



INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

2024/00211169

STATE WAGE CASE 2024

SUBMISSIONS OF THE AUSTRALIAN PARAMEDICS ASSOCIATION (NSW)

The Australian Paramedics Association (NSW) (“the APA”) makes these submissions pursuant to the orders of the Full Bench in *State Wage Case 2024* [2024] NSWIRComm 11 dated 10 July 2024 (“the decision”).

SUMMARY

1. The APA is a registered organisation with approximately 2500 members who are paramedics employed by NSW Ambulance. There is a single award which covers these paramedics.
2. The APA has a tradition of trying to bargain in relation to the Award increases (subject to the limitations of s 146C). The APA sees a bargaining framework as an important part of fixing wages for paramedics.
3. It submits that the State Wage principles are no longer fit for purpose given the contemporary industrial context. The *Industrial Relations Act 1996* (NSW) (“Act”) and by extension the Wage Fixing Principles need to encourage genuine bargaining with an appropriate safety net for those who cannot bargain.

THE CURRENT NEW SOUTH WALES SYSTEM

4. The current system does not have a great deal of consistency. There are three broad parts:
 - i. The first is the state government public service proper where wages are predominantly fixed by Awards and where there is not a strong tradition of bargaining. The Commission has adopted the National Annual Wage Review as the standard for a small number of Awards not otherwise varied by agreement.
 - ii. The second are more discrete areas such as ambulance, fire, police and local government where there is a strong tradition of bargaining. There are relatively small numbers of people also covered by awards and enterprise agreements.
 - iii. There may also be a very small residue of employees who are not covered by any award.
5. The APA has an interest in the second category only.
6. The majority of workers employed in the public sector are employed under, and have their rates of pay set by Awards that operate such that over-award payments are not available.

¹ <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWIRComm/2024/1.html>

THE CONTEMPORARY CONTEXT

7. The industrial context of the present review of the Wage Fixing Principles is significant. It marks the first review of the principles since:
- i. Large scale changes to the Act specifically:
 - a. the abolition of Section 146C;
 - b. the introduction of mutual gains bargaining provisions;
 - ii. the removal of the Government Sector Wages Policy/Regulation which capped pay rises at 2.5% unless Employee Related Costs Savings can be identified; and,
 - iii. the reconstitution of the Industrial Court.
8. It also requires the Commission to contend with an industrial relations environment where:
- i. For more than a decade Awards were primarily made through consent applications and with maximum increases of 2.5%, and
 - ii. The public sector Awards have had few adjustments for work value and productivity and efficiency with the majority of Awards over the past decade only accounting for inflationary adjustments. In the small number of cases that have been contested, the ability to identify productivity or efficiency and work value was limited due to constraints as a result of the Wages Policy, and
 - iii. The economic context of significant increases in cost of living driving the value of real wages down.
9. If the Commission is to promote and encourage participation in industrial relations and encourage and facilitate co-operative workplace reform, it should create a framework to encourage genuine bargaining with an appropriate safety net for those who cannot bargain. Turning then to the questions set out in the directions

QUESTION 1

10. The Wage Fixing Principles should be retained. They should, however, be amended to take account of the changes to the Act and contemporary circumstances. These points are addressed below.

QUESTION 2

11. Section 10 of the Act presumes that awards made in accordance with this Act set fair and reasonable conditions of employment for employees. That should not lead to a presumption that existing awards set fair and reasonable terms and conditions after their making; at least in circumstances where the environment is not in total stasis.
12. The APA submits that the onus should not be retained for the following reasons.

13. Awards inevitably and almost immediately may start becoming unfair if their rates of pay and conditions:

- i. fail to keep up with rises in cost of living;
- ii. fail to take into account productivity and work value increases;
- iii. fall behind comparative positions covered by other awards;
- iv. become historically obsolete.

MAINTENANCE OF THE VALUE OF REAL WAGES AND ARBITRATED CASE PRINCIPLE

14. As restated in *the Public Sector Salaries 2020 Case*², existing wage rates set by an award are presumed to be fair and reasonable. The Commission must attempt to fix rates which will be just and reasonable rates at the time when the award commences to operate and will likely continue to be just and reasonable during the term of the award, having regard to economic factors including the changing value of money over time, and changes to the value of money forecast during the term of the award to be made: *the Public Sector Salaries 2020 Case* [31](9)-(10).

15. The making of Awards under the Wages Policy, and, in particular, the constraints imposed by s146C, was inconsistent with this approach. During the period the Wages Policy was in effect, it only permitted increases of 2.5% per annum and did not account for increases in work value or productivity and efficiency.

16. The requirements in the Wages Policy to show employee related cost savings (“ERCs”) for any increase above 2.5% halted attempts by unions to run cases under the arbitrated case principle as even if they were able to establish a case under the wage fixing principles, the additional bar of having to establish equivalent ERCs made the task more onerous. This was made even more challenging by the inability of industrial representatives to obtain information that they could use to run a wage case.

17. The effect of more than a decade of deliberate wage suppression is that New South Wales Public Sector Awards as a broad group do not set fair and reasonable conditions and have not for some period. Considering this, the APA submits that it would be unjust to retain the onus that existing Awards set fair and reasonable conditions of employment.

18. Nevertheless, the APA acknowledges that the presumption is not an issue which currently affects its members due to the wage increase in the *NSW Ambulance Paramedics (State) Award 2023*. Despite this, public sector wage suppression impacted APA members prior to the finalisation of this Award and will likely impact its members in the future. As such, it is appropriate for APA to provide submissions on this point.

² Application for Crown Employees (Public Sector – Salaries 2020) Award and Other Matters (No 2) [2020] NSWIRComm 1066, (2020) 301 IR 321 at [31 (2)], <https://www.caselaw.nsw.gov.au/decision/174dd80fb171917762d24580>

QUESTION 3

19. The APA submits that there should be a principle (“Real Wages Principle”) making explicit the principle that real wages should be maintained. The parties should have the capacity to gain further increases over that amount for productivity and efficiency increases, work value and special cases.
20. The absence of a maintenance of a Real Wages Principle is without reason and fundamentally unjust. There is no proper justification for the erosion of buying power, that has resulted from more than a decade of deliberate wage suppression. The Commission can and should intervene.
21. The absence of such a principle has the effect of:
- i. Eroding work value and productivity and efficiency adjustments over time.
 - ii. Undermining the objects of the Act, in particular:
 - (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,
 - (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.
 - iii. Conflicting with the Commission’s powers under section 10

WHY A REAL WAGES PRINCIPLE IS NECESSARY

A Protective Mechanism against Risk of Wage Stagnation

22. The current mechanisms for advocating for wage increases are too onerous to be interpreted as being protective of the rates of pay under NSW public sector awards. In recent years, arbitrated cases under the Wage Fixing Principles (WFP) have proven to be exceptionally difficult, largely due to the reluctance of public sector agencies to engage in meaningful bargaining processes. This is despite the existence of the WFPs, Wages Policy, and the Act, which provide guidelines for such processes to occur.
23. The challenges with negotiated outcomes are unlikely to be fundamentally different in the current context, as the current Government Policy³ provides that increases above 4% may only be awarded where:
- i. parties identify substantial efficiency improvements, including changes to work practices and work systems which provide demonstrable enhancements to the delivery of services to the public (s 3.4), or

³ [M2023-04 - NSW Government Fair Pay and Bargaining Policy 2023](#)

- ii. where the associated cost is offset by savings (s 3.5)

The Impact on Mutual Gains Bargaining

24. The absence of a principle to maintain real wages undermines the effectiveness of mutual gains bargaining. If inflation or the maintenance of real wages is not accounted for, the bargaining process may be rendered fruitless. Employees and their representatives will be discouraged from engaging in bargaining if their efforts to secure wage increases are eroded by inflationary or cost of living increases in subsequent years.
25. Moreover, mutual gains bargaining is an inherently unequal process. Workers often have little choice but to accept productivity or efficiency changes imposed by employers. Refusal to participate in workplace changes has historically been deemed to be industrial action. The employees rarely obtain any benefit from those changes.
26. Unlike the Federal systems, unions have no capacity to take protected industrial action. The Supreme Court has fined unions for breaching orders to restrain them from industrial action.⁴ Unions have been left with the options of bargaining in a skewed bargaining process or the difficulties of achieving an arbitrated outcome. A proper bargaining process would fundamentally change this equation.

WHY THE SPECIAL CASE PRINCIPLES ARE NOT SUFFICIENT

27. In the past, the Commission has dealt with real wage maintenance by way of special case.⁵ As stated by the Full Bench in *Re Operational Ambulance Officers (State) Award* [2001], to satisfy the requirement of a special case the applicant must demonstrate that the case has "special attributes" or is "out of the ordinary".⁶
28. The maintenance of the value of real wages or employee purchasing power is not a consideration that could be described as out of the ordinary. The Special Case principles do not appear to be a very apt vehicle to maintain real wages.

⁴ See, for example, *Secretary of the Ministry of Health v The New South Wales Nurses and Midwives' Association* [2022] NSWSC 1178, (2022) 320 IR 249 <http://classic.austlii.edu.au/au/cases/nsw/NSWSC/2022/1178.html>, and *Secretary, Department of Education v The Australian Education Union New South Wales Teachers Federation (NSWTF) Branch (No 2)* [2022] NSWSC 1365 <http://classic.austlii.edu.au/au/cases/nsw/NSWSC/2022/1365.html>

⁵ See for example, *Application for Crown Employees (Public Sector – Salaries 2020) Award and Other Matters (No 2)* [2020] NSWIRComm 1066

⁶ *Re Operational Ambulance Officers (State) Award* [2001] NSWIRComm 331; (2001) 113 IR 384 at [166], <http://classic.austlii.edu.au/au/cases/nsw/NSWIRComm/2001/331.html>

Retention of Staff

29. The failure to adjust wages in line with inflation has led to significant retention issues in the public sector. For example, paramedics in New South Wales went from being some of the best-paid in the country to among the worst-paid due to the lack of wage increases that account for inflation. This has led to difficulties in retaining skilled staff and undermines the quality of public services.

30. The table below demonstrates the relative pay differences between paramedics in New South Wales and other states and territories. It compares the base rate for Paramedic – Year 1 under the *NSW Ambulance Paramedics (State) Award 2023* with the base rate for equivalent positions under the respective industrial awards in the other Australian states and territories.

Year (as at 1 July)	NSW	ACT	QLD	SA	TAS	VIC	WA
2019	1,358.16	1,434.06	1,321.00	1,454.06	1,346.67	1,134.65	930.90
2020	1,362.23	1,473.04	1,443.00	1,490.40	1,350.04	1,492.55	930.90
2021	1,390.02	1,513.08	1,443.00	1,527.67	1,412.87	1,522.40	970.90
2022	1,425.19	1,554.21	1,516.00	1,565.87	1,529.15	1,552.85	1,016.00
2023	1,482.20	1,603.75	1,576.50	1,605.02	1,529.15	1,583.90	1,069.80
2024	1,534.63	1,661.96	1,639.50	1,645.15	1,529.15	1,583.90	1,112.60

31. The last State Wage Case to address this issue was in 2020, during a time when the Wages Policy was still in effect and inflation was relatively stable, indeed low. However, the current industrial landscape is vastly different, with inflation rates significantly higher in recent years. For example:⁷

- Inflation in FY21: 1.6%
- Inflation in FY22: 4.4%
- Inflation in FY23: 7.0%
- Inflation in FY24: 4.2%

MAINTAINING THE VALUE OF REAL WAGES ACCEPTED IN PRIOR CASES

32. The principle of maintaining real wages is consistent with the approach taken by the Commission in previous cases. For example, in the *Crown Employees Case 2020*, the Full Bench acknowledged the importance of maintaining the real value of earnings for employees under the relevant awards (at [57-58]):

⁷ Note: FY refers to the Financial Year or the year ended on 30 June; for example, FY21 is the year ended 30 June 2021. This data is sourced from the Australian Bureau of Statistics and averages the quarterly Consumer Price Index (“CPI”) results to calculate the inflation for each respective financial year. Found here: <https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/consumer-price-index-australia>

"In our view, employees under the Relevant Awards are entitled to maintain the real value of their earnings. This is not only consistent with the Commission's jurisprudence but with the stated purpose of the Government's wages policy.

If no increase is awarded to the employees under the Relevant Awards in the period to 30 June 2021, the employees will, on the economic evidence and projections before the Commission, see a reduction in the real value of their earnings of 0.3%. Subject to what we say below at [168] and the directions at [171], the Commission proposes to make awards and variations to avoid such a reduction, by awarding increases of 0.3%."

WHY THIS SHOULD BE DEALT WITH AS A DISCRETE ISSUE IN THE STATE WAGE CASE

33. It is not sufficient for the Commission to simply lump together cost of living increases and productivity increases as part of an obscurely derived general increase.

34. An example of such an approach can be seen in the *Crown Employees (Police Officers - 2009)*

*Award*⁸:

"[544] Nonetheless, as we have described above, some practical considerations arise at this juncture which must be determined. Those questions are resolved, in our view, by the decision of the Full Bench in Operational Ambulance Officers (and the reliance, in that decision, upon Crown Employees (1993)). The Full Bench in Operational Ambulance Officers set out the following extract from the Crown Employees (1993) decision at [167]":

"In our view, the special case section of the principles provides a mechanism whereby a claim for enhanced wages or conditions beyond those normally allowed under the principles may be brought before the Commission. The hearing of such a claim is to be conducted by the Full Commission (formerly the Commission in Court Session) thus emphasising the special nature of the case. It will be a matter for the Full Commission, after hearing the evidence and submissions, particularly relating to the matters relied on to take the case "out of the ordinary" and thus to make it "special", to decide whether the claim, in part or in whole, should succeed.

...

It is also entirely appropriate, it is concluded that, in general, the claim should succeed, the Commission have regard to economic considerations, including the changing value of money over time, when deciding the amount of increase which should be awarded. Matters which may be considered in that regard are the date on which the last wage increases for employees in question took effect, and changes in money values which have occurred since that time that time or are forecast during the prescribed life of the award to be made."

[545] We agree with this Statement of Principle. It does not, however, entirely favour the contentions advanced by either party. It is appropriate, when considering appropriate remedies in a general application such as the present, to have regard to the maintenance of the purchasing power of wages by assessing, for the first year of the operation of any award made, relevant economic considerations for the period since the last salary adjustment (in this case 1 July 2010), provided there is an avoidance of double counting. However, the economic forecasts should then be considered for each successive actual year of the operation of the award. In this case, if an award were made for three years, the Commission would be required to have regard to the economic forecasts for such year of operation of the award, namely, in the second year, the forecast for the financial year 2012-2013, and, for the last year, the forecast for the financial year 2013-2014."

⁸ [2012] NSWIRComm 23, (2012) 220 IR 1, <http://classic.austlii.edu.au/au/cases/nsw/NSWIRComm/2012/23.html>

35. A process whereby these particular elements were separated out would be both more transparent and more rigorous.
36. The NSW Commission, the Qld Commission⁹, the SAET¹⁰ and the WAIRC¹¹ (at least partially) have adopted the AWR as the basis for their state wage case. There is a question whether that is a particularly apt mechanism for determining wages in NSW.
37. The application of the AWR to state minimum rates awards means that only a small percentage of the workforce is subject to the AWR. The question then arises as to what should occur to the rest of the workforce.
38. Should the Commission consider that the purpose of State Wage Cases is to provide fair and reasonable wage increases, the Commission should provide for maintenance of real wages by award prescription with the capacity for further increases by agreement or arbitration with reference to productivity and work value.
39. There is a proper reason to depart from the longstanding approach of the Commission not to pass on the AWR to paid rates awards.
40. As stated in the decision of the *Annual Wage Review 2023–24* at [76]:
- “The effect of relatively high inflation over the past three years has been to reduce the real wages of modern award-reliant employees, notwithstanding that last year’s increase of 5.75 per cent was the largest national wage increase for approximately forty years and that their nominal wage rates have grown more than the WPI over the period.”*
41. In 2022-23 the FWC saw fit to Award the largest modern Award increase in 40 years. The application of such an increase to maintain the value of real wages as part of the State Wage Case would act as a protective mechanism for public sector workers who are precluded from negotiating to obtain above award payments.
42. The AWR also found that slowing wage growth has been a significant concern, particularly in the context of rising inflation. A principle that ensures the maintenance of real wages is essential to ensure that employees do not suffer a decline in their standard of living.
43. The NSW Public Sector Wages Policy 2011 at s 1.2 states that:
- “the policy is designed to maintain the real value of public sector wages over the medium term in line with the mid-point of the Reserve Bank of Australia’s target range for inflation over the cycle.”*
44. Addressing the maintenance of real wages in the Principles aligns with longstanding practice as provided for in the policy and is particularly urgent in the current economic context.

⁹ Declaration of General Ruling (State Wage Case 2023) (No 3) [2024] QIRC 111, <http://classic.austlii.edu.au/au/cases/qld/QIRC/2024/111.html>

¹⁰ State Wage Case 2023 [2023] SAET 112, <http://classic.austlii.edu.au/au/cases/sa/saet/2023/112.html>

¹¹ 2021 WAIRC 00173, <http://classic.austlii.edu.au/au/cases/wa/WAIRC/2021/173.html>

QUESTION 4

The APA does not make any submissions on this point.

QUESTION 5

45. Yes. The notion of work value is very different to gender-based undervaluation. The focus in work value cases is upon changes in the nature of the work, skill and responsibility required or the conditions under which work is performed: *Applications for Variations to Crown Employees (Police Officers 2017) Award and Paramedics and Control Centre Officers (State) Award* [2021] NSWIRComm 1040 at [80].¹² The focus in gender based under evaluation issues is whether those jobs have been undervalued on a gender basis: see *Crown Librarians, Library Officers and Archivists Award Proceedings - Applications under the Equal Remuneration Principle, Re* [2002] NSWIRComm 55.¹³ While gender-based undervaluation may exist, at least in part, because of a failure to properly apply work value considerations; that may not be the only reason.
46. Gender-based wage discrimination is an important but complicated issue that should be assessed on its own terms and not be lumped in with another quite different principle. As the UK experience shows, if the issue is not given special attention, gender-based wage disparities will continue to exist and may even expand.

QUESTION 6

47. The special case principle should be maintained. It allows for consideration of cases with "special attributes", or which are "out of the ordinary": *Operational Ambulance Officers (State) Award, Re*¹⁴, at [166]. The notion of a special case is long-standing in industrial law. It exists because of the difficulty of applying the same principles to every case that could conceivably come before the Commission. It provides the necessary flexibility to deal with unforeseen circumstances.
48. As the Full Bench of the AIRC held in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union - re application for variation of award - T4991* [2000] AIRC 722¹⁵ at [50]:
- "In our view, "special case", as used in Principle 10, is not a self-defining term. The identification of a special case is reserved to a Full Bench level of determination. It is not necessary or desirable to attempt to paraphrase that requirement into a set of principles, or a code of considerations for general application. A case-by-case approach is necessary. The circumstances of the Award and the industry in which it operates are of fundamental importance in determining whether the requirement is satisfied. In this matter, the special case requirement entails that the AMWU has the task of satisfying the*

¹² <http://classic.austlii.edu.au/au/cases/nsw/NSWIRComm/2021/1040.html>

¹³ <http://classic.austlii.edu.au/au/cases/nsw/NSWIRComm/2002/55.html>

¹⁴ [2001] NSWIRComm 331; <https://www.caselaw.nsw.gov.au/decision/549f741c3004262463a7be17>.

¹⁵ <http://classic.austlii.edu.au/au/cases/cth/AIRC/2000/722.html>

Commission that there are sufficiently compelling reasons for awarding, as minimum rate conditions to apply across the industries covered by the Award, the substantive changes that it seeks. Should the AMWU satisfy that requirement, it will, in our view, have made out a special case in the circumstances applying to the Award.”

QUESTION 7

49. The Commission has historically not taken the question of attraction and retention into account on the basis that this was a matter for the market: *Re Equal Remuneration Principle* [2000] NSWIRComm 113; (2000) 97 IR 177 at 215. That may have been appropriate in an award system covering the private sector and largely based upon minimum rates awards. It is not appropriate in a paid rates award system whereby skilled staff are constantly being enticed interstate by higher wages. That has an effect upon the remaining staff, the level of service provided and the skills base within the remaining workforce. These matters should not be ignored.
50. In any event, the failure by the Commission to assess attraction and retention is contrary to object 3(i) which states:
- (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.*
51. It is difficult to understand how the Commission could do so without taking those criteria into account when determining wages.
52. The Government’s own guidelines state:
- “Bargaining agendas should consider workforce planning strategies and identify areas of skill shortage when proposing measures to address attraction and retention of the public sector workforce.”¹⁶*
53. The Commission should amend principle 8 to remove the reference to “attraction and retention” at subprinciple 8.5.1.

QUESTION 8

54. The APA submits that the Commission is bound by that obligation in any event. A further reference would be superfluous.

QUESTION 9

55. One of the central elements in wage bargaining is the capacity to translate productivity increases into pay increases. One thing made clear by the changes to the Act is the new emphasis on bargaining: see s 129K and onwards. One of the central elements in wage bargaining is the

¹⁶ NSW Government Fair Pay and Bargaining Policy 2023, at 1.6.

capacity to translate productivity increases into pay increases. There is no clear definition of productivity in the Act or in the wage case principles.

56. The APA believes that the bargaining process has been hampered by:

- i. the narrow definition of productivity adopted by the government, and
- ii. the difficulty in getting details as to proposed productivity changes and their proposed costings and efficiency benefits.

57. There is no clear definition of productivity in the Act. The former wages policy referred to *employee-related cost savings*.

58. The current policy adopts a broader definition that:

“Public sector productivity is the quantity and quality of public services or outcomes delivered for a given amount of public resources (labour, equipment/technology, natural resources).”¹⁷

59. The current wage fixing principles set out this definition:

“Productivity and 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.”

60. That definition is somewhat circular. It defines productivity measures in part by reference to productivity improvements. It also does not explain how such changes are to be measured.

61. There needs to be a broader definition of productivity for paramedics. The saving of the life of a heart attack victim does not increase employee-related cost savings of the ambulance service. It does, however, increase the productivity of the heart attack victim and their family. It does also increase the productivity of the health system. It reduces the drain upon both the healthcare and social security systems.

62. There also needs to be a greater capacity to obtain information as to productivity improvements in the ambulance service. That capacity appears inherent in the good faith bargaining amendments to the Act. The ambulance service is typified by constant increases in technology and training. Those changes all contribute to better productivity in a broad sense. However, without proper disclosure by the employer, those changes cannot give rise to the calculation of proper savings and consequential bargaining about the value of those savings.

63. The Government’s guidelines appear to support such disclosure stating that:

“Parties should share relevant information for each key interest and any common criteria which will be used to evaluate options during the bargaining process.”¹⁸

¹⁷ NSW Government Fair Pay and Bargaining Policy 2023, at 5.2.3

¹⁸ See NSW Government Fair Pay and Bargaining Policy 2023, section 5.1.3.

64. It is currently difficult to both define and measure productivity¹⁹. The APA proposes the following amendments to principle 8.3:

Productivity and 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 and/or provide better service, to which employees have ~~made a significant contribution, assisted in achieving~~, 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.*

QUESTION 10

NO EXTRA CLAIMS CLAUSE

65. No extra claims clauses are an important part of a disciplined wage fixing system. It is important that they be carefully drafted to ensure that the parties understand what they allow and do not allow. In particular, they should not prevent bargaining during the life of the Award. They should also not prevent discussion, conciliation and arbitration on leave reserved matters. There is no reason why such a model clause should not be inserted into all awards.

66. It is accepted that the significance of no extra claims commitments extends beyond inter parties' commitments, but also enliven considerations that "*go to matters of fundamental principle essential to the operation of, and practical viability of, the industrial relations system recognised and codified by the Act*"²⁰. For this reason, the APA submits that the construction of a model no extra claims clause is an important consideration for the Commission.

67. Such a model clause must provide certainty of outcomes for the life of the Award for workers, industrial representatives and employers. To that end any model clause must be balanced such that if it is to preclude increases in salary for classifications under an Award must also preclude reductions in salary.

68. A no extra claims clause must apply clearly and fairly. It should apply to both sides equally. It should not prevent one party from seeking increases to wages while allowing the other to reduce wages. Finally, it should allow for an agreed mechanism to allow continued negotiation.

¹⁹ See Generally Crown Employees (Administrative & Clerical & ORS) Awards [1993] NSWIRCOMM 104, <http://classic.austlii.edu.au/au/cases/nsw/nswircomm/1993/104.html>.

²⁰ Rail Tram and Bus Industry Union of New South Wales & Ors v Secretary of Transport [2017] NSWIRComm 1032 at [19].

69. Such a clause must also prevent the employer from making demands for reductions in salaries or conditions, as the absence of this undermines that basis on which Awards are made. An Award in which the rates of pay or conditions are able to be eroded by actions of the employer cannot be said to set fair and reasonable conditions. It also cannot be construed as to be consistent with the Wage Fixing Principles, as observed by Wright J, President:

“the Commission must ensure the integrity of not only its own wage fixing principles but also the strict observance of agreements and undertakings given by partes compliance with which, properly considered, are important and indeed essential to the integrity [of] the principles. Undertakings such as no extra claims provisions are crucial parts of the integrity of the system of wage fixation which occurs in the New South Wales System of industrial regulation...a strict approach of their construction should be applied consistent with the necessity of maintaining the integrity of the wage fixation principles”²¹.

70. Further, the APA submits, that the principles in relation to no extra claims clauses should restrain the employer from taking action to reduce the salaries and conditions whilst a challenge to such a decision is on foot. As stated by the Full Bench in *Re Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award*, their operative purpose has been “to prohibit the award being varied or replaced during its nominal term, in respect of those matters to which the provision applies, where the variation or replacement is contested”, other than “in what might be imagined to be the most exceptional of circumstances”²².

RETENTION OF NEGOTIATING PRINCIPLES

71. Principle 9 (Negotiating Principles) should be retained for the reasons outlined below. They should however be amended to take account of the changes to the Act and contemporary circumstances, as referred to at [74-78] below.

72. The APA submits that the negotiating principles should be retained despite the introduction of the mutual gains bargaining provisions in the Act for the following reasons:

- i. For the provisions in Chapter 2A Mutual gains bargaining to apply to negotiations the parties must agree to enter into a mutual gains bargaining process (129K). Where one or more of the parties do not agree to participate in a mutual gains bargaining process the only option should not be an arbitrated case.
- ii. The Negotiating Principles set out a framework in which the Commission can exercise its conciliation powers under the Act to facilitate a bargaining process. This, in effect, provides the parties a second opportunity to engage in bargaining where one or more parties is reluctant or unwilling to engage in the process

²¹ *Re Corrections Health Services Nurses’ Award* (1999) 90 IR 235 at 245; *Health Services Union and Director-General, NSW Department of Health* (2010) 193 IR 359 at [40]; *Re Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award* (2008) 181 IR 245 at [17].

²² *Re Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award* (2008) 181 IR 245 at [18].

contemplated in the Act. The retaining of these principles encourages mutual gains bargaining.

INFORMATION SHARING

The APA proposes a single revision to the Negotiating Principles in the following terms.

73. A new sub-clause should be inserted into clause 9.2 of the Principles to allow for the early provision of government information relating to matters that may reasonably relate to an award claim. A new sub-clause 9.2(a) could read:

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

(a) Representative bodies for employees employed by an agency of the Crown should be provided government information by that agency on request insofar as the information requested may reasonably relate to a future claim against the award. Such requests and the provision of information may occur before the formal commencement of negotiations for a new award. The information should only be provided on a confidential basis if it is information that would not be released by the agency if it were subject to an application for the same information under the GIPA Act.”

74. Such a process would benefit the parties identify the real issues in dispute and assist with the early preparation of award claims with minimal cost and formality.

75. APA's experience is that NSW Ambulance and NSW Health are reluctant to provide information (outside of the expensive and cumbersome GIPA process) that is necessary for APA to investigate and substantiate productivity and efficiency or work value claims such as business cases, evaluation reports, and other organizational documents relating to workplace changes and reform.

76. The current negotiating principles address the disclosure of relevant information at 9.3.1 (c) but the provision sits within sub principle 9.3 and therefore relates to a party's entitlement to prosecute arbitration. The principle is also not adequately prescriptive so as to effectuate the disclosure of information that may be reasonably required for the purposes of negotiation.

77. This was borne out in the experience of APA in trying to engage in negotiations on its Major Industrial Case in which requests for disclosure of information were met with assertions from Health representatives that they did not deem it relevant and that it was not their responsibility to provide information that the APA required to make out their case.

QUESTION 11:

A. Principle 10 (Superannuation);

78. The current principle as to superannuation allows for a potentially different regime to that created by Commonwealth legislation. That course does present some obvious difficulties. It is, however, possible to imagine increases in superannuation being used as part of a wage outcome

in a way that did not cause a collision of state and federal legislation. In one of the rare recent examples of such a case; a single Commissioner stated that in the absence of consent such an award may be made by arbitration if the Commission is satisfied there are particular factors warranting the award of a different provision, and that such factors may include the wishes of the parties: *Local Government Engineers' Association of New South Wales v MidCoast Council (No 3)* [2024] NSWIRComm 1046²³ at [38].

79. The current superannuation principle is drafted in a highly complex way that leads to assessment of any application by way of special case. Much of what it says is unnecessary. It is unnecessary for example for the Commission to require that any clause would be consistent with the SGA. The Commission should simply deal with such applications by way of special case.
80. There is one rather more technical issue. It is relatively difficult for an employee to enforce the SGA. The Commission should consider drafting a model clause creating an Award entitlement to those benefits which could then be enforced in a State Industrial Court.

B. Principle 12 (Economic Incapacity).

81. This principle is based on a historical position where the Commission also determined wages for the private sector: see for example *Broken Hill Commerce and Industry Consent Award 2001* [2004] NSWIRComm 200²⁴. The principle had particular relevance to industries subject to terms of trade fluctuations and natural disasters.²⁵ Short of widespread catastrophe (in which case the availability of tinned food may supplant pay increases as a topic of importance in popular discussion), neither danger is particularly relevant to State or Local Government. To the extent that economic considerations need to be taken into account, they should be dealt with through the legislative provision. The principle is obsolete and should be deleted.

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Denman Chambers
3 September 2024

²³ <https://www.caselaw.nsw.gov.au/decision/190fcde531e6b031e5620ee5>

²⁴ <http://classic.austlii.edu.au/au/cases/nsw/NSWIRComm/2004/200.html>

²⁵ Australian Workers Union and the Livestock And Grain Producers (Industrial) Association of New South Wales & Ors; The Pastoral Industry (Wages and Allowances) Award 1985 [1986] CTHARBRP 646; (1986) 303 CAR 454