APT:SND

IN THE INDUSTRIAL RELATIONS COMMISSION
OF NEW SOUTH WALES
FULL BENCH

TAYLOR J, PRESIDENT
CHIN J, VICE-PRESIDENT
PAINGAKULAM J, DEPUTY PRESIDENT
SENIOR COMMISSIONER CONSTANT
COMMISSIONER MCDONALD

WEDNESDAY 9 OCTOBER 2024

2024/00211169 - STATE WAGE CASE 2024

Mr S Meehan SC with Ms B Byrnes and Mr H Pararajasingham for the Industrial Relations Secretary
Mr L Saunders for the Fire Brigade Employees Union
Mr I Latham for the Australian Paramedics Association
Mr P Boncardo for Unions NSW
Mr Britt for Local Government NSW

PRESIDENT: Before I take appearances we will deal first with the decision in respect of stage 1.

FOR DECISION SEE SEPARATE TRANSCRIPT

Just some housekeeping to start with. Firstly just the timetable for what we're planning to do today. We're thinking that since we've started early we will take a break early at about ten to 11.00 and then go through after the break until 1.00. We will recommence at 2.00 and then have a short break at about 3.20 and then go through to finish which the Bench is hoping is 4.30 rather than 5.00 but we have availability until 5.00 if necessary. Can I next deal with the issue of documents. We have, just for convenience, put the documents that we understand the parties may have referred to into two court books which I will refer to as court book 1 and the supplementary court book. We've also had the benefit of a joint bundle of authorities that the parties have provided. Are there any other materials that any party wishes us to be referring to during the course of today? I take that silence as a no. Can I then move to then the subject of tendering evidence. So before we get to the submissions what evidence is there that any party wishes to tender which will presumably be found in the court books? Mr Meehan, you did have, file two affidavits.

MEEHAN: Yes.

PRESIDENT: But from what I've read you don't intend to ...(not transcribable)...

MEEHAN: I don't need to read the affidavits. There is a document which is exhibited to an affidavit described as productivity considerations. It is in the first volume of the court book. We propose to invite the full bench to receive that as part of our submission and if that is acceptable there is no need to read the affidavit.

PRESIDENT: Thank you. Mr Saunders, there was an affidavit of Mr Kennedy(?). Is there any need for us to receive that?

SAUNDERS: Not given the position the Crown has taken.

PRESIDENT: Thank you. Mr Britt, there is an affidavit of Mr Danzig(?).

BRITT: We do read that affidavit.

PRESIDENT: Thank you. Is there any objection to that affidavit being read?

SPEAKER: No, your Honour.

PRESIDENT: I presume there is no requirement for Mr Danzig to be available for cross-examination.

BRITT: He is available if you need him.

PRESIDENT: No, sorry, no requirement for him to be cross-examined is probably the better question. No.

SPEAKER: No, your Honour.

EXHIBIT #LGSA1 AFFIDAVIT OF MR DANZIG TENDERED, ADMITTED WITHOUT OBJECTION

PRESIDENT: Is that then the totality of the evidence? All right. Can we then move to just how we're going to deal with submissions. This, perhaps a slightly novel idea was flagged by an email from my associate with the provision of the first court book and that is rather than dealing with submissions advocate by advocate in the traditional way we might deal with them issue by issue. There is a slightly higher degree of difficulty in ensuring that we deal with it within the time allotted but I think with the benefit of assistance from the parties, particularly in not obviously needing to repeat things, a, in your submissions or, b, that another advocate has just addressed us on, I am hoping that it won't add too much time and for us we think it's useful to be able to deal with all submissions on an issue before we move to the next one except the issues that are interrelated and there will be a level of needing to foreshadow things from time to time. Has anyone got a view as to whether there is any difficulty in taking that course?

MEEHAN: For our part we've prepared on that basis because it was foreshadowed. It seems to us entirely convenient.

PRESIDENT: Thank you.

BONCARDO: As with us, your Honour.

PRESIDENT: Thank you. Very good. It may be that notwithstanding dealing with it issue by issue that one or more of you want to commit, whenever you stand, with some introductory remarks relevant to your client's position and not discourage from doing that but otherwise we will then progress on that basis and similarly at the end it may be that at the end of the day there is effectively a series of one or more points that you wish to deal with effectively in reply or in respect of issues that we haven't actually required you to say anything about that you nevertheless do want to say something about and we will try and reserve some time at the end for that purpose, but on that basis then we will then proceed in. I formed my own view as to the appropriate order of submissions for each particular issue and I hope that, again, is not going to be inconvenient to the parties if I give some guidance in that regard. As to the first issue is whether we need, the Commission needs to continue to have wage fixing principles. The parties seem to be at one that the Commission should continue to have wage fixing principles and whilst there are slightly different reasons expressed by the parties as to why that is so and in respect of the FBEU, a quite different approach that is suggested be taken, we don't think that we need the parties to express views on that subject which allows us to move straight to issue two.

Now before I go any further, the parties have before you, as we do on the bench, a one page document that simply sets out the issues. That's really just an aide-mémoire document which allows the parties to be able to refer to them and know which one we are talking about as we go. Just give me a moment. So the first, assuming the parties - and as I have said in opening remarks I've got no difficulty with the parties addressing issue one but if we move to issue two, the question of bonus and presumption, we had the benefit of written submissions of the parties on this subject and certainly for my part I think I have a reasonably clear idea of the parties' positions but the bench does have some questions on this topic. Perhaps the primary one being the extent to which the parties identify a practical difference between the position that is put by the Secretary that it should be understood to be a presumption rather than an onus or an evidentiary onus or a persuasive onus, what is the practical difference that arises from that, whereas Unions NSW, for example, suggests it is important to simply have a persuasive onus and not a presumption. Again, the question is how would that manifest in a practical sense? But Mr Meehan, would you be good enough to kick us off on issue two as to the extent to which you wish address issue one or make opening remarks, feel free to do so.

MEEHAN: Thank you, your Honour. Might I make some short opening remarks. I will skip over the first proposition which I was going to emphasise which your Honour has already done for me, namely there's support for retention of principles. I did want to identify for the bench some other areas that we contend are subject to at least a measure of agreement because that might help frame up and focus attention on the areas where there is disagreement and we did want to highlight what we understand is an

acceptance that the wage fixing principles should serve as a guideline and not fixed decisional rules and that's not to say that the current principles have been applied as fixed decisional rules, but we simply highlight that that seems to be an accepted proposition.

Next, and related to that point, the wage fixing principles cannot operate or be applied such that they will impair or detract from the statutory provisions which regulate the manner in which the Commission is required to go about its task of making and varying awards and in particular those provisions that specify the matters that the Commission may or must take into account. That is, in simple terms, the principles cannot operate to dictate the exercise of the Commission's discretionary award making powers. There is a measure of agreement in relation to that and as we will come to submit when we get to the relevant items, that strongly informs the submission that the Secretary will make about particular principles.

With that introduction, might we then come to item two. The current presumption erects an evidentiary onus or burden of persuasion. Its retention is consistent with the longstanding approach of this Commission in a contested case that the onus falls on an applicant to bring sufficient evidence and make out a case for alteration to an award which would otherwise remain undisturbed. There must be information placed before the Commission which allows it to be satisfied that the proposed award changes, if made, will provide just and reasonable rates and conditions and the authorities bare out the proposition that there must be some positive demonstration as to why a change proposed to an award should be made. We have cited the supporting authorities for those propositions in our written submissions and we won't trouble the full bench to go to those submissions now. It is s 10 of the Act that underpins the presumption and that is the statutory command that when the Commission decides to make an award it must contain fair and reasonable conditions so that presumptively when the Commission validly exercises its award making powers, the resulting award will contain fair and reasonable conditions and it is important to observe that notwithstanding s 10 underpins that presumption, it is nonetheless not a statutory presumption. We accept that and that is a point that is advanced by Unions NSW correctly. But we submit it is a derivative evidentiary presumption underpinned by s 10 and derivative in that sense only. Unions NSW appears to accept the proposition that an applicant for a variation to an award will bear the evidentiary onus but contends that there is a conceptual difference as your Honour, the President, has identified between that evidentiary onus and the presumption or the erection of the presumption. If there is a conceptual difference, which we submit really doesn't matter, but if there is, Unions NSW does not appear to have engaged on that material difference and no doubt that has excited your Honour, the President's interest in being addressed on that issue. Not--

PRESIDENT: Sorry, Mr Meehan. In your view there isn't anything of difference between describing it as an evidentiary or persuasive onus first as a presumption then. It's two ways of saying the same thing.

MEEHAN: Well perhaps not quite, your Honour. We start from the proposition, basic proposition that what is being debated is an evidentiary onus. It's not a legal onus. And an applicant for an award, making of an award or a variation consistent with long-standing juris prudence in this Commission and elsewhere will bear an evidentiary onus to make good its application for variation. But s 10 does introduce, as we submit presumptively, the notion that when the Commission has exercised its power and made an award it will contain fair and reasonable conditions and that really is a starting point and I suppose, if anything, that marks out a difference that there is a presumptive starting point or position that what exists should continue unless there is a demonstration that the existing award no longer contains fair and reasonable conditions. But none of the contradictors in the sense of those interested parties seeking to do away with that language of presumption, has sought to explain how the presumption introduces an evidentiary onus that is more onerous in character than that which an applicant for a variation of an award currently bears. No one's sought to deal with it.

The FBEU, I think, describes the difference between a persuasive onus and a rebuttable presumption as subtle but doesn't take the matter any further, other than to say that it's apt to be misunderstood - this is the FBEU's position - it's apt to be misunderstood and applied as though there is a requirement to go beyond "simply making out a case" and with respect that is an unhelpful submission in the light of s 10 of the Act because simply making out a case entails a demonstration that the existing terms and conditions in an award are no longer fair and reasonable and should be altered. In our submission, if one has met that onus, that evidentiary onus, in all likelihood the presumption has been rebutted. It almost follows as a sequitur. And so that submission really doesn't throw any light, with respect, on, substantively or practically, what the difference is.

PRESIDENT: So you accept - is it the case that you use "evidentiary onus" as a shorthand way of saying evidentiary or persuasive onus?

MEEHAN: Yes.

PRESIDENT: And I'm thinking there may be circumstances where there is no need for evidence such as an award does not contain a minimum standard that the principles would identify ought to be inserted and so nothing more needs to be known then, there is an award and it doesn't have the standard, you don't need necessarily evidence in--

MEEHAN: We would accept that proposition.

PRESIDENT: Yeah.

MEEHAN: Yes. That is to say that the evidentiary burden must be understood in the context of how evidence can be adduced in this Commission and how matters can be sufficiently demonstrated to the Commission. Unions NSW adopt, maybe say, a more nuanced approach in that it accepts that when an award was made it can be presumed that it contained fair and reasonable

terms and conditions which we submit is undoubtedly a correct proposition for reasons I have touched on and it further accepts that it will likely usually be the case that an applicant will need to demonstrate that an award requires revision or amendment because the terms are no longer fair and reasonable and that the proposed terms contended for are fair and reasonable, yet as we have indicated, it refers to a conceptual difference but leaves open the question of what is the substantive or difference in substance.

The more forceful submission - I am digressing a little here - of Unions NSW builds upon the regulatory intervention between 2011 and 2023 involving, as it puts, the suppression of wages in that period as running counter to the existence of a sound basis for the presumption based on s 10. That is to say, and I'm paraphrasing, not using its words, but s 10 they say was not capable of being exercised in an unconstrained way by reason of the regulation, therefore s 10 is not a sound statutory foundation for the presumption but that's advanced, of course, in support of its submission that the presumption should no longer be maintained but it's looking backwards and not forwards and we respectfully submit the Commission is vitally concerned with the question of principles to be applied in futuro and so one doesn't look at how s 10 has been constrained when the regulation is now no longer operative, one has to look at whether s 10 and the making of an order pursuant to it now would underpin the presumption.

So we submit in summary that no persuasive reason or substantive reason has been advanced or at least developed that would leave this Commission in a position of concluding that the language of presumption is no longer appropriate. That's the way we put the case, your Honour.

PRESIDENT: Thank you, Mr Meehan. Mr Boncardo, are you able to identify this difference between a presumption and an onus?

BONCARDO: Your Honour, if I can start by just saying something very briefly by way of opening and that is that so far as my client is concerned, over a decade of legislatively enforced wage suppression provides at least a basis and we say a significant basis for the Commission to reconsider and revise the wage fixing principles. We are, your Honour, at idem with Mr Meehan's client insofar as we are very concerned to ensure that the wage fixing principles are promulgated as guidelines rather than a decision making straightjacket that the Commission must follow when exercising its jurisdiction. Whether those provisions ought be retained in their current form and amended as we have proposed or rewritten entirely as Mr Saunders' clients proposes is ultimately a matter for the Commission. My client is largely agnostic about that. Our approach is somewhat more conservative than that adopted by Mr Saunders, but, in our view, the approaches are aligned in the sense that what they seek to do is both modernise and ensure that the wage-fixing principles apply in a way that guides the exercise of the Commission's discretion, having regard to the changes to the Act that have occurred and contemporary standards. Going directly to your question, Justice Taylor, the practical difference as we see it is this, that Mr Meehan's contentions, and indeed Mr Britt's contentions, are that there is a presumption which operates effectively as a hurdle--

PRESIDENT: As a?

BONCARDO: As a hurdle, that an applicant for an award needs to jump before their application for a new award or for a variation can be considered. And we have contended that there is no statutory basis for any such presumption and Mr Meehan, with respect correctly, has accepted that today. Whether there is a practical difference will depend on the nature of the case that is being advanced. There may be circumstances where there is no practical difference at all, that is an award has been relatively made, a party comes along to the Commission and perhaps ambitiously argues for a new allowance or a new classification. In those circumstances, it's difficult to see that absent some dramatic shift in circumstances, that that party is going to succeed in its application. But that application's success should be determined consistently with whether or not the contentions made by that party are accepted by the Commission as persuading the Commission that the current award does not contain fair and reasonable conditions of employment and that what is being put forward is a position consistent with the provision of fair and reasonable conditions of employment.

Now, one doesn't need to, and should not, start with what we say is an artificial presumption against that party succeeding. That adds, in our submission, more complexity than is necessary. Mr Meehan talks about an evidentiary onus. Now, what that means is a matter of debate. We've set out in our reply submissions at para 10 what legally an evidentiary onus means, that is that it's incumbent upon a party to point to some evidence before the onus then shifts to the other party to rebut or to establish a particular proposition. So the use of evidentiary onus in the context of an award application seems to us to be fairly inapt, with respect, because it is the applicant that carries the risk of failure and bears the burden or bears the onus, I should say, of persuading the Commission.

VICE PRESIDENT: Mr Boncardo, the basis for the presumption, as it's been expressed in that form, has been twofold. The fact of an arbitration by this Commission and, indeed, the fact of parties consenting to variations of awards. I have in mind - or if you can answer this? How do you reconcile that basis for the presumption, as it's been applied, with notions like the fact of history of consent awards being essentially an indicia of gender-based undervaluation? So I just want to test the soundness of the presumption, in circumstances where under our existing principles, variation may be required, notwithstanding the existence of some of those events.

BONCARDO: That would, in my respectful submission, Vice President, convey that the presumption's entirely unsound. If the parties have proceeded to put before the Commission consent awards, which, for whatever reason, result in the undervaluation of work on a gendered basis, then the presumption would operate in such a circumstance, according to the Secretary's position, to require a party to jump the hurdle of surmounting a presumption before they get past first base, in terms of agitating their case. It's something which, in my respectful submission, is (1) unnecessary (2) has no foundation in the text of

the Act and (3) in the kind of example that you've articulated, Vice President, is entirely inapt.

It is - and I think Mr Saunders notes this in his submissions - the presumption or lack of a presumption is not something that's ever been dealt with in the wage-fixing principles, as we apprehend it. It is, in our submission, a matter of general importance and whether the Commission deals with it in a decision or in the principles is a matter obviously for the Commission but it is something that, so far as my client is concerned, it would be useful for this bench to provide guidance and, indeed, a dispositive decision on. Unless there are any questions, those were the matters I wish to raise.

PRESIDENT: Thank you. Mr Saunders?

SAUNDERS: Before turning to the rebuttable presumption question briefly, by way of opening, there is general consensus that there should be wage-fixing principles of some kind. There is now consensus that they should operate as general guidelines or, perhaps more accurately, a centralised emanation of how the Commission proposes to approach matters, to inform the parties. That's not necessarily how they've been historically applied by the parties in this room, which is a result of their drafting. The drafting of the current principles does not reflect optional guidelines. It is in strict mandatory language. It's not a surprise. It comes from its - their, I should say, history. Did your Honours have the bundle of authorities that my friend Mr Meehan's client provided yesterday?

PRESIDENT: We do. We've got both hard copies, courtesy, I presume, of the Crown Solicitor's Office?

SAUNDERS: Yes.

PRESIDENT: And electronic copies. And we thank the parties for taking the time to actually combine their authorities into a single bundle. It's very convenient.

SAUNDERS: If the bench could go to tab 3, the National Wage Case (1983) 4 IR 429?

PRESIDENT: We've just managed to get into the Industrial Reports. Volume 4?

SAUNDERS: Yes.

PRESIDENT: Excellent.

SAUNDERS: This is the genesis of much of the contemporary drafting, not all of it, and there's some movement historically but much of the contemporary drafting of the current wage-fixing principles. If we go to p 45 of the bundle, it is, of course, the National Wage Case, giving effect to the first prices and wages Accord--

PRESIDENT: This is p 441 of the report?

SAUNDERS: Correct. Under the heading Requirements of Full Indexation, the true function of the principles are explained and, in particular, the principles imposing wage limitation, which we see replicated today in the current principles. It's a counterbalance to the restoration here of full CPI indexation, it's part of the balancing act they're meant to provide. If we go to p 57 of the PDF bundle, which is at 453 of the report, at the bottom of the page, the bench commenced, this is by way of illustration. The bench there commences the principle for Work Value Changes--

PRESIDENT: Just start that sentence again? I was just--

SAUNDERS: This is an example of where these matters come from. We see at the bottom one of the limitations that are now imposed, to ensure that wage movement outside of national wage increases is limited, the introduction of the work value changes principle. It continues over the page and the bench will recognise most of this language. Talk about the need for identifying change, most obviously at "(f) The Commission should...over-classification of jobs." This is found in today's principles. This is designed to complement generalised wage growth. It also, at this point in time, sat next to the inequities and anomalies principle, which dealt with just general work, comparative ...(not transcribable)… work undervaluation but it's that clear mandatory language. The reason it is is because in this decision, the Commission was determining what would, in fact, happen. It wasn't setting guidelines of the kind the bench is now contemplating. The language was appropriate then, appropriate in the chain of decisions that merge into the current wage-fixing principles, with some amendments, but different to the exercise that we're currently undertaking. This is why the FBEU has redrafted the principles, it's to give effect to what everyone agrees they should be rather than language that's likely of someone without recourse to the industrial reports picks them up to look like binding decision rules. This is so evident in the parts of the principle that are drawn other than from these mandatory national wage decisions. An example is the equal remuneration principle. This isn't in the bundle but I will just give the Commission the citation. The National Wage and Equal Pay Cases 1972, 147 Commonwealth Arbitration Report 173--

PRESIDENT: Just give that again.

SAUNDERS: 147 Commonwealth Arbitration Reports 173 concerned the implementation of the new principle of equal pay for work of equal value, notably at 179. The Commonwealth Commission, in dealing with issues raised, added this to the principle, "The automatic application of any formula which seeks to bypass a consideration of the work performed is, in our view, inappropriate to the implementation of the principle." What they're talking about there is straight comparative based relativities analysis in a way that worked at that time in the federal system, adopted wholesale in the State Wage Case, ...(not transcribable)… State Equal Pay Case 1973 which is 73 Industrial Reports 425 adopted word for word and it is now found, still found, at

11.4 of the current wage fixing principles notwithstanding that the formula it references has no real application in this jurisdiction and doesn't make sense in the document as a whole. It's this archaic language because of the long history, which is sought to be retained in the FBEU's drafting, in spirit that difficulties can arise.

PRESIDENT: But the primary contention you're putting to us is that the language that's been adopted in the current wage fixing principles which is in mandatory terms is because they are words which were originally drafted, potentially, in mandatory terms.

SAUNDERS: Correct.

PRESIDENT: In a legislative context in which that was not inconsistent with the exercise of the relevant statutory discretions whereas now it is. Now it would be to treat them in the mandatory way in which they appear to be drafted.

SAUNDERS: Yes. The parties are - it's one of the few things we all agree on as one in that they cannot operate in the way that the language they're drawn from was designed to do.

PRESIDENT: So how are they useful to a member of the Commission going forward if they are merely guidelines, in what way are they then used by the Commission member or, if it's a full bench, members when a party such as, take for example the FBEU says well that's that the guidelines say but you don't need to actually apply them, you can grant this application based on comparative wage justice because fire fighters in Victoria are paid this much and that alone should be sufficient for you to grant our claim to the extent to which the guidelines say, otherwise feel free to ignore them because they're guidelines.

SAUNDERS: Yes, anything is possible but what they operate is an expression of structural stability. It's more a question of comity than anything else. It's an expression of how the Commission intends to, as part of a centralised decision making process that this bench represents, approach these questions. Of course things can be departed from, that's true now. Say for example the recent decision of Commissioner Muir in the Mid North Coast in which the Commissioner quite correctly entirely ignored the superannuation principle and granted additional superannuation payments notwithstanding that there was no expert evidence saying this wouldn't contravene tax codes. The point is it would need to be persuasive. They also have a sequitur effect of assisting the community at large, the parties in understanding how the Commission is going to approach these things in the ordinary course, but they can't go any further than that.

PRESIDENT: So something closer to simply precedent.

SAUNDERS: Closer but not quite at that level because they just cannot have that binding force without the Commission either expanding its own jurisdiction

or improperly tying its own hands. We are talking, though, about wage fixation which is a difficult and fluid concept. To some degree, for example, consider the approach to work value, your Honour's Commissioners are making a decision today as to what a work value assessment involves or means, what gender-based undervaluation involves or means and the matters that are relevant to that, and in that sense it guides the general discretion that the Commission is constituted singly, otherwise ...(not transcribable)...

PRESIDENT: It does what to the discretion? Guides?

SAUNDERS: Guides.

PRESIDENT: Right, sorry, I just didn't hear the word. Yeah.

SAUNDERS: Turning to the persuasive onus or presumption question, this isn't part of the current wage fixing principles but Mr Boncardo is quite correct it should be dealt with by this full bench as it's a matter that's been expressed by several full benches in the past. It would be necessary for it to be reconsidered by a five member full bench in the ordinary course. This is the right moment to consider the matter. In terms of the difference between a presumption and a persuasive onus, it depends what the Secretary means by rebuttal or presumption. If it means that an applicant has to make out a case that the change they propose or the new addition they propose sets fair and reasonable terms and conditions of employment that's one thing, but the submission that was made today was that if the applicant made out a case that the conditions were not fair and reasonable, that would almost certainly displace the presumption. It illustrates the difficulty with the use of language. What a rebuttable presumption is, is something that needs to be disproved. It changes the nature of the persuasive exercise and it changes the nature of the evaluated judgment that the bench is being asked to make. It's a difficulty here because fairness is a spectrum, more than one thing can be fair at any one time. Minds can differ about these matters. There is an additional difficulty with presuming that awards as made were correctly made. It raises it to something like needing to prove jurisdictional error in the first place and it's just all this language, these tests, that find no home in the Act. It doesn't mean that the awards are disregarded or that a case wouldn't need to be made out for change. That's just the ordinary operation of the exercise, but adding in this additional language, all it is likely to do is place an additional burden on inevitably applicants, inevitably, almost certainly not the Crown to display something that isn't there. Unless there was anything further.

PRESIDENT: No, thank you. Who wants to go next, Mr Britt?

BRITT: Thank you, your Honour. Your Honour, a large part of this question really arises as a result of what's been described as the period 2011 through to 2023 and some alleged wage suppression that arose during that period of time. My client didn't enjoy that burden, that is the award rate set in the Local Government Award were not constrained by the government's wage fixing policy. So to some extent my client sits outside this argument at least in relation to the period 2011 through to 2023.

PRESIDENT: Can I just stop you, Mr Britt, and this just shows that I need to be tutored a little on Local Government. The Local Government Award sets, am I right, minimum rates. The actual rates that are paid are then determined at a council level by way of either enterprise agreements or perhaps some other form of agreement that's reached at a local level.

BRITT: You're right, your Honour. Since 1992, so a period of 42 years, in respect of the main Local Government Award, it's been a consent award negotiated between the industrial parties. The award is a skill-based award, so it describes a range of skills and gives a minimum rate of pay. Councils are then mandated to have salary systems. The salary systems are in addition to the classification rates in the award and it will provide for a series of classification bands, levels and people then move through those bands and on occasion can move across bands. In addition to that some councils have enterprise agreements on top of that which some of those agreements set wage rates for certain types of employees and, of course, they are free to pay above award rates. So a large number of issues in this case such as attraction, retention, local government deals with them differently and it wants to continue to deal with it differently, the way that it has done, and done successfully for the last 42 years.

So we are in an entirely different situation than everyone else at the bar table, but we are concerned that wage fixing principles are made that potentially constrain how the industry, not just my client, but the union parties, have operated for the last 42 years and, we say, successfully operated, and we don't want wage fixing principles that impede the way things are done and have been done under the existing principles.

Having said that, we say, pursuant to s 10 of the Act, there is a presumption, it's an evidentiary presumption, it has been recognised in a large number of cases in this Commission including multiple full bench decisions. As was set out in our submissions, you need good reason to depart from these earlier full bench decisions in order to so depart. We say it's not a real hurdle because, at the end of the day, when the Commission comes to varying an award or making an award, there is an onus on the applicant to support the making of a new award and/or support the variation of the award. If you can't rebut the presumption, you will not be able to rebut the onus on an applicant to make an award or vary an award, and it's not just this Commission which has said that applicants, when it comes to varying awards or making awards, bear the onus.

We refer in our submission to the decision of the Court of Appeal in the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary of New South Wales [2021] NSWCA 64, in particular, at paras 53 and 59, I think it's a decision your Honour may well be aware of because I think your Honour may well have appeared in it, where the full bench of the Court of Appeal dealt with the question of onus when it comes to making and/or varying awards. Similarly, the Supreme Court in the Secretary of the Ministry of Health v The

New South Wales Nurses and Midwives' Association [2022] NSWSC 1178, at paras 466 to 467, deals with the issue.

So that is, there's binding authority on this Commission on the question as to who bears the onus once an award is being varied or once an award is being made. They're slightly different issues, the presumption in the onus, but we conceded they're interrelated but, as I said earlier, if you cannot meet the onus, the presumption, which is less, will also not be met. Of course, this onus not just applies to employees but will also apply to employers who seek to vary an award.

In many respects, the differences between labour counsel and my client and, for that matter, the Secretary, are really subtle. In fact, they may be so subtle to really have no distinction at the end of the day in a practical sense, given the issue of onus on an applicant. Unless the Commission has any questions, they are our submissions.

PRESIDENT: This is, perhaps, a question that other parties may wish to weigh in on before we move to the next issue, while you're on your feet, Mr Britt, one of the things that Mr Saunders said, and something you've just said, has made me think of this question. You don't suggest, do you, that what you call a, you do call it a presumption, requires a party to convince the Commission that the award, when made, was not fair and reasonable?

BRITT: No, it's not a question of judicial review, but we as--

PRESIDENT: You don't have to find error in that regard.

BRITT: No, you need to find change and, in fact, you might need to find something other than change too but, certainly, you need to find change.

PRESIDENT: Yes, but you may not even need to find change. You may need to merely convince the Commission that it's time for a new type of condition to be introduced. Whether it's working from home or certain types of personal leave that haven't been recognised in the past, you may need to simply persuade the Commission of a need to do something without derogating from the fact that without trying to suggest to the Commission that it was wrong for the award not to have contained that up until now.

BRITT: That's agreed, your Honour, and that's also, to some extent, reflected in State decisions. You could have a State decision that deals with a new type of leave and then, in fact, not only could that be included in an award, it would certainly meet the onus in s 17, varying an award to include something that has arisen from a State decision. So no, it's not suggested you need to find error. Change is one circumstance. Something new is also, potentially, another circumstance.

VICE PRESIDENT: Just taking up the President's scenario, in that circumstance, does it necessarily mean that the onus must be to overturn a

presumption that the existing award is somehow unfair because it lacks the new condition that's being sought to be inserted?

BRITT: Well, (1) you measure the existing award when it's made, and there may well be new circumstances, but you don't need to show that it's unfair. I concede that.

VICE PRESIDENT: Sorry, I'm having difficulty with it. What is the utility then of that presumption if it's not to apply universally?

BRITT: To the extent that the award deals with something, you would then need to show there's been a change in circumstance.

PRESIDENT: If I deal with personal leave, then there may be no change in circumstance other than a societal view that there needs to be a different, additional type of personal leave.

BRITT: Yes, but the award hasn't dealt with that additional type of personal leave.

PRESIDENT: I see.

BRITT: I'm not saying these are easy concepts, because they're not.

PRESIDENT: No, you just have to be on your feet while we're thinking of these questions.

BRITT: No, I'm happy to take the questions.

PRESIDENT: All right, thank you, Mr Britt. Mr Latham?

LATHAM: Your Honour, I'll just be very short. The APA accepts that there's a practical obligation upon any applicant in relation to award variation or a new award to put forward evidence as to why that award should be made or the award be varied, and I think, whether that's described as an evidentiary onus or a presumption probably detracts from the obligation upon the parties and upon the Commission to assess those arguments.

I think there are two slight exceptions to that. The first is there may be situations where an onus or a presumption, however you describe it, and I'm being agnostic on that point, doesn't need to be satisfied in the strict sense. For example, there may be consent variations where one doesn't need to get into that exercise.

There may also be a further exception where it might be dangerous to have a presumption that an existing award is fair and reasonable, for example, where that award might embed long term gender underpayments in relation to pay, for example. But subject to those subtle distinctions, I think, in a practical sense, there is not a great deal of difference between the position, I think, being put by the various parties.

PRESIDENT: Before we move to the next issue, is there anything that anyone wants to say in response to what's been said? Mr Meehan?

MEEHAN: Might we simply make a submission supporting what our learned friend, Mr Britt, said in answer to the proposition that there might be some need for demonstration of jurisdictional error or error that we respectfully agree with his submission, and we submit Mr Saunders' submission went too far in that regard. One doesn't have to demonstrate some error or that the award, as made, was unfair when made, your Honour.

PRESIDENT: Yes. Yes.

MEEHAN: And I think Mr Saunders submitted that the rebuttal presumption changes the nature of what has to be proved. We submit the bench would not accept that. There's no difference in standard of proof and what has to be proved is that the contended for terms and conditions are fair and reasonable and should displace the existing terms and conditions because they are no longer fair and reasonable. That's not changed, whether one characterises the onus as underpinned by a presumption or evidentiary onus.

VICE PRESIDENT: Well, you say necessarily the change must signify that the existing terms and conditions of the award or instrument are at the point of assessment unreasonable or unfair--

MEEHAN: Not unreasonable, your Honour, no.

VICE PRESIDENT: But, in some way, unfair?

MEEHAN: No longer fair, picking up the statutory language, I hope faithfully, no longer fair and reasonable conditions. And it doesn't have to be in a universal sense. It has to be in respect of the conditions sought to be varied or displaced.

VICE PRESIDENT: If the Commission were to vary an award to include a provision that is fair, and to do so in respect of an award that's not otherwise unfair or unreasonable, wouldn't it still be discharging its statutory function under s 10?

MEEHAN: Well, it would depend on whether the award being made or the variation being made was in respect of a subject matter already dealt with by the existing award. And it would be, in our submission, incumbent on the Commission exercising its power to evaluate and be satisfied by the applicant for change that the existing award prescription is no longer appropriate because it is not a fair and reasonable term. That might not be a straightforward exercise, we accept that, because there might be a particular provision in an award may not be thought to be comprehensive and an applicant for a variation might be seeking to have a more prescriptive award term in respect of that subject matter. So we accept at a level of abstraction that the mere existence of a term that might still be in and of itself fair and

reasonable would not necessarily exclude a supplementation of it. And that really supports the notion that we advance, that one doesn't have to demonstrate some error or unfairness in point of time when the original award was made. That's not what the presumption is there to signify. If it please the Commission.

MCDONALD C: Actually, Mr Meehan, Mr Britt's submitted, I think, that the presumption was a lower threshold than the onus. I mean, do you see a difference in the thresholds of those two things or are they the same thing?

MEEHAN: No, we heard that, and we heard Mr Britt say that. Whether that was quite what he intended, we're not sure? We don't accept that presumption is some lower threshold of onus and I don't know where that proposition would be derived from.

MCDONALD C: No, indeed. Perhaps I should ask Mr Britt. Mr Britt, why do you say that?

BRITT: We say (1) because it's an evidentiary onus and, in most circumstances, it may turn out to be equivalent, but I can see situations where it could be less than the onus in s 17 or the onus in making - that is the presumption is less than the onus.

MCDONALD C: So can you give me--

BRITT: One is a presumption and one is an onus.

MCDONALD C: So can you give me an example of how they might operate differently?

BRITT: Only theoretically. It is possible that someone could rebut a presumption but not meet the onus on an applicant, but I can't give you a live example. It's more of a theoretical perspective. And I think I've conceded, most circumstances, if you rebut the presumption, you've probably met the onus or you have met the onus.

MCDONALD C: Thank you.

PRESIDENT: Do you have any questions?

SAUNDERS: Just to take up your Honour's invitation, to be clear, I did not actually submit that applicants are presently required to establish some--

PRESIDENT: We knew that.

SAUNDERS: Yeah, just checking. The problem with the whole presumption, apart from the fact that nobody can consistently identify what it is or when it applies, which does suggest a degree of difficulty, is its presumed statutory source. The justification, if one returns to the pastoral industry case that started the chain of reasoning, is that because the Commission's task is to

make awards that are fair and reasonable or that set fair and reasonable terms and conditions, and it has made an award, that award must be something that sets fair and reasonable conditions. It doesn't follow logically as a question of statutory construction. This isn't a question about should apply. It's what the Act requires. And these ideas of rebuttable presumptions, things that are assumed, just do not have a statutory source, that's the difficulty.

PRESIDENT: Excellent. It's one of those issues that only a group of lawyers could spend a good hour debating. Let's move to something, and then to the next issue, issue 3. This is an issue of real substance, that is, this issue of maintain the real value of award rates of pay and, in some ways, it's linked. And one of the questions that I might ask the Secretary to address in a moment is if there is a presumption that at the time the award is made, that it's fair and reasonable, does it not follow that therefore there's a presumption that it must be changed in to continue to be fair and reasonable? And I accept that the Secretary doesn't put that, but, logically, there seems to be some connection between the two. But could I invite Mr Boncardo to start on this issue?

BONCARDO: If your Honour pleases. My client has for perhaps over a decade without success sought to agitate a principle that would require the application of a presumption of the kind that your Honour has alluded to, that is when inflation or costs of living increases occur, that should be reflected in wage values to maintain the real value of those wages. We have adopted a slightly different position in these proceedings and it is one which isn't, in our respectful submission, properly reflected in the Secretary's response to our submissions at para 14 of their submissions. And our position is that there should be a principle reflecting that an application can be made to recognise or take account of increases in inflation and changes in the costs of living. That, we think, is a practical matter and should be included in the wage-fixing principles.

The matter that the Secretary takes significant issue with is our suggestion that a wage-fixing principle be included, that the Commission take into account or have regard to the imperative to ensure the maintenance of the real value of wages. Now, we are not putting that forward as requiring the Commission to reach a result that ensures the maintenance of the real value of wages. We're simply putting that forward as a relevant consideration that goes into the mix when the Commission discharges its statutory function and duty. It is something that ordinarily will go into the mix in the decision-making process and it is something that, given the notoriously high inflation and costs of living increases that members of the community have experienced, at least since 2021, that we think has particular practical importance at the moment.

There's a contention put that what we are suggesting will somehow fetter or trammel the exercise of the Commission's discretion. That is not how we are putting it. We are not putting it as mandating anything at all. Rather, what we are contending for is a principle that directs the Commission's attention to what is really a fundamental matter--

PRESIDENT: Yes.

BONCARDO: --and that is the maintenance of the real value of wages. Going back to the matter that you articulated at the outset, Justice Taylor, that is whether there should be a presumption that, with changes in inflation or costs of living, rates and conditions under awards should themselves change. There is practical force in that observation in my respectful submission. Ordinarily one would expect that to be the case but we do not suggest that there should be some automatic translation of costs of living increases into award increases. That is a relevant matter and certainly my client and its affiliates will no doubt be contending that it is, perhaps, the most relevant matter but we don't say, and it shouldn't be taken as saying, that there is any automatic or presumptive increase that ought be applied.

PRESIDENT: Mr Boncardo, can I take you to the text of the proposed principle that Unions NSW suggest in this regard and it's effectively two sentences. The second sentence starts or reads:

> "In determining fair and reasonable conditions of employment the Commission will take into account the imperative to ensure the maintenance of the real value of award rates of pay and conditions."

The words "the imperative to ensure" do tend to invite a level of something more than simply one of the factors you take into account. It does, it's language which gets close to, perhaps doesn't go as far as the Secretary's submission that it's mandating an outcome but it does go along the way, does it not?

BONCARDO: I appreciate that it can be construed in that way and it's certainly peaked Mr Meehan's interest in that respect.

PRESIDENT: Yeah.

BONCARDO: There would be in our submission little, if any, difference made if those - there would be little, if any, difference made if those four words were excised. Because it certainly isn't our intention that they apply as a relevant consideration in the Peko-Wallsend sense.

SENIOR COMMISSIONER: But you had submitted it is the most important from your client's position.

BONCARDO: It often will be the most important. It often will be and that will be a submission that will likely be advanced by my client and its affiliates and it will be addressed by the Commission on the merits.

SENIOR COMMISSIONER: Right, but depending on each case.

BONCARDO: Most certainly.

PRESIDENT: Thank you, Mr Boncardo. Why don't we stick with a sort of union verse then employer position on this, so Mr Saunders, do you want to go next?

SAUNDERS: Thank you. The absence of an express consideration of the need to at least have regard to the maintenance of real wages is one of the central problems with the current wage fixing principles. It demonstrates how they have become unbalanced from their initial purpose. So a result of the quite historic cessation of national flow on to all but a small number of awards, a problem that was disguised by the application of the State Wages Policy for a long time until 2020 where the decision to attempt a wage freeze exposed the issue. The wage fixing principles contained strict limitations on wage growth. The implementation was a trade-off for the introduction of steady wage growth in a national regularised way largely to do with CPI, although with a long standing historical recognition of the need for real wage growth and not just maintenance for employees to have a share in national productivity.

I've talked in the written submissions about the concept of automatic indexation. It's what it was called and it's certainly a useful way to describe the concept we're talking about. It's not, and much like "imperative" it suggests slightly more automatism than is necessary, even in the National Wage Case in 1983, it was accepted that, of course, there was some circumstances where full indexation would not be passed on. It's an economic question. It's more about - I don't want to, I am reluctant to say presumption, but it's more of a central idea that wage growth is normal. It's part of the processes. It's not something unusual. It's not something that is solely here to be restrained. The idea of including regard for real wages that the need for wages to maintain and grow, it is linked, of course, to the presumption question. It's also linked to bargaining and the Commission's role in facilitating functional mutual gains bargaining in a sector where it has not been operative or operative in any serious way outside of local government for some time.

The FBEU supports the inclusion of, if the current structure is maintained, a principle requiring the Commission to, in the ordinary course, have regard to real wage growth. It sits oddly with the current structure. The rest is things will not happen and then you suddenly have, if it does happen, the Commission will think about this, so that's the reason the FBEU proposal is slightly different. Could I ask the bench to go to the supplementary report book behind tab 2b. It says, "The cosmetically changed FBEU proposal," if I can just take the bench through how we deal with this balancing act. It starts at p 31 under the heading "Wages and Conditions." "The introduction of the idea of a properly fixed rate properly assesses the work value and has been maintained." I should say correct regard to work value considerations would incorporate an absence of gender-based undervaluation. The second section is mutual gains bargaining which recognises both the importance of it within the Act and the Commission's role in facilitating and encouraging it. The extra claims point is dealt with here but I will return to that later, but we get to then annual wage increases which is the recognition of wage growth there. It's not so much the Commission will have regard to it, it's setting out what the ordinary expectation not necessarily guarantee, the interpolation of a pandemic is precisely the kind

of extraordinary situation that might warrant change, but the ordinary expectation that informs the rest of the constrains within the principles allowances at 9. At 9--

PRESIDENT: Just before you go--

SAUNDERS: Yes.

PRESIDENT: I'm sorry, I was going to ask a question about 9. Sorry, keep going.

SAUNDERS: Nine, 10 and 11 travel together. It's the structure by which the wage growth principle is given life. There is the ordinary one recognising the Commission's obligation to consider the annual wage increase. The index 1 awards are the ones that are currently increased by, that my client has no interest in, that are currently increased by the State Wage Case.

PRESIDENT: Yes.

SAUNDERS: So that's meant to just replicate the current practice and obligation. At 10 deals with everyone else, i.e. actual employees of the State of New South Wales. It provides a pathway where there hasn't been an increase for 12 months. And application can be made. Again, it's not a guarantee or a handcuff or anything as exciting as that, a process by which an application be made to have access to the State Wage Case increase. Not automatic flow-on, but a pathway to finding it. That application would need to be determined on its merits and point 11 sets out matters that the Commission would have regard to, the status of bargaining, why delay the likelihood of an agreement being reached. It's to deal with structurally addressing the reality of public sector bargaining which is no criticism of anyone that it can take a while that employees should not be necessarily deprived of ongoing wage growth because of just the structural issues, but also incentivising bargaining to perhaps not take as long.

PRESIDENT: If para 10b were to be applied, does it follow that necessarily the State Wage Case would need to do two things, it would need to do what we just did earlier this morning when we handed down our decision and consider an annual wage increase in respect of what you describe in your principles as the index 1 awards which it would not need to have the same regard as might otherwise apply to public sector awards where the bulk of employees are to be found, matters such as the budget and the impact on the fiscal position of the State of New South Wales and the like. But if that decision were to set a change that could, under 10b, be the subject of an application in respect of your client's members, for example, nurses, teachers, police officers, where Mr Meehan's client or her related secretaries have a strong interest, they may take a quite different approach to that State Wage Case and there may be a need for us to hear the sort of material that we did not hear this time round. Is that what you envisaged? That is, that at the State Wage Case point, the bench would actually be considering a percentage increase which could then be the subject of an application by a

public sector union or, for that matter - and I'll maybe deal with local government separately for the moment - a public sector union to make an application that their award simply be varied to reflect that percentage increase absent any other considerations without the parties, again, needing to hear all the evidence about the fiscal effect on the economy, et cetera, et cetera.

SAUNDERS: No. The reason is this. It's not intended to be automatic flow on. The intent of this provision is to provide access to the State Wage Case and increase all such other increases the Commission considers appropriate. The idea would be that because it's a question of whether it should happen, that economic evidence is led in the particular award. The impact on the economy for an increase for my client today is likely to be quite different than, for example, the entirety of New South Wales Health. There are different subsectors within it and it's dealt with on a case by case basis but the drafting doesn't need to be refined to reflect that. Certainly, it's not intended to set up an entitlement. Of course, the FBEU can apply today to have the State Wage Case increase flowed onto its awards. Good luck to it. It's just about setting out a process rather than opening any new mandatory guarantees or anything like that.

PRESIDENT: Yes. I'm just concerned about the inefficiency of multiple cases, each of them having expert evidence and the like. I'm also mindful of the fact that to date, anyway, it's usual for the person who is the employer on the government's side to take what might be said to be a, whole of government approach, to an increase such that it may actually be convenient for this to be dealt with once for the public sector without, I accept, ultimately constraining the parties in any particular application that that broad position should be departed upon, perhaps because on the union's side, they say their members are being particularly effected by some aspect that was generally considered, and on the Secretary's side, to take into account that this group of workers have had more significant increases in the past and shouldn't therefore be treated the same way.

SAUNDERS: It's certainly an option. The point of this structure is just to set out a path for steady wage growth, which is what I understand the intent of Unions NSW application. Likely to be messy at first but if I could observe, your Honour, the idea that it would be this disorderly process of various stakeholders running two week cases with expert evidence to get a CPI increase, that is happening now.

PRESIDENT: I know.

SAUNDERS: The point of this is to try and structure something to avoid that, including by incentivising slightly faster decision making in respect of bargaining. It's a question of leverage which the current wage fixing principles critically lack. But there's a number of ways to do it as we've said in the submissions, this is just a suggestion. The point is a mechanism for wage growth rather than just a principle saying that you're allowed to take it into account, which helpful to write it down but the Commission already does, that was made clear in the 2020 public sector wages case.

PRESIDENT: Thank you, Mr Saunders. Mr Latham, do you want to say anything on this topic?

LATHAM: Just quickly. The APA doesn't submit that the process of economic adjustments should be an inflexible principle which mandates a particular outcome but it is a principle that the Commission should have regard to, and it appears that all the parties today, at least in theory, support maintenance of real wages. It really seems that the issue is, how has that manifested in the principles or if it should be manifested in the principles at all? If the principles are to be a comprehensive way of looking at how wages are to be determined in this system, it should be in those principles, at least as an ambition. I think if the Secretary doesn't support that in principle, it should say why. I don't have anything further on that point.

PRESIDENT: Mr Meehan?

MEEHAN: We should start by indicating, the Secretary is supportive of maintaining the real value of award rates of pay overtime as part of consideration of multiple factors and the Secretary contends that no principle should be adopted. May we first respond to the FBEU contention, which as one has seen from the proposed principle, contends for presumptive access to annual wage increases which would repair any erosion in the real value since the last increase, including a protective component and allow for real growth.

We submit that formulation of a principle would, contrary to what we indicated in opening, had been accepted. Namely, that the principles should not be intended to have a practical status as a decisional rule. This would have the effect that there is, presumptively, an annual wage increase to ensure the maintenance of real wage rates having regard to inflation. The most cogent argument against adopting a principle of that kind is that the Commission is required by s 146.2 to take the public interest into account and must have regard to the state of the New South Wales economy and the likely effect of its decision on the economy. In respect of the exercise of the Commission's functions in the case of public sector employees, the Commission must take into account the fiscal position and outlook of the government and the likely effect of the exercise of its functions on that position and outlook.

PRESIDENT: Mr Meehan, do I understand, the difficulty you have with the suggestion that it be considered annually is the suggestion that whatever the CPI change has been, it simply be applied because that would fail to take into account that we must consider a range of matters. But do you have the same difficulty with the principle that would require us to consider whether or not to do so on an annual basis?

MEEHAN: we submit the Commission, ordinarily, when exercising its functions, its award making functions, does take into account inflationary factors, that it has done so for a long time, as does the Federal Commission in the exercise of is different powers but in relation to the modern award and minimum wages. The Secretary submits, there is no need for a discreet

principle that would elevate the objective of real wage maintenance to some principle, and as we submit, almost a presumptive decisional rule in the case of what is being advanced by the FBEU.

Unions NSW is advancing something different. My learned friend has dealt with the criticism we make of the language of imperative, and that does address a principle issue of concern to the Secretary. Namely, the notion that this principle, if one were to be adopted, would in effect erect the maintenance of real wages in and of itself that would be subject to, as we have submitted in opening, the paramount force of the statutory mandated considerations which might tell against in a particular year, might tell against an outcome that maintains real wages. And the fiscal position of the government in a particular year might be such that, notwithstanding high inflation, that it is regarded by the Commission as inappropriate to maintain real wages.

PRESIDENT: Mr Meehan, I don't have any difficulty with the submission you make that both this tribunal and the federal one regularly takes into account costs of living. I struggle though to find where in the current principles that can be done other than under the special case principle. If you are arbitrating, therefore you must come within one of the arbitral principles, it's clearly not change in work value, it's not underpayment on gender grounds. Is there any principle other than the special case principle that can currently be considered?

MEEHAN: Not directly, no. Your Honour is right, with respect.

PRESIDENT: And you'd accept, as a matter of principle, there's nothing special about inflation affecting employees covered by an award. Almost by definition, it's the opposite of special. Every award will be so affected.

MEEHAN: It's a factor that we would accept it would be inapt to characterise it as special, yes. But the absence per se of a principle directing attention to that issue does not interfere with the exercise of the statutory power, which permits that to be taken into account in setting of fair and reasonable terms and conditions. And we respectfully submit that having regard to the nature of that power, it is unnecessary to have a principle and certainly inapt to adopt a principle of the kind that is being advocated for by the unions because it seeks to do what we have submitted the parties have conceded is inapt and that is frame it as though it is an imperative or a fixed objective.

PRESIDENT: What do you say to Unions NSW proposal with those words of reference to imperative excised?

MEEHAN: That doesn't wholly cure the--

PRESIDENT: So--

MEEHAN: That doesn't wholly cure the difficulty, your Honour, because the language that changes in the living costs of employee, et cetera, may constitute a basis for increases in wages and salaries, without a party needing

to make out a special case, is suggestive of the notion that inflation per se, without the other mandatory considerations, is a foundation for a wage increase and we say that is not a proper reflection of the paramount force of the mandated statutory consideration.

PRESIDENT: But assuming that the principles in some way identify that all principles have to be applied by reference to mandatory considerations, whether it's this proposed principle or the current principles, such that anyone considering the Unions NSW principle would need to also consider matters such as fiscal state of the economy, gender equality, the other mandatory considerations, does your client's concern then fall away?

MEEHAN: Well, the answer, perhaps unsatisfactory answer, is I can't answer that directly without further instructions.

PRESIDENT: And perhaps this is, you know, one of those sort of lawyer points, but that point that I'd raised at the outset, if the Secretary takes the position that at the time an award is made, it is presumed to be fair and reasonable, then does it not follow that if inflation over the following 12 months has been 2% that there's a presumption that in order for that award to be fair and reasonable, it would need to be increased by 2% and a presumption it could be overcome by a variety of factors, but that is the starting point, because it would only be fair and reasonable if the rates of pay in real terms were the same as when they were made?

MEEHAN: I can't accept that proposition, at that general level of abstraction, your Honour. It would certainly be how inflation had run since the making of the award, we would readily concede, must be a relevant factor--

PRESIDENT: Yes.

MEEHAN: --but we can't accede to the proposition that, presumptively, it would render the award that had been made as no longer fair and reasonable.

PRESIDENT: Are we able to move on, Mr Meehan?

MEEHAN: Yes.

PRESIDENT: So, Mr Britt? Thank you. Mr Britt?

BRITT: Your Honour, I support the submissions of my learned friend, Mr Meehan. Can I make a number of observations? First of all, I think your Honour, in a question to Mr Meehan, referred to annual. The principle proposed by the Labor Council doesn't set the period over which inflation and wages are to be measured, and that's a concern--

PRESIDENT: Mr Boncardo's opening remarks would suggest he's looking at something longer than the last 12 months.

BRITT: Yeah, and I understand. And that becomes a concern. How far back does one go, to measure? So, in the case of my client, notwithstanding, we say, as set out in the affidavit of Mr Danzig at para 36, that since 1991/1992, wage increases in the local government sector have been in excess of the rate of inflation, but if over the next 18 months, they're less than the rate of inflation, are we then faced with a further increase or do we get credit for other periods of time when the wage increases have been in excess of the rate of inflation? So how one measures, over what period of time one measures are not dealt with in this particular principle--

PRESIDENT: One way or the other, I think you'd accept?

BRITT: Yes.

PRESIDENT: It's not dealt with one way or the other.

BRITT: That's right.

PRESIDENT: It doesn't close off either potential argument. It certainly would allow your client, for example, to pray in aid past increases in real terms and for the union to point to some shorter period that it is more concerned about.

BRITT: All that's going to do is create an argument. What we would--

PRESIDENT: Well--

BRITT: --which is good for the lawyers in the room, but what we would really look for, if a principle of this nature was to be included, that there be some certainty.

PRESIDENT: And by that you mean a time period?

BRITT: Over time periods, credit given to increases above the rate of inflation--

PRESIDENT: Well, you can't have both, can you?

BRITT: --over that time period.

PRESIDENT: I see. So you would be looking at a longer time period? I must admit, when I thought time period, I assumed you meant since the last increase, but you're actually contemplating a longer time period?

BRITT: Well, because the principle contemplates a longer time period.

PRESIDENT: Yes, I understand. Yeah.

BRITT: It doesn't specify over the life of the award, over the life of wage-fixing principles.

PRESIDENT: Sure.

BRITT: It would allow a person to go back or a party to go back beyond the creation of the principle, to reassess whether wage rates have kept pace with inflation. Secondly, it fails to take into account other social payments that employees may receive, such as income support, such as changes in tax rates, that ultimately what people are concerned about is their take-home pay. And it fails to take into account those matters. I accept what Mr Meehan said, that the rate of inflation is quite clearly a matter that the Commission needs to take into account and we don't quibble with that. What the proposed principle also doesn't take into account is where the parties themselves, rather than focus on a wage increase, look at including other benefits in the award, which come as a cost to the employer, such as enhanced leave, enhanced long service leave, greater flexibility in taking sick leave, where the parties have decided that in the interests of both the employers and the employees, we want to improve conditions, rather than give a percentage salary increase and the principle doesn't acknowledge that, nor does the principle acknowledge, as has happened recently in the Local Government Award, (1) increasing rates of pay but then also providing cash payments in addition to that. Those cash payments don't change the rates of pay in the award, but what they do is give the individual employees a further sum of money and the principle doesn't take those types of matters into consideration and they need to be taken into consideration. This type of principle was first floated by the Labor Council in 2010. The Commission didn't accept it. Mr Meehan's client and my client opposed it. We continue to oppose it today. But we recognise that considering inflation is an important matter when it comes to setting the wages of employees.

PRESIDENT: But I think your broader point, Mr Britt, is that, and this is the point you made earlier, is that we as a bench need to be careful to consider that there is a difference between the consent positions that might have been reached over the last decade in the public sector where that consent occurred against a background in which unions couldn't in fact obtain more than two and a half per cent compares to the local government where, and I presume your submissions is, was an unfettered consent in that, and so we need to be careful not to undo deals that were done over a ten year period where wages may have been somewhat traded off against conditions and the like by simply looking at inflation alone over a period of time.

BRITT: That's right. That, it was unfettered consent. As in all these matters people are occasionally brought to agreement kicking and screaming, but at the end of the day it was unfettered agreement.

PRESIDENT: We've got a short period before we break. If the people who want to respond to what's being said - Mr Boncardo?

BONCARDO: Can I say two things. Firstly, as you identified, Justice Taylor, there is a deficiency in the current wage fixing principles because absent a special case and increases in costs of living and inflation can, by definition, never be a special case, there is no facility for a union to make an application

to deal with the kind of notorious inflationary environment we have been experiencing in the last few years. That deficiency should be attended to and addressed given, as Mr Latham with respect correctly set out, the Commission is involved here in promulgating general comprehensive wage fixing principles. In respect to Mr Britt's points can I say two things. My client would not have any difficulty if the Commission formed the view that there needed to be a period of time before which an application of the kind contemplated by our proposed 8.3 would be made. That could--

PRESIDENT: A period of time from when? From the time of the last increase?

BONCARDO: From the time of the, from the time of last increase.

PRESIDENT: As per Mr Saunders, whose client's suggestion it had to be at least 12 months from that proposal.

BONCARDO: Yes. And we wouldn't cavil with at least 12 months. In respect to Mr Britt's other contentions that matters that should be taken into account aren't included in the principles, those matters that go into the decision making mix when the Commission actually comes to arbitrate the matter, there is no need, in my respectful submission, for a page and a half of potentially relevant considerations to be set out in the wage fixing principles. If Mr Britt's client or any other employer wants to come along and agitate those matters they are able to do so. The Commission pleases.

PRESIDENT: Thank you. Any other responses? Mr Saunders.

SAUNDERS: Only to Mr Meehan's submissions. The FBEU's proposal isn't for automatic indexation, it's for including within the structure of the principles something that recognises that change in the real value of wages is a basis for a wage increase. It has been recognised by this Commission consistently and every industrial tribunal in Australia, it is a basis. It's not a guarantee. It doesn't mean it's automatic in that sense, but to say that the principles should only contain restraints which again are all limitations that assume CPI repair has no basis. In terms of your Honour's point about the way the FBEU's proposal works, it would, on reflection, be possible and likely more efficient to have it considered as part of the State Wage Case which would have the benefit of the State Wage Case determining wages for some State employees of any significance. Because of the nature of the Commission's power, there would still need to be separate reconsideration when the application was made. The intention is not to limit the matters that the employer could bring to tell against particularly economic circumstances, that kind of thing, it's just indicating that that pathway is there. It would just be done through the standard notification to interested parties of change in the same manner that these questions have been put forward. The Commission, in that respect, is assisted by the stability of wage growth in this sector. It's not hard to tell how awards have changed and just for reference in respect of local government every increase since 1991 is helpfully identified in the text of the award so it is

unlikely that things would ever be forgotten in that respect. That's all I have to say.

PRESIDENT: Anything further arising, Mr Britt?

BRITT: Just briefly in relation to the Labor Council's submission. We're not asking for 12 pages. The issue of one-off payments is easily solved by inserting the words "award rates of pay or payments." It doesn't require 12 pages, it's two words.

PRESIDENT: Can I just indicate this before we break, which may assist when we're dealing with matters of what I might say are detail like this and I am very happy to get it, but our bench is currently minded that the time it hands down the decision it will, before it finalises the principles, It will publish some things that the parties seek their feedback. So to the extent to which there are matters of that type of issue that you have just identified, Mr Britt, it will be that opportunity, otherwise if we try and do that now we start disappearing into a rabbit hole of hypothetical drafting which might mean that we can't finish today, so I do give the parties that indication now. So we're about to break. When we come back we are going to deal with question 9 next. This is the question that deals with - this is probably the other substantive question, the most time consuming question, dealing with productivity and the exhibit that Mr Meehan's client is relying on ...(not transcribable).... We do have some questions as to how the productivity is to be measured in circumstances where the Secretary's submission is that productivity must be measured in order to grant a wage case, particularly in circumstances where you are trying to measure changes in quality which the exhibit makes clear can be a change in productivity over quantity, and also in circumstances where there is no cost saving, something which the exhibit makes clear there are situations in which you can have a change in productivity, a substantial improvement in productivity, without any cost saving how the Secretary understands that would be measured in a way that could be understood to translate in the wage rise.

The last thing that I am certainly interested in, and this emerges out of the current principle I accept, is what exactly it means to say that the employee contributes to the change in productivity as a matter of practicality. What does that mean? I think it's clear that it does not mean that they work longer hours or that they get paid any differently but it's clearly important, on the Secretary's case, that they substantially contribute, oddly phrased in the singular, the employee, in circumstances where one would imagine that certain productivity improvements might emerge because of particular employees working more efficiently and others working the same, whether that leads to different outcomes. But I just flag those things. We don't have the benefit of a witness to ask these questions of so, Mr Meehan, Ms Byrnes, Mr Pararajasingham, we will be asking you those questions and to the extent to which any of them require further time over lunch, we may need to do that. That's the reason we are bringing it forward to deal with straight after morning tea so that if there are issues that are immediately able to be dealt with, we have that chance because it's a principle that's perhaps easier to state but not necessarily easy to understand how it's to be applied in a public sector context as I think your

submissions would rightly identify. So we will break now and we will resume at ten past 11.00.

SHORT ADJOURNMENT

So the ninth question. Mr Meehan, do you want to kick us off?

MEEHAN: May we deal directly with what we understood were the principle issues raised by your Honour, the President, which canvassed the issue of measurement, and the starting point for our submission is in the productivity considerations document. Do the members of the bench have that? It's in the court book.

PRESIDENT: Yes.

MEEHAN: Section 4 of that document deals with measuring productivity in a public sector context.

PRESIDENT: This is page 17 of the court book?

MEEHAN: Yes, correct, your Honour, and perhaps the starting proposition which, perhaps, won't be welcome news to the bench is found in para 4.2 on the third line, namely "There is no single measure of productivity across the public sector." What one, in our submission, helpfully finds is that there are a range of indicators and proxy measures that relate to inputs and outputs, albeit of a specific workforce or setting that can be deployed to assist in measurement, and it is said that they can be both quantitative and qualitative, and one sees in subpara 4.2.1 and, perhaps, a couple of examples, one in a hospital setting and one relating to educational setting.

PRESIDENT: I read them as both being measures of quantity rather than quality. I can imagine teachers, for example, identifying that the quality of a lesson may be enhanced by having greater breaks and, therefore, teaching less often so that they have a chance to prepare for the next lesson, for example. It's the quality measurement that, I suspect, is a particularly difficult one.

MEEHAN: Well, an example, whether one characterises this as quantitative or qualitative might be a measurable outcome, namely, the achievement of an enhanced NAPLAN results by students which one might properly attribute to improvements in the way teaching is carried out. That might involve, picking up on one of your Honour, the President's, observations, not working longer hours but working differently and deploying different models of teaching to enhance the learning outcome. I suppose one could say that is a quantitative result if one can measure the number of students who have improved, or one could say it's qualitative in that it is measurably leading to a different quality of teaching.

Other examples one can give, for example, in policing, and there's a decision in part A in which the Commission was able to, based on evidence, conclude

that, by statistical results, there had been a measurable decrease in crime which the Commission was able to conclude, on the facts, was attributable to improvements in the way that policing was conducted. Again, that is a manner of measurement but one is driven back to the basal proportion there's no single measure and, given the nature of the public sector and the various services provided, that comes as no surprise.

But the focus so far as employee contribution is concerned which, I think, is the second of his Honour, the President's, questions, that might pick up things like training to perform a different role and actually carrying out a role in a different way or performing a particular role by way of a different process, which, in the simplest terms, changes the way they are carrying out their role, so that would be an example that is identifiable and measurable. As to how measurement can be carried out, that is addressed in para 4.3 of the document and we concede that, when one reads it, it potentially throws up further questions that we may not be able to directly assist this bench on today but one does see emphasis on changes in inputs relative to outputs, efficiency in resource allocation that enables service delivery the same, service delivery with fewer resources, and 4.33 touches upon employee contribution, albeit it doesn't take the matter much further in terms of measurement but we do come back to what I earlier said about performance of working a different way to achieve a better outcome for the employer.

Now all of what we have said rather emphasises there is real difficulty in the adoption of a principle that seeks to capture, in a universal way, a method of measurement that would apply globally in the public sector whereas, we submit, that the consideration on a case by case level of productivity related claims for improved wages and conditions can be dealt with with proper evidence including, when needed, expert evidence.

PRESIDENT: The document identifies, for example, in the first line of the first sentence on para 17 under the heading "Productivity and Housing Reforms" should be measured using a context-specific approach. Are you able to assist, does the government currently attempt to measure reforms as it goes - aside from any proceedings where an application has been made on the basis of it, is it something that is part and parcel of government to be measuring productivity change in particular areas?

MEEHAN: Does your Honour mean by that in a routine way?

PRESIDENT: Yes.

MEEHAN: Might I just take a moment? We may not be able to answer that but might I have that short indulgence?

PRESIDENT: Yes, yes, of course.

MEEHAN: We don't think we're in a position to answer that with confidence, your Honour. We can--

PRESIDENT: I was lead - it was the language, for example 4.3, “New South Wales Treasury uses a context-specific approach” as if this is something that it is doing from time to time.

MEEHAN: Routinely.

PRESIDENT: And I was curious as to whether in fact it is doing it, which leads into an issue which I know the parties are at odds about as to whether, as part of negotiating principles, the government ought to actually be providing information about such things.

MEEHAN: Yes. Might we take up the opportunity that’s presented by the luncheon break as your Honour foreshadowed--

PRESIDENT: Yes, of course.

MEEHAN: --to see if we can obtain some instructions that would allow us to answer that more fully.

PRESIDENT: Yes. Can I then take you to a different part of the document at 2.5. Here the author or authors are identifying productivity or efficiency improvements and how they could arise, the first of which, at 2.5.1, would give rise to a cost saving. Similarly at 2.5.3 it gives rise to a cost saving but the other two, 2.5.2, delivering a better service with the same inputs, and at 2.5.4, achieving a large improvement in service quality or quantity with a relatively small increase in inputs would not give rise to a cost saving. Now it is my experience that when unions have sought to identify productivity or efficiency improvements, it has been a common response by government that there needs to be an identification of a cost saving before it can be taken into account in justifying a wage rise. But do you accept that this document would allow for all other things being equal, and by that I mean the other things that s 3 identifies as necessary, it’s substantial, the employees have contributed, it’s measurable, that there could be wage rises justified notwithstanding that there have been no cost savings, there’s only been substantial productivity or efficiency improvements?

MEEHAN: Well that, your Honour, is right, in that the focus is on productivity or efficiency improvements which of their nature do not necessarily entail cost reduction but they may, notwithstanding that they may not result in overall cost reduction, they may result in a reduction in costs per service delivered, for example, even though the overall cost has increased.

PRESIDENT: But that’s not necessary for there to be a substantial improvement in productivity.

MEEHAN: It’s not necessary except that - and your Honour’s question is focussed on what is said in this document.

PRESIDENT: Yes.

MEEHAN: We accept that that is a conclusion that one would reach.

PRESIDENT: And Justice Paingakulam has reminded me that your example of the teacher, the NAPLAN teacher may be an example where there is no change in costs in order to improve NAPLAN results. It's data driven, it's focussing on better ways of teaching and yet there may be, on your example, a substantial improvement in productivity that is identified by a change in quality that would, do I understand the Secretary's position, if that were demonstrated, all other things being equal, be a basis upon which the Commission might, under the productivity and efficiency principle, consider an increase in pay.

MEEHAN: We would have to accept that in point of principle based on the example.

PRESIDENT: Yes.

MEEHAN: Yes.

PRESIDENT: Thank you. I interrupted you.

MEEHAN: I think I would reserve anything further we would want to say in reply if we may.

PRESIDENT: Yes, of course.

MEEHAN: Thank you.

PRESIDENT: Mr Boncardo, can I call on you next?

BONCARDO: Certainly, your Honour. It's obviously trite that productivity is notoriously difficult to measure in a public sector context and for that reason consideration might be given to jettisoning the principle all together but that is not my client's position and that is because the principle, one, reflects or at least picks up on one of the objects in s 3 of the Act, and two, can have productive work to do in a public sector context if productivity and efficiency, and we haven't at this point addressed the difference, if any, between those concepts, but they are different and they should be given different work to do, is understood in a broader way and this document which is relied upon by the Secretary does give some assistance in conceptualising productivity in a broader sense and in a sense that is more apposite to the public sector context. One of the suggestions of the Secretary is to include in their proposed 8.3 examples of productivity or efficiency improvements and the Commission will see, and I think this is at court book volume 2, p 73--

PRESIDENT: Just give that reference again, court book 2--

BONCARDO: Page 73, court book 2. Mr Meehan's client picks up on the matters set out in 2.5 of the report if your Honours have that.

PRESIDENT: I'm struggling with the reference. Court book 2 doesn't seem to get to page 73.

BONCARDO: Mr Saunders tells me it's court book 1. I apologise. My document is entitled court book volume 2.

PRESIDENT: How you name your documents is--

BONCARDO: Yes, indeed. Page 73, I hope, will--

PRESIDENT: Yes, of course.

BONCARDO: --have the relevant provision. My client doesn't have any difficulty with the matters set out being included, so long as they are not understood to be exhaustive. They are illustrative of the kind of matters that might lead to a productivity-based or an efficiency-based increase being granted. We are concerned with the inclusion, however, of what are said to not be productivity or efficiency improvements in the wage-fixing principles. One may accept that what is set out at about point 6 of the page, being a list of four items that do not constitute productivity or efficiency improvements, don't constitute productivity or efficiency improvements but we don't see any need for those kind of matters to be articulated in the wage-fixing principles. We think that the concept of productivity or efficiency is sufficiently pointed to by the examples Mr Meehan suggests in the first amendment to the provision.

One matter we have suggested, which is, unhelpfully perhaps, not underlined in our amended 8.3, I'm sorry, 8.4, is that in determining fair and reasonable condition of employment, the condition will take into account the achievement of outcomes or goals, including societal benefits of work performed by employees. That perhaps goes to this idea of a better quality service being provided and being something that could and should be taken into account as contributing to efficiency or productivity in the peculiar context that we're dealing with here.

PRESIDENT: Just so that I understand that last submission, just where were you in 8.4?

BONCARDO: It's in my client's 8.4.

PRESIDENT: Yes.

BONCARDO: I'll give your Honour the page number in a moment. It's page 148. Now, the word "will" given the interchange we've had today about mandatory matters and the like, can be replaced with should or can, but one of the matters that, in our respectful submission, should be brought to bear is that the employees that we are talking about here are invariably engaged in the provision of services and the engagement in work that is directed to particular objectives of the State and particular objectives of society as a whole and those are matters which should be brought to bear, in assessing the kind of

matters that are set out in 2.25 to the report, so far as service provision is concerned. If the Commission pleases.

PRESIDENT: Just before you sit down--

BONCARDO: Certainly.

PRESIDENT: --Unions NSW seeks to delete the words "in seeking to become more competitive and efficient"?

BONCARDO: Yes.

PRESIDENT: Why is it appropriate that those words be deleted?

BONCARDO: Because of the concept of productivity and efficiency being something that is not measurable purely in an economic sense. And we are concerned that retention of those words, in respect to competitiveness, in particular, undercut the examples that Mr Meehan includes in his proposed amended principle, which are not premised on or are not related to competitiveness or efficiency, for that matter.

Now, competitiveness is probably more of a problem than efficiency, but there is no, in our submission, reason for those matters to be conditions precedent to productivity or efficiency increases being granted. And they seem to, in our respectful submission, grate with the concept picked up at 2.5.2, for example, of delivering a better service with the same inputs. Now, how does one measure competitiveness in a public sector context, to begin with, and, secondly, what does competitiveness have to do with delivering a better quality service, not necessarily a better quantity service, with the same inputs? We think that that concept of competitiveness is inapt and there is no need for it to be referred to in the principles.

PRESIDENT: Is another way of dealing with it not to delete those words but to add another option to improve quality of service, in seeking to improve quality of service and/or become more competitive and/or efficient?

BONCARDO: Yes, your Honour. We'd accept that.

PRESIDENT: Thank you. Mr Britt, you got to your feet first and I've lost my capacity to direct this, so I'm happy to deal with it on that basis.

BRITT: Thank you, your Honour. My client takes the slightly bolder position than my learned friend Mr Boncardo. We think this principle should be deleted.

PRESIDENT: Do you?

BRITT: And we think it should be deleted for a number of reasons. And if it's not deleted, it should not apply to my client. And it shouldn't apply to my client for a number of reasons (1) Local Government consists of 124 councils and

ten county councils, all of whom operate differently. It would be impossible to look at improvements in efficiency across the industry. It would require a consideration at each Local Government employer, which would then see another 134 splinter awards. Secondly, it should not apply because Local Government has a skills-based award, that is, there are a number of different jobs or occupations sitting at the same level. If one was looking at improvements in efficiency from kindergarten workers, you would actually have to have the award apply only to the kindergarten workers in the particular skill level. Thirdly, when it comes to recognising individuals' efficiency and productivity, all councils have salary systems, employees are assessed in relation to their performance, usually over the previous 12 months, and to the extent that they are more productive and more efficient, they can fast-track through the salary system, that is my client looks at efficient and productivity at the individual level for the employees, rather than look at particular classifications. Since the principle has been in operation, since 2010, it's found no use at all in Local Government and has not been applied.

PRESIDENT: I was going to ask you that question, but I guess the flip side of that last point is it doesn't sound like it ultimately concerns Local Government--

BRITT: That's right.

PRESIDENT: --that it's still there, I mean, if it was to remain, it doesn't sound like it's going to concern your--

BRITT: Our preference would be--

PRESIDENT: I hear that.

BRITT: --we'd be excluded, but, yes.

PRESIDENT: Mr Latham?

LATHAM: Yes, your Honour. I just wanted to use the example that's set out in para 61 of the APA's submissions and that's the--

PRESIDENT: This is the primary submissions?

LATHAM: Yes, your Honour.

PRESIDENT: Let us find that. Just give us a second. So the submissions are at p 108 of the first court book, and paragraph number 61, did you say?

LATHAM: Sixty-one.

PRESIDENT: That's 118, yes. Thank you.

LATHAM: And so this is a fairly dramatic example, I think, of the difficulties that the Commission needs to grapple with. There may be a new protocol, for example, in relation to dealing with heart attack victims.

PRESIDENT: Yes.

LATHAM: And, on one view of it, that is actually a productivity decrease for the health system, because there is then a requirement for ongoing health care for that person for the rest of their life.

PRESIDENT: Additional training to the paramedics?

LATHAM: And additional cost. And that might be, in terms of a sort of economic analysis, seen in one way. For the person who suffers the heart attack, it might be seen a quite different way, a very undesirable sort of approach for the health services of New South Wales to provide their services.

PRESIDENT: And it's good for the economy of New South Wales, is it not, for people to continue to--

LATHAM: One would assume so--

PRESIDENT: --live and be productive taxpayers, et cetera?

LATHAM: Well, except for the undertaking industry, of course, and the funeral sector.

PRESIDENT: Well, I think they will get them, eventually.

LATHAM: They do get them eventually, your Honour, yeah. But it does put into stark contrast, I think, the difficulties about dealing with productivity, and I'll get to that at the end, but if one looks at it on a broader view, there are a number of different issues that arise and they're not solely issues about inputs and outputs. For example, there is, obviously, a benefit to the person in not dying of a heart attack.

On a broader sense, there is a benefit to the ambulance service in relation to how they provide their service and the objectives of the NSW Ambulance Service. There is also a broader potential saving in relation to the health system as a whole in relation to further care that might be required for that person, but there's also benefit to the community as a whole in having a person not die in those sorts of circumstances.

The question, I think, the Commission needs to consider and confront is how does one tie some of those aspects into this sort of productivity arrangement process because they're not all financial issues and they are not all, in fact, none of them are very easily measurable. They also put into stark contrast, I think, the difference between looking at productivity in the classical economic sense, and we all understand what that means, and also looking at quality of services and how the quality of a service can be increased.

Also, I think the difficulty is how does one value this? For example, if there is a case involving this particular example, how does one say saving this person's

life is worth “a dollars” or “b dollars”? At some stage, in the APA’s submission, there does need to be a situation where the Commission might not have ready answers to all of those questions and might, for example, as personal injury lawyers say, the Commission might have to do the best it can. But without reference to some identifiable formula, that is replete, in the submissions of the Secretary.

VICE PRESIDENT: Mr Latham, doesn’t your heart attack example presumably fall into the assessment of how productivity might be improved in 2.5.4 or 2.5.2 of the document, JW1?

LATHAM: To some extent, your Honour, of course, but all I’m saying is there is a complexity about these matters and how they are to be measured. What the APA submission is, at heart, and this does follow on from the Secretary’s position, is that it would be very, very difficult to create a comprehensive definition of these matters at this moment, and that what should occur in relation to the assessment of those, if I can describe them as productivity changes, should be done on a case by case basis, but one adopting a fairly broad analysis in relation to these matters rather than one circumscribed by strict and prescriptive qualifications. But beyond that, unless there’s any further questions, they’re the submissions, your Honour.

PRESIDENT: Mr Saunders?

SAUNDERS: Yes, I thought I’d better get up quickly before someone else did. There is a real difficulty with the approach the Secretary has taken to this fairly critical question. This isn’t a technical point about the Evidence Act. It’s substantial, this position paper that’s been produced by a collection of anonymous employees, apparently of Treasury, is being relied on as opinion evidence. These are contestable matters about a complex subject that’s being put forward as a submission by Mr Meehan, qualifications presently unknown, to justify a significant alteration to the way fixing principles that will, on the Secretary’s draft, reduce the ability of employees to seek variation to their wages in circumstances where they are contributing more to the State of NSW.

They have the witnesses, they could have identified who wrote this thing. We all know it’s inevitably several people but someone could have put their hand up. It’s completely unfair to, as a response to a basic request for the documents that you would ordinarily see provided with expert evidence, simply pull the two affidavits and have the report sit there as this magic emanation of what Treasury says the Commission should do. Equally outrageous, if there are persisting questions for Mr Meehan to go and speak to this anonymous economist or economists over lunch and tell your Honours what the answer should be.

It’s not an unusual practice by the Secretary. It shouldn’t be encouraged. They are contestable matters. Your Honour, Taylor J, has identified several of the questions we would have asked the witnesses who have met the people who wrote the report at their internal inconsistencies, particularly on the critical question here of measurement. It’s an oddity that the report transitions from

what is a fairly basic description of different types of productivity equally applicable to the private sector but, more importantly in the public sector, quality improvements, the achievement of the actual goal of government which is to assist society, and then devolve suddenly to an idea that you can only measure this in a quantitative way.

It's not unclear, notwithstanding the Secretary's submissions today. The submission is and the variation is the productivity should be measured by the Commission on an input/output basis. It is impossible. It does not work in the public sector except in the crudest possible way. The examples in the position paper, itself, show that. Often, quantity increase leads to either a cost increase which, on this measure, is somehow deficient, or it leads to a drop in quality.

It's particularly difficult, we often won't ask for the easy-ish examples where are, at least, measurable output. What is a fire fighter's output across the year? Anything you think of, I mean, large animal rescue, one of its more recent developments, is it more productive if it rescues more large animals than the last year or is this just dependent on the number of horses that are getting stuck in dams?

Number of fires put out per fire fighter? Something may have gone wrong with the agency's broader goal of prevention? The idea is that the fires don't happen, that's why they spend a lot of time checking smoke detectors, or it drives against the Commission's need to have regard to retention and recruitment. If the fire brigade is doing more with less, that may not necessarily mean the fire fighters are particularly efficient, it may mean that the service is understaffed.

PRESIDENT: So is the solution to remove the principle then?

SAUNDERS: No.

PRESIDENT: Right, so obviously, there are difficulties with the principle and everyone says that. Mr Meehan's done his best to explain how it might work in practice, and you've done your best to identify how difficult, in fact, it is in reality, but what does that mean we should do?

SAUNDERS: It's more complex than difficult. It becomes difficult or impossible if one retreats to the self-taught commonest approach of the cost-benefit analysis, and there's cost saving matrix, but it is possible, and the Commission has done it on numerous occasions to look at it wholistically with or without the aid of expert evidence and evaluate the work, the contribution that a change is making. Mr Latham identifies that there is no mathematical formula to doing that. That's true of all wage fixation. There's no precise science for this. It is, as a value--

PRESIDENT: With the exception, possibly, of CPI.

SAUNDERS: It depends which CPI measure you use, your Honour. It is possible, and the problem with removing it, this is where we, regrettably, depart from Unions NSW, is because of the way these wage-fixing principles work. It's not a situation where it doesn't matter that Mr Britt's client doesn't want to do it. He doesn't have to. This isn't an option. It operates as an exception to the restriction that is, otherwise, we say, presently unfairly imposed on wage growth. It's a path in. It's useful, in that respect, to look at the current principle. It's behind tab 12 of the bundle of authorities at p 518 of the bundle.

PRESIDENT: I've got a different document, so if you take us to the principle in question?

SAUNDERS: 8.3.

PRESIDENT: 8.3. Yes?

SAUNDERS: It's an amalgam. We're focusing intensely on productivity. It's not inherently surprising because it is, quite correctly, a universal focus of government, but it's--

PRESIDENT: And it's a focus of us. That's one of the things that we are required under the Act to focus on, improving productivity.

SAUNDERS: Improving productivity and, well, removing that from one's considerations and reward for that would seem to be inconsistent with that. The productivity different to efficiency. Efficiency is closer to the input/output idea. It has a particular genesis which is, also, what we see here is all this language; substantial, cost savings, substantial contribution, significant contribution. That's not a function of economic considerations. One of the problems with the Treasury report is it seems to imply that significance is needed for it to be a productivity improvement, and productivity improvement is simply the size it is. That language of size is to do with the nature of the restriction that's being imposed. It limits the exception to wage movement. That needs to be remembered.

PRESIDENT: Your written submission questions why the principle currently requires employees to have made a significant contribution and also questions why it is that there needs to be a significant change in productivity before this can be taken into account.

SAUNDERS: Yes.

PRESIDENT: And I identify that those words you say come from historical reasons, but as a matter of history, why was it seen as useful to, firstly, ensure that the productivity change was significant before it would generate a wage rise? Is that simply because otherwise there's a danger, given how hard it is to measure, that you might in fact find one when it's barely there and it's highly contentious as to whether it exists at all?

SAUNDERS: You get a microscopic wage increase but one isn't justified because it's just not meritorious. It is very unclear. This has a relatively recent genesis. Your Honours will find it in the 2010 decision, which is behind tab 9 of the bundle. NSW Industrial Relations Commission 183. At para 98 at p 383 of the PDF.

PRESIDENT: Just give that reference again, sorry. Just moved a bit quickly.

SAUNDERS: It's tab 9 of the bundle of authorities.

PRESIDENT: Yes.

SAUNDERS: State Wage Case 2010. NSW Industrial Relations Commission 183. Paragraph 98. The decision itself is not paginated, but 383 of the PDF. It's evolved through the special - it's an exploration of a principle, sorry, expansion of a principle that had evolved through various historic special cases. That's where you see significance because you need that degree of importance to be sufficiently special. There's no particular science to it. It's just an expression of restriction. It, critically, is not an economic concept of any kind.

The Secretary's amendments have a difficulty. The solution proposed by Unions NSW that they simply be non-limiting as suggestions is not itself a complete answer. What they do is they focus attention directly on input-output measurement. It leads to a suggestion that anything outside of that is unusual and has to be specially justified, which, in circumstances where this is unlikely to ever really be the appropriate measure of productivity, is undesirable. If other considerations, if there is going to be a list of considerations, then it's appropriate that they consider everything that might come into effect. That is, without turning the document into two to three pages, difficult with productivity, hence the higher level approach that the FBEU's submissions take. It is, as I've said, not helpful to jettison it.

The point of it is there is a general expectation that has developed over 120 years, a general expectation that wage growth is normal, that it is right and proper that employees not only maintain the worth of their wages but experience improvements in their quality of life, their standards of living, and share, particularly post the 80s, in national economic productivity and the particular productivity of their enterprise.

There's two discrete concepts. The latter is expressed in the federal system through enterprise bargaining following the fifth Prices and Wages Accord when it was finally agreed. That's where that low hanging fruit productivity comes. Because the public sector is different, is not - who it's competing with is unclear. It's difficult to see how a police officer becomes competitive with anyone else except particularly in Victoria, but you are looking at these general productivity movements through the FBEU's proposed approach, but occasionally extraordinary and identified productivity gains in particular areas. Employees are contributing more to the State disproportionately to the general

gain, and in those circumstances it is appropriate to increase their wages to reflect that additional value.

The concept is closely linked to work value, which is why it can't be done mathematically and shouldn't be approached in that way, but it is about that fundamental principle of wage fixation. That's why it's appropriate to retain it as an express consideration in the principles and also, as your Honour observed, because it is something the Commission needs to take into account.

PRESIDENT: Yes.

SAUNDERS: It shouldn't be deleted simply because it is hard.

PRESIDENT: No. It's certainly useful to get the parties' assistance as to how it is to be applied, given that ultimately the parties say it should be there and we should apply it. So it's nice to know how the parties think we should do it.

SAUNDERS: It is one of the problems with the way the wage-fixing principles are approached. It's to be remembered this isn't saying this is when wages will be increased. It's saying these are exceptions to the rule that they won't, that that informs some of the language that's in there.

PRESIDENT: Although you make the point in your submissions that that language emerges out of a historical context in which the principles said you will get an indexed increase, effectively CPI increase, and you will not otherwise get any increase unless you can walk through one of these narrow doors.

SAUNDERS: And that is - we're not critical of the wage-fixing principles as they have existed forever. It's their effectiveness now at this particular point in time, this particular industrial, legislative, economic context. That's where the dissonance goes. It's why we're not asking the Commission to say, "You will get a wage increase." The FBEU's proposal isn't structured in the way the accord was. Tempting though it may be, it's about pathways and retaining - there's a lot said in particularly Local Government NSW submissions about abandoning the work of the past and the structural instability that that will take. That has been done but the language has been retained, that's the problem. Unless there's anything further.

PRESIDENT: I started to give myself a bit of a rough timetable as to how long we spend on each question, and we've gone five minutes over this one, but is there things that need to be said? Mr Meehan, you may need to feel like you need to respond to some of the things that have been said.

MEEHAN: One thing, your Honour, I would like to reserve the ability to respond to after lunch, and that's an observation your Honour made in response to Mr Boncardo's, the language in his proposed principle.

PRESIDENT: Yes.

MEEHAN: And I would like the chance to obtain an instruction about that and just say something in response if we may. I can't do that now.

PRESIDENT: Can you remind me post-lunch?

MEEHAN: Yes. We're talking about the insertion of the language of improved quality of service.

PRESIDENT: Yes.

MEEHAN: Does that--

PRESIDENT: Yes, I remember the question and I was just - what I was actually asking you to do is prompt me after lunch.

MEEHAN: Yes, we will.

PRESIDENT: In case I overlook asking you to do that. That'd be helpful, thank you. I appreciate that.

MEEHAN: There's little else we wish to say, although I probably should respond to Mr Saunders's criticisms about the document.

PRESIDENT: I don't think--

MEEHAN: We're not in an adversarial proceeding.

PRESIDENT: I don't think you need to respond, no.

MEEHAN: Thank you.

PRESIDENT: So are we able to move past issue 9? So can we move then to issue 4, which, reminding myself, Mr Latham, can we start with you on issue 4? To what extent there ought to be some mechanism introduced to set an appropriate minimum rate of pay. I think there's a level of agreement on this issue.

LATHAM: Your Honour, we have no submissions on that.

PRESIDENT: Then can I turn to you, Mr Saunders, because I think in your submission you identified I think no need to change principle 7, but nevertheless identified that there may be some mechanism that the Commission ought to consider in order to ensure that no award contains a rate of pay for any particular classification that is too low.

SAUNDERS: Yes, this was not a feature of the awards that apply to the fire brigade, but my client is aware and ...(not transcribable)… general interest in these things. There are awards in this system which contain adult rates of pay that are below the federal minimum wage. They tend to be for - it's not exclusive, they tend to be for adult apprentices who themselves,

demographically, we are informed, disproportionately come from disadvantaged background. The FBEU simply submits that it's an issue that should be corrected and this may be the - a review process, noting that the Commission is undertaking one for the various awards, is being undertaken as well. It could be included in that.

PRESIDENT: I'm mindful of the fact that the federal tribunal has recently identified that there were awards which contained rates of pay which, in its view, should be pay that would only apply during an initial six-month training period.

SAUNDERS: Yes.

PRESIDENT: Is that something that we can learn from in our review?

SAUNDERS: There is at least one award that replicates the C14 problem and ambiguity as to whether it's truly a transitional rate or not. I cannot at this moment tell your Honours what it is but, yes, it is something that my client would say should be the subject of review.

PRESIDENT: Because the principle at the moment is directed to ensuring that no one's paid less than a minimum rate if they're not covered by an award, but is silent as to whether awards should allow for rates below that for those who are covered.

SAUNDERS: Yes, it's one of the difficulties with the structure of the Act in terms of a minimum rate. It could be done as a principle. It can simply be done as the Commission's own motion. We simply raise it as something that ought be addressed.

PRESIDENT: Mr Meehan, did your client have a view about that?

MEEHAN: No, your Honour. And we have said all we wish to say in our written submission.

PRESIDENT: Is there anyone else that needs to say anything about issue 4? You can assume that we've read the materials. Turning then to issue 5. Again there seems to be a common view that there ought to continue to be a separation of general work value considerations from increases to wages based on gender-based undervaluation, but parties - in particular Unions NSW - identify under this issue the potential for there to be changes to the gender-based undervaluation principle. Mr Boncardo, do you want to take us through those?

BONCARDO: Certainly, your Honour. What we have sought to do is simplify the current principle and we've sought to do that by making clear that claims can be made for the ...(not transcribable)… alteration of wages, conditions, et cetera, on the basis of historical undervaluation on the basis of gender. And we have pointed the Commission to, if such a case is established, taking action to ensure wage rates, conditions of employment and the like properly

reflect the value of the work, skill, responsibility required and the conditions under which the work is performed.

In our respectful submission, the principle does not need to be more complex than that. The current principle, as it is framed, is, in our respectful submission, too lengthy, unnecessarily complex, and adds a number of caveats or qualifications which do not facilitate, in our submission, undervaluation based upon gender to any appreciable degree. Mr Saunders, in his opening, astutely drew attention to what is currently principle 11.13, which is one of the principles we say, or subprinciples we say should be removed. That is, the Commission will guard against contrived classifications and overclassification of jobs. In our respectful submission, entirely meaningless, arcane language that has been picked up from the National Wage Case back in 1983, and not necessary to be included.

PRESIDENT: You don't think there's still work to be done in discouraging applicants from trying to take a team leader position and create five different team leader positions and ask for rates of pay for each of them?

BONCARDO: An applicant bona fide seeking to address gender undervaluation wouldn't be expected to do that in the first place, and the Commission identified that, and as an issue it wouldn't be countenanced, I would imagine. It doesn't need to be set out in the submissions.

PRESIDENT: It's not a problem with the text, it's just a problem with the text appearing in the context of undervaluation principle.

BONCARDO: Quite, quite. And I wasn't putting the point, perhaps, as precisely as I should have. That is our main complaint with a number of the provisions. We haven't set out that 11.4, for example, should be jettisoned. We've suggested that it should be amended to ensure that any formulas that are in fact used are not themselves the product of gendered conceptions of the value of work. But if one is looking to refine and recast these principles, we would certainly not be heard against cl 11.4 being removed entirely. There's no, in our respectful submission, need for it. 11.6 in respect to wage relativities, again, and the reference to the need to ensure against leapfrogging we think is superfluous, and if anything - by reference to external relativities - could be deployed to continue to suppress wages on a gendered basis. Now, each case will turn on its own facts, but in our submission there is no need for a subprinciple such as 11.6.

In respect to 11.7 and 11.8, which Mr Meehan points out in his submissions, we have removed without any reason or rationale. So far as we are concerned, they are captured by our revamped 11.1. That is that the need for ensuring alternate relativities are based on work skill responsibility, et cetera, is something that the Commission can, should and will do when it is addressing appropriately the undervaluation of work based upon gender conceptions. Ditto with cl 11.8, which refers presently to assessments being made as to how the undervaluation should be addressed. We have tried to concisely and crisply deal with that in 11.1.

We're not seeking to effect a substantive change. What we are seeking to do is to make the principle more direct and easier to understand for both the parties and the Commission, because ultimately these cases will turn upon their own facts, and there is in our view no need for any prescription in how they are dealt with.

We have also said in the submissions that what Mr Saunders has suggested is also an apposite way that the Commission may consider dealing with gender undervaluation.

PRESIDENT: Yes.

BONCARDO: Commission pleases.

SAUNDERS: Aside from matters of drafting, we agree with the position put forward by Unions NSW. However one cuts it, principle 11 needs to be rewritten. It is itself, on one view, infected in its drafted by approaches which led to gender-based undervaluation and certainly includes restrictions that drive it.

11.4 is an example. The formula that was being talked about, what the bench was reacting to in the federal equal pay decision 1972 were employer submissions identifying concerns about catch-up claims for male employees in different jobs who were suddenly being paid less or the same as women, to restore relativities which had at that time occurred in New Zealand and England, interestingly, somehow undermining the point of gender-based undervaluation. It's expressed more clearly, as my friend Mr Boncardo said, at 11.6. No likelihood of wage leapfrogging within related classifications. That is impossible to comply with if a rate is set that's being linked, properly or otherwise, to a comparative classification. One can't move without the other. It has an ossifying effect.

Similarly, see at 11.1, these are all directed at the economic and monetary threat posed by the staged introduction of gender-based undervaluation correction. They're all limiting it. It's ratcheting it back. 11.11. In respect of - I mean, that could only make sense, this is where undervaluation is established only in respect of some persons covered by a particular classification, and that's only going to make sense in the kind of banded classification structure in the awards that were fully the subject of structural efficiency reform. It's not really a contemporary problem. Gender-based undervaluation tends to hit as an industry focus rather than within a workplace or sub-occupation.

The more fundamental question is what is the point of this? It's a way for employees to claim, but more importantly for the Commission it is a process of correcting a historical wrong. It's a public policy question as much as anything and it is, it should, in that sense, be retained as a statement, a true statement of principles as to the Commission's approach to these things, which is done in two separate ways in the FBEU's proposed approach. It has a genuine, as we've seen in the federal system, a genuine effect of encouraging these claims

to be brought or the issue to be addressed on the Commission's own motion and for that reason it should be returned but simplified so it directs attention to what the Commission is truly trying to do rather than guarding against things that might go wrong.

PRESIDENT: Thank you. Mr Meehan.

MEEHAN: We have dealt, in our reply submissions which are found relevantly at p 232 of the court book in paras 23 to 25, the proposed changes advanced by Unions NSW. We don't need to elaborate further on those. We otherwise note your Honour's observation about the degree of agreement as to the separation of these considerations.

PRESIDENT: I don't want to be unfair but when I read your submissions I summarised them as identifying that the Secretary submits that Unions NSW hasn't put forward a sufficient reason to change rather than the Secretary saying the change in fact would be detrimental for some particular reason.

MEEHAN: Well the way we put it, the criticisms advanced by Unions NSW were that the provisions as they stand actually potentially entrench discrepancies based on gender bias and the changes they - well firstly we don't think that's established. We don't understand how one gets to that result, but secondly that the changes, which mainly involve applying the blue pen, as it were, don't actually engage on the suggested advices at all.

PRESIDENT: Yes. It is--

MEEHAN: So our criticism stops at that point.

PRESIDENT: It's the - yeah, that's how I read it.

MEEHAN: It's just the utility of the changes, they don't advance them.

PRESIDENT: Does anyone else need to be heard on this issue? Can we then move to issue six, retention of the special case principle and whether the circumstances that establish a special case ought to be better defined. I think the parties are all of a view - no, that's overstating it, I think - that it should be retained. There are various ways in which it should be changed over. I think at least one party thinks there is no need for it anymore. Perhaps we can start with any party who wishes to remove the principle all together. Whose position was that?

SAUNDERS: Mine.

PRESIDENT: Yes.

SAUNDERS: Perhaps predictably. It's not so much the removal of the principle entirely. It's to do with the way we say the entire structure of the principle should be reshaped. What a special, what the special case principle is is the blanket exception. It is this structure, you will get a national annual

wage increase. In exchange your wages will not move unless you can demonstrate significant work value, gender-based undervaluation, productivity efficiency or something else really good, a special case. It's to cover the multiplicity of situations that arise in an industrial context with a range of different universes. Calling it a special case, though, doesn't add much in terms of clarity or value. It is difficult to describe as anything other than silly. It's special because it is. It's not of assistance for the parties seeking to bring these matters before the Commission and it leads to, as it has historically, misapplication of, in response, of how the claim is shaped. We're not so much saying that that structure should be changed. The point that the FBEU is making is that that duality of access to wage increases but restriction on free for all wage movement should be maintained. The approach we've taken is at the second court book, tab 2b, page 34.

PRESIDENT: Where are we?

SAUNDERS: 12 of the FBEU's proposed variation.

PRESIDENT: And this is the amended--

SAUNDERS: Yes it is. What this is intended to do is effectively roll up that list of one, two, three, special, into setting out that more precisely defined, as the question suggests, list of circumstances where a change might be warranted. It's an attempt to cover the current panopticon of what special cases constitute and we see there the inclusion of properly fixed rates and the erosion of real value which, notwithstanding the submissions that have been advanced today, has been recognised by the Commission as constituting a special case which does suggest that that - because it's something that necessarily justifies a wage increase from a fairness and reasonableness perspective. The only thing under the current principles to call it is special but it's obviously not. It's just a uniform part of economic movement. It demonstrates the need to move away from this sort of artificial term of art into a clearer explanation of how a wage movement is going to work. Without offering drafting amendments, I should observe this list, it has become apparent to me today, is missing something. It would need to cover the circumstances where your Honour Justice Taylor identified earlier it is simply a new idea, a societal shift. Policies have changed, something else has happened. But that--

VICE PRESIDENT: But doesn't that demonstrate, Mr Saunders, the flip side of what you're attempting to do in defining all those circumstances in the universes of which you referred to. Isn't that preferable to have a principle that functions as a repository for, or a residual area of discretion for the Commission to operate in?

SAUNDERS: There's force in that. It just becomes confusing when it's done as this sort of amorphous thing defined by reference to a two decade old full bench case that doesn't say much except it should be sufficiently important or new. Twelve is not meant to be exhaustive.

VICE PRESIDENT: It's not meant to be?

SAUNDERS: Exhaustive, although it does read a little like that, that's not the intention.

PRESIDENT: It does rather read like that, would only do so.

SAUNDERS: Yes. It's not intended to and as the submissions are said twice, this is simply an attempt. We're more directing the bench's attention towards the purpose here. The limitations of the trade-off for the access, the potential access to annual increases via the State Wage Case, the union accepts that there should be some give and take in that respect.

PRESIDENT: Yes. Mr Boncardo.

BONCARDO: Your Honour, our position is that there should be an avenue or a vehicle for dealing with cases that do not slot into the category of work value, gender undervaluation et cetera and the special case principle is an apposite one for the Commission to retain. Our concern is that utilising the special case principle as we see in our submission the Secretary and Local Government Association as establishing what Mr Saunders describes accurately in our view as faux jurisdictional preconditions to an application being made is problematic and should not be reflected in the wage fixing principles. There is, in our submission, no basis for a party to have to establish that its case has the requisite level of specialness before it can proceed. If the case is not one which slots into any of the other subheadings and then principles, then it should proceed in the ordinary course in our submission and shouldn't be cut off because a level of specialness is unable to be attributed to it.

PRESIDENT: What is the need then for the principle?

BONCARDO: That's a good question but it does retain its utility in allowing the Commission to funnel all the other cases into a particular stream.

PRESIDENT: I think traditionally it was there to be clear or try and make clear to parties that if they couldn't meet one of the other requirements - work value and the like - there was nevertheless still one door available to them, but they had to establish that it was something unusual and special--

BONCARDO: Yes.

PRESIDENT: --about the case, lest every applicant would say, "Can we also have a 5% increase", that the Commission needs to be established. There was some reason why this particular group should be treated in a way that was more beneficial than everyone else.

BONCARDO: Yes.

PRESIDENT: And, I hear the criticism that ultimately this starts coming down to a rather subjective assessment as to specialness, but nevertheless, many of the parties - including you, I think, still think there's a role for us to assess an

application against some type of standard that requires the applicant to justify and differentiate their situation from everyone else, lest everyone then turn up the next day and say, “Can we have that too?”

BONCARDO: We don’t cavil with the need for something different--

PRESIDENT: Yes.

BONCARDO: --to be identified. It’s really a question of ensuring that there isn’t an artificial threshold imposed that a party has to necessarily jump through before its case can advance. If it’s something different and if it’s something of the nature that Mr Saunders sets out in paragraph 12 - excepting that the mandatory language perhaps should be removed - then that is something that certainly my client would embrace.

PRESIDENT: Mr Meehan. Sorry, Mr Latham. Yes, why don’t you go next?

LATHAM: Just very--

PRESIDENT: So that Mr Meehan can respond to all the union parties.

LATHAM: Just very quickly, your Honour. The APA oppose any process whereby what is meant by a special case in the current principles would be paraphrased or somehow defined, because that will almost inevitably lead to it being narrowed, and the whole purpose of the special case definition is to adopt a very broad - perhaps somewhat obscure mechanism - whereby unions who do you not get - or applicants - who do not get through all of the other gateways do have a gateway where they can seek increases.

Could I just say, in relation to a question that your Honour asked earlier, it was put that it really required the Commission to - the parties to the Commission - to substantiate something different that would allow their application to be heard, and that’s correct--

PRESIDENT: “Granted” I think is the--

LATHAM: Granted, and that’s absolutely correct, and that to a large extent is really a paraphrase of the same broad sort of principles that we see in a special case principle at the moment. So, in the submission of the APA there should be no change to that principle.

VICE PRESIDENT: Broad is something we might pursue, but I’m not sure obscurity is an end that the Commission would be prepared to explore for redrafting these principles, Mr Latham.

LATHAM: Obscurity is not necessarily a bad thing, your Honour, but I don’t think we need to take the point any further.

PRESIDENT: We’re back into presumption and onus. Mr Meehan, what do you say?

MEEHAN: The APA in its written outline submitted - and we agree - the special case principle should be maintained as it provides the necessary flexibility to deal with unforeseen circumstances where cases have special attributes or are out of the ordinary. That's the - spells out its basic utility. The Secretary does not agree with the FBEU proposal to abolish the principle. Its central criticism is that the special case principle is inherently amorphous so as to be meaningless. No decision of the Commission I've seen over decades has considered the principle as meaningless, and what the authorities do show is a capacity for the principle to be invoked in a range of circumstances, as we see, including or example the effect of COVID-19, and that is a good example of the flexibility that the principle can be deployed to address.

The Secretary agrees with Local Government's submission that the principle itself can be better defined, and members of the bench will have seen the Secretary has proposed that the principle pick up, as it were, some of the approaches outlined in the authorities, which might be seen as constituting matters out of the ordinary or having special attributes, but we don't submit that it is a closed category. It can't be, given the purpose that it serves.

This has been touched on, and we agree that the principle doesn't service some jurisdictional threshold of pre-requisite. In other words, it hasn't been applied and would not, in our submission, be applied so as to warrant, as it were, a preliminary hearing to decide whether or not the gate should be opened. That's not how the Commission has approached it. As we stated, the requirement for something out of the ordinary or having a special attribute is the requisite quality before the relief will be granted. It's not a threshold issue that one has, as it were an interlocutory hearing to see whether the gate is opened, and so the bench should not see that as some threshold issue that should stand in the way of the continuation of the principle. Everything we wish to say, we've put in written form.

PRESIDENT: Thank you. Mr Britt.

BRITT: Your Honour, we say that the principle should be retained. There is considerable jurisprudence developed by this Commission over 20/30 years as to what in fact is a special case. It's not a limiting expression. I note your Honour in response to some of the matters this morning in relation to wage rates falling below the rate of inflation observed that that by itself would not be a special case, and I concede that in relation to a relatively small timeframe, but if one had the situation whereby someone - wage rate had fallen behind inflation for five or six years, that may in fact be brought as a special case, and a tribunal hearing the matter would have to determine on the evidence whether that was special. That's one of the great benefits of obtaining this particular principle on the basis it does provide that avenue to look at those matters which are out of the ordinary and addressing wage matters that therefore flow.

We have pages 196 and 197 of the court book attempted to redraft the principle to simplify the wording. One of the amendments we made was to include superannuation in that principle, and we've done that because we

agree that the superannuation principle should be deleted, but superannuation claims could be dealt with by way of a special case. Unless you've got any questions, they're our submissions.

PRESIDENT: Two observations. First, I guess the more that the bench accepts the proposition that these principles are no more than guidelines, can't in any way restrict, the closer we move towards not needing a principle because the extent to which an application doesn't fall within existing principles but they're only guidelines an applicant could nevertheless make out a case. Is that something that your client raises? I do feel like there's a tension in the submissions that have been put between us to say retain it, but nevertheless, these things are only guidelines and even if you can't establish a special case or any other basis, the Commission may still be able to upload a claim.

BRITT: They're guidelines that also assist the parties as to how they structure a case.

PRESIDENT: Yes.

BRITT: That is - many of these principles provide advice as to how one would go about running a particular case under the principles, whether it's this case or the work value case principle. They do, and one of the great benefits of having principles is they assist the parties in framing claims.

PRESIDENT: I mean, originally, of course, their primary purpose was to ensure that individual Commission members took a consistent approach to determining claims and effectively guiding them in the way they would do it.

BRITT: That may well be--

PRESIDENT: So as well as assisting parties, they also assist the bench.

BRITT: That's right. And it also helps develop a system of jurisprudence and a history of jurisprudence, which is important to ensure stability within the system.

PRESIDENT: The other thing I wanted to raise with you, a number of the parties have identified that your client's proposed redraft, rather than relaxing the threshold, as the submission states, in fact makes it harder by adding an additional requirement that it must also be in the public interest.

BRITT: Well, ultimately in making an award or varying an award, it needs to be in the public--

PRESIDENT: It depends how you--

BRITT: Maybe we should have used the phraseology "not contrary to the public interest" which reflects the statutory requirements.

PRESIDENT: I think if you put it that way, a lot of the concern would dissipate. Thank you.

VICE PRESIDENT: Mr Britt, sorry, your proposal in 7.3.3 regarding the no extra claims clause, how do you see that operating? Are you suggesting that that provision and the principle would operate in the face of, or in the teeth of the precise terms of any particular no extra claims clause asserted in the award?

BRITT: That's right. A no extra claims clause would not prevent a special case being run.

VICE PRESIDENT: Irrespective of the terms of the--

BRITT: That's right.

VICE PRESIDENT: Of the clause itself.

BRITT: That's our position.

VICE PRESIDENT: How do you suggest the principle would override the terms of a clause that otherwise would, on its face, prohibit a special case application?

BRITT: It would be necessary, and it's one of the later questions should there be a model no extra claims clause making that clear in the model.

VICE PRESIDENT: I see.

BRITT: And you're right, your Honour, it may well be better that it's included there rather than in the principles.

VICE PRESIDENT: Thank you.

PRESIDENT: Mr Saunders.

SAUNDERS: To clarify, the FBEU's position that the special case principle should be removed and redrafted in just to a global pathway for controlled variation is made in light of the broader position that we take that this whole thing should be restructured. If the Commissions keeps the current structure, the alternative position is as expressed by Unions NSW that it should be retained as an alternative gateway to variation. It's just the complexity of the different thing. A no extra claims clause award would prevent a party from bringing a claim, whatever this document says, on the basis that they would be contravening the order to do so. It doesn't work in that respect. And what I actually wanted to reply to was your Honour Justice Taylor's observation as to the tension between having these prescriptive or semi-prescriptive phrases in something that everyone says is guidelines. The embrace of the wage fixing principles as mere guidelines by the Secretary and the Local Government NSW is correct but new. The practical way that these are applied is as strict

rules. That is a fact of practice in this jurisdiction. It arises, as I have said earlier, from the manner in which they are drafted in historical approaches, but it should be borne in mind by the bench that this is what is likely to follow which is why the - apart from where I forgot to do it, the FBEU's draft is in this permissive expansive language, that's how it's intended to operate.

PRESIDENT: Yeah. It would be different if the no extra claims clause was drafted in the historic way which is that a party will not bring a claim, undertakes not to bring a claim other than in accordance with the wage fixing principles. At that point it is binding itself to only be able to bring a claim of a certain sort and in that manner and in those terms it can be expressed in a mandatory form because the party has consented to a restriction that the Act doesn't provide. That's the historic basis of the language and we will get to the no extra claims clause after lunch, but one of the things I would be interested in the parties considering is whether there might be circumstances in which that historic approach is one that is worth bringing back for certain types of situations.

SAUNDERS: As your Honour says, it arises in respect of another question but the primary observation is yes, that was the historic approach. That's how the issue was resolved in respect of the 1983 decision. It was the price of entry to a wage increase and my client's position on it, existing absent that trade-off, is possibly easy to anticipate.

PRESIDENT: Anything further on--

SAUNDERS: No, thank you.

PRESIDENT: --question, where are we up to, 6? Question 7 or issue 7, the extent to which principle 8 was to be amended or some other mechanism was introduced to permit the consideration of claims based on attraction and retention of skilled staff and where there are skill shortages in having regard to the effective and efficient delivery of services, this does strike me as somewhat of a drafting exercise and I think, Mr Meehan, your client in reply has accepted a proposition that there ought to be a change to the principles in light of the statutory obligation that we have to consider strategies for attraction and retention.

MEEHAN: Your Honour is correct.

PRESIDENT: And does that mean that there remains an issue between the parties as to the drafting of this clause?

MEEHAN: May I just have a moment.

BONCARDO: Your Honour, as I understood it, and I apologise for interposing, I'm not sure that Mr Britt's client has the same position as Mr Meehan's.

PRESIDENT: I see. I should have restricted it to the parties in the public sector.

MEEHAN: Perhaps Mr Britt can go first.

PRESIDENT: Yes, yes of course.

MEEHAN: And I will come back to them then.

PRESIDENT: Mr Britt.

BRITT: It's our submission that the principle not be amended to deal with claims of attraction and retention of skilled employees. The recruitment and retention of employees is itself a complex matter and not one that can always be easily related to award rates of pay which would apply to the employee's position. The consideration of the labour market circumstances within which particular employers operate is not a matter for consideration under a particular principle. The basis on which particular employers seek to attract and retain employees in tight labour market circumstances we say should be outside the wage fixing principles. Further, in respect of the local government, changes in rates of pay is itself a blunt instrument and it's particularly so because the award classification in the Local Government State Award is skill-based, not position-based. To increase wages across the board because a small number of occupations may be in short supply is not the best use of council's resources. Secondly, to increase the rate of pay of a particular level or band in clause 7 of the award will mean that other occupations who are not in short supply would receive a wage increase as well as those who may in fact be in short supply.

PRESIDENT: These submissions, though, assume that an attraction and retention principle would give rise to a general wage rise rather than one that is targeted to the particular subgroup.

BRITT: Even if it's targeted to a particular subgroup the levels in the award could apply to five or six occupations, five or six jobs.

PRESIDENT: Within ...(not transcribable)...

BRITT: So if you increase, by way of example, level 4--

PRESIDENT: Just move the microphone slightly further from you.

BRITT: I will move from the - if you increase--

PRESIDENT: Another practical alternative.

BRITT: Touching the microphones, I break them so I will move back. If you increase, by way of example, level 4 in the award it would in fact lead to a range of other people in other positions, which are not in short supply, receiving the remuneration. It would also impact upon the internal relativities in wages, especially in a skill-based structure. Finally, local government

consists of 128 councils, ten county councils, and has approximately 30 other corporate entities covering metropolitan, rural, and regional NSW.

Where issues of attraction and retention of staff may exist, they are likely to differ across such a broad range of employers and depend upon a multiplicity of factors from the size of the employer, the location of the employer, the liveability of the location in which the employer finds itself. In such circumstances, employers are better able to consider what strategies are needed at a local level rather than relying on movements in the award.

In essence, the best use of a council's money is for them to target that particular group of employees that may be in short supply or they may wish to retain. The Local Government Award is a minimum rates award. The way to attract persons is to pay them above award rates of pay. It's focussed, it deals with particular problems rather than some blunt instrument about increasing the rate of pay in the award which may then reward other employees who are not in short supply as well as people in the same occupations but employed in a different council where there is no shortage of staff.

PRESIDENT: The principle though as it stands could also be used, could it not, to make an application that, for a period of time to deal with a particular attraction issue, employees employed north of Dubbo, within 300 kilometres of Dubbo, should be paid an additional allowance to attract them to be employed by that council if it was identified there was a particular issue. I hear what you're saying, but--

BRITT: You would then also have to identify, well, what are the particular positions that, in this council, we'll call it Dubbo Council rather than 300 kilometres north of Dubbo, but in Dubbo Council, which are in short supply. The easy way to deal with that is what Dubbo Council would now do, have a comprehensive recruitment strategy to find such people and reward them, usually by placing them in a higher step in their council salary system which, in essence, is paying above award rates of pay.

PRESIDENT: The other observation I was going to make is if this principle were to be introduced in the manner that some of the other parties suggest, if you were right that it has no application to local government, isn't it then, nevertheless, still a concern that it might come in even though you don't anticipate that it would, in fact, be relied upon within the local government?

BRITT: It may well come in. Someone may attempt to rely upon it.

PRESIDENT: I see.

BRITT: But to be entirely blunt, and I don't mean to be offensive, in our submissions, councils are better able to determine how they employ people, how they attract people, than wage fixing principles developed by this bench do, in our submission.

PRESIDENT: Does anyone else want to respond? Mr Meehan?

MEEHAN: I won't respond to anything Mr Britt has said but just to clarify and answer your Honour's question, that the Secretary accepts, and I'm working off the Unions NSW proposed amendment to 8.6 of the principle which is the exclusion, what we have conceded is that, in 8.6.1, the words "attraction and retention" would be removed but nothing else. Well, as you see, Unions NSW have put a line through the totality of that sub provision.

PRESIDENT: Yes. Just remind me, the "except as provided in" and then there's two cases, are they both cases that dealt with attraction and retention? My recollection is, certainly, the first did. I haven't reviewed the second. To the extent to which they only deal with that issue then, presumably, those words can be removed as well, or do you need to have a look at that?

MEEHAN: I'll need to have look at them, yes.

PRESIDENT: Thank you. Anything further, Mr Boncardo?

BONCARDO: Your Honour, on just three short points, I think Mr Britt might be battling with a straw man of sorts. What we are suggesting, and I do apologise, I haven't been speaking to Mr Meehan in respect to the relevant clause, it's 8.5.1, we have it as 8.6.1 but it is, in fact, 8.5.1 in the current wage fixing principles, our contention is that the reference in that clause to attraction and retention, being not a basis for a claim, cannot sit with new s 3(i), and nothing Mr Britt has said has cavilled with that proposition.

We are not seeking to, and nothing in our amended principles could be construed as doing this, having a new head of case based upon retention and/or attraction matters. We're not agitating for a new sub-principle, we're simply saying that that aspect of 8.5.1 cannot stand with s 3(i). If someone wants to make a case based on attraction and retention, they can do so. The issues that Mr Britt is very concerned about can be agitated by his client and they're not matters that, in our submission, convey in any way that the current principles reference to attraction and retention should be retained. Can I deal with--

PRESIDENT: Yes, there's a long history of jurisprudence that the Commission tribunals don't increase merely to deal with shortages because shortages are, by their nature, transitory, but the wage rise is not, and there can be better targeted ways of dealing with it including ways that are not wage-based, but the mere deletion of those words would not remove the validity of some of those earlier observations.

BONCARDO: Not at all. Not at all, and that's certainly not our intention in removing them. We have removed, perhaps without sufficient explanation in the written submissions, 8.5.1 which, as drafted, imposes a prohibition on particular classes of case being agitated. We do not think that that is consistent with the principles operating as guidelines.

PRESIDENT: But that is, you're also removing the prohibition on claims that are based substantially on comparative wage justice.

BONCARDO: Yes.

PRESIDENT: What's the rationale for taking away a long-standing principle?

BONCARDO: It's a principled rationale that these are, as Mr Meehan and Mr Britt accept, guidelines that should not operate as prohibitions or preclusions on cases of any nature being brought. If someone did bring a case based upon comparative wage justice, it may be given short shrift. But in our submission, the principles do not and should not operate to preclude the agitation of such a case.

SPEAKER: Nothing to add.

PRESIDENT: Anything further from any party on this question? I notice that it's 10 to 1. Just remind me of the next issue. Can I just, perhaps, one of the ones that I identified as potentially particularly short was the last one, not because there's not something substantive the parties say about it, but because what they say about it is fairly short and clear such that it's not easy to understand.

There may not be much that needs to be said in respect of question 11 but given we have ten minutes, is there, though, a party that wants to address something in respect of question 11 that, perhaps, emerged out of another party's written reply submissions or, otherwise, address a particular point for us that needs to be emphasised?

BRITT: The only point I make is that s 1462 doesn't apply to local government and, for that basis, we want to retain the economic incapacity principle.

PRESIDENT: I think, in your submissions, Mr Britt, you identified that there had been at least one example where a local council had, in fact, relied upon--

BRITT: Yes, your Honour.

PRESIDENT: --the principle to deal with a matter that--

BRITT: Of a particular nature, given their particular fiscal position. It's not readily used but it has been used.

PRESIDENT: Yes. Nothing else on that principle? Then issue 8 is the other one, perhaps, we can knock over before lunch, on the basis that there seems to be some common view that, to the extent to which the principles by way of preamble or otherwise, refer to the objects of the Act and the matters that the Commission must consider, that they ought to be amended, to take into account the recent amendments. I think only Mr Latham's client thinks that this shouldn't be done, but not, from my understanding, any reason other than it's

just simply unnecessary rather than there's a reason not to do it. Mr Latham, what's the position?

LATHAM: Yes, your Honour. We don't have anything to add to what's set out in the written submissions on the point.

PRESIDENT: Yes. Does anyone else have anything to add to the issues on principle 8 - question 8, not principle 8, issue 8? All right. So just to recap then, what we will do after lunch is deal with anything remaining from issue 9, and Mr Meehan was going to say some things about that, and then turn to 10. Have I overlooked anything? Excellent. All right. Well, we'll reconvene then, seeing as we seem to be doing relatively well, we'll take an extra ten minutes for lunch and we'll reconvene at 2 o'clock sharp. The Commission is adjourned.

LUNCHEON ADJOURNMENT

Mr Meehan, is now a convenient time to deal with the issues that you were going to consider over lunch?

MEEHAN: Yes, it is. One of the matters his Honour the President raised when I was addressing principle 8.5.1 and what the proposed amendment to that principle or the proposal to amend by Unions NSW was that his Honour asked whether the two decisions referred to in that sub-principle related only to the attraction and retention point.

PRESIDENT: Yes.

MEEHAN: They both do, but they're not confined to it and, in particular, the pharmacists decision also touched upon a comparative wage claim but so far as they concerned attraction and retention, and one might think the very reason they are referred to in this exclusion is that the full bench reasoned that there were demonstrated shortages of labour that were critically relevant because they had resulted in changes in the nature of the skills and responsibilities associated with the work. And it was those changes occasioned by the shortages that was reasoned to be a matter that could be picked up as part of a special case, not the shortage of labour per se, was the effect of the shortage of labour. Now, that seems to be the principle, the reasoning that has informed the way that exclusion was drafted. The direct answer to his Honour the President's question is those two cases are not just confined to attraction and retention issues.

PRESIDENT: Thank you.

MEEHAN: One of the other issues related to, the other issue related to the language proposed by Unions NSW in its proposed sub-principle 8.4 entitled Productivity and Efficiency Considerations. And his Honour the President posited the possibility when there was debate about the words struck out, namely "in seeking to become more competitive and/or efficient" that there might be a reference to the seeking of improved quality of service. And if--

PRESIDENT: Leaving those other words in, but adding--

MEEHAN: Yes.

PRESIDENT: --that expression as against--

MEEHAN: I think that was--

PRESIDENT: --the Unions NSW primary position was to just delete those words, which your client strongly disagrees with.

MEEHAN: We disagree but the instructions we now hold are that the addition of the language posited by your Honour would be accepted by the Secretary.

PRESIDENT: Thank you.

MEEHAN: The next and I think the final issue before we come to the no extra claims matter related to whether we could obtain instructions as to whether there was at whole of government level a routine productivity measurement process. And in the time we've had and the inquiries we've been able to make, we don't know of such a routine or systematic approach to measurement. That's the best we can do in the time we have. May it please the Commission.

PRESIDENT: Thank you. Is there anything that arises out of any of those matters? Then can we move then to the last issue, which I tend to deal with as, in fact, two issues because really they fall out that way. The first is whether principle 7 ought to be varied or, to take Mr Britt's client's position, removed, the second issue being if there is to be a model no extra claims clause, as the Secretary has suggested, in what circumstances should it be utilised and what form should it take? Is there a question - I mean, principle 9, sorry, my apologies. Negotiating principles not principle 7. So can we start then with the first of those issues, that is principle 9, whether it should be retained and if so, whether it should be modified? Mr Britt, your client's position is we don't need it at all. So maybe you should start?

BRITT: (1) we say you don't need it at all (2) my client's had successful industry negotiations, going back to 1991, without this prescriptive approach.

PRESIDENT: Yes.

BRITT: We've adopted in relation to each and every one of those awards being made our own negotiation process. It begins at least 12 months out from the making of the award and we've been able to do it without following this principle and we see that in our industry, it has no work to do.

PRESIDENT: And just so I can understand, is it an annual process, that is, is there something, is there an outcome every year of this process?

BRITT: No. Usually the award runs for a couple of years.

PRESIDENT: I see. So historically it's been a two year, a one year lead-up with a two year outcome?

BRITT: It's usually a three year award. It's usually a three year award.

PRESIDENT: I see.

BRITT: And after the beginning of the second year the process starts with the parties meeting, looking at wage expectations, looking at changes in conditions, et cetera, working parties, series of meetings, both sides going back and reporting and, you know, to date it's always lead to an award being consented to.

PRESIDENT: Okay. I don't want to not take the course I said of dealing with them sequentially but when you're next on your feet, while I'm thinking of it, can you just address for me what the no extra claims clause, if any, is that has emerged over that consent process?

BRITT: We have both a no extra claims clause and a leave reserve clause. Those matters in the leave reserve clause are not impacted by the no extra claims, but as we set out in our submissions dealing with special case it may well be necessary to exclude the no extra claims clause dealing with special cases but that's not a matter we've had to address.

PRESIDENT: Thank you. Maybe we move next to those parties who want to amend the principle and I think a number of parties suggest changes to it, starting with you, Mr Boncardo, you've got some proposed changes to the principle, primarily I think the need for government to provide relevant information.

BONCARDO: Yes, your Honour. My client and its affiliates' experience has been that inevitably there's an information asymmetry between the applicants. The applicants are parties and the government employee entities in respect to matters dealing with the kind of issues we were discussing previously, such as productivity, whether, maybe in respect to service delivery or productivity in a more conventional sense and it would be facilitative of both negotiations and bargaining for there to be included in the principles that the government employer provide information relevant to the matters being agitated in the context of bargaining. Our position is that that would, one, facilitate agreement, two, facilitate my client and its affiliates being able to know, with some degree of certainty relatively early on in the piece whether the claims that they are pursuing ought be pursued and ought be pursued in the manner that they are formulated. Against that, Mr Meehan says well you can always issue a summons. Now that's of course open to my client and its affiliates to do but in terms of facilitating an expediting bargaining we think that it would be both appropriate and efficient for a principle of the kind that we have formulated to be included. If there are concerns about confidentiality and the like then undertakings can, and no doubt will be, provided in respect to

information that the government employing entities may be concerned should not be disseminated publicly.

PRESIDENT: Just as the matter of detail, the drafting, do you accept that your proposal that's currently drafted doesn't provide a great deal of clarity as to precisely what would need to be provided in any particular case and that would need to be done which then leads to the obvious question as isn't there effectively going to be a summons issued in any event?

BONCARDO: We've attempted to be relatively broad because we think it would be difficult to be prescriptive because each case will turn on its own particular facts and circumstances and the principle is designed broadly to encourage the parties to the extent possible to, if possible, agree on the kind of information that should be disclosed and in the event that it's not disclosed then unfortunately the route that your Honour has alluded to will be the one that the parties will have to go down.

PRESIDENT: Mr Britt's clients suggest it can be simply removed. Mr Saunders submissions ask us to accept that they've been ignored by the parties for years which, if so, then does give Mr Britt's client's position some merit, what is the point of continuing to have something that the parties pay no attention to. Your submissions have identified that this is in part due to the nature of the task that's occurred over the last decade, that is there hasn't really been any effective bargaining because of the so-called wages cap.

BONCARDO: Yes.

PRESIDENT: What do you say though to the proposition that we ought to retain them and they actually have some value beyond the Act's more broad obligations to bargain in good faith?

BONCARDO: Our position is that they do retain utility. They do provide framework for negotiations to occur before the matter comes to be arbitrated and to the extent that they've been underutilised or not utilised at all, we think that that is likely the function of s 146C and the fact that, as a practical matter, bargaining really has not been occurring since June 2011. So our position is that they ought be retained. There is some forcer to what Mr Saunders puts. But so far as my client is concerned, that is the result of the legislative restrictions that have now been removed and given the removal of those restrictions, we are confident, and I think the Secretary shares this position with us, that the framework set out in principle 9 can and should be utilised by the parties moving forward.

PRESIDENT: What do you say to the proposition that currently at 9.2 the relevant steps commencing with the words "In respect of the commencement of negotiations for a new award" and then there's a series of steps that start with at least three months before, that those words maybe could be changed to read "When arbitrating any application the Commission will have regard to whether the parties have done the following" or some words to that effect, that that is encouraging the parties to take these steps because it will be a relevant

matter if they don't.

BONCARDO: We wouldn't, in principle, oppose that because I think that will certainly focus the parties minds on taking the steps set out in principle number 9. The extent to which that will weigh in the balance in determining the relevant claims would be determined on a case by case basis.

PRESIDENT: Yes, I think that's right. It's just that at the moment it seems to be a set of substatutory requirements that don't appear to have actually anything hanging off them. If the party doesn't do it it's not really clear what's supposed to happen as a result.

BONCARDO: Yes. And we would accept that that is a deficiency in the principles and what your Honour is suggesting is an aggravating factor for the parties to ensure that they do take the principle seriously and engage with them.

PRESIDENT: The Secretary identifies the value of the negotiating principles, assuming that they are to be obtained, making express reference to mutual gains bargaining given the statutory provisions that now arguably encourage the parties to at least actively consider that as an alternative. Your draft doesn't recognise that legislative change. Is there a reason for that?

BONCARDO: Our view, which we've set out in the written submissions, your Honour, is that the mutual gains bargaining regime is discrete and bespoken and is entirely voluntary. If the parties with to utilise it they're able to do so. We don't think that there is any necessity for that to be referred to in the negotiating principles. It contains, that is, I think it's chapter 2A of part 11, contains its own bespoken provisions which deal with a circumstance where there's been a voluntary acceptance by the parties of going down the mutual gains bargaining route, there is an agreement, and the Commission takes into account and is able to take into account what has occurred in the context of mutual gains bargaining. That is already attended to by the statute.

PRESIDENT: Yes.

BONCARDO: And, in our submission, we don't see any utility in that being referred to or replicated in the wage-fixing principles, because of the matters that your Honour put to me, that it could be included as a relevant circumstance in arbitrating an award, whether or not the parties have complied with the negotiating principles. We see them as separate. We see the negotiating principles as being obligatory, in a sense, whereas mutual gains bargaining, which of course the Act envisages and encourages, being entirely voluntary.

PRESIDENT: Yes, I see, although I'm not sure you saying that these principles are mandatory sits happily with the notion that all these things are merely guidelines.

BONCARDO: That's why I said "obligatory, in a sense"--

PRESIDENT: I see. Right.

BONCARDO: Yes.

PRESIDENT: I think--

BONCARDO: As Mr Saunders says, in a sense that they're not necessarily, just in case the transcript didn't pick him up.

PRESIDENT: Yes, it's one of the areas that I am actually having trouble with the parties, even though you have a consent position on this, the notion that we spend a lot of time drafting principles that then are merely--

BONCARDO: Yes.

PRESIDENT: --as a reference document that may or may not need to be referred to in any particular proceeding. I'm indicating in a more serious matter that I'm not entirely comfortable with the notion, and I guess it depends what you mean by "guideline" but I presume that the principles, if we're to make them, are intended to ordinarily effect the exercise of the discretion of the Commission whenever it's hearing a matter--

BONCARDO: Yes.

PRESIDENT: --lest or unless a party can convince the Commission to depart from them for a legitimate reason?

BONCARDO: That's as we can see them, your Honour.

PRESIDENT: Let me just - while I'm looking at my notes, does anyone else have a question for Mr Boncardo? Mr Latham, you too think that there ought to be information provided - that is your client does - as part of a negotiating process?

LATHAM: Yes, your Honour. Can I put the APA's position perhaps in a bit more detail than was previously put in relation with some of the other matters? I think the situation for the APA is that the negotiation process and the mutual gains bargaining process is going to be a very significant driver of wage fixation in this State, at least in its sector. And I think it is important that the Commission does grapple with how the principles will apply to this process of bargaining which is, for many of the parties, quite new. In particular, I think, the APA submits that this context will define both the fairness and the success of much of the wage determination for the New South Wales sector, if we can describe it like that, leaving aside Mr Britt's client, who is somewhat of an outlier in this process, and we don't say that they should be lumbered with the same sort of issues that we are seeking the Commission apply to at least the APA sector.

Can I just say, that position, I think, is supported by the second reading speech of the Minister in relation to the amendments to the Act and particularly what the Minister said in the second reading speech about mutual gains bargaining and this was seen as a way forward. I won't take the bench to that, because it's well-known. I think it's also supported strongly by the objects of the Act, particularly object 3(c) which talks about the promotion of participation in industrial relations by employees and employers specifically at an enterprise and a workplace level, and that is an important part of the context. And I think, secondly, 3(h) which talks about encouraging and facilitating cooperative workplace reform and "equitable, innovative and productive workplace relations".

Now, I think where we are at the moment is there are some provisions in the Act, well, some new provisions in the Act that do talk about how the mutual gains bargaining process is to work, and you'll see those specifically at 129L and they talk about there the principles of mutual gains bargaining. I won't read it, but it refers to particularly a collaborative approach, identifying key needs and also specifically I think, and perhaps unusually, the parties will aim to reach an agreement that meets core needs and that's in, I think, some stark contradistinction to the similar provisions in the Fair Work Act about bargaining. And you'll see again at (f) and (g) also the need to maintain and strengthen good relations.

So I think there is a series of principles set out there. There is then a process or, sorry, a definition of good faith bargaining set out at 129M, which is seemingly largely derived from the fair work provisions, but I think those steps are largely procedural steps and I think many of us have some knowledge of the federal system cases where it appears that sophisticated participants can carefully force this process into stagnation simply by providing the procedural steps that are required. And I think the Commission needs to grapple with this point, because we don't want to get into a situation where some way down the track, we have procedural steps that are used really to stagnate the process. This is a process that needs to work in real life and it is a process that if it does work, will give benefits both to both of the parties but also to the State of New South Wales.

And I think specifically at 129O, there is a perhaps muted but important indicator that the Commission has a role in this process and that the Commissioner "must act as...reach a resolution" although it does, of course, set out alternate processes to do so. So I think just to interpose there for a moment, the submission of the APA is that the principles should make clear the role of the Commission in encouraging and facilitating that negotiation process and that should be whether it's within or without the mutual bargaining process. The APA's position is quite clearly that it has got a history of bargaining and it wants to continue that history, but it wants to make sure that that process works.

And there's a number of steps that the APA submits need to be determined for that process to work. The first, which is dealt with in some detail in the written submissions, is the proper exchange of positions and information and that has

been an issue that has arisen in the past and is set out in the written submissions. It's put by the Secretary that there are already mechanisms to deal with this process and, in particular, there's a mechanism of a summons, and, in particular, there's a mechanism of the GIPA process. Those are fairly blunt instruments in dealing with this and particularly in relation to the GIPA process, the GIPA process is a very slow one and it gives the State of New South Wales great ability to suppress the provision of information, particularly because it denies the applicant access to the documents, to be able to make precise and detailed submissions about why that material should or should not be disclosed. I think the second thing that needs - sorry. The APA submits the second thing that needs to be looked at, which has been dealt with in some detail already, and I won't repeat the submissions on that, is a broad definition in relation to productivity and how that might be measured.

Thirdly, or third, sorry, an acceptance that a no extra claims provision should not prevent bargaining processes from occurring and that does come down to, assuming the Commission was to accept no extra claims clauses, how that might be worded. And then, I think finally, the capacity for arbitration if that process breaks down and what the Commission might then do if one party or the other try and obstruct that negotiation process. So they're the sorts of nuts and bolts issues that the APA submit need to be looked at. I think, just in summary, to ignore that bargaining process as a part of this process, I think is to ignore what will be one of the major mechanisms by which wages are likely to be increased in NSW. As set out in the submissions, the NSW system is a very different system to, for example, the federal system. It does not allow for protected industrial action where parties can use their industrial strength to be able to reach outcomes, and I don't think there's any suggestion that such a process would ever be allowed. That leaves the parties I think, essentially, back in the system of circumscribed negotiations or, in the absence of that negotiation process, some sort of circumscribed arbitral process.

The question, in my submission, I think, is whether the parties have the inclination and the ability to make a negotiation process work and, I think, central to that will be the ability of the Commissioner or the willingness of the Commission to conciliate outstanding matters and also to arbitrate outstanding matters because, otherwise, what was will happen is that union claims will simply be governed by the government's bargaining principles. If they fall outside those policies, the process will simply come to an end and that is not a desirable outcome.

I think, ultimately, unless the Commission does get involved in that process, and the APA are saying that it should, and it is saying that the process should be set out in the principles or, at least, the Commissioner's role should be set out in the principles, unless the Commission is willing to get involved in that process to that extent, the bargaining process may well be likely to come to an end.

Just in summary, what that would really mean is, I think, perhaps a return to a sort of Dickensian process where mendicants attend this Commission, or this Court with their bowl, asking for some more. What the APA are proposing is

something much more of interest than that sort of traditional process. There are many moving parts in this process, and I've dealt with some of them. The notice of claims clause is, obviously, another moving part in that process as well, but there are a series of moving parts that may lead to an entirely new way of determining wages in this State and that would be a productive and a forward-looking process. Unless there's anything further?

PRESIDENT: Thank you, Mr Latham. Mr Saunders?

SAUNDERS: In respect of your Honour, Justice Taylor's, persisting concern as to what the point of these principles are if they don't mean anything--

PRESIDENT: Well, if they're not applied by the parties, I think is what--

SAUNDERS: Yes, indeed, and that's a little more complex with negotiating principles because they just never had the opportunity to work in the public sector. They came in in 2010, shortly thereafter, substantive bargaining, effectively, ceased for a long period. Everyone's trying to get back into the habit. They are visibly directed at a persisting issue at the time. What the bench can take from the imposition of time limits, in particular, is it's directed at the issues that can arise in public sector bargaining of it taking a long time to commence. I'll come back to that. It--

PRESIDENT: Taking a long time to?

SAUNDERS: Commence, get anywhere, continue, resolve. It's a slow process for a range of largely insurmountable structural reasons.

PRESIDENT: Yes.

SAUNDERS: Just returning to this guidelines issue though, it does draw attention to the difficulties with approaching reform of these things in a piecemeal way, looking at one principle, adjusting the word. Here, it distracts attention from what they, in fact, are and what they do. It's not a true statement of wage fixation principle per sé. They're largely procedural. If matters X will be dealt with by a full bench, you have to contact someone within 28 days. Those aren't matters of principle as to how wages should be fixed.

PRESIDENT: No.

SAUNDERS: They're a statement of how the Commission has determined it will manage various claims before it and how it will exercise its competing obligations under the Act, and they're all interlinked. That's where bargaining comes in. The Commission has a clear role in facilitating, encouraging, supporting, bargaining between the parties in the complex system here mostly because it, ultimately, expresses itself as an industrial dispute if not resolved. It's interlinked, that bargaining process, because we have solely, leaving local government to one side which I'll return to, is solely talking about centralised wage fixation for its State employees.

The approach to managing and supporting bargaining has to be linked with the Commission's approach to wage control and wage growth, and it's part of the statutory context that raises the question as to why, following the recent changes, the principles, we say, are not fit for purpose. The Commission's been returned to a central role in wage fixation. That's the point of lifting the wages cap. There is a statutory expectation that the government has, happily or otherwise, relinquished its previous grip on what employee wages will be.

It's certainly influential. It can influence that outcome by bargaining, it can influence that outcome here but it doesn't have the control it has. That has to be taken into account when the Commission considers, as it is setting these statements of approach, might be a better way to describe them, it can't be a system where wage growth is left to the government which it would be by the party that can withhold the agreement unless there are extraordinary circumstances. It's a problem structurally.

The FBEU's draft doesn't retain the current negotiating principles. It takes a different approach, reflecting that true purpose of a statement of intent of this kind which is to recognise the role of mutual gains bargaining, specifically. It's not really a point of conflict, but it is a feature of the Act. It is not mandatory. Parties can continue to have non mutual gains bargaining, sole party gains bargaining, but Mr Latham is likely right. It is certainly likely to form a significant part of the way wage fixation works in this State. I might mention too, it's at the supplementary court book, tab 2A, page 31 of the PDF.

PRESIDENT: Just slow down for a second?

SAUNDERS: Of course.

PRESIDENT: Supplementary court book?

SAUNDERS: Tab 2A, I think? Yes. 2B, I'm sorry.

PRESIDENT: What page is that?

SAUNDERS: 31.

PRESIDENT: Yes?

SAUNDERS: Yes, tab 5 Mutual Gains Bargaining, these are statements of principle that probably should be two paragraphs but it's an indication of the role the Commission is going to take. It's a reaffirmation of the approach determined here that we say should be decided. The second part of the paragraph which really should be para 6, the Commission recognises the need, looks at the competing tensions that are involved there which does include a role of legitimate industrial action to advanced claims. The protections for employees who take industrial action under this Act are inadequate compared to--

PRESIDENT: Are?

SAUNDERS: --are completely inadequate compared to federal legislation that states that the country's obligations under international treaties, but there is some reflection in the Act that this will be part of it. We see that at s 140 through to 142 of chapter 3, part 3 of chapter 3, which is the protections in tort for unions who organise industrial action while a matter is being conciliated by the Commission.

It, perhaps, reflects the period in time in which it was drafted, and the more collective focus on who wanted to prosecute for taking industrial action that there is a lacuna that the individual employee is not protected, but it is part of the scheme of the Act and it has to be, otherwise employees cannot properly collectively bargain, and that's, of course, been recognised by the Commission in dispute order applications to restrain industrial action, particularly in the middle of bargaining. What else are employees to do?

6 deals with your Honour's no extra claims question so I'll return to it, but it's all interlinked to this concept of access to an annual wage increase other than by consent or in circumstances of change. The consideration is, how's bargaining going? It's linked to that facilitation. It's just part of the pressure there. The current dispute processes don't fit within the FBEU's structure, that's why they're not there. It's a root-and-branch rewrite reflecting the intent. It also steps away from this unfortunate situation where parties are directed to do things under this negotiating principle with no apparent source of power to make any such direction and no consequences for not doing it. In respect of your Honour Justice Taylor's question to my friend, Mr Boncardo, as to 9.2 of the words "The Commission will take in account" are added, we would say that doesn't do much to improve the situation because what would matter if a claim is made out as fair and reasonable, it's justified on its merits, what would it seriously matter that the person hadn't responded to the log of claims within 28 days? It's just not - these kind of procedural requirements, they're different for good faith bargaining, but these kind of procedural requirements aren't the kind of thing that would properly shift a discretion on a substantive claim. It could be very different if the good faith bargaining provisions as set out or as expanded weren't but it's not as easy a fix.

The other problem with, as Mr Latham's observed, they might work now. They might have some work to do now that bargaining has resumed, but they are very clearly directed at, orthodox bargaining might be a way to describe it, the process by which parties just simply exercise their muscle the best they can to extract what they can until an acceptable compromise is reached. We see that most plainly at 9.2b where clearly what is being contemplated is a classic log of claims approach. That's fine. It's a legitimate method of bargaining but it's not mutual gains bargaining. If they are retained they should be - sorry, if the current structure is retained, I should say, this principle should nevertheless be revised to talk more about the role of the Commission and what the parties can expect there rather than the focus on procedure. It is another oddity in this piece of legislation that there are good faith bargaining requirements only for mutual gains bargaining. It's an opt-in good faith system, but again that is the

structure with which the Commission is dealing. So the FBEU's position in short is that it should be as part of the wholesale restructure of the wage fixing principles. The idea of the Commission's role in negotiations should be baked in but in a different way with a not complete but certainly prime focus on mutual gains bargaining and supporting those processes but the other facets as well.

In terms of local government, Mr Britt may have said these provisions have never been complied with by his client. He then gave a description of bargaining which precisely follows the obligations that happens in a timely fashion. The claims are responded to, it's just an example of the principles being so successfully embedded into the process that they don't need to be read again. It doesn't mean they should be deleted for everyone. It's related to a separate issue. What it demonstrates is, again, as we have heard, as has been made repeatedly clear today, local government is a completely different creature to the public sector. Amendments to the wage fixing principles, resistance to the FBEU's proposal that are driven by factors unique to local government, they can't be imposed on the public sector sensibly, so a lot of what is being said in resistance to the Unions NSW and the FBEU and APA claims falls away on that basis. It just, it's not the local government, it doesn't matter, it's very special but it should have its own special wage fixing principles because of these discrete differences.

PRESIDENT: That's your client's position that the local government should have its own set of principles?

SAUNDERS: It's a - the FBEU's position is the principles that we have prepared should apply universally. Secondly that things should not be read down because something is working or is too difficult for local government and its particular needs and successes and the submission that they should have their own separate is it should be taken as a suggestion rather than something that's being advanced as a substantive position, more of a drafting idea.

PRESIDENT: I see, all right.

SAUNDERS: Unless there was anything further.

PRESIDENT: No, thank you. Mr Meehan, we'll get to notice of claims in a moment, although some parties have touched on it don't feel that you need to respond to that yet unless you think you need to, to deal with the proposed changes that are negotiation principles. It seems to me there are two primary issues. One, whether we should adopt the approach of amending them in the way that at least Unions NSW and the APA suggested is to propose additional information obligations on your client and your client's related persons and, secondly, your client's positive proposal that it should be changed in a way that recognises mutual gains bargaining.

MEEHAN: Yes. As to the former, your Honour, we've dealt with that in our reply submissions in paras 50 and 51 at court book 239 and 240 and the first point made is that there are provisions in the current bargaining policy which

require provision of government information and then there are also the mechanisms available under the Act and the principle position of the Secretary is that it's unnecessary to incorporate requirements of that time into the principles and secondly there's the question of, this really follows if the bench was against us, but there's a question of precision as to what information ought be required and the potential correlative burden that that would impose if there was a very broad brush prescription. We don't need to develop those positions any further I think. Members of the bench have seen what the Secretary proposes by way of amendment to the existing principles to make reference to the new bargaining regime. Unless members of the bench have any specific questions relating to those proposed amendments, we don't wish to be heard any further in support of them. They're not terribly substantive, but they're just really modernised to reflect the new regime, the existing principles.

PRESIDENT: What do you say to the issue that I raised with just a couple of the parties, that is that these negotiating principles exist but we are told are not being actually applied by the parties which then begs the question as to whether we need them. What's the Industrial Secretary's position as to whether in fact they are going to be applied in the future as far as the Industrial Secretary is concerned and the benefit of therefore retaining it?

MEEHAN: Well I think I can answer that they are going to be applied in the future. I can't, as I presently stand here, confidently answer that in terms of what has happened. Yes, but if they are the principles that this Commission determines should continue, then they will be applied.

PRESIDENT: Is there anything further you want to say on that subject?

MEEHAN: Not until we get to "no extra claims."

PRESIDENT: I was going to call on you first to deal with that.

MEEHAN: May it please.

PRESIDENT: So if you wouldn't mind turning then to the "no extra claims" question.

MEEHAN: Yes. Well there is a measure of agreement at least as between the Secretary and the APA at point of principle and local government that there is utility in a model no extra claims provision.

PRESIDENT: Would you mind if we - you speak directed to the particular text of the provision in question? I just, remind me of where I can find that in the court book.

MEEHAN: You'll find that in our submissions-in-chief at p 49 of the submissions and it's a new principle 9.7. This is a proposed model and members of this branch--

PRESIDENT: Sorry, pages - I haven't found it yet.

MEEHAN: I'm sorry, your Honour.

PRESIDENT: Where am I finding it?

MEEHAN: Page, sorry, it's 42 of the, page 42 of the submissions-in-chief and 9.7 is the principle. I'll give your Honour an appeal book--

PRESIDENT: Page 77 of the court book, thanks.

MEEHAN: Court book, 77. Sorry.

PRESIDENT: Yes, I have it now, yes, thank you. So now that I've got that in front of me I am keen to hear you identify the purpose and effect of this.

MEEHAN: Might I give the members of the bench just a moment to read that because it's not a traditional no extra claims clause. So the first point we wish to emphasise is that it proscribes, other than is provided for in the Act, claims and demands for proceedings et cetera with respect to employees covered by the award that take effect prior to the nominal expiry of the award unless there is an agreement. In other words it's a proscription on unilateral action to advance claims or demands which would take effect during the nominal term and so that's - well perhaps if one reads on the clause is not a clause intended to prevent ongoing discussions to deliver additional enhancements or to remuneration or conditions of employment and so it's not intended to operate as a complete blocker as it were to industrial negotiations and that it doesn't prevent consensual applications to vary an award, so if the discussions that are not prevented occur and they are fruitful and yield up terms that might find their way into a consent award, that is not prevented by the proposed clause. So what one sees is, really, a mechanism designed to protect the integrity for the nominal term of an award or what has been settled.

PRESIDENT: I have a series of questions. Do you mind if I take you through them?

MEEHAN: Of course, your Honour.

PRESIDENT: Can I start with the first - before you actually get to the clause the paragraph of your submission starts, "Where a no extra claims clause is to be inserted into an award." In what circumstances would one be inserted and in what circumstances would one not be inserted?

MEEHAN: That's perhaps infelicitous drafting. It's a proposed model clause and it would be the, as it were, default clause that should go into an award whether arbitrated or consensual.

PRESIDENT: I see. And--

MEEHAN: I should add to that, your Honour, obviously with the, well perhaps not obvious, with a consent award one can readily identify the possibility that

parties might come up with an alternative prescription which, by consent, the Commission would adopt that this is, as we seek to emphasise, is a proposed model clause.

PRESIDENT: Is it your client's view then that were we to arbitrate a case, take Mr Saunders' case for example, that the outcome of that case, if we were to make a new award, it would contain this clause.

MEEHAN: Yes, your Honour. Yes. Because of its protective purpose, that is to protect the integrity of the system of wage fixing.

PRESIDENT: And if the only thing that was being considered in respect of a particular application is that the award ought to be updated for CPI purposes and no other aspect is before the Commission, nevertheless this clause would be the appropriate one that would prevent any other matters being determined for the life of the award.

MEEHAN: Well--

PRESIDENT: By arbitration other than by consent.

MEEHAN: That's a difficult question to answer and one can contemplate there might be appropriate circumstances where there would be leave reserved on issues so that a circumstance may come to arise even in an arbitration situation where the Commission does not resolve by arbitration or the competing claims, but nonetheless makes an award and specifically, as has been done from time to time historically, identifies specific claims or subject matters in respect of which there is leave reserved and there may, on an occasion such as that that they need to mark out or make exception for those type of matters.

PRESIDENT: Turning to the text itself, it commences with the words "Other than as provided for in the Industrial Relations Act." What do you understand the effect of those words are? What is that essentially preserving or committing that the rest of the words on their face prevent?

MEEHAN: The intention, pulling from the language, is that the prima facie position is there won't be further claims, but if that was in some way repugnant to the provisions in the legislation they couldn't have that legal effect or operative effect.

PRESIDENT: Do you see a difficulty with us making an award that would make it a civil penalty offence for someone, an applicant, to come before us and make a claim pursuant to s 17 to amend an award given that they have that right under the Act? What would you say that that's not the effect of this clause?

MEEHAN: Well does your Honour have in mind the, I'd say the mere making of the claim that would--

PRESIDENT: It may depend on what the words mean but there will be no further claims, demands or proceedings instituted before the Commission. On one view, the very institution of the proceedings, possibly in a dispute in which the dispute notification makes a claim, that there ought to be some different way in which an allowance is paid et cetera, would in fact invite a conclusion that a person had breached the clause of the award.

MEEHAN: Breached the award. I can't discount that as a possible effect on the language.

PRESIDENT: The language that we have here has its genesis, as you would have read, from various parties' submissions from language which originally was cast in the form of an undertaking. That is, a party would give an undertaking that they would not make further claims of a particular sort, subject to ...(not transcribable)… whatever, and in that form perhaps the same issue didn't arise but I do have a concern that we not make an award that might be read as making it a civil penalty offence for an applicant, whether it's your client or any other person represented here, from making a claim, that would seem to be inconsistent, wouldn't it, the statute?

MEEHAN: I accept the force of what your Honour says. It's complicated by the distinct possibility that the parties, as part of a consensual arrangement, comes back to some degree to what your Honour, the President, said about the genesis of these clauses as an undertaking but parties could consent to a provision of this type going into an award and the position would be no different, your Honour. In other words they could consensually submit themselves to the difficult circumstances that you have identified, the practical term.

PRESIDENT: Except, perhaps, if they undertake that they won't make or pursue further claims for a period of time, then they are committing themselves, rather than us imposing an award obligation on them, particularly in circumstances given your client's position that we should impose such a clause as defaults in circumstances where there's been an arbitration that we then should insert a clause which says then you cannot bring any further claims of payments in penalty. That does give me some pause, sorry, pause for thought.

MEEHAN: And, with respect, quite rightly. And the position I'm emphasising is the legal position if, as you're positing, a claimant would be exposing themselves, by making a claim, to penalty, the position would be no different whether the award had been made by consent or arbitrated.

VICE PRESIDENT: Where this clause might be imposed by a process of arbitration rather than consent, that prohibition would extend to parties seeking an arbitrated outcome before the nominal expiry of the award by consent, would it not?

MEEHAN: Not if the - only if it would take effect prior to the nominal expiry, yes.

PRESIDENT: The final words of that first paragraph “unless otherwise agreed by the parties” is it your client’s position that those words permit, and your client accepts that it’s appropriate to permit parties notwithstanding a no extra claims provision, whether undertaking clause or otherwise to arbitration, that is what might be referred colloquially as consent arbitration?

MEEHAN: Yes, your Honour.

PRESIDENT: A matter that I raised with your junior Mr Pararajasingham in some proceedings recently, that is it intended by the Industrial Secretary that a no extra claims clause shouldn’t go so far as to prevent the parties not only reaching agreement through a mutual gains process or otherwise to amend the award during its nominal term, but also wouldn’t prevent the parties agreeing to have the Commission arbitrate a matter by consent?

MEEHAN: Yes, well, I'm tempted to answer directly, but I should consult my learned junior, lest I answer in a way that’s inconsistent--

PRESIDENT: Now, he gave me a position, and I did indicate to him that I wasn’t entirely confident that was, in fact, your client’s position and I was hoping it could be clarified today. So--

MEEHAN: My understanding of the position is that if the matter proceeds by consent, that is the invocation of arbitration by consent, that’s permitted by this clause. And one sees, of course, the deployment of the word “unilaterally” which is important in the fifth line of the first paragraph.

PRESIDENT: And would that extend to a consent position that the arbitrated outcome could apply prior to the expiry of the award, that is the parties, if they consented to such an arbitration, that exclusion would also permit that?

MEEHAN: Well, it would be open to the Commission to read those words as qualifying the entirety of what precedes it.

PRESIDENT: That’s how I did read them, but it would be helpful if we are able to get an indication that that is, in fact, your client’s preferred outcome from a no extra claims clause, that is that notwithstanding there is a no extra claims clause, there would be potential for the parties, only by consent, I understand your party’s position, but by consent arbitrate an issue that’s arisen during the course of a nominal term of an award, knowing that that outcome would, in fact, apply prior to the expiry?

MEEHAN: Yes. Is the best way to deal with that by sending a note to your Honour’s associate?

PRESIDENT: Yes. I'm quite content with that, unless there’s an immediate response, I'm quite content with that. I think that’s - I had a series of questions. I think I've exhausted them. I thank you for giving us that

assistance, other than for that last point. Are there other members of the bench who have questions?

MEEHAN: Your Honour, I wonder if I might take up this--

PRESIDENT: Yes.

MEEHAN: --point, as well, to perhaps be the subject of a note, and that is to further consider what your Honour said about the prospect of exposure to penalty, and just confirm in the light of your Honour's observation the Secretary's position in respect of that?

PRESIDENT: All right. If you want to, between now and the time we rise, confer with your juniors as to when you want to provide that note and indicate that to us, but--

MEEHAN: It would be a very concise note.

PRESIDENT: I would imagine so, so I was hopeful that it could be done quickly.

MEEHAN: Yes.

PRESIDENT: Thank you. So we're dealing with no extra claims. Mr Boncardo, do you want to go next?

BONCARDO: Yeah, if your Honour pleases. Our position, as set out in writing, is that so far as we are concerned, no extra claims clauses have no place in an arbitrated award. We say that for a number of reasons. First and foremost, we formally put that in light of s 17 of the Act, it would be inconsistent with the scheme envisaged by the Act for the Commission to impose by way of arbitration a no extra claims clause that, in effect, locks a party out of making an application for variation under s 17. We have cited in our submission the Full Court's decision in Toyota v Marmara which, no doubt, the bench are familiar with. That is cited at paragraph, it's footnote 32 of our original outline, para 69, where the Full Court of the Federal Court dealt with a no extra claims provision in the context of variations, which can be made to enterprise agreements under div 7 of pt 2-4 of the Fair Work Act and the gravamen of their Honours' analysis was that the Act provides a regime for variation, it is inconsistent with the primary instrument, that is the Act, for a subordinate instrument to purport to oust or otherwise fetter the power and jurisdiction of the Fair Work Commission to grant a variation.

We would say that a similar would apply here. We don't go so far, however, as to say that a no extra claims clause could not be included by consent and our submission is, to that effect, limited to a no extra claims clause being imposed by the Commission. And we certainly do not concur with, and we resist, para 55 of Mr Meehan's reply submissions, where the Secretary says there should be a model no extra claims clause included in the wage-fixing principles and it should be included in all awards. That--

PRESIDENT: In all--

BONCARDO: Into all awards.

PRESIDENT: --awards.

BONCARDO: Those are the words that are used, and that, we say, ought not occur for the reason that I've identified. Insofar as your Honour raised the issue of whether or not a no extra claims clause, if breached, would result in a civil penalty offence for the purposes of s 357 subs (1) if framed in the way that the Secretary's clause is framed, it is difficult to see why a claim made in breach of that provision would not be a contravention of an award. The clause as framed imposes an obligation not to make a claim. A claim is made. There's therefore been a contravention of an industrial instrument, which could sound in a civil penalty. Now, that is not, as we understand it, the intent of the Secretary subjectively, but that objectively is how the clause is presented and how it is read.

Now, so far as the Commission's question number 10 is concerned, we have perhaps, and I think everyone perhaps, has not been focused upon the actual question that was asked, that is, should there be a model no extra claims clause in respect to agreements? And those words were perhaps used with some consciousness by the Commission and perhaps the parties have deviated somewhat from the question that was asked, because if the question was directed to should there be a model no extra claims clause for agreed awards or consent awards, then that is a matter about which we are agnostic. We certainly wouldn't oppose such a model clause being promulgated for parties to consider and build on, amend or otherwise utilise, in the context of negotiations. But we resist any notion that a model extra claims clause should be imposed by fiat of the Commission in an arbitrated award. Insofar as Mr Meehan's proposal is concerned, it, with respect, raises more questions than it answers. The opening words "Other than is provided for in the Industrial Relations Act", does that mean the no extra claims clause could be surpassed by an application under s 17?

PRESIDENT: Indeed, I was going to say that perhaps those words are there to deal with your Toyota v Mamara point, that is, you can, in fact, make an extra claim if the Act allows you to do so, but that does then beg the question as to the utility of what follows.

BONCARDO: Exactly. It becomes entirely superfluous, and then one also questions how the parties engage in collaborative discussions and reach agreement without party A first making a claim or demand about something. Conversations about new employment conditions don't just emerge organically. Generally, someone will need to make a claim or a demand which will then be discussed collaboratively, one would anticipate, before an agreement is reached. So the clause is problematic for that reason as well.

In our respectful submission, this is not something that this full bench needs to consider or deal with in the context of articulating wage fixing principles. If it is intended, as it should be, for no extra claims clauses to be limited to consent awards, that is something that the parties can and should be left to negotiate themselves. In the event that the Commission considers that there may be utility in promulgating a model clause, then we would certainly wish to say something about that in due course, but we think, as framed, the Secretary's clause is problematic and should not be included in any reformulated wage fixing principle.

VICE PRESIDENT: What do you say, Mr Boncardo, to Mr Meehan's indication of the need to protect the integrity of an arbitrated outcome in an award for a period of time, if not by the insertion of some form of no issue claims clause?

BONCARDO: We do not accept that there is an imperative for a no extra claims clause to protect the integrity of an arbitrated outcome. In the event that an arbitrated outcome is reached by the Commission and a party comes along and seeks to disturb that, then unless there are very good reasons for disturbing the arbitrated outcome, it's difficult to see why the Commission would countenance such an application.

We do not see the need for a no extra claims clause in order to protect the integrity of an arbitrated outcome. If one of my clients made an application for a 3% pay increase which was granted, and then the next day came along and made an application for a 3.5% pay increase, it's difficult to see why the Commission couldn't, using its ordinary powers and procedures, dismiss that application without the need for a no extra claims clause to be invoked.

PRESIDENT: With Mr Meehan's client, we're aware, from related proceedings, would like the certainty of a three-year award and so that the State of NSW has some certainty about budget going forward for a period of time. As I understand your position, were the parties in such proceedings to reach a consent position, it may well be appropriate for the union parties to give undertakings performed, recognised by a clause that would give that certainty that there will be no further claims that would give rise to costs, et cetera, as the price of the deal, so to speak.

But if we posit a different scenario and that is no consent position is reached and there's an arbitrated outcome, to pick up the Vice President's point, is there some appropriate way in which the award can recognise the same certainty that the Industrial Secretary certainly would like to see, that is, some confidence that having run a case and there's an outcome that has delivered the outcome, and it's in this hypothetical notion, a three-year award, that they're not going to face in 12 months' time, an application for further increases in that period?

BONCARDO: Absent undertakings of the kind that your Honour has referred to, in our submission, such comfort is unnecessary in circumstances where if the Commission adjudicates a three-year application and makes a determination on that, it would be highly unusual for the Commission to

change its view on the application by a union party a year and a half or two years down the track. There doesn't need to be a no extra claims clause for the Commission to say, I will either not entertain this application or I'm going to dismiss this application because we had a full-blown hearing a year and a half ago and all these issues were settled.

MCDONALD C: Mr Boncardo, what if it's a different, like, that seems reasonably straightforward if you're talking about a wage increase and you've already arbitrated that it's 3%, you can't come back and ask for 3.5 a year later, that's reasonably straightforward, but what if you've done 3% and then in a year's time a claim is made for a four-day week? They're different things but, clearly enough, the arbitration of the matter a year prior would have proceeded differently, perhaps, if it was known that a year later, the employees only wanted to work four days a week. Isn't it the moment there is an ability to go, well, you can't do that. We've got industrial peace for three years, you can't come back and make such a point.

BONCARDO: I think that that kind of claim would be dealt with by the Commission in a similar way to the 3.5% claim, that is, we've had a full-blown hearing premised on a five-day week and you've got 3% out of that--

MCDONALD C: So what, the idea is you should have brought that, like, some kind of issue estoppel, this should have been brought a year earlier?

BONCARDO: Not an issue estoppel--

MCDONALD C: No, I realise it's not exactly--

BONCARDO: --but going to the Commission's exercise of its discretion under s 10 or s 17. What my client is trying to avoid is fetters on the Commission exercising its discretion in a sensible and coherent way, and we don't think that there is any principle reason why a no extra claims clause needs to be included to preclude unions or employers or anyone else making claims of the kind that you have contemplated, Commissioner.

VICE PRESIDENT: Your solution, Mr Boncardo, knowing that the Commission would ordinarily exercise its discretion not to entertain?

BONCARDO: Yes.

VICE PRESIDENT: And that presupposes that the extra claim is made in this forum. What if that doesn't happen? What if the demand is made outside of this place during the life of the award?

BONCARDO: If the demand's made outside of this place during the life of the award, then that will be a matter for the employer or the union parties to consider outside the confines of the Commission. In the absence of a requirement for the employer or anyone else to accede to that demand, then the demand is likely to go nowhere.

MCDONALD C: And also ...(not transcribable)…

PRESIDENT: I think, put the Vice President's question more bluntly, if we arbitrate Mr Saunders' client's claim that's coming before us in February and March, and the outcome is one which, six months later, his client think, perhaps, at the time, thought was inadequate and six months later decides to start taking industrial action because they are just unhappy with the outcome, that's the type of bringing the claim other than here that the Vice President might have been referring to. I can imagine the Industrial Secretary saying isn't there a role for the award to prevent that type of conduct, that is, to make clear that you cannot pursue claims whether outside the Commission or in the Commission once you've had your go for the life of the nominal term.

BONCARDO: And in that entirely hypothetical scenario, there are provisions under the Act which would enable this Commission to make dispute orders, restraining Mr Saunders' client, and if Mr Saunders' client does not comply with them, the Supreme Court can take action.

VICE PRESIDENT: Industrial Court.

BONCARDO: I'm sorry, I'm thinking pre-2023. I do apologise. This Court can take action against Mr Saunders' client so that, and not against Mr Saunders, I hope. And, in that sense, there's no need for a no extra claims clause because the Act already deals with--

VICE PRESIDENT: Yes.

BONCARDO: --that kind of circumstance. If the Commission pleases.

PRESIDENT: Who wants to speak next on no extra claims clause? Mr Saunders?

SAUNDERS: Just to pick up on what Mr Boncardo was saying, just before I do that, though, could I just draw the bench's attention to s 134? It's in respect of good faith bargaining and to clarify a matter. 134 ...(not transcribable)… correct that there are no discretely enforceable good faith bargaining obligations in respect of ordinary bargaining in the Commission. It's not a totally irrelevant process, we see, at subs (4) the Commission when dealing with a dispute implicitly by conciliation given the section it's within must have regard to these things. And the reason it's perhaps of interest is in respect of your Honour Justice Taylor's question, as to what the source of possible power for the negotiating principles. (4)(b) it does seem inherently likely that the Commission would regard its own principles as reasonable and I've been helpfully informed by someone involved in the 2010 proceedings, who, in keeping with today's practice, I won't name, that that was the point, that was how the negotiating principles were meant to come in. But it's a very limited set of obligations. It doesn't extend, as I would read that section, into any arbitration.

In terms of no extra claims, it is in considering this, useful to reflect on the development of these provisions, both in arbitrated and non-arbitrated contexts. In the inter partes context, enterprise agreement negotiations, they reflect a deal. It's a trade-off, it's an agreement in the move from centralised wage-fixing to a bargaining and enforcement cycle that the employees will waive their ability, legal or otherwise, to take industrial action. It's the price of peace, as you put it, Commissioner McDonald. The history is slightly different in respect of arbitrated proceedings, but it's consistently the same point. It's that opt in process, that you have this benefit, the way the Commission will provide, if you consent to this arrangement which would operate by force of your agreement to prevent the claim being run. As I've always understood it, that's the basis of no extra claims arguments in this place and elsewhere being run as effectively strike out points. You're prevented from running this. It's not a contravention argument, because it doesn't directly, the fact that something is inconsistent or prohibited by an award does not directly mean the Commission can't do it, in terms of making another award, in theory, in any event.

In respect of your Honour Vice President Chin's question as to the protection of the integrity of the bargaining system if these can't be imposed on a party absent their consent, which we agree with Unions NSW, they either can't or shouldn't, the integrity of the system is preserved in two ways. Section 17 specifically subs (c)--

PRESIDENT: 3(c) is that--

SAUNDERS: 3(c) I apologise. "During its nominal term", so that's the only period an extra clause could apply for "if the Commission considers that it is not contrary to the public interest". The public interest is uncontroversially served by a stable and structurally efficient industrial relations system. It's not expressed, but the entire scheme of the Act is about breadth of power. So there is that, if it's imposed by consent. It doesn't address the issue of imposing on a party unilaterally. Again, indeed, that would create its own public interest difficulties.

The second way is that there is no reason why the Commission could not make a conditional determination, make its award in whole or in part conditional on the employee association agreeing, possibly largely only in part. There would be an issue in terms of constructive failure to exercise jurisdiction if the dispute remained unresolved, but it's available in theory as an option.

PRESIDENT: Sorry? What was that? There's no reason why the Commission can't impose what? I missed it.

SAUNDERS: And can't propose an opt in process, much like the model in the 1983 National Wage Case.

PRESIDENT: Yes.

SAUNDERS: Whether the union opts in is a matter for it and if it doesn't dispute continues and other options need to be explored until the Commission has completed the task of exercising its jurisdiction, but that is there as a practical solution.

PRESIDENT: You mean making variation conditional on proffering of an undertaking of some--

SAUNDERS: Yeah, so providing consent to a no extra claims clause. The drafting in the awards reflects that history of undertakings. It's in that language of, often I should say, and certainly in the - certainly not in the Fire Brigade awards, but often in that language of the parties agree that there will not be.

PRESIDENT: Yes.

SAUNDERS: So it's not fatal, but what it can't be is imposed on a party without its consent.

PRESIDENT: Just stopping there, the subject that I was asking you questions about this morning, the notion that there might be a State Wage Case that might determine a change in the rate of pay based on considerations that focus on CPI but also on the other matters that we're required to take into account, fiscal responsibility and the like, that then can be the subject of an application by state unions, I can imagine the Industrial Secretary at that point being keen that any such application would only be granted on the basis of a no extra claims clause, in broad terms, whether by way of undertaking or otherwise, the Industrial Secretary proposes here, and if that were not to be granted, the union would then need to run a case within the principles?

SAUNDERS: Yes. That is structurally available within the Act, and it would be very difficult. As the Commission has seen, the proposed structure doesn't contemplate that, but it would be very difficult to resist that, given that respondent of it is based on the structure of those national wage decisions, very difficult to resist the proposition that the condition that they contain shouldn't travel along with it. But it would be a functional way of facilitating that, limited and controlled access to non-agreed normal wage increases for the normal state employee.

PRESIDENT: It would give the Industrial Secretary certainty for the life of that award albeit based on the outcome of the State Wage Case?

SAUNDERS: Yes. It would need in that respect, and it takes me conveniently to the next point, the issue of leave being reserved, because that would necessarily only deal with wages, there may be any number of outstanding conditions claims. And it's true, anyway, of the processes, that the reality is the Commission is confronted with a significant reform process, and my current client's application is a very good example, in the sense of a number of claims being put forward. The ability for parties to advance complex reform packages through mutual gains bargaining is desirable but very complicated. Those bargaining processes are necessarily labour-intensive, time-consuming.

I'm drawing that from the new approaches program in the federal system but it's structurally the same thing.

It takes a while for the parties to firstly get out of the habit of simply disagreeing with each other, providing, you know, ambit logs of claims. It's a new way of thinking. And it'll take time. It's undesirable that employee wages and conditions claims where they are agreed or can be discretely arbitrated are held up for that process. It's largely to lead, likely, I should say, to lead to a continuing state of ongoing disruption and so there are circumstances where the Commission should be open to leave reserved clauses, which have worked perfectly well in the past, particularly considering my current client, in circumstances where a large scale work value case is foreshadowed in the future, which, again, a time-consuming process. So the FBEU's proposed principles reflect a statement that the Commission will remain open to that, whether it's appropriate or not varies case by case.

It is related to the question, and it came up in an exchange between your Honour Justice Taylor and my friend Mr Boncardo as what's a claim precisely? It's - historically - on one view of the word, it just means asking for something. Historically, locked away, it's been interpreted in this jurisdiction, a claim - and we see that reflected in the Secretary's proposed language it's a claim/demand. It's something that's sought as a right, or as a force, in effect, and it's all linked to the piece that's being bought here, which is industrial action. It's part of the package there. The disruption that the Secretary is concerned about is not the need to meet with a trade union to discuss a claim they don't want to give. It's industrial disputation erupting in workforce disruption. It does mean it's unlikely that it would be a breach of an award to ask for something that - it gives some light as to what is actually trying to be achieved here. It does, as a process, sit a little oddly with the absence of access to wage growth outside of limited circumstances, but that is addressed by the structural reforms of the FBEU proposes the return of an integrated wage growth system to the State wage principles. Unless there was anything further.

VICE PRESIDENT: Mr Saunders, your two system integrity measures--

SAUNDERS: Yes.

VICE PRESIDENT: --identified. Are they apt for inclusion or addressing in some way as part of our principles as an alternative to the Secretary's proposal for a mandatory no extra claims clause?

SAUNDERS: In part, because the principles could not of course say section 17C will be applied as if it prohibits variation when there is a no extra claims clause in place without straying outside the scope of guideline judgments into arbitrary decision rules - not arbitrary, I'm sorry. Just decision rules, but certainly it could be - if that is the broach that the Commission determines it will take, which is the point of this exercise, then it can and should be reflected in those principles. Certainly, if a process involving access to an agreed centrally fixed wage conditional on a no extra claims clause, it would be a

benefit to everyone if the full consequences of that were made clear, and indeed, of course the general principle of structural stability would be appropriately included in the preamble, and I think already is in the FBEU's draft, although we were rather talking about internal and external wage relativities. It can be interpreted in a number of ways. Unless there was anything further.

PRESIDENT: Mr Britt.

BRITT: Your Honour, your Honour asked me a question when I was last on my feet about whether location government award contains a no extra claims clause. Historically, it has, but in the last two manifestations, I understand, it hasn't contained a no extra claims clause, and that reflects the maturity of the parties. That is, issues are kept to be debated and discussed at the making of the new award. That is, we haven't had an experience of people seeking additional claims because we've had that 33 years of practise in negotiating. So, we certainly don't support that it's mandatory to include in every single award a no extra claims clause.

In our submissions, we did support the making of a model clause. Having heard the arguments today and reading the submissions in reply, which we haven't a chance to read, we no longer support the making of a model no extra claims clause. The extent there are to be no extra claims clauses, and in particular, a rising from the Commission arbitrating a matter, the actual wording of that clause really needs to encompass the nature of the arbitration that was before the Commission. That is, it's difficult to see how you could have a model clause dealing with everything such that people don't ask for 3% and 12 months later come back and ask for three-and-a-half %. The matter raised by Commissioner McDonald is important in the sense of, you can have other matters that are not wage-related that arise. So, in relation to a State decision creating a new form of leave, section 17 allows a claim to be brought in those circumstances.

So, to the extent there are no extra claims clauses, in our submission, it's a feature of the particular case that the Commission arbitrated. Parties, of course, would then be free in a consent matter to come up with their own version of a no extra claims clause, if that is what they agreed to do, rather than have one provided by the Commission, and two, can I just respond to the submissions of my learned friend Mr Latham and Mr Saunders in relation to my client being an outlier.

We accept the tail - which is my client - doesn't wag the dog - which is the parties to my left, but there's still a tail, and the Commission in making wage-fixing principles has to take into account the circumstances of my client, and in particular, the history of my client, and its industrial parties, the unions, in having 33 years of consent arrangements. Those principles formulated by this Commission should not make that more difficult. They should not impede what in fact has been a success story of the industrial parties working together to create efficiencies in local government, to increase real wages, to provide better careers. There are some - as set out in the affidavit of Mr Danzig -

there's some 60-odd thousand people employed in local government, and the principles have to be crafted in a way that recognises that what may or may not work in government may not work at all in local government.

The last time this Commission considered wage-fixing principles in toto as is happening here today was in the State Wage Case 2010, reported [2010] NSW Industrial Relations Commission 183, and at paragraph 93 of that decision, the full bench said, "The other major sector subject to the Commission's jurisdiction is local government, which consists of about 44,000 employees", noting that in the last 14 years the number of people employed in local government has gone up approximately 40%.

I go on: "Obviously, any new principles have to be designed to cater for this important sector. The local government sector has an enviable record of consent awards", noting that's now continued another 14 years, "Stretching bac to 1992. Nothing that is proposed should affect the arrangements in that industry that have benefit employers and employees alike over a long period of time". What we say to this Commission is, a similar approach needs to be adopted in this case in respect of what principles are developed, and you should follow the lead of the State Wage Case ten years ago. Thank you.

PRESIDENT: Mr Meehan, I've got a couple of additional questions but it may also be that you've got some things to say in response. Do you mind if I jump in with my questions? First is - and feel free if you think you'd prefer to do this by way of a note to deal with it - but just going back to the drafting of the proposed model claim where after the introductory words which refer to the Act, it says there'll be no further claims/demands or proceeding instituted before. I perhaps read the words "further claims or demands" as being further claims or demands brought to the Commission, but it may well be that the intention is to prevent further claims or demands that are not brought to the Commission. It really wasn't - if we're going to adopt this language, it might be important to be quite clear about which one it is.

MEEHAN: Yes.

PRESIDENT: Does your client have a current position as to what that ought to be understood to mean?

MEEHAN: May I also deal with that in the note?

PRESIDENT: Yes.

MEEHAN: One can take a view on the language, but you're asking about the intention and--

PRESIDENT: I am asking about the intention, so it's important to make that clear if we're going to adopt it. The only other thing that I did mean to ask while you're on your feet, and it slipped my mind, the parties are aware, of course, that under s 19, we have an obligation to review awards on a regular basis and that the purpose of that review is to modernise and consolidate

awards. Now, there is no doubt a strong case that can be made out and, indeed, as I understand it, in some sectors is being actively made out by both the relevant Secretary and the union, that there is a need to modernise and consolidate.

I presume, but, again, I'd like some clarity, that any no extra claims clause that the Industrial Secretary would invite made, whether by consent or otherwise, would not prevent modernisation and consolidation during the life of existing awards even though inevitably, that would lead to some level of disagreement that, hopefully, could be dealt with by conciliation but if not, by arbitration as to, if you're consolidating awards, which clause should ultimately find its way into the consolidated award, assuming, for example, you have 42 health awards and there are eight different ways describing long service leave, just hypothetically, then which of those clauses is ultimately adopted could be a matter of disputation. I just want to be clear as whether the Industrial Secretary says that on its approach or her approach--

MEEHAN: His approach, yeah, your Honour.

PRESIDENT: --it is his, is it, my apologies - his approach, the Commission is in any way restricted from being able to exercise those powers under s 19 by any no extra claims commitments been given, whether by imposition or undertaking or otherwise?

MEEHAN: Yes. Just by reference to the language deployed, it's hard to see how the Commission could be restricted for two reasons. It's hard to see that the indication of or the application of s 19, which mandates action by the Commission, could be picked up by the language of claims, demands or proceedings instituted and, secondly, this might be a good example of the utility of the opening words in the no extra claims model clause, where s 19, in the circumstances, would have paramount force.

PRESIDENT: Yes. The concern that I had was that there not be any suggestion that in proceedings which were initiated by the Commission to modernise and consolidate, that the Industrial Secretary, Health Secretary or the relevant Secretary says that the particular position being sought by a union amounts to an extra claim during the life of the award and whether what we need to do is something more than simply other than as provided, we need to be clear that that does not impose a limitation on a party, can't ultimately impose limitation on the Commission, but impose a limitation on the party in such proceedings from being able to make a claim as to what it thinks is the appropriate outcome of such a process.

MEEHAN: Yes, thank you, your Honour. I understand your Honour's question. Might that be a matter--

PRESIDENT: Yes.

MEEHAN: --that comes in to the note?

PRESIDENT: It may be that the note extends to the Industrial Secretary proposing a different form of clause and if that were to be the case, I, for my part, have no difficulty with the note attaching such a change. I only say that the difficulty is that if you go too far in this note, then we end up in a whole series of reply submissions and reply submissions. So the last question is when do you think you can provide a note about these matters?

MEEHAN: Well, my intention is to try and have a conference this afternoon. That might not yield a note today.

PRESIDENT: No.

MEEHAN: But I would hope tomorrow. Now, that may or may not be wishful thinking, but it'll be on the top of my priority list.

PRESIDENT: Yes. I think we all have experience with the fact that your client has a number of layers of decision making and sometimes it can take a little while for them to work their way through. I'm just concerned to get a realistic view as to when we might expect it so we can actually direct it by that date and then we don't have to be concerned about an open-ended deadline.

MEEHAN: May I respectfully submit, that direction won't be necessary, solely for the reason that it will be my top priority to have a note delivered to your Honour's associate and that will be done at the earliest possible opportunity, notwithstanding your Honour's observations about the layers that may exist.

PRESIDENT: I'm minded, notwithstanding your submission there's no need to make a direction, to give you seven days and to ask for any note in response to be filed within seven days, unless you tell me that you anticipate you will not be in a position to file within seven days.

MEEHAN: No, I can't cavil with that.

PRESIDENT: Mr Meehan, it may well be that there are other matters the parties have dealt with other than my questions that you wanted to deal with before you sat down. Is there other things that you need to deal with?

MEEHAN: No, your Honour, but just to be absolutely clear, the purpose of the note is to explain the intention, as I understand it, of the Secretary in the formulation. But your Honour has extended the possibility of some, perhaps, sparing amendments to reflect that intention. I just wanted to be sure that that is really the scope of the invitation by the bench.

PRESIDENT: Can I put it this way, that the Secretary is granted leave to file within seven days, a note in respect of the submission at 9.7, the Secretary's primary submissions at p 77 of the court book that first, identifies the tendered circumstances in which a no extra claims clause would be inserted into an award. Secondly, sets out the intended effects of the draft clause. Further, to the extent to which the Industrial Secretary in light of those matters identifies

that his position as to the content of the draft award has changed, that an amended marked up version of the draft clause set out currently at 9.7, be included. Does that cover that matters?

MEEHAN: Yes, I think it does, your Honour.

PRESIDENT: Can I be clear for those who may respond that any responsive note needs to respond to that note and not to other matters that may occur to the parties between now and the time they write that note. Finally, can I indicate an expectation that these notes will be no more than three pages, and if some reason a party thinks they need more than three pages, can you please apply for leave and explain why before you file it? Is there anything further that needs to be dealt with, Mr Latham?

LATHAM: Your Honour, can I just be heard - just very quickly - on the no extra claims clause?

PRESIDENT: Yes, of course. If I - did I - I meant to call on you, Mr Latham.

LATHAM: That's all right. That's fine. Just very quickly, the APA accepts a motion of no extra claims clause in relation to consent arbitration matters, because that's a classic form of no extra claims in terms of an undertaking made by the parties. The issue of an arbitrated decision I think is more complicated, and I think - I don't need to go into that right now. I think there's also a question about where there are discrete in relation to an award or a particular group of people under the award, where whether a no extra claims clause would then be made in relation to all people and all issues under the award, which comes down to the issue about what matters are the subject of the award, but we will comment on the proposal put forward as proposed by the Commission. We can deal with those matters in greater detail at that stage.

BONCARDO: Just one matter very, very quickly. We've mentioned at paragraph 31 of our reply submissions our opposition to the Secretary's proposed transitional provision. Can I indicate that we embrace and endorse Mr Saunders's transitional provision.

PRESIDENT: I hate to say this, but this particular sub-issue may have passed my attention, so just--

BONCARDO: Yes.

PRESIDENT: Would you mind just backing up a second? What is the Secretary's position on transitional provisions and why is it opposed?

BONCARDO: It's in the clause 13 of the Secretary's proposed wage-fixing principles. As we apprehended what it does, is it limits any reformulated wage-fixing principles, which this bench might articulate to applications that are, one, both filed and determined after the promulgation of any new principles, and to awards that are outside their nominal term. We think that is

too restrictive, and Mr Saunders's alternative approach of - this is at proposed clause 28 - of applications made after the commencement of the proceedings, and applications which have been filed prior to the commencement of the new wage-fixing principles and where the matter has not proceeded to a substantive hearing is more appropriate.

PRESIDENT: So, in short, the difference between the parties is whether any changes that are made to the wage-fixing principles will have effect in respect of proceedings which are on foot?

BONCARDO: Yes.

PRESIDENT: And, in short order, are there any position of principle that would encourage us to prefer your client's position over that of Mr Meehan's?

BONCARDO: Mr Saunders reminds me that it's his client's position, which I am pilfering, but in terms of a matter of principle, it is that the Commission can and should take into account and apply as guidelines any reformulated wage-fixing principles in respect to matters that haven't been conclusively determined, because those principles will be reflective of modernised version of the principles in light of the changes to the statute that have been made since 2023, and it would be more appropriate for contemporary principles to be applied than to - than the current principles.

PRESIDENT: Yes.

BONCARDO: Mr Saunders has a simpler answer.

SAUNDERS: It's the current transitional provisions from the last State wage principles, so 2022 decision, and it is taken from a long chain of transitional provisions. So, it's--

PRESIDENT: What is the current - sorry, is that the - your client's position at paragraph 28 reflects the current approach?

BONCARDO: Yes. The current and historic approach. It's unusually, in the document, a perfectly conventional approach to wage fixation in this jurisdiction, and the reason is relatively obvious. It allows for consistency of decision-making at the same time, prevents this odd approach where hearings conducted on the same day might be taking a different approach to different things, noting the nature of these statements.

I had one matter that I wanted to address. It is slightly divorced from the extra claims, but it arises from my exchange with your Honour Taylor J about the proposal of using the State Wage case to concoct a paid rates award alternative as opposed to national system flow-on. Of course I'm conscious that I have not addressed the bench on the historical reasons why the national decision is not taken to flow on to paid rates awards. We do not consider it significant, that's why I haven't done it. It's a decision made in a particular time, when those awards, when wage fixation was working in a particular way.

If, however, that troubles the Commission , I can prepare a historical note and would seek to be heard on why it doesn't matter. The considerations that those decisions involve would certainly factor in the relevant considerations to whatever figure the Commission's consideration of a figure, whether a figure should be set, but there's nothing that affects it as a matter of principle, being a course that's adopted. Again, if that does trouble the Commission, I would seek to be heard further. Not at this precise moment.

PRESIDENT: Mr Saunders, partly because I know how much you'd enjoy writing it, I think we would appreciate that.

SAUNDERS: Certainly.

PRESIDENT: Will you mind, though, as I'm sure you would have attended to do so, keeping it as - so no more than simply, in effect, a chronology of the development and with the reference to the key cases about developing an argument as to why therefore it should lead to a particular outcome so that we - you can understand the distinction, so that we understand the point you've made, the submission - what you're, I think, identifying is that in case we are troubled as to how it's come about, the State Wage case no longer makes decisions that flow into public sector and that level of government awards, if you wanted to explain at what point that nexus broken--

SAUNDERS: Why that happens.

PRESIDENT: --a note to that effect would be useful.

SAUNDERS: Yes, certainly. I can do it in the seven days.

PRESIDENT: Thank you. Anything further? Well, can we thank the parties. We appreciate very much that quite a lot of work has gone into giving some quite careful thought, and when I say thank the parties, I genuinely mean the parties, for taking the time and effort to brief experienced counsel to give us this assistance. I think I can speak for the whole bench that without that, the outcome would have been of a much lower quality. So we really appreciate the assistance that we've got to date.

We look forward to receiving these notes and we will then proceed to hand down a decision as quickly as we can, but, as I indicated, given that there is a drafting exercise attached to it, to the extent to which we determine that we will continue to be wage-fixing principles but they will not be in their current form, we do have an intention that they will be provided in a manner that will allow the parties an opportunity to provide comment on them. The exact manner by which that comment will be provided is something that the Full Bench will discuss, but it may be that it's simply dealt with in writing. It may be convenient to actually have a round-table discussion which involves some communication that assists us along with some written note. We will advise the parties of that in due course.

APT:SND

DECISION RESERVED