IN THE INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

2024/211169

STATE WAGE CASE 2024

Reply submissions for Unions NSW

A. Introduction and overview

1. These submissions reply to the submissions filed by:
   a. the Industrial Relations **Secretary** (**IRS**);
   b. **Local Government** NSW (**LGS**);
   c. The Australian **Paramedics Association** (NSW) (**PS**); and
   d. The **F**ire **B**rigade **E**mployees **U**nion (**FS**).
2. Unions NSW continues to rely on its submissions filed 3 September 2024. The abbreviations and terms defined in those submissions are replicated in these submissions.
3. These reply submissions consider each of the issues raised about the ongoing utility of WFPs, the nature of the WFPs, as well the revisions and reforms proposed to be made to the WFPs.

B. The ongoing utility of WFPs

4. FS [5]-[29] eruditely outline the historical genesis of the WFPs, the particular context in which they were formulated (being an historical moment where there was an Accord between organised labour, business and the Commonwealth government at a time of anaemic economic growth, runaway wage increases and inflation) and the purpose for which they were promulgated (to balance wage growth with wage restraint). Those principles have been applied, as the FS make clear, with relatively minor revisions but without major or significant reform since their original pronouncement some 40-years ago. This has been despite a fundamentally and radically changed legislative and economic context. In this regard, the FS expose LGS [42] as being plainly erroneous.
5. Unions NSW concurs with the contention at FS [23] and [27]-[29] that the WFPs have been regrettably conceived and applied as an arbitrary fetter on the exercise by the Commission of its functions, are no longer fit for purpose and require both reconsideration and, if they are to be retained, reform.

6. IRS [4] and LGS [43] observe that the WFPs are, and have been considered to be, in the nature of 'guidelines'. Unions NSW agrees that the WFPs should only be guidelines.

7. There is, however, tension in the Secretary's contention that the WFPs 'ensure consistency of approach' and 'predictability in wage fixation' and the conception of the WFPs as 'guidelines'. Unions NSW supports retention of the WFPs only on the basis that they are formulated and applied as guidelines, rather than a 'framework' (as suggested at LGS [31]) which effects a decision-making straitjacket . This is, in essence, the position agitated for at LGS [31]-[32] and most starkly illustrated by the submission at LGS [37] where Local Government bemoans the lack of prescription under the IR Act as compared to the FW Act and argues that this lacuna is 'dealt with in the wage fixing principles'. WFPs should be neither prescriptively drafted, nor should they operating prescriptively.

8. The contention at LGS [36] is a *non-sequitur* and appears premised on the view that WFPs are necessary to provide 'prescription' which the flexible and open-textured framework explicitly created by the IR Act neither requires nor envisages.

9. The appeals to conservativism at IRS [5] and LGS [33] are unconvincing and involve a side-step of any serious attempt to argue that the WFPs are fit for purpose and retain utility. The Commission is charged with ensuring that it conducts its functions in a manner which accords with its statute and contemporary economic and social realities. Whether WFPs should be retained and how they should be crafted requires assessment of both the text of the IR Act (read contextually and in light of its purpose) as well as a present-day realities. The WFPs are not rendered fit for purpose in 2024 by reason merely of their longevity or the fact that, at particular moments in the past, members of the Commission and industrial parties have extolled their virtues (cf LGS [38]).

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

10. IRS [7] should not be accepted. It does not follow that because the Commission is charged by s 10 of the IR Act with making awards setting fair and reasonable conditions of employment that an onus is foisted on an applicant to establish that an existing award does not set fair and reasonable conditions of employment. The notion that removal of the onus would 'undermine the authority of the Commission' should be rejected. Section 3(a) of the IR Act and the objects set forth in s 3, do not supply support for imposition or retention of an onus on a party seeking variation or amendment to an award. The notion that an onus assists in providing a 'guideline' for an applicant is nonsensical: RS [8]. An onus (whether

legal or evidentiary) is not a 'guideline'. An evidentiary onus involves an obligation on a party to show there is sufficient evidence to raise an issue, so as to require the other party to make out relevant facts.[1] A legal onus of proof imposed on a party requires the party to make out facts relevant to the particular issue.[2] A 'presumption' about a particular matter casts the burden of both proof and persuasion on the party who must rebut the presumption.[3]

11. The contentions at LGS [48]-[49] do not identify any basis in the text or structure of the IR Act which support the imposition of a rebuttable presumption (or onus) on an applicant to establish that extant award conditions are fair and reasonable. As FS [40]-[43] point out, the jurisprudential basis for imposition of the onus is somewhat flaccid.

12. The endeavour at LGS [51]-[56] to call in aide the usual caution that a Full Bench will not depart from prior decisions unless convinced they are wrong does not assist. It is an entirely discretionary exercise under s 51(1) of the IR Act (subject to satisfaction that it is consistent with the objects of the Act and that there are good reasons for doing so) for the Commission to pronounce or not pronounce WFPs. The exercise of that discretion occurs in a statutory and economic context that has, in Unions NSW's contention, appreciably changed.

D. Maintenance of the real value of award rates

13. Unions NSW maintains that the WFPs should set out that the Commission should consider and take into account the imperative to ensure the maintenance of the real value of award rates. It is supportive of including in revised WFPs that, in setting terms and conditions of employment, Commission should have regard to the need for rate increases to include a protective component and to allow for real wages and salary growth. However, it does not concur with the FS [47] that a rebuttable presumption should be included in the WFPs of the kind envisaged by the FBEU. Whilst no doubt not intended to fetter or dictate the Commission's exercise of its discretionary power to set fair and reasonable conditions of employment, it is not congruent with the conception of WFPs as 'guidelines' for presumptions of one kind or another to be imposed.

14. Unions NSW's suggested WFP is consistent with the recognition in IRS [10]-[13] that maintenance of the real value of award rates is a matter that the Commission does and should consider. LGS [56]-[66] do not contain any cogent basis for a principle dealing with the maintenance of the real value of award rates not to be included. It is also not apparent why

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1 See for instance *Commissioner of Police v Zisopoulos* (2020) 299 IR 314 at [61]-[62] and [74]-[75] (Bell P) and [96]-[99] (Macfarlan JA).

2 *Creak v Ford Motor Co of Australia Ltd* (2023) 112 NSWLR 272 at [26].

3 Ibid., at [27].

the exercise of by the Fair Work Commission of its minimum rate setting function under Part 2-6 of the FW Act is germane to the exercise by the Commission of its materially distinct functions under ss 10 and 17 of the IR Act.

E. Separation of general work value considerations from increases based on gender-based undervaluations

15. The parties appear to be *ad idem* on the imperative to separate claims premised on gender-based undervaluation from conventional work value claims.

16. The real question is what reforms ought to be made to the WFPs to deal with gender-based undervaluation claims. Unions NSW seeks to reform and recraft the current provisions as detailed in its outline of submissions. Clauses 18-19 of the FBEU's proposed WFPs seek to address the deficiencies with the current principles. Unions NSW agrees that these clauses are a possible means to deal with gender-based undervaluation.

F. Retention of a special case principle

17. FS [54]-[59] outline persuasive reasons why a special case principle should not be retained. Unions NSW maintains its position that any 'special case principle', or explication of principles dealing with what the FBEU correctly describe as 'non-routine matters', should be expressed in a manner that does not involve the imposition of artificial preconditions or prerequisites to the exercise by the Commission of its functions in making or varying awards. An understanding of a 'special case principle' as imposing conditions that operate as quasi jurisdictional prerequisites to the exercise by the Commission of its statutory functions is what, in truth, is contended for at IRS [24]-[33] and at LGS [78]-[80]. This involves an impermissible and unnecessary gloss on the statutory text which should not be countenanced.

G. Update of Principle 8 to allow consideration of claims based on the attraction and retention of staff

18. The IRS and LGS do not grapple with the fact that WFP 8.5 is inconsistent with the new object in s 3(i).

19. That principle should be deleted as it is incongruent with this newly inserted object.

H. Fiscal outlook

20. Unions NSW maintains its position that it suffices that new s 146C(2)(c) be referred to in the preamble to the WFPs. That appears consistent with the position adopted by the Secretary and Local Government.

I. Productivity and efficiency considerations

21. FS [63]-[65] pithily set out the difficulties intrinsic to assessing productivity in a public sector context and the imperative to formulate WFPs that encapsulate these complexities.

22. The Secretary appropriately recognises this reality and the difficulty the current principle effects for applicants at IRS [57]. An attempt to reflect the bespoke nature of productivity or efficiency in a public sector context is set out at IRS [66.3]-[66.4]. Proposed clause 17 in the FBEU's recast WFPs is superior in both recognising and reflecting the unique nature of the work performed by employees in the public sector.

J. Negotiating principles

23. IRS [72]-[74] and FS [71(a)] do not engage with the fact that mutual gains bargaining is an entirely voluntary procedure which industrial parties may (but need not) elect to utilise. There is no principled reason for the WFPs to encourage or facilitate mutual gains bargaining and no imperative for mutual gains bargaining to be referred to in the WFPs.

24. LGS [87] is incorrect to contend that the negotiating principles have been superseded by mutual gains bargaining. The latter are intended to be voluntary. Further, there is no necessary connection between parties participating in mutual gains bargaining and commencing proceedings for the making or variation of awards. The negotiating principles should be maintained but updated in the manner contended for by Unions NSW. Unions NSW's proposed reform to impel the disclosure of relevant information by public sector employers will aide both the early resolution of claims and their adjudication. The matters detailed at PS [73]-[75] speak eloquently of the importance and utility of such a provision.

K. No extra claims clauses

25. Unions NSW maintains its contention that no extra claims clauses should not be included, nor referred to, in the WFPs. Unions NSW disagrees with PS [65]-[66] for the reasons set out in its original submissions. The bald assertion that no extra claims clauses are an important part of a 'disciplined wage fixing system' does not withstand scrutiny and is, in

any event, difficult to reconcile with the statutory requirements on the Commission to set fair and reasonable conditions of employment.

26. It is difficult to apprehend how or why such clauses should be included in an award made by the Commission following a contested arbitration, although Unions NSW accepts that such clauses may, where a consent position is reached by the industrial parties, appropriately be included in an award.

27. In the event the Commission is, contrary to Unions NSW's position, disposed to formulate a model no extra claims clause, Unions NSW seeks to be heard on the content of such a clause.

L. Principles 10 and 12

28. The Secretary, somewhat curiously, supports retention of an economic incapacity principle. Absent an economic catastrophe of nightmarish proportions, it is difficult to envisage a situation where the State of New South Wales or a local council would be in a position where the principle would ever be relevant. FS [73](b) correctly points out that the principle was directed at micro private sector enterprises and is no longer relevant, including because the Commission is required to take into account the fiscal and economic position of the State.

29. None of the reasons outlined in IRS [82]-[86] or LGS [89]-[91] supply a reason for retention of the superannuation principle which FS [72](a) correctly details that it is an historical anachronism which serves no useful contemporary purpose.

M. Conclusion and application of any reformulated WFPs

30. The IRS are silent on proposed clause 13 in the Secretary's proposed WFPs.

31. Proposed clause 13 seeks to limit the operation of any reformulated WFPs to applications that are both filed and determined *after* the promulgation of new WFPs and to awards that are not within their nominal term. No basis is articulated for this 'transitional provision'. If the WFPs are not fit for purpose and require reformulation, any new principles should apply with immediate effect to all applications to make or vary awards, regardless of when those applications were filed, what stage of proceeding they are at and whether the awards they relate to are within or outside their nominal term. The Commission should reject any attempt to include a 'transitional provision' in the WFPs.

32. The WFPs should be reformed to ensure they appropriately reflect contemporary statutory and economic circumstances and that they are formulated as guidelines rather than a series

of preconditions or directives which parties must comply with in order to make or vary awards.

33. Unions NSW would seek an opportunity to make brief submissions on any proposed amended principles formulated by the Commission following the hearing on 9 October 2024.

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30 September 2024