could arise from (but are not limited to):*

...

11.3 *The following are illustrations of matters that may not be productivity or efficiency improvements in the public sector:*

Draft principle 14—Value of money principle

16. To ensure that this principle is framed in a user-friendly and straightforward manner to assist industrial parties, the principle should be bifurcated with the preconditions to a new award or variation to address changes in the real value of money being stipulated in a sub-principle and the matters which the Commission is to have regard to in determining whether the make a new award or vary an existing award if those preconditions are satisfied, being set out in a further sub-principle. Further, the no extra claims commitment should be limited to wages or salary related matters for the same reasons as those identified in [6]-[7] above.

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

- (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 wages or salaries 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 In determining to make or vary an award to address changes in the real value of money, the Commission will have 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.*

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