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IN THE INDUSTRIAL RELATIONS COMMISSION
OF NEW SOUTH WALES

CHIN J

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TUESDAY 27 AUGUST 2024

2024/00211169 - STATE WAGE CASE 2024

10 Mr E Yap for the Australian Workers Union, NSW Branch
Ms N Salameh for the Local Government Association of New South Wales
Ms K Kless for the Industrial Relations Secretary

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HIS HONOUR: I'll take the appearances. Good morning everyone. Mr Yap for Unions New South Wales?

YAP: Mr Yap appearing for Unions New South Wales.

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HIS HONOUR: Yes. And yes?

KLESS: Ms Kless for the Industrial Relations Secretary.

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HIS HONOUR: Thank you, Ms Kless. And Ms Salameh?

SALAMEH: That's right, your Honour. Good morning. Thank you. Salameh, initial N. Local Government New South Wales.

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HIS HONOUR: Thank you everyone. The matter's back before me for report back essentially in respect of all three categories of awards. Who would like to go first?

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YAP: I'll go first in respect of the category 1 awards. Perhaps we'll deal with that wholly and then move onto 2 and 3.

HIS HONOUR: Sure.

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YAP: So the IR Secretary in New South Wales have had discussions since the filing of the reply submissions by Unions New South Wales yesterday. The IR Secretary wishes for matters be programmed for hearing. We had an early directions hearing foreshadowed that maybe the matter could be determined on papers but it seems not. We do not oppose the matter going to hearing but merely ask for the matter be programmed as quickly as possible for a few

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HIS HONOUR: Sorry, is this a consent position, Mr Yap? Are both parties asking for the matter to go to hearing?

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YAP: Yes. Well firstly, Unions New South Wales think that the matter can be

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determine on the papers and that submissions should close. However, if the Commission is minded to hear from the parties further, we do not oppose going to hearing either.

5 HIS HONOUR: So on the last occasion it seemed likely from what I was told by you both, both parties, that it's likely the matter would be able to be determined on the basis of written submissions. I take it that there's no proposal for any evidence to be called, is there?

10 YAP: Not from Unions New South Wales.

HIS HONOUR: Ms Kless?

KLESS: No proposal for any evidence to be called.

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HIS HONOUR: Why can't the matter be dealt with on the basis of the written submissions in view of that, that there's not going to be any evidence to be relied on by either party in relation to this issue of the timing of the increase?

20 KLESS: The Secretary is in an unusual position when he filed the submissions in chief and submissions responding to the original submissions of the Unions New South Wales. The submissions in reply from Unions New South Wales expand the argument and the IR Secretary wishes to be heard in relation to those two issues of the issue of timing and prorating.
25 It should not take long. My estimate is one or two hours and the position is that the last sets of submissions really expands the argument and the Industrial Relations Secretary wishes to be heard in relation to that.

HIS HONOUR: As I understood the submissions from Unions
30 New South Wales in reply were responsive to the arguments put by the Industrial Relations Secretary in your submissions, were they not, they were responsive?

KLESS: They were responsive but the Secretary's position is that it wishes to
35 expand and advance their position at the hearing.

HIS HONOUR: What if I were to give you an opportunity to do so in writing,
supplementary submissions strictly in response to the submissions as filed by
40 the Unions New South Wales yesterday?

KLESS: I'm in the Court's hands to that. The preference of my instructors is to
seek a hearing date. If that's going to be more convenient for the Court to
have a further set of submissions, that's also acceptable.

45 HIS HONOUR: I'm just mindful of the time that it's taken on an issue like this where the parties are largely or broadly in agreement as to quantum. To convene a five-member full bench for a hearing on such a narrow compass is something that I have some reluctance in doing. Unless you can persuade me
50 necessary?

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5 KLESS: The IR Secretary will accept a filing date for the further submissions. Another option would be to allocate some time at the beginning of the substantive hearing on 9 October, that's another option, but I'm in the Court's hands.

HIS HONOUR: I'm not going to leave it that late.

10 KLESS: Yes.

HIS HONOUR: Mr Yap, what do you say to that proposal?

15 YAP: Firstly, there's a procedural matter I wish to raise about whether a five-member bench needs to hear this stage, stage 1 of the matter. So our view is that if a hearing were to be programmed, the matter can be considered by a three-person full bench. Whether that is a subset of the five-member bench or a new composition altogether provided that the rules in s 156 are complied with. We say this for two connect reasons. So first, the power to make the decisions in respect of stage 1 and stage 2 are separate powers.

20 So firstly, stage 1 with regards to these awards are powers pursuant to s 50 and then for stage 2, in respect of the wage fixing principles, that powers pursuant to s 51 in both provisions, I guess the provision is for a full bench to consider the relevant materials and make a decision. There's nothing that requires the full bench to be the same bench. In that respect, I think if that assists in the Commission's programming, we would ask for a three-person full bench that can be convened as quickly as possible. So that's the procedure,

25 HIS HONOUR: What I'm asking your position on, Mr Yap, is the proposal I've raised that giving the moving party for an oral hearing really is the Industrial Relations Secretary, as I understand it, that they would be content with a further opportunity to respond to your submissions in writing. As an alternative, if I were to give you an opportunity to strictly or confine any further written submissions to a response to those further submissions, would that not be a satisfactory way forward?

30 YAP: That would satisfy, yes.

35 HIS HONOUR: What I have in mind is, so Ms Kless, if I were to give you a further week to put whatever else you want to say in writing in response, strictly in response to what's been filed by Unions New South Wales yesterday and then give Mr Yap a week thereafter to make further written submissions in response to whatever you file, would that be suitable?

40 KLESS: May I ask for slightly longer than the week until 9 September? But if that's inconvenient to the Court, I will accept a one-week filing date.

45 HIS HONOUR: Well what if I gave you until 6 September and then Mr Yap, do you need another week?

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YAP: Yes, I think a week would be suitable. Thank you.

HIS HONOUR: Sixth, then the 13th.

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KLESS: Thank you.

HIS HONOUR: Okay, well before I make directions in that regard or any directions at all, can we then move onto categories 2 and 3? Now as I understand it, consent applications keep getting raised but we haven't received anything as yet in respect of any of those two remaining categories of awards. What's the position?

YAP: Yes, the parties are in agreement as to the general award that the Commission should make. So the order is that the quantum be increased by 3.75% and be operated from 1 September for each of the four awards. So the two awards in category 2 and the two awards in category 3. The practice of the parties previously acting to file the variations with the orders, the proposed orders, there's been delay and this is solely on my part. I am, as they say, a one-person band at the moment in my office so I wish to apologise to my colleague and the Commission. I will be working on finalising those today with the hope that those proposed consent orders and variation be filed by the end of this week in advance of 1 September.

There is a further matter I wish to raise with regards to the proposed rescission of the entertainment award. My instructions are that that award is not to be rescinded at this stage and there is not yet an application for rescission filed by Local Government New South Wales. So as the award is still operative, we seek for the rates in that award to be increased in the usual course. But the issue of rescission is still being discussed between the parties.

HIS HONOUR: So is that position a matter of consent?

YAP: As I understand, yes.

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HIS HONOUR: Ms Salameh?

SALAMEH: Thank you, your Honour. So yes, as already alluded to by Mr Yap, with regard to - if I could just focus on - if we can park the entertainment one just to one side for a second. With the three awards, being one in category 2, the Local Government (Electricians) State Award and the two awards in category 3, we are in agreement over quantum. Local Government New South Wales has forwarded the relevant union parties with the adjusted rates of 3.75%.

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HIS HONOUR: So not just quantum but also timing?

SALAMEH: Okay, so with the timing, if we can get it in by this week, and I mean just a consent variation, just bang it in, we're good to go. 1 September 2024. On or after 1 September 2024. In each of those

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three awards that I just mentioned, the increases don't take effect until
1 September of every year anyway, so if we can get them in by 1 September,
that would be wonderful. That would prevent any backdating on the part of our
members because I think our members are going to riot if they have to
5 backdate something that increases by 2 cents for instance, an allowance that
increases by 2 cents or something like that.

HIS HONOUR: Well we want to avoid riots, Ms Salameh.

10 SALAMEH: What's that?

HIS HONOUR: We want to avoid riots.

15 SALAMEH: Yes, please. Yes, please. If we could. In the Local Government
Secretary at any rate, that would be wonderful. With the Entertainment and
Broadcasting Industry, Live Theatre and Concert (State) Award, I'm not going
to go into the ins and outs of the negotiations between the parties, suffice to
say that we couldn't reach an agreement on a draft application to rescind
which I subsequently put to the union parties. In the absence of agreement,
20 we're not going to arbitrate a matter that does not apply to anyone in
Local Government. That would be a waste of resources and funds and stupid
quite frankly. So we're more than happy to consent to a variation in
accordance with 3.75% to this award from whenever you want it to take effect.
It doesn't really matter because it doesn't apply to anyone in
25 Local Government.

HIS HONOUR: All right. Mr Yap, why should we be varying an instrument that
applies to no-one, if that's correct? Do you accept that's--

30 YAP: My instructions are that that fact has not been confirmed, firstly.
Secondly, I would say that there's a presumption that if an award has not been
rescinded, that it applies to someone that has capacity to apply to someone. If
Local Government New South Wales wishes to make an application for
recission that is not in a consent basis, they are free to do so, but as matters
35 stand now, I think that the better course is to increase the rates but because
the award has not been rescinded.

HIS HONOUR: Is the position of Unions New South Wales that the
entertainment award, if I can refer to it in that shorthanded way, still has work
40 to do or still has application?

YAP: Yes, those are my instructions.

HIS HONOUR: So it's not a matter of consent as a matter of fact that there are
45 no employees currently covered by the order?

YAP: My instructions are that the fact that the assertion from
Local Government New South Wales is that no employees covered by the
award has not been confirmed or validated, so as far as we're concerned,
50 there are still employees covered or potentially covered by the award.

HIS HONOUR: So if this instrument is to be the subject of a consent variation for the moment on the footing on the basis that you both put to the Commission, can I encourage both parties to continue discussions about the
5 viability of that instrument? If there's any continuing utility operation of the award, then that needs to be explored. If there is not, then the parties have a responsibility to bring it back before the Commission to deal with it efficiently, and I'd encourage both parties to do that.

10 SALAMEH: Yes, absolutely. There is definitely continued utility in continuing the discussions. Suffice to say, as I said, I don't want to get into the nitty gritty of the negotiations in the last two weeks, but we, being Local Government
15 New South Wales, encountered vehement resistance from the Media, Entertainment & Arts Alliance. They asked for various things. A couple of things we were able to provide. The last of their request was simply untenable which is why I retracted the application to rescind altogether, threw up my hands and said, "Let's just vary the thing. Okay", but I do agree there is continued utility in continuing the discussions as long as the parties are amenable to negotiating in good faith I guess.

20 HIS HONOUR: Well it doesn't seem like an entirely satisfactory basis to move forward.

25 SALAMEH: No, it wasn't.

HIS HONOUR: But Mr Yap, can I have an undertaking from your side that discussions will continue notwithstanding the foreshadowed consent application?

30 YAP: Yes, certainly, yes. We will continue those discussions. We will continue the discussions.

HIS HONOUR: And finally, when can both parties submit the consent application together with the variation? Can you do it by the end of the week?
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YAP: To clarify, I think that the discussions surrounding the application for the rescissions of this award probably needs more discussion.

40 HIS HONOUR: So as I understand it, you're going to be filing a consent application to vary that award?

YAP: Yes.

45 HIS HONOUR: You're not in a position to rescind that award. Discussions about a potential rescission of that award will continue?

YAP: Yes.

50 HIS HONOUR: I'm not asking about those discussions, having gleaned from you an undertaking that those discussions will continue. What I'm just focusing

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on now is the foreshadowed consent application to vary the category 1, 2 and 3 awards. How much time do you need?

5 YAP: Yes, I apologise. The materials that'll be filed by the parties not in the form of applications but in the form of proposed consent orders and variations. The s 52 of the Act allows for that.

HIS HONOUR: And how long do you need for that?

10 YAP: And by the end of the week.

HIS HONOUR: Okay, all right. Is there anything else before I make directions?

15 YAP: In discussions before the proceedings today, the IR Secretary raised the possibility that they will be seeking an extension to the hearing duration for the wage fixing principles but we had not received anything in writing or any concrete proposals either in writing or verbally, so perhaps I'm just foreshadowing that issue.

20 KLESS: That's correct. I anticipate receiving instructions to approach the chambers of his Honour, the President, and indicate that the Industrial Relations Secretary estimates that the matter will take longer than one day and with that in mind seek that an additional day be allocated.

25 HIS HONOUR: I'll note that.

KLESS: Thank you.

30 HIS HONOUR: While you're on your feet, Ms Kless, there is one thing arising from the submissions of the parties which might be able to shorten whatever submissions are to come from this point. Can I just ask, in relation to the submissions you have filed, in para 13 there's a submission to the effect that - I'm quoting here - "Where the Commission...variation is precluded", are you making a submission that in this case the Commission lacks power to make a retrospective operative date for an increase as to 1 July 2024?

35 KLESS: Sadly I'm not able to assist at this moment. If I can, I will make a note that your Honour is interested in the paragraph and I will make sure that it's addressed in the submissions. I simply don't--

40 HIS HONOUR: I think Unions New South Wales has responded to it as though that's your submission but I'm not so sure that it is the submission that you're making.

45 KLESS: Yes. I will sadly not be able to respond on my feet as I was not the author of the submission but I will definitely consider that paragraph and I will liaise with Mr Yap if need be. It'll be reflected in the submissions filed.

50 HIS HONOUR: You might make a note that I can't see how the reference to

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5 s 15(3)(b) of the Act, which is cited in that paragraph, explains a submission if in fact you're putting such a submission that the Commission in this case is unable to determine an operative date retrospectively to 1 July 2024 for the flow on increases to take effect. I don't apprehend that's actually what the submission is but if it is, then I'd be assisted if the parties could clarify your respective positions on that issue, namely the power of the Commission to make the operative date retrospective to 1 July.

10 KLESS: I will. Thank you.

HIS HONOUR: Is there anything further?

KLESS: Nothing further.

15 HIS HONOUR: In that case, I make the following directions:

1. By 4pm on 6 September 2024, the Industrial Relations Secretary is to file and serve submissions in response to the submissions in reply filed by Unions New South Wales on 26 August 2024.

20 2. By 4pm 13 September 2024, Unions New South Wales is to file and serve submissions in response to the submissions filed by the Industrial Relations Secretary pursuant to o 1.

25 Just pausing there. I note for emphasis that the submissions to be filed by both parties are strictly to be in response to the submissions identified in my directions.

30 3. By 4pm 30 August 2024, the Unions New South Wales is to file and serve consent orders and associated variations of the relevant awards referred to in categories 2 and 3.

35 I note that in respect of that direction, the Unions New South Wales, Local Government New South Wales and the Industrial Relations Secretary have reached a consent position as to the quantum and timing of the flowing on of the annual wage review increases for category 2 and 3 awards.

40 I further note that with respect to the category 1 awards, upon the closing of submissions filed by the parties on 13 September, as foreshadowed in the orders I have made today, the full bench of the Commission will then proceed to determine whether and to what extent the decision in the annual wage review case 2023-24 cited in [2024] FWCFB 3500 is to be adopted in respect of category 1 awards based on the parties' written submissions and without proceeding to a hearing on that issue. I note that that process is going to take place with the consent of the parties.

45 Unless there's anything further, Mr Yap?

50 YAP: Yes. With respect to o 3 about the filing and serving of consent orders, the consent position is between Unions New South Wales and

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Local Government New South Wales only as the Industrial Relations Secretary does not have an interest in any of those awards.

5 HIS HONOUR: I see. Thank you. I noted I think on the last occasion that the Industrial Relations Secretary was engaged in discussions about the category 2 awards, but if that's not the case now, I'll make corrections to the directions accordingly and those directions will be communicated to the parties in due course. Notwithstanding that, the State wage case then will next come before the Commission in stage 2 with these directions effectively dealing with
10 the stage 1 aspect of the proceedings. I thank the parties for their assistance and the Commission is adjourned.