

APT:SND

IN THE INDUSTRIAL COURT  
OF NEW SOUTH WALES

CHIN J

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FRIDAY 9 AUGUST 2024

**2024/00211169 - STATE WAGE CASE 2024**

10 **DIRECTIONS**

Mr E Yap for Unions NSW

Ms N Salameh for Local Government NSW

Mr T Elliott with Ms K Kleiss for the Industrial Relations Secretary

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HIS HONOUR: Mr Elliott, should I hear from you first?

20 ELLIOTT: Certainly, your Honour. As your Honour would have seen, there  
was correspondence passed onto chambers earlier this week. Regrettably the  
Industrial Relations Secretary has not been able to comply with your Honour's  
directions to file and serve his substantive submissions by the 7th. I have now  
25 received instructions, which include very strong instructions to file and serve  
those submissions by today and accordingly today I am seeking an extension  
of time to file those submissions by close of business today and for an  
extension of time for the submissions in reply by one week to 23 August.

HIS HONOUR: I see.

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ELLIOTT: Your Honour, I am also able to indicate the Industrial Relations  
Secretary's position, which I have relayed to my friend from Unions NSW.

HIS HONOUR: What is that?

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ELLIOTT: That is that the 3.75% should be passed on, but it should be done  
at the time of the usual commencement of these awards.

HIS HONOUR: So there will be a dispute about the timing of the flow-on of the  
40 increase.

ELLIOTT: Yes, your Honour. I believe that that is the sole issue at this stage.

HIS HONOUR: Sorry, what are you asking for? A variation of the direction to  
45 file, for the Industrial Relations Secretary to file by the close of business today?

ELLIOTT: Yes, your Honour.

HIS HONOUR: And then a variation of the direction presently to file by next  
50 week to extend that to 23 August submissions in reply.

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ELLIOTT: Yes, your Honour.

5 HIS HONOUR: While you're on your feet, Mr Elliott, I should say as to the  
correspondence that you refer to, informing my chambers of the  
Industrial Relations Secretary's inability to comply with the direction, whilst the  
notice is appreciate can I just say that that's not generally the appropriate  
10 course to take or to deal with that issue. The appropriate course is to either  
comply with the Commission's directions or, as you have done this morning, to  
seek to vary the directions so that you are in a position to comply with it. It's  
not particularly helpful to simply declare your inability to comply. Generally  
that's not the appropriate course. It is basic conduct expected of parties  
15 before any court or tribunal and from experience industrial parties such as the  
Industrial Relations Secretary. Frankly this Commission expects more. I won't  
say anything further, but I'd appreciate if you could relay that message to your  
client.

ELLIOTT: That will most certainly be impressed to my client, your Honour.

20 HIS HONOUR: Thank you. Mr Yap.

YAP: Your Honour, my instructions are that we impose the variation of the  
direction and simply ask that the Commission pass on the increases by way of  
25 the default position because the time for compliance has passed, however  
we're in your hands as to whether your Honour is minded to vary that direction.  
In response to Mr Elliott's submissions about the variation of the subsequent  
direction, which is the submissions in reply, we have no difficulty in that should  
your Honour vary the earlier direction, however I note that we do not yet know  
30 the reasons for the IR Secretary's opposition to the default position. So we  
wish to reserve our right to have a further direction for further submissions  
after the next round of submissions.

HIS HONOUR: Mr Yap, presumably you will get those reasons today. You  
will have an opportunity to respond to those reasons if I vary the direction for  
35 your reply submissions in due course. What further submissions beyond that  
are you envisaging?

YAP: I am envisaging that the IR Secretary may raise further issues in their  
reply submissions, and if so, we wish to respond to those in writing as well.

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HIS HONOUR: Strictly speaking, given the Industrial Relations Secretary's  
default, there is only an opportunity for them to put their position today. They  
can do at the same replying to your submissions. Your response to, or reply to  
45 the Industrial Relations Secretary's submissions that cover both those areas  
don't call for a further reply from you, do they?

YAP: Strictly speaking, no. However I am just anticipating, and perhaps that  
may not be true, but we do not yet know the substance and perhaps that's a  
50 matter for further directions if required.

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HIS HONOUR: I don't suppose the parties are in a position to indicate, in the absence of knowing the reasoning of the Industrial Relations Secretary's position, whether, given the limited nature of the likely dispute, a hearing will be required after the close of submissions or whether the full bench may be able to deal with the dispute on the papers as it were. Is that something you can address me on?

YAP: Yes. We've thought about that issue, your Honour. I think if any, I think a half day or less hearing would be required, but yes, we do agree that maybe a hearing is not required. But if so, perhaps a half day should be programmed in anticipation.

HIS HONOUR: Mr Elliott.

ELLIOTT: Your Honour, I apologise to cut across my friend. I just wanted to indicate that, your Honour, my understanding of the directions that the full bench made on the last occasion was that there was to be mutual exchange of substantive submissions on the 2nd and then the 7th, which of course has not occurred. And then there was also to be mutual exchange of submissions on the reply on 16 August. On that basis, I think it would be difficult for the Industrial Relations Secretary to file submissions today, which while they will set out the reasoning for the timing differences, they would not be substantive submissions in reply to my friend's submissions with respect to the so-called default position. I merely raise that because if--

HIS HONOUR: Sorry, I'm just trying to follow you.

ELLIOTT: If it is intended that the Industrial Relations Secretary's submissions now also incorporate the Secretary's submissions in reply, there will be some difficulty with providing those by close of business today. I had understood that these submissions would be the Secretary's substantive submissions with the Secretary's submissions in reply to follow on the 16th or whatever further date the Court orders.

HIS HONOUR: But you already have the brief submissions put by Unions NSW. You've had them for a couple of days. What's the difficulty in responding to that and in putting in the Industrial Relations Secretary's position, are you not invariably in substance responding to the position put by the unions?

ELLIOTT: To a large extent, yes, your Honour. The difficulty is simply timing. If it's the case that the Court is minded perhaps to have the Industrial Relations Secretary put on submissions in reply and then have the other parties put on any further submissions in response that could be done but I think the timetable would need to be slightly amended to allow the Secretary proper time to incorporate those submissions. To that end, if the Court is so minded, your Honour, I would be seeking that the Secretary have until at least Tuesday next week to file and serve those submissions.

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HIS HONOUR: So is this the position, that you can file submissions stating your position on the stage 1 aspect of these proceedings as they relate to category 1 awards today, but you can't respond to the submissions of Unions NSW received earlier this week by today?

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ELLIOTT: At least not substantively, your Honour. I think that there's going to be some detail involved in those submissions because there is some history in terms of the commencement of these awards which goes back quite some time. I don't believe, and I merely raise it because I don't want the Secretary to set a goal and then miss it once more in terms of the filings this afternoon.

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HIS HONOUR: Well I would expect any submission, at this stage, filed by the Industrial Relations Secretary to take into account effectively what the unions' position is, which you've got before you. I hear what you say.

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ELLIOTT: Thank you, your Honour.

HIS HONOUR: Sorry, Mr Elliott, what do you say, before you sit down what do you say about the resolution of the foreshadowed dispute by way of oral hearing or on the papers.

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ELLIOTT: Your Honour, I don't have specific instructions. I agree with my friend's estimate of about half a day, however I don't wish to bind counsel on that. Mr Pararajasingham and Ms Burns(?) of counsel are jointly briefed in this matter. I also would indicate that I believe my client is hopeful that a consent position can be reached subsequent to further discussions between the parties during the course of these submissions.

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HIS HONOUR: Thank you. Mr Yap, did you want to respond?

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YAP: I do. Your Honour, firstly I wish to state that the Secretary has had the benefit of our position since 5 August which is when we notified them by email in advance of the submissions that were made on 7 August. Secondly, given what we've heard from Mr Elliott, I think our primary position would be that the matters in dispute be confined to whatever the Secretary files as their primary submissions and the parties' reply to that, however as we have heard from Mr Elliott, they may wish to agitate, I guess, further issues in relation to our position even though they've had the benefit of them for a few days now. If your Honour were not minded to confine the issues to the primary submissions or the first submissions of the IR Secretary, then I think a third round of submissions may be required, as Mr Elliott foreshadowed.

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HIS HONOUR: If I direct the Industrial Relations Secretary to file it's submissions on the category 1 awards which includes a response to your submissions by early next week, give you an opportunity to respond to that subsequently, and then relist the matter before me for further directions, either by way of allocation of a hearing date or some other process, does that deal with the issue? I don't understand why there's a third round of submissions. You've said what you need to say, they've responded, you've replied. What

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else needs to be done before the matter is determined either orally or in writing?

5 YAP: My earlier submissions before Mr Elliott spoke was anticipating that Mr Elliott would have that position, that there would be a first set of submissions that they would provide today to comply with the deadline that they've missed and I anticipated that there would be a second set which would expand the issues--

10 HIS HONOUR: No, I am not interested in that. The Industrial Relations Secretary, I will make a direction for filing submissions to state their position, say what they want to say. You will have that opportunity and you will have an opportunity to respond to the unions' position. The unions can reply and then the matter will be determined by the full bench one way or another based on  
15 what you tell me is the appropriate course when the matter returns back before me. That's my present intention by way of programming.

YAP: If that is the case, your Honour, we are content with that.

20 HIS HONOUR: Thank you. Mr Elliott.

ELLIOTT: We're in the Court's hands. Of course if there are further difficulties that arise we can raise them with the Court at that time but I am not  
25 anticipating that there will be.

HIS HONOUR: Does it need to - so what is the prospect of you both coming back before me after the written submissions are filed with the joint position that the matter can be determined on the papers?

30 YAP: Your Honour, I think that is a strong possibility but we're not ruling out the possibility of a hearing.

HIS HONOUR: Mr Elliott.

35 ELLIOTT: Your Honour, I believe that it is a possibility and I think it will become clear in the course of the submissions being filed. I would hesitate to say that it's guaranteed.

40 HIS HONOUR: No, no, I'm not asking that. I'm just wondering about the utility of me setting a hearing date now, which I can do, but I gather from what you tell me, that may be, at this stage, somewhat premature.

45 ELLIOTT: Yes, your Honour. I believe that it would be premature at this stage to set a hearing.

HIS HONOUR: Thank you. Now I should hear from Ms Salameh in relation to, I think it's the category two awards.

50 SALAMEH: Thank you, your Honour. So in relation to the Local Government (Electricians) (State) Award, your Honour, the parties, meaning ourself and

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Mr Yap on behalf of Unions NSW, have provided a schedule, an updated or amended schedule or rates of pay that reflect the 3.75% increase. I believe it's currently being, the figures are currently being reviewed by Unions NSW. But I guess the issue that is, I hesitate to say in contention, but is also the date on which those rates, amended rates, would take effect. It is our position, Local Government NSW, that we cannot agree to any retrospective backdating of the increases and that the increases should take effect as per our usual practice on or after the date that the consent variation is ratified before this Commission. So that's in relation to the electricians at the moment.

10 HIS HONOUR: I see. Now there's also the Entertainment and Broadcasting Industry Award.

15 SALAMEH: Shall I jump there or shall we stay with the electricians? Because that's going to be a little bit different.

HIS HONOUR: Well in relation to both of them we were told on the last occasion that you anticipated filing consent orders before today.

20 SALAMEH: Yes, okay. So I will jump to the Entertainment and Broadcasting Industry Award then, your Honour, because we've only recently discovered that that award is somewhat obsolete. Would you mind if I furnished you, your Honour, with some documentation that has already been provided to the unions. Thank you.

25 HIS HONOUR: Certainly.

SALAMEH: The first document that I am providing is the gazetted copy of the Local Government State Award 2023. If I can direct your attention, your Honour, to the purple tab on the gazetted copy of the Local Government State Award, specifically cl 47 III and then (1) of that award. So the entertainment and broadcasting industry award, your Honour, only applies to one council and that is Newcastle. We have only just discovered this week that in the Newcastle City Council enterprise agreement that it has been specifically rendered obsolete, the Entertainment and Broadcasting Industry Award.

HIS HONOUR: I see.

40 SALAMEH: So if I can just - sorry, I will stop if I'm going too quickly, your Honour. Thank you.

HIS HONOUR: No, no, I understand, I understand.

45 SALAMEH: So in schedule 6 of the document that's coming up to you now, that is a gazetted version of the Newcastle City Council enterprise agreement.  
HIS HONOUR: I see.

50 SALAMEH: If you look at the two tabs there, the two tabs there in purple are cl 9, that's the first one, where it specifically states in cl 9 that this--

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HIS HONOUR: Sorry, I think your tab just detached--

SALAMEH: Came off, okay, sorry.

5 HIS HONOUR: --from my copy. Hang on, I will just, well you want me to look at cl 9, I can find cl 9 on my own.

SALAMEH: Yes, thank you. Thank you, your Honour.

10 HIS HONOUR: I have that.

SALAMEH: I should use, what do you call it, the sticky glue next time.

HIS HONOUR: You have adhesive, Miss.

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SALAMEH: The stuff that doesn't come off, yeah.

HIS HONOUR: Never mind, I've found cl 9.

20 SALAMEH: Thank you so much, your Honour. It specifically states in that particular clause that the Entertainment and Broadcasting Industry Award is displaced entirely by the Newcastle City Council Enterprise Agreement. And then if you go to sch 6 which is the subsequent purple tab at the end of that document, you will see that the provisions of the Entertainment and  
25 Broadcasting Industry Award have specifically been subsumed and absorbed into sch 6 of the Newcastle City Council Enterprise Agreement. Given this position that we only just discovered this week, as I say, your Honour, and I apologise that it was only just discovered this week rather than perhaps when it should have been discovered which was earlier, we believe that this award  
30 no longer has any utility or value and should therefore be rescinded entirely.

HIS HONOUR: I see. Are you saying that the terms of the order being subsumed under this agreement such that it operates but those terms operate by force of the agreement or are they--

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SALAMEH: Correct.

HIS HONOUR: --rendered obsolete entirely in substitute with different terms?

40 SALAMEH: I would say that they are rendered, the Entertainment and Broadcasting Industry Award has been superseded by the Newcastle City Council Enterprise Agreement where it, in essence, has been rendered obsolete entirely and therefore there is no longer any utility to its existence.

45 HIS HONOUR: I see.

SALAMEH: This position, your Honour, has been put to the unions and then I believe the unions just need to review that position and--

50 HIS HONOUR: I see.

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5 SALAMEH: --we're happy to put forward any affidavit evidence to that effect as well. I had a conversation with the Industrial Relations lead at the council on Wednesday of this week and she confirmed that they no longer have any vested interest in that award.

10 HIS HONOUR: I see. I might just ask Mr Yap. Mr Yap, do you have a position on that latter point regarding the Entertainment and Broadcasting Industry Award?

15 YAP: Yes, your Honour. Firstly we are still seeking instructions in relation to the information that's been provided. I think we had a discussion on Wednesday and the material was provided yesterday so that's the first point. The second point is as a matter of procedure, your Honour, I think if it is indeed obsolete and serves no purpose, I think that there needs to be an application for rescission of the award made under a different power in the Act just to foreshadow the procedural steps.

20 HIS HONOUR: That may well be so, but you'll need an opportunity to form a view about what's being said.

YAP: That's correct.

25 HIS HONOUR: Also the issue with respect to the category 1 awards, namely timing of increase, seems to also now apply to the Local Government (Electricians) (State) Award. There haven't previously been any directions for submissions addressing that award. Is it appropriate that I, whatever submissions I make in respect of the category 1 awards now, include the Local Government Award to give the parties an opportunity to address the  
30 Commission on whatever difference they have as to the timing of increases?

35 YAP: The parties are still hopeful that we can reach a consent position with regards to these awards. The differences are that I guess the customary or the traditional start date of these increases is much earlier in time, in 1 September, and Local Government NSW has foreshadowed that they are willing to move that date even further forward so on that basis we are willing to work together towards a consent position. I think we're close ...(not transcribable)...

40 HIS HONOUR: So you don't need directions in that respect, okay. Thank you. Now Ms Salameh or someone, who is going to address me on category 3?

45 YAP: Yes the category 3, we've come to a consent position in relation to the state wage case adjustments to those awards but not yet the timing. I think the timing issue is the same as the category 2 awards. But with respect to the aged care work value case, we would say that that increase should come later after the increases have been made as part of the state wage case adjustments. So by way of background, your Honour, the increases that are foreshadowed in the aged care work value case is from 1 January 2025 and



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there may be a requirement for the orders to anticipate that that is a further increase by way of a separate application to the Commission.

5 HIS HONOUR: I see. Now just going back to the award review increases flow-on for these category 3 awards, is it the position that the same issue as pertains to the category 1 awards apply to these awards?

10 YAP: That's correct. We have put the, I guess "default" position as in our submissions to Local Government NSW as well. I am not sure of what Local Government's position on default position is, but we're committed to having a time that is perhaps not 1 July but on or before 1 September as the start date for those increases and we believe that there are sound reasons to do so.

15 HIS HONOUR: Do you need - so is this going to be the subject of disputation in the same way as the category 1 awards are, or is this something that's going to lead to consensus without the need for directions made for submissions to address these issues?

20 YAP: We're hopeful for consent with these ones. With category 2 and 3.

HIS HONOUR: I see. All right. Thank you. Is there anything else, Mr Elliott?

25 ELLIOTT: Nothing further, your Honour.

30 HIS HONOUR: In that case, before I make the directions, can I just foreshadow what I have in mind is to, with respect to the category 1 awards, to direct the Industrial Relations Secretary to file submissions stating its position on stage 1, salary increases and responding to Unions NSW's submissions by close of business early next week, namely Monday the 12th, to give Unions NSW seven days to respond, Monday the 19th and then bring the matter back before me on Wednesday, 21 August. Is there any difficulty with that?

35 YAP: Your Honour, I note that the previous directions had a gap of two weeks between the first set of submissions and the second set, so we would seek two weeks instead of one week.

40 HIS HONOUR: So that would take it, submissions in reply on 26 August and then the matter return before me on the 28th.

ELLIOTT: Your Honour - apologies.

YAP: Sorry. That is, Your Honour, on the 28th I have bargaining all day.

45 HIS HONOUR: What about Tuesday, the 27th?

YAP: Tuesday 27th is more appropriate, suitable, thank you.

50 HIS HONOUR: All right. Mr Elliott, you wanted to say something.

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ELLIOTT: Your Honour, the Secretary is in the Court's hands. I merely note that we have had the Union's submissions from the 7th which means that there will be a five day period for the Secretary to put on his submissions in reply followed by a two week period for the Unions to then put on further submissions in reply.

HIS HONOUR: But, Mr Elliott, there is nothing really to respond to. It's just stating your position, effectively, given the well-known default position, as the unions call it, for matters of this nature. I don't understand what the delay is really.

ELLIOTT: Your Honour, I understand that it's been referred to as the default position but it's a curious way to phrase it when that has not been the default position for, I believe at least, the last ten years in this jurisdiction and I think that there is going to be some scope to discuss that issue before the Court. I merely note that, as I say I am in the Court's hands. I merely note that the Secretary's time to reply has now been truncated to a period of five days including a weekend, whereas there's still going to be a two week period for the unions to respond.

HIS HONOUR: Well I think you mentioned before that you sought until Tuesday next week to do the reply as well as state your position.

ELLIOTT: Yes, your Honour.

HIS HONOUR: Well if I gave you until Tuesday the 13th would that be satisfactory?

ELLIOTT: I am in the Court's hands.

HIS HONOUR: And Mr Yap, if I truncated your time by one day, that wouldn't be a difficulty, I'd take it?

YAP: That's no difficulty, your Honour.

HIS HONOUR: Okay. In that case, I make the following directions;

1. I vacate the direction referred to in paragraph 10b of the statement of the full bench published in *State Wage Case 2024* with the medium neutral citation [2024] NSWIRC OMM1;

2. The Industrial Relations Secretary is to file and serve his submissions on the issue of whether and to what extent the decision in the *Annual Wage Review 2023 to 24*, 24 FWC FB 3500 is to be adopted in respect of the category 1 awards and to reply to the submissions of Unions NSW filed on 7 August 2024 by 4pm, Tuesday 13 August.

Just pausing there. Mr Yap, do I only need to give you an opportunity to file submissions in reply or any other interested parties?

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YAP: I think it should just be confined to Unions NSW. No other party has signalled any interest.

HIS HONOUR:

5           3. Unions NSW to file and serve submissions in reply by 4pm, Monday 26 August 2024; and

10           4. The matter is listed before me for further directions at 10am on Tuesday, 27 August 2024.

15 I note further that Unions NSW, Local Government NSW and the Industrial Relations Secretary are to have continuing discussions in relation to the category 2 awards, including with respect to the standing of the *Entertainment and Broadcasting Industry Live Theatre and Concert State Award* and that before the next listing on the 27th or otherwise that the matter will be listed for report back concerning the category 2 awards at the same time on the 27th.

20 Just pausing. I should say that if there is to be any consent position arrived at then I would invite the parties to file any relevant applications before the matter returns, including any rescission application.

25 I further note that in respect of the category 3 awards, the same parties are continuing discussions with respect to the flowing on of the annual wage review increases and that I am told that the reaching of consensus on that issue is likely. Again, if a consent position is reached before the matter has returned before me on the 27th, then I invite the parties to communicate that position to my chambers, together with any application to be filed by consent before the 27th. Failing that, the matter will return before me for report back further directions on the 27th.

30 Is there any other matter I need to deal with this morning?

YAP: Nothing further from Unions NSW.

35 SALAMEH: Nor LG NSW.

ELLIOTT: Nothing further, your Honour.

40 HIS HONOUR: I thank the parties for their assistance and the Commission is adjourned.

ADJOURNED TO TUESDAY 27 AUGUST 2024