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IN THE INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

2024/211169

STATE WAGE CASE 2024

Outline of submissions for Unions NSW

A. Introduction and overview

1. On 10 July 2024, a Full Bench of the Commission, in light of important and consequential amendments to the *Industrial Relations **Act** 1996* (NSW) effected by the *Industrial Relations **Amendments Act** 2023* (NSW), directed the filing of submissions about whether the **W**age **F**ixing **P**rinciples promulgated by the Commission were still fit for purpose.[1] The amendments to the IR Act included the restoration of the Commission's wage fixing functions.

2. Unions NSW, being the State peak council for employees for the purposes of s 215 of the IR Act, contends that:
   a. there is some utility in retaining the WFPs and for the Commission to promulgate WFPs as long as those principles are expressed and applied only as guidelines for the exercise of the Commission's powers under Part 1 of Chapter 2 of the IR Act.[2] The WFPs should not (and, it is submitted, cannot) trammel, control or otherwise detract from the statutory task conferred on the Commission to make or vary awards to set fair and reasonable conditions of employment for employees; and
   b. the WFPs require revision and recalibration.

3. These submissions first set out matters of statutory context. Next, the status and nature of principles promulgated by appellate bodies, including the WFPs historically articulated by this Commission are detailed. Reasons why WFPs should be retained, so long as they are properly understood and applied as principles rather than prescriptive or determinative rules are next outlined. Questions posed by the Full Bench in its 10 July 2024 decision in *State Wage Case 2024* are then addressed.

4. **Attached** to these submissions is a copy of reformulated proposed WFPs 1, 8 and 9.

B. Statutory context

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[1] *State Wage Case 2024* [2024] NSWIRComm 1 at [15]-[17].

[2] *Secretary of the Department of Education v The New South Wales Nurses and Midwives' Association* (2022) 320 IR 249 at [13] and [15]-[16] (Walton J); and *Crown Employees (Correctional Officers, Department of Corrective Services) Award 2007 for Kempsey, Dillwynia and Wellington Correctional Centres* (2014) 248 IR 145 at [62]-[63].

5. In assessing whether WFPs should be retained and, if so, what form they should take, the provisions of the IR Act dealing with the making and variation of awards should be at the forefront of the Commission's consideration. Moreover, matters of legislative history, including changes to the Commission's wage fixing jurisdiction wrought by the former Liberal-National Party government from 2011 onwards, and the changes effected to the IR Act by the Amendments Act, significantly bear on whether the WFPs should be retained and, if so, in what form.

Salient provisions of the IR Act

6. Section 10 of the IR Act is contained in Part 1 of Chapter 2 of the IR Act which concerns 'Awards'. The section confers power on the Commission to make awards. It directs that the object of the power, and the Commission's task or function in exercising the power, is to make awards 'in accordance with the Act' that set 'fair and reasonable conditions of employment for employees'.
7. The requirement that awards be made 'in accordance with this Act' operates to both guide and constrain the Commission's power in making awards, as it must undertake that function and exercise its award making powers in conformity with relevant and applicable provisions of the IR Act. For instance, an award must have a nominal term that conforms with s 16(2) and cannot contain ordinary hours exceeding those set out in s 22.
8. The requirement that awards set 'fair and reasonable conditions of employment' is the purpose or aim of the exercise of power.
9. Circumstances when an award may be made are dealt with in s 11, whilst formal matters and mandatory terms concerning dispute resolution are prescribed by ss 13-14. The commencement and term of an award are dealt with by ss 15-16.
10. Section 17(1) reposes power in the Commission to vary or rescind an award. By virtue of s 17(3), the circumstances in which variation may occur are expressly constrained. Importantly for present purposes, s 17(2)(b) provides that an award may be varied to give effect to a decision of the Full Bench under ss 50 or 51 of the IR Act.
11. Section 23 requires the Commission, when making an award, to ensure that it provides equal remuneration and other conditions of employment for men and women doing work *'of equal or comparable value'*.
12. Part 3 of Chapter 2 of the IR Act deals with National and State decisions. The former is defined in s 48 to be a decision of the Minimum Wage Panel or Full Bench of 'Fair Work Australia' that generally affects, or is likely to generally affect, the conditions of employment of employees in New South Wales, subject to the jurisdiction of that panel or body. A State

decision is detailed in s 49 to be a decision of the Full Bench of this Commission that generally affects, or is likely to generally affect, the conditions of employment of employees in New South Wales who are subject to this Commission's jurisdiction.

13. Section 50(1) imposes a duty on a Full Bench of the Commission to, as soon as practicable after the making of a 'National decision' give consideration to that decision and, unless satisfied it is not consistent with the objects of the IR Act or there are 'other good reasons for not doing so', adopt the principles or provisions of that decision for the making of awards and other matters. Section 50(3) permits principles or provisions of a 'National decision' to be adopted in whole or in part and with or without modification and generally for all awards or other matters under the IR Act, or only for particular awards or other matters.

14. Section 51(1) permits the Full Bench, if satisfied it is 'consistent with the object of the Act and that there are good reasons for doing so', to make a 'State decision' setting *principles* or *provisions* for the purposes of awards and other matters under the Act. Section 51(3) allows the Full Bench to determine that a State decision applies generally to all awards or other matters, or in respect to particular awards or other matters.

15. Section 146(1) outlines the general functions of the Commission. These include, amongst other things, setting remuneration and other conditions of employment. In exercising its functions, the Commission is required to 'take into account the public interest' and for this purpose, it is have regard to three matters enumerated in s 146(2), viz.,
    a. the objects of the IR Act;
    b. the state of the New South Wales economy and the likely effect of its decisions on the State economy; and
    c. for exercises of functions *'about public sector employees',* the fiscal position and outlook of the Government and likely effect of the exercise of the Commission's function on the position and outlook.

16. These are 'mandatory considerations' in the sense described by Mason J (as he then was) in *Minister for Aboriginal Affairs v* ***Peko-Wallsend*** *Limited*[3] which the Commission has a duty to consider in exercising its award making functions and powers.[4] The third matter detailed in [12] above, which is found in s 146(2)(c) of the IR Act, was introduced by the Amendments Act and has not yet been the subject of consideration by the Commission or a Court.

17. The term 'public sector employee' is defined in the Dictionary to the IR Act in a non-exhaustive fashion to include an employee of a public authority, member of the Public

[3] (1986) 162 CLR 24 at 39-40.
[4] See generally *Plaintiff M1-2021 v Minister for Home Affairs* (2022) 275 CLR 582 at [78]-[79] (Edelman J).

Service, NSW Police Force, NSW Health Service or the Teaching Service. 'Government' is not defined but, when read contextually, is clearly a reference to the Government of the State of New South Wales.

18. The objects of the IR Act enunciated by s 3 include, relevantly for present purposes:

(a) to provide a framework for the conduct of industrial relations that is fair and just,

(b) to promote efficiency and productivity in the economy of the State,

…

(e) to facilitate the appropriate regulation of employment through awards, enterprise agreements and other industrial instruments,

(f) to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value,

…

(h) to encourage and facilitate co-operative workplace reform and equitable, innovative and productive workplace relations,

(i) to encourage strategies to attract and retain skilled staff where there are skill shortages so as to ensure effective and efficient delivery of services.

19. The object detailed in s 3(i) was added to the IR Act by the Amendments Act.

Legislative history and the changes effected by the Amendments Act

20. Prior to the alterations effected by the Amendments Act, s 146C(1) of the IR Act imposed an overarching duty on the Commission, when making or varying any award or order, to give effect to any policy on conditions of employment of public sector employees which was declared by the regulations to be an aspect of government policy required to be given effect to by the Commission and applied to the matter to which the award or order related.

21. Section 146C(3) provided that an award or regulation made by the Commission did not have effect to the extent it was inconsistent with the Commission's obligation under s 146C(1). In other words, if the Commission strayed from the dictates of s 146C(1) in exercising its award making or variation functions and powers, the exercise of those functions and powers would be *ultra vires*.

22. The overriding and paramount effect of s 146C was made pellucid by s 146C(7), which provided that the section had effect despite ss 10 and 146 of the IR Act, or any other provision of the IR Act or any other Act. As Bathurst CJ explained,[5] the effect of s 146C(7)

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5 *Secretary of the Treasury v PSA* (2014) 89 NSWLR 688 at [34] and [44]. See also at [66] (Meagher JA).

was that *"the award-making powers of the Commission, contained in s 10, are constrained by s 146C and the policies declared in the Regulation which the Commission is required to give effect to"*.

23. On and from 20 June 2011, the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW) was declared, for the purposes of s 146C of the IR Act, to contain aspects of government policy this Commission was required to give effect to when making or varying awards. These included, by clause 6, that public sector employees were to be awarded increases in 'remuneration or other conditions of employment' that did not increase employee related costs by more than 2.5% per annum unless sufficient 'employee-related costs saving had been achieved to fully offset such increased costs'. The 2.5% threshold, colloquially referred to as the 'wages cap', was held by the Court of Appeal to include superannuation contributions made for the benefit of employees.[6] Equivalent provisions were included in the *Industrial Relations (Public Sector* ***Conditions of Employment)*** ***Regulation*** *2014* (NSW), which remained in operation by virtue of extensions granted under s 10(2) of the *Subordinate Legislation Act 1989* (NSW).[7] Amendments were made to the *Conditions of Employment Regulation* for financial years 2022-2023 and 2023-2024 to permit remuneration increases of not more than 3% together with superannuation benefits and the potential of a further 0.5% if the employer had supported the introduction of 1 or more productivity reforms.[8]

24. In summary, the obligation to give effect to any applicable policy overrode and displaced the Commission's obligation under s 10 to make awards setting fair and reasonable conditions of employment for employees or, in exercising its award making (or variation) functions, to have regard under s 146(2)(a), to the objects detailed in s 3 to the extent they were inconsistent, or otherwise clashed, with any applicable promulgated government policy. This necessarily extended to the object to provide a framework for the conduct of industrial relations that was 'fair and just'.

25. The objects of the Amendments Act were detailed in the Explanatory Note to the *Industrial Relations Amendment Bill 2023* (NSW) as being to amend the IR Act to, amongst other things:
    a. repeal s 146C; and
    b. require the Commission to consider the New South Wales' government's fiscal position and outlook in exercising its functions about public sector employees.

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6 Ibid.

7 See generally: *PSA v Industrial Relations Secretary of New South Wales* [2021] NSWCA 64 at [12] (Bathurst CJ).

8 Clause 6A. These amendments were implemented in the context of a notorious cost of living crisis and in circumstances of spiralling inflation.

26. In her second reading speech, the Minister for Industrial Relations and Minister for Work Health and Safety, the Honourable Sophie Cotsis said:

> *…I am proud to introduce the Industrial Relations Amendment Bill 2023 on behalf of the Minns Labor Government. It has been a very long, difficult 12½ years for public sector and essential workers in New South Wales—hardworking nurses, firefighters, paramedics, road workers, bus drivers and police who have done an extraordinary job. For 12 years since June 2011—and I will never forget that period because I was the shadow Minister for Industrial Relations—our essential public servants have not received an adequate wage rise. Their wages were capped.*
>
> ***Section 146C of the Industrial Relations Act was introduced, which was about wage suppression. The Industrial Relations Commission of New South Wales basically had its hands tied and was null and void. The Industrial Relations Commission had, for over 100 years, been the independent umpire between workers and the employers. It was a fair system. The Government made a commitment to remove the wages cap****; to listen to our essential workers; to respect, respond and rectify; and to work through the many important issues that have been sitting on the backburner for 12 years.*
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> …
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> ***The wages cap, via section 146C of the Act, severely limited the commission's conciliation and arbitration powers and had a stultifying effect on its ability to resolve disputes out of what seems to have been a concern that any resolution, recommended or arbitrated, might breach 146C of the Act and the policy underpinning that section. There is no doubt the wages cap has had a repressive effect on public sector bargaining, modernising awards and genuine engagement between employees, their unions and public sector agencies.*** *I acknowledge the paramedics who are in the gallery and thank them for their service to the people of New South Wales. I also acknowledge their union, the Health Services Union. This blunt, unsophisticated instrument will be replaced by a resumption of genuine, meaningful public sector bargaining in New South Wales.*
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> *It is important that any new arrangements provide the best chance of achieving both sustainable public finance outcomes and desirable terms and conditions of employment for employees. Improving productivity in the public sector is important to underpin the joint achievement of these objectives.*
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> …
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> *Specifically, the bill finally repeals section 146C of the Industrial Relations Act 1996; adds a new, more consultative mutual gains bargaining approach to allow workers and their unions to*

engage with government agencies; establishes an industrial relations court that would have jurisdiction to resolve work health and safety matters and other workplace issues; ***amends section 146 of the Act, "General functions of Commission", to provide that when it is exercising its functions in relation to public sector employees, it must also take into account the New South Wales Government's fiscal position and outlook; adds an object to the Act to encourage strategies to attract and retain skilled staff where there are skills shortages so as to ensure the effective and efficient delivery of public services****; and makes consequential amendments to other New South Wales legislation.* (emphasis added)

C. The status and function of the WFPs

27. WFPs made under s 51(1) to the IR Act are, properly understood, in the nature of guidelines.[9] They operate, by the provision of *principles*, to provide guidance as to the exercise of the discretionary power to make or vary of awards. Necessarily, they cannot add to, nor detract from, the Commission's jurisdiction. Nor should they be expressed or applied to fetter or trammel the statutory task reposed in the Commission when making or varying awards. This is congruent with the capacity of the Full Bench, if satisfied it is consistent with the objects of the IR Act and there are *good reasons* for doing so, to make a State decision setting *principles* for the purposes of awards.

28. In this regard, it is erroneous for WFPs to be construed or viewed as *dictating* how, or in what circumstances, the Commission can or should exercise its award making and variations powers. Such an approach involves placing a gloss on the statutory text, and, potentially, a deflection from the paramount task accorded to the Commission of making or varying awards that set fair and reasonable conditions of employment in accordance with the IR Act.

29. Whether an award should be made or varied turns on whether, in accordance with s 10 of the IR Act, the conditions of employment are fair and reasonable.[10] The requirements of 'fairness' and 'reasonableness' involve an evaluative assessment of whether the conditions of employment constitute a proper and proportionate balance between the entitlements of affected employees and the interests of their employers.[11] That assessment cannot be undertaken or determined by an un-thinking or automatic application of WFPs, as if those principles constituted binding rules of law.

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9 *Applications for Variations to Crown Employees (Police Officers—2017) Award and Paramedics and Control Centre Officers (State) Award* [2021] NSWIRComm 1040 at [23] and [29].

10 *Re Operational Ambulance Officers (State) Award* (2001) 113 IR 384 at [164].

11 *City of Sydney Wages/Salary Award 2014* (2014) 247 IR 386 at [19].

30. WFPs may, however, guide the exercise of the Commission's evaluative assessment and exercise of discretion.[12] They should not, however, be understood or applied as operating to constrain the Commission's discretion within a predetermined framework.[13]

31. The above observations may be said to be good reasons why WFPs should be jettisoned or, to use the nomenclature of s 51(1), to demonstrate that there are not good reasons for setting principles for the purposes of awards. Unions NSW believes it is right and rational for the Commission to consider ongoing relevance of the WFPs. However, after considered reflection, Unions NSW concurs (with one important caveat) with the view expressed by the Full Bench in *State Wage Case 2010*[14] when it said that the WFPs *"have served the Commission and the parties well over long periods of time… The Principles provide a coherent set of rules that ensures consistency of approach by the wage fixing tribunal and certainty and predictability in respect of the fixation of wages and setting of employment conditions"*. The caveat is that WFPs should be understood and deployed as *guidelines* or *principles* that inform the exercise of the discretionary power[15] rather than as *rules* that must or necessarily should be applied in each and every case.

32. Appellant courts and tribunals have, in a number of areas and historically, developed principles to guide the proper exercise of a statutory discretion and to highlight matters which, if taken into account (or not taken into account) may cause the discretion to miscarry. In *Norbis v Norbis,*[16] Mason and Deane JJ said:

> *It has sometimes been said by judges of high authority that a broad discretion left largely unfettered by Parliament cannot be fettered by the judicial enunciation of guidance in the form of binding rules governing the manner in which the discretion is to be exercised ... however, it does not follow that, because the discretion is expressed in general terms, Parliament intended that the court should refrain from developing rules or guidelines affecting its exercise ... Guidelines were what Lord Wright had in mind in Evans v Bartlam when he said [1937] AC at page 488: `It is ... often convenient in practice to lay down, not rules of law, but some general indications to help the court in exercising the discretion ...*

33. Mason CJ explained (in the context of the exercise of the judicial discretion to order costs) in *Latoudis v Casey* that:[17]

> *… it does not follow that any attempt to formulate a principle or a guideline according to which the discretion should be exercised would constitute a fetter upon the discretion not intended by the*

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12 Cf *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [35] (Gaudron and Gummow JJ) and [65] (McHugh J).

13 Cf *Norbis v Norbis* (1986) 161 CLR 513 at 520.

14 (2010) 201 IR 155 at [87].

15 See generally: *Wong v The Queen* (2001) 207 CLR 586 at [45] (Gaudron, Gummow and Hayne JJ).

16 (1986) 161 CLR 513 at 519-520.

17 (1990) 170 CLR 534 at 543.

legislature. Indeed, a refusal to formulate a principle or guideline can only lead to exercises of discretion which are seen to be inconsistent, a result which would not have been contemplated by the legislature with any degree of equanimity.

34. Brennan J (as he then was), made a similar point in *Norbis v Norbis*[18] (in the context of the exercise of the discretion to divide matrimonial assets in property settlement proceedings under the *Family Law Act 1975* (Cth)):

    It is one thing to say that principles may be expressed to guide the exercise of a discretion; it is another thing to say that the principles may harden into legal rules which would confine the discretion more narrowly than the Parliament intended. The width of a statutory discretion is determined by the statute; it cannot be narrowed by a legal rule devised by the court to control its exercise…

35. The WFPs should, therefore, be understood to be principles that may inform (or guide) the exercise of the Commission's discretionary power to make and vary awards. They should not be elevated to the status of rigid rules, nor detract from or provide a substitute to the statutory text. This is congruent with s 51(1) of the IR Act which provides for State decisions to be made setting principles for the purposes of awards

36. If properly understood and applied as *principles* rather than constraints on the exercise of the statutory discretion or legal rules which must always be followed, Unions NSW submits that there is continued utility in retaining WFPs. For the reasons that follow the present principles should be reformulated.

37. In light of the reality that the WFPs do not (and cannot) operate to constrain the exercise of the Commission's award making and variations powers and functions, the preamble to the WFPs should be recast in the terms proposed by Unions NSW.

38. The proposed amendments:
    a. remove from principle 1.1 terminology that conveys that the Commission is obliged to consider the WFPs as if they were mandatory considerations in the *Peko-Wallsend* sense;
    b. add new principle 1.2 to detail the status of the WFPs; and
    c. recast previous principle 1.2.1 (now 1.3.1) to reiterate the overarching statutory task reposed in the Commission and the mandatory considerations detailed in s 146(2) without conflating those considerations with the statutory task; and
    d. removes from previous principle 1.3 (now 1.4) the mandatory language which conveyed that movements were *required* to fall within the WFPs.

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18 (1986) 161 CLR 513 at 537.

D. Should there be a presumption that existing awards set fair and reasonable terms and conditions of employment and an onus on an applicant to rebut that presumption?

39. There should be no such presumption and no such onus should be imposed on an applicant.

40. *First,* there is no textual or contextual basis for the notion that an applicant for the making or variation of an award should face a presumption that an award sets fair and reasonable terms and conditions of employment. In making or varying an extant award, the Commission will have been satisfied at the point in time the award was made that the award provided fair and reasonable terms and conditions of employment. It can, for that reason, be assumed (or perhaps 'presumed') that, when the award was made, the Commission determined that it provided fair and reasonable terms and conditions of employment.

41. However, that will not necessarily be the case at the time an application for variation of the award or the making of a new award is made. This will depend on the circumstances. For example, a practice or mode or working may have arisen that was not contemplated or in existence when the award was made. Alternatively, the employer may have engaged in conduct, or taken action, which changed or varied working conditions. Further the circumstances in which work was performed may have changed. Additionally, a dispute about a matter not contemplated or able to be dealt with appropriately (or at all) within the framework of the existing award may emerge between the industrial parties. Given the array of circumstances which may emerge after the Commission has conducted its point in time assessment, it is unsafe for any presumption as to fairness and reasonableness to be exist.

42. As a practical matter, Unions NSW accepts that it may, and will likely usually, be the case that an applicant will need to demonstrate that an award requires revision or amendment because the terms and conditions it prescribes are not fair and reasonable and that the terms contended for by the applicant are fair and reasonable. However, that is conceptually different from the erection of presumption that an applicant must rebut before an application can succeed.

43. *Second,* presuming that there was previously a basis or bases for the existence of such a presumption, that basis or bases was obliterated by the former Liberal-National Party government's artificial and arbitrary wages cap which, as the Minister detailed in her second reading speech, repressed wages and tied the Commission's hands in discharging its award making and varying functions. Sloan C detailed this reality crisply in *Industrial Relations Secretary v PSA*:[19]

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[19] [2022] NSWIRComm 1042 at [27].

> *In the arbitration of a dispute, the Commission may make or vary an award under Ch 2 Pt 1 of the Act: s 136(1)(b). Section 10 of the Act empowers the Commission to make an award "setting fair and reasonable conditions of employment for employees". Had the PSA notified a dispute in respect of its wages claim, as the Notifiers contended it should have done, it is at least theoretically conceivable that the Commission might determine that a wage increase in the quantum greater than that proposed by the Government was necessary to ensure that the conditions of employment for the employees remained fair and reasonable. However, the Commission would be powerless to effect that outcome. The Commission would be unable to "resolve the dispute efficiently and fairly under the auspices of the Commission", to adopt the language of the Full Bench in BlueScope Steel.*

44. The Commission was not required to be satisfied, from 20 June 2011 to the commencement of the Amendments Act, that the awards it made or varied provided fair and reasonable conditions of employment to the extent that this was contrary to, or at odds with, the overarching obligation to comply with and not detract from the strictures fixed by the *Conditions of Employment Regulation*. It was, in substance, unable to settle disputes between parties. If a union made a claim for an increase in wages and conditions beyond the arbitrarily set wages cap, the Commission could not "settle" the dispute. Rather, it was confined to awarding an increase not in excess of the wages cap and, after doing so, its jurisdiction was exhausted.

45. Unions NSW contends that it would fly in the face of the reality of over a decade's worth of statutorily enforced wage suppression for public sector employees created by the arbitrary and artificial imposition of fetters and constraints on the Commission's wage fixing functions for any presumption to now apply that awards set fair and reasonable terms and conditions of employment. This is particularly so in the case of the notoriously high inflation that has afflicted the Australian economy since late 2021. The Consumer Price Index has increased as follows since the September quarter of 2021:[20]

Quarter	**Percentage variation**
September 2021	0.8%
December 2021	1.3%
March 2022	2.1%
June 2022	1.8%

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[20] Source: https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/consumer-price-index-australia.

September 2022	1.8%
December 2022	1.9%
March 2023	1.4%
June 2023	0.8%
September 2023	1.2%
December 2023	0.6%
March 2024	1.0%
June 2024	1.0%
Total	15.70%

46. *Third,* by operation of s 163(1)(b) of the IR Act, the rules of evidence do not apply in the Commission and therefore the rules of law concerning onuses of proof and the legal concept of onus do not strictly apply to the Commission.[21]

47. It will, however, be the case that unless a proceeding is commenced on the Commission's own motion that the applicant for a new award, or for a variation of an existing award, will bear the risk of failure of its application. To that extent, it can be said that an applicant bears a persuasive onus of satisfying the Commission that an award should be made or varied.[22] However, there is no foundation or support under the IR Act for the deployment of the concept of 'onus' in proceedings before the Commission, or the imposition of an onus on applicants in a discrete class of case involving applications for the making or variation of awards.[23]

48. *Fourth,* the imposition of an onus is unclear and apt to distract from the overarching statutory task of determining fair and reasonable terms and conditions of employment. Does an 'onus' mean an evidential onus to show that there is sufficient evidence to raise an issue as to the existence or non-existence of facts or matters in issue?[24] Or does it refer to a legal onus which requires the applicant to affirmatively prove the existence or non-existence of facts or matters in issue?[25] Further potential difficulty is added by the fact that any onus will operate to mean that an applicant must prove a negative, viz., that the current award does not provide fair and reasonable conditions of employment.

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21 Cf *Jain v Infosys Ltd* [2014] FWCFB 5595 at [35].
22 Cf *Coal and Allied Operations Pty Ltd v AFMEPKIU* (1997) 73 IR 311 at 317.
23 Cf R*e Pastoral Industry (State) Award* (2001) 104 IR 168 at [77].
24 *Momcilovic v* R (2011) 245 CLR 1 at [665] (Heydon J).
25 See generally *Currie v Dempsey* (1967) 69 SR (NSW) 116 at 125 (Walsh JA).

49. *Fifth,* Unions NSW readily accepts that factors relied upon by the applicant in support of an application that have already been accommodated by the earlier made award are relevant considerations in determining whether the award presently provides fair and reasonable conditions of employment. It will likely usually be the case that absent some new or additional factors, or changes in the circumstances which were taken into account when the Commission made the current award, that an applicant will face practical obstacles in contending for variations to an extant award.

50. *Sixth,* the imposition of a presumption is apt to deflect the Commission from its statutory task of resolving disputes.

51. *Seventh,* it is not apparent how the presumption can and should operate in relation to mechanical provisions of awards, such as no extra claim clauses. The latter are examined further below.

52. For these reasons, there should be no presumption that current awards set fair and reasonable conditions of employment nor the imposition of an onus for a new award or a variation to an existing award requiring an applicant to rebut such a presumption.

53. In the alternative, Unions NSW submit that if a presumption is to be retained, it should not apply beyond the nominal term of an award. The point in time assessment of 'fairness and reasonableness' undertaken by the Commission when making the award cannot rationally be said extend beyond the nominal term of the award specified under s 16.

E. Maintenance of the real value of award rates of pay

54. A WFP should be articulated that provides for the Commission to consider and take into account the imperative to ensure the maintenance of the real value of award rates of pay, having regard to the rate of inflation and changes to the cost of living. This principle should be applicable generally. Such a principle should be adopted for the following reasons.

55. *First,* ensuring that awards provide fair and reasonable conditions of employment logically and necessarily requires consideration of the expenses borne by employees and the real value of their take home pay. Changes in inflation and the cost of living are directly and critically relevant to this assessment.

56. *Second,* the Commission's jurisprudence is to the effect that employees are entitled to maintain the real value of their earnings.[26] For instance, in *State Wage Case 2007,*[27] the Full Bench said:

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26 *Application for Crown Employees (Public Sector Salaries 2020) Award and Other Matters (No 2)* [2020] NSWIRComm 1066 at [157].

27 (2007) 163 IR 253 at [274].

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

57. *Third,* relevant economic considerations would necessarily include inflation and cost of living indices, such as the Employee Living Cost Index published by the Australian Bureau of Statistics.[28]

58. *Fourth,* the Full Bench of the Fair Work Commission has articulated a principle that it is desirable that modern award minimum wages maintain their real value and increase in line with the trend rate of national productivity growth.[29] Adoption of such a principle in relation to private sector employees and employees of the Commonwealth and its agencies provides support for its adoption by this Commission in relation to the predominantly public sector employees who fall within the Commission's jurisdiction.

59. *Fifth,* there is utility in the articulation and adoption of such a principle to assist in framing the Commission's discretionary decision-making as evidence as to historical and projected inflation and cost of living expenses will invariably be given in proceedings.

60. *Sixth,* as a practical matter, given the wage suppression effected by the former Liberal-National government over more than a decade and the reality of notoriously high inflation as detailed in [45] above, public sector wages have diminished in real terms over time. The need for principle that requires consideration to be given to the maintenance of the value of real wages is particularly acute in this context.

61. A proposed new clause 8.3 is set out which seeks to give effect to the above-described objects. The principle is designed to ensure the Commission takes into account the imperative to ensure the maintenance of the real value of employee wages and conditions and the need, if an applicant seeks a diminution in wages, for an applicant to establish a real and substantive basis for such a diminution[30] in the context of the imperative to ensure the real value of wages and conditions are maintained.

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28 See generally *Annual Wage Review 2023-24* [2024] FWCFB 3500 at [41]. See most recently Chin J in *PSA v Industrial Relations Secretary* [2024] NSWIRComm 2 at [16].

29 Ibid., at [171].

30 For instance, some extreme and unforeseen circumstance(s) that lead to a fiscal necessity to decrease wages.

F. Negotiating principles

62. There is utility in retaining a WFP that seeks to regulate and guide the processes for resolution of applications for new awards or variations to awards. Subject to relatively minor amendments, current WFP 9 should be retained.

63. A proposed variation is sought that requires the employer, if the State government or an emanation of the state government, to provide economic, financial and demographic information for employees covered by the proposed award. There is often inevitably information asymmetry between employees and their unions on the one hand, and the government on the other as to the economic, financial and demographic information salient to an application for make or vary an award. Timely production of such information which is information peculiarly within the knowledge and purview of the government would enhance resolution of applications and facilitate bargaining between industrial parties.

Mutual gains bargaining

64. The mutual gains bargaining principles are not relevant to negotiating principles. They are separate and distinct from the process envisaged by current WFP 9 and need not be referred to in the WFPs.

65. The Amendments Act introduced Chapter 2A into the IR Act which created a regime for 'mutual gains bargaining'. The provisions set out in the Chapter apply where the parties agree to enter into mutual gains bargaining under s 129K. The principles of mutual gains bargaining are enunciated in s 129L. These include, relevantly, that the parties aim to reach agreement that meet their core needs so they are satisfied with the content of the agreement (s 129L(d) and that each party is satisfied that their interests have been addressed (s 129L(g)).

66. Parties are required (at least indirectly given s 129P(3)(a)) to bargain in 'good faith' for the purposes of s 129M(1). Section 129O(1) imposes a duty on the Commission to act as a facilitator to assist the parties to reach a resolution during mutual gains bargaining, although s 129O(2) permits the parties to appoint a third party as a facilitator or ask the Commission to do so and also provides that the parties are not required to use the services of a facilitator during mutual gains bargaining(s 129O(4). Where agreement is unable to be reached, the facilitator (which may be the Commission or one or both of the parties if there is no facilitator) may declare the bargaining 'unresolved' under s 129P and issue a written notice which is taken by s 129Q(1) to be a notification under s 130 of the IR Act. Salient considerations in an arbitration under Chapter 3 include the conduct of the parties during mutual gains bargaining: s 129Q(3).

67. These provisions provide an alternate consensual means which the parties may utilise to resolve issues They are self-contained, and they set out how they are relevant to any arbitration that follows an unsuccessful instance of mutual gains bargaining. For these reasons, there is no utility or need for them to be referred to in the WFPs.

Proposed amendments

68. In line with the fact that the WFPs are principles rather than prescriptive rules, clauses 9.2(a) and 9.3 have been amended to make clear that they do not fetter or otherwise impose conditions precedent on the making of applications for new awards or the exercise by the Commission of its award making functions and powers. A new provision has been proposed that deals with information sharing as outlined above.

No extra claim clauses

69. Unions NSW submits that no extra claim clauses should not be referred to, or otherwise form part of, the WFPs. Such provisions do not and cannot oust the Commission's jurisdiction to vary an award under s 17, which itself contains limitations on the Commission's power to vary awards.[31] They also do not and cannot detract from the exercise by the Commission of its statutory function to vary awards to set fair and reasonable conditions of employment. Whilst not in issue in these proceedings, Unions NSW formally submits that no extra claims clauses cannot be included in awards without the agreement of the parties as to do so is inconsistent with the IR Act which expressly permits awards to be made and varied on application.[32]

70. No extra claims clauses have been accorded significant weight in the Commission determining not to vary awards,[33] including for the avowed purpose of ensuring the integrity of the wage fixing principles and observance of agreements and undertakings given by parties.[34] It has been said that their purpose is to ensure that, during the currency of an award, there will be no extra claims other than by agreement.[35] In this regard, it has been held that such clauses may extend to matters about which an existing award does not specifically deal as *"To limit the no extra claims provision to the type of matter already specified in the*

31 *RTBU v Secretary for Transport* (2017) 267 IR 122 at [16] (Newall C).

32 IR Act, ss 10, 11(1)(a), 11(2)(b) and 17. See approach in *Toyota Motor Corporation Australia Limited v Marmara* (2014) 222 FCR 152 at [97] and [108] and *Public Service Association and Professional Officers' Association Amalgamated Union (NSW) v Roads and Maritime Services* (2015) 250 IR 412 at [27]-[40].

33 *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]-[18].

34 *Re Corrections Health Service Nurses' State Award* (1999) 90 IR 235 at 245 (Wright J).

35 *NSW Education Employees (Non-continuing Contract Employment) Award* (unreported, Cahill J Vice President, Hungerford J, Neal C, 13 July 1998) at p 9.

Award would leave the way open for legalistic, unscrupulous claims in relation to additional matters to be put forward".[36] However, there is authority somewhat to the contrary, viz., that where new or different circumstances arise that are not dealt with or were not contemplated when the award was made, these may fall outside the scope of a no extra claim clause.[37]

71. Unions NSW's position is that given the terms of s 17(3)(c) of the IR Act, the utility of no extra claims clauses is questionable and therefore should be questioned. Further, Unions NSW submits that there is no proper nor principled basis for weight being accorded to no extra claims clauses in determining whether the Commission should vary an award under s 17(1). In this regard, it should not be the case that a no extra claims provision would preclude consideration of a variation application to deal with a new and previously non-existing circumstance or state of affairs.

72. It is also unclear why or how there is any warrant for the inclusion of a no-extra claims clause in an award prescribing fair and reasonable conditions of employment. How such a provision is congruent with this mandate is unclear.

73. Further, the position on no extra claims clauses is not changed by the inclusion of mutual gains bargaining provisions in the IR Act. Any agreements reached in the context of mutual gains bargaining are able to be implemented by variations to awards under s 17(3)(a) and these new provisions do not supply a basis for no extra claims clauses to be included or referred to in the WFP, nor for a model clause to be developed by the Full Bench in relation to agreements reached in WFPs.

74. If, contrary to the foregoing, the Full Bench determines to consider promulgating a model no extra claims clause in the WFPs, Unions NSW would seek to be heard on the terms and content of such a clause.

G. Work value and increases based on gender-based undervaluation

75. One of the objects set forth in s 3(f) of the IR Act is to prevent and eliminate discrimination in the workplace and, in particular, to ensure equal remuneration for men and women doing work of equal or comparable value. Further, s 23 imposes on the Commission, when making an award, a duty to ensure the award provides equal remuneration and other conditions of employment for men and women doing work or equal or comparable value. These provisions beg the question: what does 'men and women doing work of equal or comparable

36 *Re NSW Education Employees (Non Continuing Contract Employment) Award* (1999) 92 IR 239 at 244. See also *Health Professional and Medical Salaries (State) Award* [1999] NSWIRComm 348 (Wright J).

37 *Re NSW TAFE Commission (Teachers and Other Educational Staff) Salaries and Conditions Award 1996* (1999) 123 IR 360.

value' entail or involve, and, more specifically, how should this accommodate gender-based undervaluation in the context of the Commission determining fair and reasonable conditions of employment when making or varying awards?

76. That more general question has previously been answered by the Commission in an unduly restrictive manner. In *Re Equal Remuneration Principle*,[38] it was held that s 23 requires, in determining remuneration and other conditions fixed by an award, the Commission to ensure that conditions as between women and men who perform work of equal or comparable value as indeed 'equal'. The Full Bench in that matter concurred with a view expressed by Professor McCallum that the provision was not concerned with claims of undervaluation of work performed by women.[39] The Full Bench bolstered its view that the legislature did not intend s 23 to deal with the undervaluation of female dominated occupations and that an approach to s 23 that involved redressing undervaluation could lead to 'leapfrogging' so as to undermine the balance of the existing WFPs.[40]

77. Unions NSW contends that there is a serious question about the correctness of this construction and approach to s 23 of the IR Act. It is not apparent that the construction is congruent with text or purpose of the provision.

78. In any event, s 23 of the IR Act should not be construed or applied as fettering or otherwise imposing restrictions on the advancement of cases to set 'fair and reasonable' conditions of employment that redress historical undervaluation of work based on sexist conceptions of the relative value of work that is historically (or currently) performed (or perceived to be performed) principally by women.

79. WFP 11 seeks to mandate an assessment of work, skill and responsibility in the context of claims for alteration in wage rates and conditions of employment in a gender-neutral fashion: WFP 11.2. A system for neutralising biases and prejudices against work that has been historically (or is currently) performed by women and is under-valued is detailed in WFP 11.3-11.4. However, addressing undervaluation based on historical or current gender biases and prejudices are constrained by an elaborate series of provisions set out in WFP 11.2, 11.6-11.11 and 11.13. In Unions NSW's view, these principles have the potential to entrench rather than ameliorate discrepancies in award rates based on historical and/or current gender-based under-valuation. Indeed, wage-fixing principles can and have historically reproduced gender inequalities found in the workplace, as the Full Bench of the Fair Work

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38 (2000) 97 IR 177.
39 Ibid., at [104]-[105].
40 Ibid., at [114]-[115].

Commission recently exposed in *Aged Care Award 2010*.[41] In that case, gendered conceptions and assumptions were explicated to have been embedded within the framework for the determination of wage rates, such that those rates did not take into account the skills and responsibilities in aged care work and the particular environment in which that work was performed.

80. Unions NSW submits that the WFPs should ensure that work value criteria do not reproduce historical (or current) biases against women workers and that where work value considerations or criteria have produced wage fixing principles and results that reflect or reproduce gender inequalities, the Commission should be both cognisant of these and ensure they are addressed and rectified in making and varying awards to set fair and reasonable conditions of employment.

81. Unions NSW contends that a straightforward principle that ensures that (a) work-value criteria are stripped of biases against women workers in historically undervalued professions; and (b) which acknowledges the potential for historical wage fixing principles to have reflected or reproduced gender inequalities and gender-based undervaluation of work, should be adopted.

82. Unions NSW considers it appropriate that a separate gender undervaluation principle is retained but is simplified and amended. Ultimately, the question is one of appropriate and fair value for work, stripped of archaic perceptions of gender.

83. WFP 11 should, therefore, be amended and clauses 11.2, 11.6-11.1 and 11.13 should be removed. The proposed amended clause 11 seeks to achieve the above aims by permitting claims to be made for alterations in wages or conditions where particular work has historically been, or is presently, undervalued on the basis of gender, including where such undervaluation may have resulted from the Commission's own historical wage fixing principles and practices. Where such a claim is established, the Commission should ensure that wages and conditions properly reflect the value of the work, skill and responsibility required and/or the conditions under which the work is performed in order to achieve equal remuneration and eliminate discrimination.

H. Special case principles

84. Unions NSW opposes the retention of a special case principle and the processing of 'special cases' *if* an applicant agitating a 'special case' is required to demonstrate as a threshold matter or condition precedent that the case has 'special attributes' or is 'out of the ordinary' so as

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41 [2022] FWCFB 200 (Stage 1 Decision) at [42] and [758].

to take it outside of restrictions that may otherwise apply under WFPs. As outlined above, the WFPs cannot and should be construed or applied as containing 'restrictions'.[42] Nor is there any statutory basis for an applicant to be required to demonstrate a case has special or exceptional attributes in order for the applicant to discharge what be described as its persuasive onus to establish that the rates and conditions it contends for are fair and reasonable.[43]

85. However, if a 'special case' is conceived as a case that does not otherwise fall under the umbrella of the particular kinds of cases detailed in the WFPs, Unions NSW has no opposition to retention of such a principle. The following amendments to the principles articulated in *Re Operational Ambulance Officers (State) Award* would accommodate Unions NSW's concerns:[44]

> *In order to make out a special case the applicant is required to make out that the variation is necessary to establish fair and reasonable conditions of employment ~~and that the matter has special attribute~~s. In doing so, the applicant is not required to meet a higher onus or standard of proof. The evidentiary requirements of a special case are no more strict than would apply in an ordinary matter~~, although the applicant to a special case will need to establish an adequate evidentiary foundation for those factors which are relied upon as showing the special case attributes of the case~~. Whilst respect will be afforded earlier decisions of the Commission or its predecessors, the conditions of employment earlier established need to be ultimately tested against the requirements of s 10 of the Act ~~and that which we have discussed as being applicable to making out a special case~~. Where, as here, the former decision involved a test case, particular care should be taken to ensure that the factors relied upon by an applicant in support of its claim do not replicate factors which were taken into account by the Commission or its predecessors in establishing the general standard emerging from such case. In any event, the basis for and circumstances under which the conditions in the award were established will be significant considerations in the Commission's deliberations in order to assess whether the factors relied upon by the applicant in support of a special case have already been accommodated by the earlier made award (in which case the present prescription may adequately compensate for those factors)…*

86. Proposed new WFP 8.6 sets out a revamped special case provision.

I. Amendments based on the addition of ss 3(i) and 146(2)(c) to the IR Act

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42 ***Re Operational Ambulance Officers*** *(State) Award* (2001) 113 IR 384 at [164]-[166] and [168].

43 *State Wage Case,* May 1991 (1991) 36 IR 362 at 376-377.

44 *Re Operational Ambulance Officers (State) Award* at [168].

87. Current WFP 8.5.1 is inconsistent with s 3(i) of the IR Act and must be deleted.

88. Unions NSW does not propose any further amendments to the WFPs to take into account the new object detailed in s 3(i), as this is already a mandatory matter required to be taken into account by the Commission given the terms of s 146(2)(a). The requirement to have regard to the objects in s 3 is recited in proposed WFP 1.3.1(a).

89. Additionally, the factor detailed under s 146(2)(c) of the IR Act is alluded to in proposed WFP 1.3.1(c).

J. Principle 8.3—productivity and efficiency

90. Application of the concepts of productivity and efficiency are often difficult and sometimes impossible to apply to various segments and categories of public sector employees.

91. The concept of 'productivity' has, in the context of the *Fair Work Act 2009* (Cth) been held to refer to the well-known economic concept of the quantity of outputs relative to the quantity of inputs.[45] However, a purely economic understanding or conception of 'productivity' may be and often is inapt in the context of an assessment of the work of public sector employees.

92. How the productivity of public service employees is to be measured may be inherently difficult. Further, public sector employees perform jobs and functions that, in large measure, are directed to achieving societal outcomes or goals that are not purely monetary or capable of monetisation. The social benefits of the work of public sector employees should be considered and factored into the assessment what constitutes fair and reasonable conditions of employment. Unions NSW, however, does accept that increases in productivity (or efficiency) can supply a basis (or one of several bases) for increases to conditions of employment and does not contend that there should be no reference to productivity (or efficiency) in the WFPs. Rather, Unions NSW contends that a broader and more nuanced assessment of productivity and efficiency should be undertaken by the Commission in light of the unique situation and circumstances of public sector employee roles.

93. Unions NSW contends that a WFP focused on productivity and efficiency should recognise and take account of these realities. A recast WFP 8.3 is proposed to attend to these realities by removing the requirement that any productivity or efficiency improvements be connected with achievement of the objectives of the employer *'seeking to become more competitive or efficient'*.

94. WFP 8.3 is largely proposed to be retained to recognise instances where employees have contributed in a substantial way to productivity or efficiency improvements.

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45 *Schweppes Australia Pty Ltd v United Voice Victoria Branch* [2012] FWAFB 7858 at [45]-[46].

95. The cumulative word ‘and’ is proposed to be replaced with the distributive ‘or’ to recognise that the concept of productivity and efficiency are distinct and certain categories of workers are more likely to achieve efficiencies in the performance of work rather than productivity.

96. A recast WFP 8.3 (now WFP 8.4) has been included to attend to the above matters.

K. Principle 7—minimum wages for award and agreement free employees

97. Unions NSW does not view that there is any need to amend or vary WFP 7.

L. Removal of principles 10 and 12

98. Unions NSW concurs that current principles 10 (relating to superannuation) and 12 (concerning economic incapacity) should be removed.

99. These principles have no present utility.

100. In relation to the latter is irrelevant to the award making and variation task given that the State of New South Wales or emanations of the Crown will be employers bound by the bulk of awards made by the Commission. It is nonsensical for a principle concerning economic incapacity.

M. Conclusion

101. The WFPs should be retained on the basis that they should be applied as guidelines. They should be amended in accordance with Unions NSW’s proposal.

P Boncardo
Counsel for Unions NSW
3 September 2024

Attachment - Unions NSW Submission on Wage Fixing Principles

1. Preamble

1.1. These Principles ~~have been~~ are established set by the Industrial Relations **Commission** of New South Wales ~~("Commission")~~ under s 51 of the *Industrial Relations **Act** 1996* (NSW) ~~("Act")~~. These Principles recognise that most employees within the jurisdiction of the Commission are employed by the Crown in the right of New South Wales, a local government entity, or a statutory body representing the Crown. The ~~Commission further~~ Principles have been formulated on the basis ~~recognises~~ that the awards which will be made or varied by the Commission in respect of which these Principles apply ~~which will require consideration of these Principles by the Commission~~ are primarily public sector awards.

1.2 These Principles provide a guide for the exercise of the Commission's discretionary power to make or vary awards. They are not intended to be and should not be construed as constraining or otherwise detracting from the Commission's award making and variation powers and functions under the IR Act.

1.3. The four primary aims of these Principles are:

1.3.1. to provide a ~~framework~~ guiding set of principles under which wages and employment conditions in the government and local government sectors of New South Wales ~~remain~~ are fair and reasonable in accordance with the overarching requirement~~s~~ of the Act~~, and economically sustainable reflecting the obligation of the Commission to~~ and take into account the public interest ~~and, in doing so, to have~~ having regard to:

(a) the objects of the Act, and

(b) the state of the economy of New South Wales and the likely effect of its decisions on that economy, and

(c) in relation to the exercise of a function about public sector employees, the fiscal position and outlook of the Government and the likely effect of the exercise of the Commission's function on the position and outlook.

1.3.2. to provide a ~~framework~~ guiding set of principles that accommodates the interests of employers and employees and their representatives and ensures consistency of approach, certainty and predictability as to the principles that are to operate in respect of the fixation of wages and the setting of employment conditions;

1.3.3. to provide a ~~framework~~ <u>guiding set of principles</u> in which all awards within the Commission's jurisdiction are maintained up to date in respect of rates of pay and pay-related allowances; and

1.3.4. to protect the low paid.

1.4. Movements in wages and conditions ~~must~~ <u>should generally</u> fall within the following Principles.

8. Arbitrated Case

8.1 General

Any claim for increases in wages and salaries, or changes in conditions in awards, other than those allowed elsewhere in the Principles, will be processed as an Arbitrated Case by a Full Bench of the Commission unless otherwise allocated by the ~~Chief Commissioner~~ <u>President</u>. In determining such an application, the Commission will, subject to the relevant provisions of the Act, <u>generally</u> do so in accordance with the following criteria:

8.2 Work Value Considerations

a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.

b) In addition to meeting the test in 8.2a), a party making a work value application ~~will need to~~ <u>should</u> justify any change to wage relativities that might result not only within the relevant internal award structure but also against any external classification to which that structure is related. There ~~must~~ <u>should</u> be no likelihood of wage leapfrogging arising out of changes in relative position.

c) <u>Save for the matters detailed in Principle 11,</u> the foregoing circumstances are <u>generally</u> the only ones in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this Principle.

d) In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.

e) Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification, or where it is performed only by some of the

persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.

f) The time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the *State Wage Case 1989* (1989) 30 IR 107 or the last work value inquiry or the date of a consent award where the parties have agreed pursuant to a consent award the wage increases reflect increases in work value, whichever is the later.

g) Care should be exercised to ensure that changes that were taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this Principle.

h) Where the tests specified in 8.2 a) are met, an assessment ~~will have to~~ should be made as to how that alteration should be measured in monetary terms. Such assessment will normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work or the date of a consent award where the parties have agreed pursuant to a consent award that the wage increases reflect increases in work value.

i) The expression "the conditions under which the work is performed' relates to the environment in which the work is done.

j) The Commission will seek to guard against contrived classifications and over-classification of jobs.

k) Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other Principle of these Principles, will not be taken into account under this Principle.

l) In arbitrating an application made under this Principle, the Commission is required to determine whether or not future State Wage Case general increases will apply to the award.

8.3 Maintenance of the Real Value Wages

Changes in the living costs of employees, including as a result of inflation and increases to the living cost index (or similar data), may constitute a basis for increases in wages and salaries without a party needing to make out a special case.

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.

8.4 Productivity and Efficiency Considerations

Productivity ~~and~~ or efficiency measures that have delivered substantial costs savings and/or productivity or efficiency improvements or which have made a substantial contribution towards the attainment of the objectives of the employer (including departments and agencies of the Crown) ~~in seeking to become more competitive and/or efficient,~~ to which employees have made a significant contribution, may constitute the basis for increases to wages and salaries or improvements in employment conditions without the requirement to make out a special case, provided that the time from which such measures, savings or improvements are measured is the later of:

a) the date of the last adjustment awarded on account of productivity and efficiency; or

b) the date of a consent award where parties have agreed pursuant to a consent award that the wage increases incorporate an adjustment made under this Principle.

In determining fair and reasonable conditions of employment, the Commission will take into account the achievement of outcomes or goals, including societal benefits, of work performed by employees.

8.5 Special Case Considerations

A claim for increases in wages and salaries, or changes in conditions in awards, other than those allowed elsewhere in the Principles, and which is not based on work value and/or productivity and efficiency pursuant to this Principle, will be processed as a special case ~~in accordance with the principles laid down in Re Operational Ambulance Officers (State) Award [2001] NSWIRComm 331; (2001) 113 IR 384 and the cases referred to in that case at [165]-[168]~~.

~~**8.6 Exclusions**~~

~~**8.6.1** Claims that are based substantially on comparative wage justice (save for the matters detailed above in relation to gender based undervaluation of work), attraction and retention or community standards will not be countenanced except as provided in Re Public Hospital Nurses (State) Award (No 3) [2002] NSWIRComm 325; (2002) 121 IR 28 and Re Health Employees Pharmacists (State) Award [2003] NSWIRComm 453; (2003) 132 IR 244.~~

8.6.2 There will be no double counting, provided however, that an Arbitrated Case claim may rely upon a cumulation of the factors referred to in these Principles.

9. Negotiating Principles

9.1 In order to encourage participation in industrial relations by representative bodies of employees and employers, avoid industrial disputes, provide a prompt and fair manner for their resolution with a minimum of legal technicality, and to encourage and facilitate co-operative

workplace reform, the following processes will be followed with respect to claims under Principle~~s~~ 8~~ and 11~~.

9.2 In respect of the commencement of negotiations for a new award:

a) At least three months before the nominal expiry date of an award a party to the award ~~must~~ should notify the Commission ~~(where a major industrial case is contemplated pursuant to Practice Direction 8A)~~ and the other parties to the award that it is their intention to enter into negotiations for a new award in respect of claims pursuant to Principles 8 and/or 11.

b) The parties to the award must begin negotiations as soon as is practicable after the notification has been given. In this regard, once a written claim has been made by one party on another party, negotiations must begin within 28 days unless it is agreed by the parties to commence negotiations at a later time.

c) The employer will provide economic, financial and demographic information for employees covered by the proposed award if reasonably requested to the applicant(s) in order to facilitate resolution of disputes and encourage settlement of claims.

d)Disputes about these procedures will be dealt with in accordance with the dispute resolution procedures in the relevant award applying to the parties to the dispute.

9.3 Subject to the provisions of the Act, and unless the Commission otherwise determines, a party ~~is not~~ will generally not be permitted by the Commission ~~entitled~~ to prosecute arbitration unless the party has bargained beforehand in good faith.

9.3.1 In particular, parties are expected to have :

a) attended meetings they have agreed to attend and had been represented at the negotiations by persons capable of giving genuine consideration to the proposals of other parties and giving reasoned responses to those proposals; and

b) complied with agreed or reasonable negotiating or meeting procedures; and

c) disclosed relevant information for the purposes of negotiation; and

d) responded to each other's claims and/or counter claims in a reasonable and timely manner.

9.3.2 These good faith bargaining requirements do not require:

a) a party to make concessions during bargaining; or

b) to reach agreement on the terms that are to be included in the agreement.

9.4 The Commission may assist the parties in reaching agreement. The Commission may provide such assistance in respect of a dispute when a request is made by any party or on its own motion.

9.5 The Commission may exercise conciliation powers under the Act, and in that connection may, at the request of all the parties to a dispute, engage in a "Bluescope" process:

see *Construction, Forestry, Mining and Energy Union (New South Wales Branch) and Macquarie*

Generation [2009] NSWIRComm 160; *Re Operational Ambulance Officers (State) Award* [2008] NSWIRComm 168; *Minister for Industrial Relations (Notification under s 167 of a dispute between BHP Billiton) and The Australian Workers Union*[2002] NSWIRComm 378; *Crown Employees (NSW Fire Brigades Permanent Firefighting Staff) Award 2008* [2008] NSWIRComm 174; and *Re Crown Employees (Public Sector -Salaries 2008) Award* [2008] NSWIRComm 193.

9.6 If conciliation fails, and the parties do not elect for the "Bluescope" process, the Commission may arbitrate consistent with the powers under the Act and these Principles.

~~Equal Remuneration and Other Conditions~~ Gender Based Undervaluation

11.1 (a) Claims may be made ~~in accordance with the requirements of this Principle for an alteration in wage rates or other conditions of employment on the basis that the work, skill and responsibility required, or the conditions under which the work is performed, have been undervalued on a gender basis.~~ for an alteration in wage rates or other conditions of employment on the basis that the work, skill and responsibility required, or the conditions under which work is performed, have historically been, or are presently, undervalued on the basis of gender.

b) Where such a claim is established, the Commission will seek to ensure that wage rates and conditions of employment properly reflect the value of the work , skill and responsibility required/ and/or conditions under which the work is performed.

~~**11.2** The assessment of the work, skill and responsibility required under this Principle is to be approached on a gender neutral basis and in the absence of assumptions based on gender~~.

11.3 Where the under-valuation is sought to be demonstrated by reference to any comparator awards or classifications, the assessment ~~is~~ should not ~~to~~ have regard to factors incorporated in the rates of such other awards which do not reflect the value of work, such as labour market attraction or retention rates or productivity factors.

11.4 The application of any formula, which is inconsistent with proper consideration of the value of the work performed, including where such formulas may themselves have been the result or product of gendered conceptions of the value of the work the subject of the application, is inappropriate to the implementation of this Principle.

11.5 The assessment of wage rates and other conditions of employment under this Principle is to have regard to the history of the award concerned, including any historical gendered conceptions of the value of the work the subject of the application.

~~**11.6** Any change in wage relativities which may result from any adjustments under this Principle, not only within the award in question but also against external classifications to which~~

~~the award structure is related, must occur in such a way as to ensure there is no likelihood of wage leapfrogging arising out of changes in relative positions.~~

~~**11.7** In applying this Principle, the Commission will ensure that any alternative to wage relativities is based upon the work, skill and responsibility required, including the conditions under which the work is performed.~~

~~**11.8** Where the requirements of this Principle have been satisfied, an assessment will be made as to how the undervaluation should be addressed in money terms or by other changes in conditions of employment, such as reclassification of the work, establishment of new career paths or changes in incremental scales. Such assessments will reflect the wages and conditions of employment previously fixed for the work and the nature and extent of the undervaluation established.~~

~~**11.9** Any changes made to the award as a result of this assessment may be phased in and any increase in wages may be absorbed in individual employees' over-award payments.~~

~~**11.10** Care should be taken to ensure that work, skill and responsibility which have been taken into account in any previous work value adjustments or structural efficiency exercises are not again considered under this Principle, except to the extent of any undervaluation established.~~

~~**11.11** Where undervaluation is established only in respect of some persons covered by a particular classification, the undervaluation may be addressed by the creation of a new classification and not by increasing the rates for the classification as a whole.~~

11.12 The expression "*the conditions under which the work is performed*" has the same meaning as in Principle 8.2, Work Value Considerations.

~~**11.13** The Commission will guard against contrived classifications and over-classification of jobs.~~

11.14 Claims under this Principle will be processed before a Full Bench of the Commission, unless otherwise allocated by the **President** ~~Chief Commissioner.~~

11.15 Equal remuneration will not be achieved by reducing any current wage rates or other conditions of employment.

11.16 In arbitrating an application made under this Principle, the Commission is required to determine whether or not future State Wage Case general increases will apply to the award.