



## Industrial Relations Secretary's Note to the Full Bench of the Commission

1. Question posed by the Full Bench: What are the intended circumstances when a NEC Clause would be inserted into an Award?

Secretary's Submission: The Secretary's proposed model no extra claims clause could be inserted into an Award by consent or after an arbitration of a dispute where the Commission considers it appropriate to do so in the exercise of its discretion. It is submitted that the model clause could be inserted in all Awards unless there are reasons to depart from its use or the parties agree otherwise.

2. What is the intended effect of the clause -

(a) Question posed by the Full Bench: What does the Secretary say about the proposition that the NEC clause inserted into an Award (as a result of arbitration) would result in the IRC imposing a penalty to an applicant for making an application to vary the award under s 17(3)(c) of the *Industrial Relations Act 1996 (IR Act)*? (i.e. variations during the nominal term of the award may be made where not "contrary to the public interest").

Secretary's Submission: The opening words of the proposed clause would preserve the capacity of a party to invoke section 17(3)(c) of the IR Act, and therefore this issue will not arise. However, the Secretary accepts that the no extra claims clause is enforceable under the IR Act and may have the consequence of exposing a party to civil penalty.

(b) Question posed by the Full Bench: Would the model NEC clause allow for arbitration with results to take effect during the life of the Award where the parties agreed to arbitrate an issue?

Secretary's Submission: The model NEC clause allows for applications to be made to vary an Award during its nominal term where this is consistent with the IR Act. However, unless the parties agree otherwise, and subject to the operation of the IR Act, the operative outcome of any arbitration would take effect after the expiry of the nominal term of the Award. This is to ensure fiscal stability during the nominal term of an award, preserve the finality of the Commission's decision and guarantee the position of both parties during the nominal term of an Award.

The model NEC clause will also allow for matters to be arbitrated by consent during the nominal term of an award with any changes to the Award terms or conditions to take effect on a date to be agreed by the parties or a date determined by the Commission in accordance with the IR Act.

(c) Question posed by the Full Bench: What does 'claims/demands' mean? Would this refer to claims and demands not made in the Industrial Relations Commission (IRC)? Would this capture arguments made to the IRC where it, of its own motion, is reviewing awards under s 19 of the IR Act for the purposes of modernisation or rationalisation?

Secretary's Submission: Under his proposed amended version, the phrase 'claims/demands' has been removed and the reference to 'claims' has been confined to claims made in proceedings before the IRC, which removes any ambiguity. In respect of the review of Awards under section 19 of the IR Act, the clause would not prevent the

parties to the Award making submissions in accordance with s 19(5). However, in a particular case, the clause would limit the submissions which could be made to the IRC during its exercise of the review function under s 19 of the IR Act. If a party seeks to vary an Award under review to include substantive changes to wages, salaries etc or conditions of employment in the Award during its nominal term, this is not concerned with the purpose in s 19(2) of the IR Act and would accordingly be prohibited.

(d) Question posed by the Full Bench: What does ‘unless otherwise provided by the IR Act’ mean?

Secretary’s Submission: It means that the no extra claims clause is not intended to operate in a way that gives rise to inconsistency with the IR Act and to the extent of any inconsistency, cannot displace statutory rights conferred and obligations imposed on the parties under the IR Act.

Such a qualified clause is considered to still have utility in ‘reminding parties of the settled nature of the award during its nominal term’s: *Public Service Association and Professional Officers Association Amalgamated Union of New South Wales v Roads and Maritime Services* [2015] NSWIRComm 16 at [42]. The decision of the Full Bench in *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award and Crown Employees (Teachers in TAFE and Related Employees) Salaries and Conditions Award* [2008] NSWIRComm 209 at [16] determined that the inclusion of a no extra claims clause was valuable in providing certainty to the industrial parties as to their rights and obligations during the life of an industrial instrument:

The purpose of no further claims commitments is to ensure certainty during the life of the relevant industrial instrument. That is to say, all matters **agreed or arbitrated** upon represented a settled arrangement for the term of the award or agreement. Depending on the terms of the commitment, employers could plan and act on the basis that during the life of the award or agreement, they would not incur any additional labour costs or industrial action in support of extra claims, nor would they be required to divert resources to dealing with such claims. Employees and their unions would not face claims to cut wages or alter to their detriment employment conditions prescribed by the award or agreement. (emphasis added)

3. Question posed by the Full Bench: Are there any amendments the IR Secretary wishes to propose to its proposed NEC clause.

Secretary’s Submission: Yes. See below:

9.7 Other than as provided for in the Industrial Relations Act 1996, during the nominal term of the Award, there will be no further ~~claims/demands or~~ proceedings instituted, or claims made in any proceedings, before the NSW Industrial Relations Commission for the making of an Award or the variation of an Award to give effect to extra or reduced wages, salaries, rates of pay, allowances or conditions of employment with respect to the Employees covered by the [Award/~~Enterprise Agreement~~] with an operative effect during the nominal term of this Award that take effect prior to the nominal expiry of the [Award/~~Enterprise Agreement~~]

~~unilaterally made by a party to this [Award/Enterprise Agreement] unless otherwise agreed by the parties.~~

Provided that this clause does not prevent the Parties from ~~continuing~~ conducting collaborative discussions during the ~~life~~ nominal term of the [Award/Enterprise Agreement] involving proposals to deliver additional enhancements to remuneration and/or conditions of employment, and to achieve additional industry wide and systemic efficiencies and productivity improvements to the delivery of Government services to the public.

Further, this clause does not prevent: ~~Changes to conditions or salaries may be jointly progressed and, if agreed, an application to vary the Award/ Enterprise Agreement may be made~~

(i) Award variations applications being made by consent prior to the ~~nominal expiry date of~~ end of the nominal term of the Award to reflect the agreed outcome of collaborative discussions.

(ii) consent applications being made to the NSW Industrial Relations Commission during the nominal term of the Award for matters to be arbitrated, with the operative effect of any arbitrated decision and any consequential changes to the Award terms and conditions to take place on a date agreed by the parties or the date determined by the Commission in accordance with the IR Act.