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IN THE INDUSTRIAL COURT
OF NEW SOUTH WALES
FULL BENCH

5 TAYLOR J, PRESIDENT
CHIN J, VICE-PRESIDENT
PAINGAKULAM J, DEPUTY PRESIDENT

10 WEDNESDAY 10 JULY 2024

2024/00211169 - STATE WAGE CASE 2024

15 Mr E Yap for Unions NSW
Ms B Jacobs for Australian Paramedics Association NSW
Ms C Clark for Fire Brigade Employees Union NSW
Mr M Dunstan for NSW Nurses and Midwives Association
Ms J Vertellini for Industrial Relations Secretary
Mr J Arndt for NSW Business Chambers Pty Ltd
Ms N Salameh with P Best for Local Government NSW

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25 PRESIDENT: I welcome the parties to a hearing of the first State Wage case to be heard by this reconstituted Commission. In these proceedings the Commission has acted on its own initiative. First, on 14 June 2024 an initial summons to show cause was issued. Following the reconstitution of the Commission on 1 July 2024, a revised summons to show cause was issued on 5 July 2024 and that should be the one that the parties have with them today. The revised summons you will see addresses two matters. First, what action should be taken pursuant to pt 3 of ch 2 of the Industrial Relations Act 1996 and cl 4 of the Commission's wage fixing principles to adjust State award wages following the Fair Work Commission's annual wage review 2023-24.

35 Second, a review of the form and content of the Commission's wage fixing principles. We've listed the matter today to explain the Commission's intention with respect to these two matters and to make directions for progressing each of them. Given the significance of the Commission's review of the wage fixing principles I will be constituted a five member bench to hear and determine this matter constituted by the three presidential members who are appearing before you today and in addition, Senior Commissioner Constant and Commissioner McDonald.

45 I'll now read a statement that will be published following today's proceedings. I will also indicate our preliminary view as to appropriate directions and invite the parties to respond. After hearing from the parties we will then make directions. We propose to deal with the two matters separately and in two stages. We will first deal with the adjustment of State award wages. On 3 June 2024 an expert panel of the Fair Work Commission delivered its decision in the Annual Wage Review 2023-24. By this decision the expert panel increased the National minimum wage and all modern award minimum wages by 3.75% effective from

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1 July 2024. As a National decision under s 50 of the Act this full bench must now give consideration to the expert panel's decision and determine whether, and to what extent its principles or provisions will be adopted for the purposes of awards and other matters under the Industrial Relations Act.

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Unless the Commission determines otherwise the awards relevant to the Commission's consideration in this regard pursuant to s 52 of the Act are listed at subprinciple 4.2 of the Wage Fixing Principles set out in annexure A to the State Wage Case 2022 [2022] NSWIRComm 1081. The relevant awards will be listed in the statement and are no doubt known to the parties before us today. The Commission seeks for submissions from interested parties as to whether and to what extent the decision of the expert panel in the annual wages review decision is to be adopted in respect of the relevant awards.

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Also, as part of this first stage, the Commission calls for the submissions from interested parties as to whether and to what extent the stage 3 wage increases awarded by the Fair Work Commission in the Aged Care Award 2010 decision being [2024] FWCFB 150 and the related decision Aged Care Award 2010 reported in [2024] FWCFB 298 are to be adopted or applied in respect of two awards, the Local Government, Aged, Disability and Home Care (State) Award and the Nurses' (Local Government) Residential Aged Care Consolidated (State) Award 2021, whether by operation of s 52 of the Act or by other means.

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As to this first stage, the Commission is minded to make the following directions subject to the parties' views:

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1. Any interested party wishing to make submissions on the adjustment of State award wages following the relevant Fair Work Commission decisions must do so by filing and serving on each party to these proceedings written submissions on this matter on or before 2 August 2024.

That is about three weeks from now, a little over.

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2. Any interested party wishing to respond to any submissions filed and served in accordance with o 1 must do so by filing and serving on each party to these proceedings written submissions in reply on or before 16 August 2024.

That is two weeks later.

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3. The parties are to indicate in their submissions whether they consider that the matter ought to be dealt with at a hearing or if it can be dealt with on the papers.

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4. The matter will be listed for hearing or decision on a date to be fixed.

We will fix that once we have seen the written submissions, but our intention is to move as quickly as possible so we don't anticipate it will be much more than a couple of weeks after the last set of submissions are filed and we will notify a date following receipt of the first set of submissions.

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I now turn to the second matter, the Commission's review of the Wage Fixing Principles. In our view, there is a proper basis to consider whether they are still fit for purpose. In various iterations the Commission's Wage Fixing Principles have been in use for over 40 years. In the State Wage Case 1983, the Industrial Commission of New South Wales in court session adopted in whole the Australian Conciliation & Arbitration Commission's principles as determined in the National Wage Case September 1983.

After a substantial history of comity in approach to wage fixing between the New South Wales and Federal jurisdictions this Commission's wage fixing principles survived a general review in 2010 that was conducted after the Federal system had ceased to use principles of this kind. Since then the principles have been subject to review from time to time, albeit in a legislative context which had substantially reduced the Commission's role in wage fixation.

Since the principles were last considered the Industrial Relations Amendment Act 2023 has reformed the Commission and restored its wage fixation functions. In addition to reconstituting the Commission and re-establishing the Industrial Court of New South Wales, the amending Act also relevantly:

(a) abolished the requirement for the Commission to give effect to government policy on adjusting wages for public sector employees as contained in the former s 146C;

(b) introduced the objection of encouraging strategies to attract and retain skilled staff, where there are skill shortages;

(c) requires the Commission to have regard to the fiscal position and outlook of the government; and

(d) established a new stream of mutual gains bargaining in ch 2A of the Act.

This has coincided with the government publishing a new approach to bargaining within the public sector titled "NSW Government Fair Pay and Bargaining Policy 2023". It is against that background that the Commission invites interested parties to address it on the question of the continued appropriateness and content of the Commission's existing Wage Fixing Principles. In particular, the Commission invites submissions on whether the Wage Fixing Principles should be abolished or retained. And if they are to be retained what amendment should be made to them having regard to the contemporary industrial and legislative context.

Without limiting the scope of the parties' submissions on this matter the Commission would be assisted by the parties addressing 11 matters. As I said earlier, we will publish a statement so there is no need for you to get these down verbatim, but I will read them out so you can understand what we are considering so that we can get some feedback from you on the appropriate timetable.

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1. Whether to retain Wage Fixing Principles in whole or in part.
- 5 2. Whether to retain the onus on applicants seeking different conditions or rates of pay to rebut a presumption that existing awards set fair and reasonable terms and conditions of employment.
- 10 3. Whether and to what extent there ought to be a principle addressing increases to maintain the real value of award rates of pay having regard to the rates of inflation and changes in the cost of living for employees. And if so, whether it should apply generally or be limited to employees on low wages.
- 15 4. Whether and to what extent principle 7, which deals with minimum wage for award agreement 3 employees ought to be amended or some other mechanism introduced to set an appropriate minimum rate of pay to be applied to low wage employees at a base grade in an award.
- 20 5. Whether there will continue to be a separation of general work value considerations from increases to wages based on gender-based undervaluation.
- 25 6. Whether to retain a special case principle, and if so, whether the circumstances that establish a special case ought to be better to find.
- 30 7. Whether and to what extent principle 8 the arbitrated case principle ought to be amended, or some other mechanism introduced to permit the consideration of claims based on the attraction and retention of skilled staff where there are skill shortages, and having regard to the effective and efficient delivery of services.
- 35 8. Whether and to what extent one or more of the principles ought to be amended in light of the Commission's obligation to have regard to the physical position and outlook of the government, and the likely effect of the exercise of the Commission's function on the physical position and outlook.
- 40 9. Whether and to what extent sub principle 8.3 the productivity and efficiency considerations principle ought to be amended, or some other mechanism introduced to expand, clarify, and or refine the concept of public sector productivity and efficiency. And in particular, the relevance of and relationship between improvements in the quality of public sector services and employee related costs.
- 45 10. Whether and to what extent principle 9 the negotiating principles principle ought to be retained or revised in light of the mutual gains bargaining provisions in the Act. The Commission is particular interested to receive submissions addressing the appropriateness and operation of no extra claims clauses in agreements in light of the mutual gains bargaining scheme, and whether there ought to be a model no extra claims clause.
- 50 11. Whether the following principles ought to be removed from the wage-fixing principles.

Principle 10, superannuation, and principle 12, economic incapacity. Can I just add for my own benefit at least in respect of the ninth point, productivity and efficiency considerations? I'd be particularly assisted from the industrial secretary if the treasury could give us some assistance on that definition of productivity. The Commission is minded to make the following directions in respect of this second stage. Any interested party wishing to make submissions in respect of the Commission's review of the wage-fixing principles must do so by filing and serving on each party to these proceedings written submissions on this matter on or before 9 August 2024, so that is approximately four weeks.

Two, any interested party wishing to respond to any submissions filed and served in accordance with order 1 must do so by filing and serving on each party to these proceedings written submissions in reply on or before 30 August 2024, so that's three weeks later. And we will then list the matter for hearing, and at this stage we anticipate a one-day hearing. We call on the parties now to address those submissions. Firstly, those proposed directions and also to put any other matters that you wish us to take into account. In respect of the directions for the first stage, Mr Yap, do you want to go first?

YAP: Thank you, your Honour. I have some visual aids for my submission. I cleared it with the parties today, and I'll hand these up to the associate. Your Honour, I will first address the first item in the summons which is in relation to the annual wage review decision, and also the aged care work value case decision. For the awards listed in clause 4.2 of the wage-fixing principle broadly, the union's position is that there should be a state wage case adjustment to the rate of pay in those awards by at least the increase provided in the annual wage review.

However, because of the different industrial context in which the awards exist, I think it will be more efficient to deal with the awards in three categories, so I have in the visual aid that I have just provided to the bench, we have categorised them into three categories based on the employer and also the industry. The first column is the category, so there are three categories there, and the second column is the employer or employer representative, and the third column relates to the nine awards and how they're categories, and then the fourth column relates to the unions with an interest, and then the last column is about the last increase to the pay in these awards.

PRESIDENT: I'll just stop you there.

YAP: Sure.

PRESIDENT: I'll just indicate the document you've just described, I'll mark as MFI 1. Please continue.

MFI #1 SCHEDULE OF AWARDS

YAP: Thank you. Just for completeness, the second visual aid that I have

handed to the bench is just a list of acronyms, and they're matching to the full name of the unions.

5 MFI #2 LIST OF ACRONYMS MATCHING TO FULL NAMES OF THE UNIONS

10 YAP: In relation to the first category which contains five awards, we said that the increases to these awards should be at least the annual wage review increases. However, negotiations are being had with New South Wales
15 Government regarding the public sector pay increases more generally. As such, we wish to defer consideration of the actual pay increases to these awards while negotiations are being had. For completeness, we say that there's no prejudice to the increase in these awards because they are quite far away. They are in the last increase where - in December 2023 and April 2024, so that's category 1.

20 And category 2 awards are local government awards that relates - that are the electricians award and the live theatre award, we say also that the annual wage review increases should flow onto these awards, and we - the parties
25 have been discussing and hoped to prepare and filed proposed consent orders and variations in advance of the next appearance before the Commission. So that's the direction which we have discussed and seek subject to your Honour's consideration.

30 In relation to category 3, the annual wage review increases should also flow onto these awards, and in addition we say that the aged care work value case increases should also flow onto these awards. There are current discussions between the federal government, the HSU, the nurses association, and employed by these about the implementation and funding of the aged care
35 work value increases. We expect to be able to provide a meaningful update to the Commission in early to mid-August about the result or the product of these discussions.

40 In terms of process, we propose that once those discussions have concluded, the unions and Local Government New South Wales wish to file a single set of documents which give effect to both the annual wage review increases and also the aged care work value increases likely through an award application. Can send the award application hopefully, but we propose to deal with the form of those documents at a later date. So those are the considerations that we've
45 had in relation to each category. In relation to the directions--

VICE-PRESIDENT: Mr Yap, can I just interrupt you?

45 YAP: Sorry. Sure.

50 VICE-PRESIDENT: In relation to the category 3 awards, the increases relating to the aged care work value case, is it proposed that that be dealt with by a mechanism separate to reflection or passing on of the national decision under s 52? And if so, need the processing or consideration of those increases need result in holding up the national minimum wage increases for those awards?

5 YAP: That is a possibility. The party's approach last year was that we filed a fresh award application to deal with the increases as a whole, but only because the increases were "packaged up" in a single increase. For the stage 3 aged care work value case increases, there will be two stages to the increase, so what you say, your Honour, it can be done that way, but the party's position at the moment is that it be dealt with in an application that has both increases.

10 PRESIDENT: And just going back to the first category to make sure I understand the position of Unions NSW, there are five awards there. And is it Unions NSW's position that those award increases are not ones that, assuming that there are award increases, would not take effect from 1 July or from the date of decision, but take effect from some later day?

15 YAP: We haven't considered that aspect of the annual wage review. The increases have traditionally been made on those dates as indicated by the table, but if the bench wishes for us to consider an earlier date, certainly we will consider that and provide submission at a later date.

20 PRESIDENT: And as for category 2, it's your current expectation that the parties would not need to address those matters by submissions because you anticipate a consent position being provided to the bench for variations to awards. Is that what you are proposing for category 2?

25 YAP: That's correct, your Honour, and that has been the conventional approach if I can put it that way.

30 PRESIDENT: In respect to the awards you've numbered 6 and 7 on MFI 1?

YAP: That's correct.

35 PRESIDENT: Is there anything else? We'll deal with the second stage. I'll have it separately. So I just want to deal with the first stage and hear from the parties. Is there anything else you want to say to us on that, Mr Yap?

YAP: Nothing further at this stage, your Honour.

40 PRESIDENT: Thank you. Who wishes to speak next? Should we deal with any applicant/union parties because we move to the respondents? Is there anyone who wishes to add anything to what Mr Yap has suggested?

CLARK: No, your Honour.

45 PRESIDENT: Thank you. Can I then move to - who wants to speak on behalf of the response first? Ms Vertellini?

50 VERTELLINI: Thank you, your Honour. I would agree that the Industrial Relations Secretary would in respect of the category 1 awards which it has an interest in, which is number 1 to 5 on the MFI 1 document. The

Industrial Relations Secretary is seeking further time to seek instructions and consider its position and communicate that in respect to Unions NSW.

5 PRESIDENT: So, we propose some directions. Is there anything you want to say about those? In respect to that category, as I understand it, Unions NSW is simply, to use Mr Yap's words, seeking to defer those matters at this stage. What's your position?

10 VERTELLINI: We also agree to defer at this stage.

PRESIDENT: Thank you. Turning then to category 2 matters as Mr Yap's described them, the local government matters.

15 SALAMEH: Thank you, your Honour. So, yes, absolutely, as alluded to already previously by Mr Yap, we've already foreshadowed consent with the category 2 awards as they appear on MFI 1, and with respect to the category 3 awards, yes, as already alluded to, we are awaiting the outcome of discussions between the various union parties and federal government and are also comfortable with the defer.

20 PRESIDENT: Also comfortable with?

SALAMEH: To defer.

25 PRESIDENT: While you're on your feet, could you answer Chin J's question about whether there's any reason why we need to wait for those discussions before we can deal with at least the national wage decision?

30 SALAMEH: Yes, okay. So, absolutely, I mean, it's entirely up to the bench and the parties as to how they want to proceed. Traditionally, we've applied for both together accumulatively so as to, I guess, minimise any disruption in logistics or administration near Christmas, but happy to be guided by your Honour's wisdom in this case.

35 PRESIDENT: I think it's partly influenced by how long the second stage might take. Do we have any insight into that from your point of view?

SALAMEH: That, I don't know.

40 PRESIDENT: No. Mr Yap, is there anything you can tell us on that?

45 YAP: The instructions that I have are that we will be able to provide some sense of what the funding situation and guidance from the federal government will be by mid-August. So, I know that skates very close to 1 September, but at least in the last year, the parties have been able to work cooperatively to provide a consent position to the Commission.

50 PRESIDENT: And while you're on your feet, Mr Yap, do you know why, for example, the first award in your list was increased in April 2024 by reference to a national wage decision that took place almost sort of nine months earlier?

YAP: These are historical dates--

PRESIDENT: I see.

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YAP: --which precede my time at Unions NSW. So, I cannot provide an explanation right now.

PRESIDENT: So, from that, do I understand it is that 16 April has been a date that that award has moved in previous years?

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YAP: Previous years, yes.

PRESIDENT: I see. I'm not sure I understand, but I see. I understand that at least. Thank you. Anyone else wash the same thing in respect of the first stage of the proceedings? All right. Let's move then to the - what we call the second stage, the review of the award fixing principles. We've proposed a timetable. Mr Yap, do you want to say something about that?

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YAP: Yes, your Honour. The parties have discussed the directions in relation to the wage fixing principles. The discussion is a bit different to what the bench has proposed, which is that the matter be deferred to a date no earlier than two weeks for further directions.

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To address the item 2 of the summons directly, the Union intends to review the form and content of the wage fixing principles and have considered some of the matters the bench has raised in discussions already, but we wish some time to firm up that position. I think four weeks seems sufficient, but that was not what we had contemplated in our discussions.

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PRESIDENT: Yes, thank you, Mr Yap. You can sit down. I will just make this comment. I think it was probably clear from what I read, but whilst we do see submissions on 11 specific matters, that doesn't limit the party's capacity to deal with any matters that they think ought to be raised and considered by us in a general review of the wage fixing principles.

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Any other union parties wish to say something about the proposed timetable, particularly, the fact that four weeks will be sufficient time to put on to consider submissions as to the matters that we are seeking? We want to move as quickly as we can. We thought four weeks would be about as fast as we could move.

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YAP: I have new instructions. I think if the timetable could be brought back, as in increased, by an extra week forward in time, that would be helpful.

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PRESIDENT: Thank you. On the respondent's side, Ms Vertellini, what would you say about the proposal?

VERTELLINI: I would agree with Mr Yap that we have discussed potentially scheduling a time for a report back prior to entering into directions. I would

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also suggest that given the nature of the 11 significant issues that the Commission has addressed, that further time would be required in respect of the first direction.

5 PRESIDENT: Thank you.

SALAMEH: Thank you, your Honour. We're happy with the timetable as agreed to by the parties.

10 PRESIDENT: Thanks, Ms Salemeah. Anyone else wish to be heard?
Mr Yap, just before - we're going to break for a couple of minutes before we
come back onto the bench and make some directions, but just can I
understand the purpose of a two week period and a report back rather than us
15 simply making directions now? What might assist us by not making directions
for two week period?

YAP: To use the word, "deferral", again, I think it's just a matter of differential
time when the parties can come back to the Commission and provide a firmer
position as to how we want to program. However, I think the directions that
20 have been proposed are reasonable. My instructions are that if those dates
can be moved into the future by a week, I think that would be helpful.

PRESIDENT: Thank you. So, we'll adjourn. I think we might adjourn for
about five or ten minutes, and then we'll come back onto the bench and make
25 directions.

SHORT ADJOURNMENT

30 PRESIDENT: As I indicated at the outset, we propose to deal with the matters
in two stages. In respect of the first stage we have been greatly assisted by
the submissions of Mr Yap and the other parties as to the most convenient way
to deal with those matters. We propose the following directions:

35 1. In respect of the first category identified in MFI 1, being five awards, we do
ask the parties to file what could be a very short submission on or before
2 August 2024 that addresses, in particular, two matters; the quantum of any
increase and the timing of any increase.

40 2. Any interested party wishing to respond to those submissions will file and
serve them on or before 16 August 2024.

These proceedings will, however, come back before Chin J for further
directions between those two dates on Friday 9 August at 10am. That will give
the parties the opportunity, having filed those initial submissions, to indicate to
45 Chin J whether any variations to the directions that have been made for
submissions in reply need be made. It will also allow Chin J to give
consideration as to whether there needs to be a hearing date set, at which
point the parties can be heard as to the appropriate hearing date on that
occasion.

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Can I indicate in respect of the two awards in category 2 and the two awards in category 3 they will also be mentioned before Chin J on 9 August at 10am. We hear from the parties that it may well be that by that date category 2 awards will have been the subject of a consent application to vary and, if so, we would appreciate that application being filed in advance of that date or, alternatively, the parties informing Chin J on that occasion as to when they expect that to occur.

Category 3 will be dealt with by way of directions on 9 August, at which point we hope the parties are better informed as to the timetable. I can indicate from the bench's point of view some willingness to proceed on a single increase, if it can be done conveniently. But if there is going to be some delay then Chin J will hear submissions as to why the matter should not be dealt with by effectively two stage increases, the first one being the national wage case decision and the second one being anything that arises out of the Aged Care Awards decisions.

The further directions we make are in respect of what we have described as the second stage of the proceedings and the directions we make are as indicated earlier, but with some adjustment to the dates.

1. Any interested party wishing to make submissions in respect of the Commission's review of wage fixing principles must do so by filing and serving on each party to these proceedings written submissions on this matter on or before 16 August 2024.

That is five weeks from now.

2. Any interested party wishing to respond to any submissions filed and served in accordance with o 1 must do so by filing and serving on each party to these proceedings written submissions in reply on or before 13 September 2024.

So that is a period of a further four weeks, so we have added a further week at that point, and the matter is listed for hearing before the full bench at 10am on Thursday 3 October 2024.

ADJOURNED TO THURSDAY 3 OCTOBER 2024