

IN THE INDUSTRIAL RELATIONS COMMISSION OF NSW

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**OFFICE OF THE
INDUSTRIAL
REGISTRAR**



State Wage Case 2024

SUBMISSIONS IN REPLY FOR UNIONS NSW

in respect of Stage 1, Category 1 awards

26 August 2024

A. Introduction

1. The IR Secretary Submissions (“**IS**”) provides two proposals for the Category 1 awards:
 - (a) **IR Secretary Proposal 1:** A quantum increase of 3.75% consistent with AWR 2024 but at the various dates in IS [17] which are between 5 to 10 months later than the 1 July 2024 commencement date provided by AWR 2024.
 - (b) **IR Secretary Proposal 2:** A “pro rata increase” commencing on 1 July 2024.
2. As an aid to Unions NSW’s reply submissions, we provide **Appendix 1** which contains a table summarising the last 14 State Wage Case (“**SWC**”) decisions (Column A) in respect of the following:
 - (a) The quantum and timing of increase for each corresponding Annual Wage Review (“**AWR**”) (Columns B and C).
 - (b) The quantum and timing of increase for each Category 1 award (Columns D, F, H, J and L).
 - (c) The timing of the increase for each Category 1 award (Columns E, G, I, K and M).

B. Reply to IR Secretary Proposal 1

3. As previously submitted, the **default position** is to adopt the AWR 2024 principles and provisions wholly (or “in full”) for the Category 1 awards, being:
 - (a) **Quantum of increase:** Award minimum wages will be increased by 3.75 per cent, and be at least the National Minimum Wage, being \$915.90 per week or \$24.10 per hour.
 - (b) **Timing of increase:** These increases are to take effect from 1 July 2024.

4. The default position must be adopted for or “flowed on”¹ to the Category 1 awards in full unless a party shows:
 - (a) That it is not consistent with the objects of the IR Act to do so; or
 - (b) There are other good reasons not to do so.
5. The IR Secretary has made no submissions in respect of the objects of the IR Act.
6. The IR Secretary provides four brief reasons in IS [12]-[16] with respect to “other good reasons”. None of those reasons, considered alone or in combination, are good reasons to depart from the default position.

Reason #1: Timing of increase is not a “principle” or “provision”: IS [12]

7. The IR Secretary’s first reason is that the timing of an increase is neither a “principle” nor a “provision” of the AWR 2024.
8. We do not dispute the assertion that the timing of an increase is not a “principle” of AWR 2024 within the meaning of s 50(1) of the IR Act. However, the timing of an increase is a “provision” of AWR 2024.

Meaning of “provision” of a National decision in s 50

9. The meaning of the word “provision” in s 50(1) has not been subject to extensive consideration by the Commission. It is not defined within the IR Act, in the *Interpretation Act 1987* (NSW) or in other relevant legislation.
10. In an English case, ***Berkeley v Berkeley***,² Lord Simonds considered the two meanings of the word “provision”. His Lordship observed:³

[The word “provision”] is a word of diverse meanings which slide easily into each other. It may mean a clause or proviso, a defined part of a written instrument. Or it may mean the result ensuing from, that which is provided by, a written instrument or part of it.

11. The first meaning is a broader interpretation of the word “provision”. Adopting this meaning would mean every “defined part of” (i.e. paragraph of) a National decision is a

¹ *State Wage Case 2022* [2022] NSWIRComm 1081, Annexure A – Wage Fixing Principles, sub-principle 4.1.

² [1946] AC 555.

³ [1946] AC 555 at 580. Lord Simonds’s passage in *Berkeley* has been cited with approval by a plurality of the High Court in respect of the possible meanings of the word “provision” used in a statute. See *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd* [2009] HCA 50 at [31] (French CJ, Gummow and Crennan JJ).

“provision” of that decision. The second meaning is narrower, referring only to the result or outcome “ensuing from” the National decision.

12. It is unnecessary for the Commission to decide between the two meanings in the current proceedings. This is because the timing of an increase is a “provision” of the AWR 2024 in both meanings of the word as observed by Lord Simonds in *Berkeley*.
13. The timing of an increase is a “defined part” of the AWR 2024, specifically paragraphs [175]-[176] and [178], thereby satisfying the first meaning. The timing of an increase is also a result or outcome “ensuing from” from the AWR 2024, being the *outcomes provided by* [175]-[176] and [178] which satisfies the second meaning.

Cases cited by the IR Secretary

14. The IR Secretary cites various cases in support of its propositions that the timing of an increase is not a “provision” of the AWR 2024 and has not historically been interpreted by this Commission to be a “provision”. However, none of the citations in IS [12] at footnote 2 interpret the meaning of “provision” in s 50(1), and do not support the IR Secretary’s proposition:

- (a) *State Wage Case 2020 (No 2)* [2021] NSWIRComm 1079 at [175] is the Commission’s reasoning for the exclusion of paid rates awards from the operation of Wage Fixing Principle 4.
- (b) *State Wage Case 2020* [2021] NSWIRComm 1015 at [25] refers to the consent position adopted by the parties which provided for different quantum increases for different awards in that specific year, and the Commission’s power to adopt the consent position.
- (c) *State Wage Case 2004* [2004] NSWIRComm 148 was decided under a different set of Wage Fixing Principles and a vastly different industrial landscape. At the time, Principle 8 stipulated that increases were awarded upon application, with sub-principle 8(a) specifically providing that “the operative date will be no earlier than the date of the variation to the award.”⁴ These principles are no longer in effect.

15. IS [12] does not provide “good reason” to depart from the default position. It is also a misapplication of s 50(1). The timing of an increase is a “provision” within the meaning of s 50(1) for reasons given above.

⁴ *State Wage Case 2004* [2004] NSWIRComm 148, Annexure B – Wage Fixing Principles, sub-principle 8(a).

Reason #2: Power of Commission to vary award to provide retrospective increases: IS [13]-[14]

16. The IR Secretary's second reason is "where the Commission commences its consideration of a National decision on a date later than the federal commencement date, the retrospective effect of any variation is precluded"⁵ by s 15(3)(b).
17. However, the IR Secretary does not specify the date on which the Commission is said to have "commenced consideration" of the AWR 2024. Is this date before, on, or after 1 July 2024?
18. Regardless, the IR Secretary is incorrect.
19. Pursuant to s 17(3)(b), the Commission may vary an award "at any time" to give effect to a National decision under s 50 of the IR Act. Section 17(2) provides that s 15 applies to a variation. Contrary to the assertion in IS [13], s 15(3)(b) does not preclude retrospective increases. Instead, s 15(3)(b) stipulates that the earliest date an award can be expressed to apply retrospectively is the date on which "the Commission itself initiated proceedings for the award".
20. The Commission initiated the present proceedings by way of a summons to show cause on 7 June 2024, Therefore, the earliest possible variation date for these awards is 7 June 2024, which is evidently before 1 July 2024.
21. IS [14] refers to s 52(1). That provision is intended to facilitate the adoption of a National decision. It provides generally that the Commission has the power to make or vary awards or to make orders to give effect to the Commission's decision in s 50. It says nothing about the content or commencement dates of those awards or orders.
22. IS [13]-[14] do not provide "good reason" to displace the default position. For reasons given above, the Commission has the power to vary the Category 1 awards to apply retrospectively from 1 July 2024 as sought by Unions NSW.

Reason #3: Consistency with previous commencement dates: IS [15]-[16]

23. The IR Secretary's third reason is there is "utility" in maintaining the current commencement date pattern for the Category 1 awards for "consistency" with previous awards of the SWCs. While it is true that the commencement dates have historically

⁵ IS [13].

been later than the standard 1 July increase,⁶ the argument for "consistency" alone is insufficient to justify the IR Secretary's proposed departure from the default position.

24. Unions NSW provides four reasons against upholding historical "consistency" in the commencement dates merely for consistency's sake.
25. *First*, for at least the last decade, the variation of Category 1 awards has proceeded on a consent basis.⁷ In those SWC proceedings, no party submitted arguments regarding the statutory default position or the Commission's discretion to observe or depart from the default position. Consequently, the Commission has not had the opportunity to consider the exercise of its discretion beyond the consent of the parties. In this context, the dates set by the Commission in previous SWCs have limited to no precedential value for the current proceedings and there is no matter of legal principle that can be discerned from those previous decisions.
26. *Second*, the consent variations must be viewed in the context of the NSW public sector wages cap which was in effect from June 2011 to 1 September 2023. In that period, the now repealed s 146C of the IR Act provided that the Commission must, when making or varying an award, give effect to any government policy on conditions of employment that is declared by the regulations.
27. The *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) and later the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2014* were declared as the relevant polices on conditions of employment (collectively the "**Wages Cap Regulations**").
28. Among other things, the Wages Cap Regulations imposed a government policy of limiting "increases in remuneration or other conditions of employment that increase employee-related costs" to:
 - (a) 2.5% "per annum" (from 2011 to June 2022).
 - (b) 3% "per annum" (for the 2022–2023 and 2023-2024 financial years).
29. The combined effect of s 146C and the Wages Cap Regulations was that the Commission could not award wage increases or changes in conditions of employment

⁶ See table in Appendix 1 to these submissions, Columns E, G, I, K and M. Those columns provide a summary of the commencement dates for the Category 1 awards as compared to the AWR commencement dates in Column C.

⁷ *State Wage Case 2014* [2015] NSWIRComm 4 at [4]; *State Wage Case 2014* [2015] NSWIRComm 31 at [4]; *State Wage Case 2016* [2016] NSWIRComm 12 at [2]; *State Wage Case 2017* [2017] NSWIRComm 1068 at [2]-[3]; *State Wage Case 2018* [2018] NSWIRComm 1063 at [2]; *State Wage Case 2019* [2019] NSWIRComm 1065 [2]-[3]; *State Wage Case 2020* [2021] NSWIRComm 1015 at [29]; *State Wage Case 2021* [2022] NSWIRComm 1014 at [22]; *State Wage Case 2022* [2022] NSWIRComm 1081 (see "Decision"); *State Wage Case 2023* [2023] NSWIRComm 1121 at [10].

that resulted in an increase in “employee-related costs” of more than what the Wages Cap Regulations promulgated, whether by agreement or arbitration.

30. During the operation of the wages cap, for SWC 2011 to 2022, none of the quantum increases exceeded what the Wages Cap Regulations provided.⁸ For every year except 2016, the increase to the Category 1 awards was lower than what the AWR provided.⁹ Further, because the Wages Cap Regulations limited increases in employee-related costs on a “per annum” basis, the timing of the increases was not able to be moved forward in time. In other words, s 146C and the Wages Cap Regulations restricted the Commission’s ability to give effect to the default position in respect of both quantum and timing of increases. The repeal of s 146C removed those restrictions and restored the capacity of the Commission to set fair and reasonable conditions of employment for employees. The Commission is now able to adopt wholly the principles and provisions of the AWR 2024 for the Category 1 awards, including by flowing on the AWR 2024 increase at the default commencement date of 1 July 2024.

31. *Third*, if timing of the increase for SWC 2024 follows the current commencement date pattern, six classifications in the Category 1 awards will be below the National minimum wage of \$915.90 per week for periods of between 5 to 10 months. Those classifications and their current pay rates are as follows:

(a) Miscellaneous Workers - Kindergartens and Child Care Centres, &c. (State) Award (“**Kindergartens Award**”) – 2 classifications: Support Worker (\$882.80 per week) and Support Worker (Qualified Cook) (\$894.90 per week).

(b) Health, Fitness and Indoor Sports Centres (State) Award (“**Fitness Award**”) – 2 classifications: both Level 1 and Level 2 are currently at the same rate \$882.80 per week. The relativities between these classifications collapsed in 2023.

(c) Clerical and Administrative Employees (State) Award (“**Clerical Award**”) – 2 classifications: Grade 1 (\$882.80 per week) and Grade 2 (\$899.80 per week).

32. This is clearly undesirable. It is also inconsistent with sub-principles 6.1 and 6.2 of the Wage Fixing Principles. Those sub-principles provide:

6.1. The Award Review Classification Rate is the rate below which no full-time adult employee (excluding trainees, apprentices and employees on a supported wage or on a probationary rate) may be paid under the relevant award.

⁸ See table in Appendix 1 to these submissions, Columns D, F, H, J and L.

⁹ See table in Appendix 1 to these submissions. Compare Column B to each of Columns D, F, H, J and L.

6.2. Unless the Commission determines otherwise, the Award Review Classification Rate is the rate of pay equal to the National Minimum Wage, as varied from time to time by the Fair Work Commission.

33. *Fourth*, the NSW public sector wages cap has resulted in a significant decline in the real value of pay rates for Category 1 awards. To counteract this decline, it is imperative that the AWR 2024 pay increases of 3.75% be flowed on commencing on 1 July 2024, rather than be delayed by between 5 to 10 months. The urgency of preventing further erosion of real wages far outweighs the desire of the IR Secretary to maintain “consistency” in the timing of these increases.
34. In AWR 2024, in providing a 3.75% increase to the National Minimum Wage and modern award pay rates on 1 July 2024, the Fair Work Commission found:¹⁰

[155] In this Review, the cost-of-living pressures continuing to be experienced by modern award-reliant employees, especially those who are low paid and live in low-income households, is a primary consideration even though inflation is considerably lower than it was at the time of last year’s Review. Modern award minimum wage rates remain lower, in real terms, than what they were five years ago, notwithstanding the 5.75 per cent increase which resulted from last year’s Review, and this has caused financial stress in employee households. The current CPI rate, as we have earlier stated, does not fully capture the extent of this financial stress, since the CPI inflation rate for non-discretionary goods is 4.2 per cent and the LCI rate for employee households is 6.5 per cent. This weighs strongly against there being any further reduction in real modern award wage rates resulting from this Review.

[underline added]

35. If modern award minimum wage rates have declined in real terms compared to five years ago, then the pay rates under the Category 1 awards have lagged even further behind. Since AWR 2019, modern award minimum wage rates have increased by 19.51%,¹¹ while the Category 1 awards pay rates (other than the Clerical Award) have increased by only 15.39%,¹² and the Clerical Award has increased by even less, by 13.74%.¹³ These discrepancies show that the Category 1 awards are not keeping pace with the AWR

¹⁰ *Annual Wage Review 2023-24 Decision* [2024] FWCFB 3500 at [155].

¹¹ This is the cumulative increase on a compounding basis for the last five years of AWR increases from 2019 to 2023 (3.00%, 1.75%, 2.50%, 5.20% and 5.75%). See table in Appendix 1 to the submissions, Column B, Rows 1 to 5.

¹² This is the cumulative increase on a compounding basis for the last five years of SWC increases from 2019 to 2023 for Category 1 awards other than the Clerical Award (2.50%, 1.75%, 2.04%, 2.53% and 5.75%). See table in Appendix 1 to these submissions, Columns D, F, H, and J, Rows 1 to 5.

¹³ This is the cumulative increase on a compounding basis for the last five years of SWC increases from 2019 to 2023 for the Clerical Award (2.50%, 0.3%, 2.04%, 2.53% and 5.75%). See table in Appendix 1 to these submissions, Column L, Rows 1 to 5.

adjustments made to modern award minimum wages, resulting in a more significant erosion of their real value over time.

36. Relevantly, we note the Commission's recognition that its task of setting "fair and reasonable conditions of employment" in s 10 of the IR Act includes the maintenance of the real value of wages. In *State Wage Case 2007*, the Commission said:¹⁴

[274] In fixing rates of pay under the Work Value and Equal Remuneration Principles the Commission is required to do so under the umbrella of s 10. That is, to fix fair and reasonable conditions of employment which, of course, includes wage rates. The same overriding injunction applies in fixing rates of pay in State Wage Cases. In such Cases the Commission is concerned to ensure the real value of minimum award wages is maintained and it does so having regard to relevant economic considerations.

37. This principle was recently affirmed in a statement by Chin J in *PSA v Industrial Relations Secretary*:¹⁵

[16] The Commission's task in setting fair and reasonable salary rates can include the consideration of the changing value of money over time and the value of employees' real wages. This consideration is consistent with the Government's contention that the Secretaries' offer provides for real wage growth.

38. In summary, the IR Secretary's desire for "consistency" is simply not a good reason to depart from the statutory default in s 50(1). The AWR increases must be flowed on in full on 1 July 2024 to prevent further erosion of the real value of wages in the Category 1 awards.

Reason #4: Administrative efficiency, certainty and "potential issues with respect to retrospective effect": IS [16]

39. The IR Secretary's fourth reason is there is "utility" in maintaining the current commencement date pattern for the Category 1 awards for "administrative efficiency", "certainty" and to "avoid any potential issues with respect to retrospective effect."

40. It is unclear what "administrative efficiency" or "certainty" or "potential" issues are associated with retrospective increases. What specific problems might arise? Are these issues significant or easily manageable? The IR Secretary has provided no further

¹⁴ [2007] NSWIRComm 118 at [274].

¹⁵ *Public Service Association and Professional Officers' Association Amalgamated Union of NSW v Industrial Relations Secretary; Public Service Association and Professional Officers' Association Amalgamated Union of NSW v Secretary of the Department of Education; Public Service Association and Professional Officers' Association Amalgamated Union of NSW v Secretary Transport for NSW* [2024] NSWIRComm 2 at [16].

explanation or evidence to clarify the extent or severity of these potential issues. Therefore, the Commission should assign minimal to no weight to this unsupported assertion.

41. As discussed in [19] above, s 15(3) of the IR Act contemplates the possibility of retrospective increases. It is not uncommon for wage-setting tribunals, including this Commission, to award retrospective increases that result in backpay. Often, such decisions are made months after the claimed commencement date, which is a common aspect of contested proceedings. The current proceedings are no different.
42. Therefore, the IR Secretary's fourth reason is also not a good reason to depart from the default position.

C. Reply to IR Secretary Proposal 2

43. The Commission should reject the IR Secretary's pro rata proposal in IS [18]-[20] for the reasons below.
44. *First*, this approach is not in accordance with s 50(1) of the IR Act. The various percentages of 0.77%, 0.92% and 2.01% are not "provisions" of the AWR 2024.
45. *Second*, the pro rata approach does not account for the compounding effect of percentage increases. An increase of 2.01% applied on 1 July 2024 is not equivalent to an increase of 3.75% applied on 16 December 2024. The pro rata method results in a lower base figure for subsequent increases, leading to a diminished overall impact on pay rates over time.
46. *Third*, and perhaps most importantly, adopting the pro rata approach would further erode the real value of the wages in the Category 1 awards. The pro rata approach is inconsistent with at least one principle of AWR 2023, which was affirmed in AWR 2024 at [154]:¹⁷

[154] The AWR 2023 decision stated the principle that '... in the medium to long term, it is desirable that modern award minimum wages maintain their real value and increase in line with the trend rate of national productivity growth'. We affirm that principle, which operates subject to the implicit qualification that in the immediate circumstances of particular annual wage reviews it may not be possible to adhere to that objective.

¹⁷ *Annual Wage Review 2023-24 Decision* [2024] FWCFB 3500 at [154] citing *Annual Wage Review 2022-23 Decision* [2023] FWCFB 3500 at [87].

47. The principles of AWR 2023 and 2024 require that each review of wages maintain the real value of wages in line with the trend rate of national productivity growth over the medium to long term. The pro rata approach does the opposite.

48. *Fourth*, adopting the pro rata approach would lead to five classifications in the Category 1 awards being below the current National Minimum Wage of \$915.90 per week:

(a) Kindergartens Award (applying a 2.01% increase) – 2 classifications: Support Worker (\$900.54 per week) and Support Worker (Qualified Cook) (\$912.89 per week).

(b) Fitness Award (applying a 2.01% increase) – 2 classifications: Level 1 and Level 2 will both be \$900.54 per week. The relativities between these classifications collapsed in 2023.

(c) Clerical Award (applying a 2.01% increase) – 1 classification: Grade 1 (\$900.5 per week)

49. As explained in Part B in [32], this is clearly undesirable and inconsistent with sub-principles 6.1 and 6.2 of the Wage Fixing Principles.

D. Conclusion

50. For the reasons above, the IR Secretary has failed to provide “good reasons” to depart from the default position in s 50(1) of the IR Act with respect to the AWR 2024.

51. Given the IR Secretary’s failure to provide “good reasons”, the Commission should reject both of the IR Secretary’s proposals, and the provisions of AWR 2024 should be adopted wholly, being:

(a) **Quantum:** Award minimum wages will be increased by 3.75 per cent, and be at least the National Minimum Wage, being \$915.90 per week or \$24.10 per hour.

(b) **Timing of increase:** These increases are to take effect from 1 July 2024.

Unions NSW
26 August 2024

Appendix 1

	A	B	C	D	E	F	G	H	I	J	K	L	M
	SWC	AWR	AWR	Security Award	Security Award	Kindergartens Award	Kindergartens Award	Fitness Award	Fitness Award	Transport Industry Award	Transport Industry Award	Clerical Award	Clerical Award
Row	Year	Quantum	Timing of increase	Quantum	Timing of increase	Quantum	Timing of increase	Quantum	Timing of increase	Quantum	Timing of increase	Quantum	Timing of increase
1	SWC 2023	5.75%	1-Jul-23	5.75%	16-Apr-24	5.75%	16-Apr-24	5.75%	16-Dec-23	5.75%	01-Apr-24	5.75%	16-Dec-23
2	SWC 2022	5.20%	1-Jul-22	2.53%	16-Apr-23	2.53%	16-Apr-23	2.53%	16-Dec-22	2.53%	01-Apr-23	2.53%	16-Dec-22
3	SWC 2021	2.50%	1-Jul-21	2.04%	16-Apr-22	2.04%	16-Apr-22	2.04%	16-Dec-21	2.04%	01-Apr-22	2.04%	16-Dec-21
			1-Sep-21										
			1-Nov-21										
4	SWC 2020	1.75%	1-Jul-20	1.75%	16-Apr-21	1.75%	16-Jun-21	1.75%	16-Jun-21	1.75%	01-Mar-21	0.30%	16-Dec-20
			1-Nov-20										
			1-Feb-21										
5	SWC 2019	3.00%	1-Jul-19	2.50%	16-Dec-19	2.50%	16-Dec-20	2.50%	16-Dec-20	2.50%	07-Sep-20	2.50%	16-Dec-19
6	SWC 2018	3.50%	1-Jul-18	2.50%	16-Dec-18	*	*	2.50%	*	2.50%	*	2.50%	16-Dec-18
7	SWC 2017	3.30%	1-Jul-17	2.50%	16-Dec-17	*	*	2.50%	*	2.50%	*	2.50%	16-Dec-17
8	SWC 2016	2.40%	1-Jul-16	2.50%	16-Dec-16	*	*	2.50%	*	2.50%	*	2.50%	16-Dec-16
9	SWC 2015	2.50%	1-Jul-15	2.50%	16-Dec-15	2.50%	16-Dec-15	2.50%	16-Dec-15	2.50%	16-Dec-15	2.50%	16-Dec-15
10	SWC 2014	3.00%	1-Jul-14	2.38%	16-Dec-14	2.38%	16-Dec-14	2.38%	16-Dec-14	2.38%	16-Dec-14	2.38%	*
11	SWC 2013	2.60%	1-Jul-13	2.27%	16-Dec-13	2.27%	16-Dec-13	2.27%	16-Dec-13	2.27%	16-Dec-13	2.27%	*
12	SWC 2012	2.90%	1-Jul-12	2.50%	16-Dec-12	2.50%	16-Dec-12	2.50%	16-Dec-12	2.50%	16-Dec-12	2.50%	16-Dec-12
13	SWC 2011	3.40%	1-Jul-11	2.50%	*	2.50%	16-Dec-11	2.50%	16-Dec-11	2.50%	*	2.50%	*
14	SWC 2010	4.80%	1-Jul-10	4.25%	16-Dec-10	4.25%	16-Dec-10	4.25%	16-Dec-10	4.25%	16-Dec-10	4.25%	16-Dec-10

Symbols and abbreviations

Symbol or abbreviation	Meaning
*	An asterisk means there is no record (or record was not readily found) of the quantum or timing of increase in the Industrial Gazette or relevant State Wage Case decision
SWC	State Wage Case
AWR	Annual Wage Review
Security Award	Security Industry (State) Award
Kindergartens Award	Miscellaneous Workers - Kindergartens and Child Care Centres, &c. (State) Award
Fitness Award	Health, Fitness and Indoor Sports Centres (State) Award
Transport Industry Award	Transport Industry (State) Award
Clerical Award	Clerical and Administrative Employees (State) Award