Industrial Relations Commission
New South Wales

INDUSTRIAL RELATIONS SOCIETY OF NSW ANNUAL PRACTITIONER'S DAY

SPEECH FOR 20 MARCH 2025 AT MARRIOTT HOTEL

JUSTICE JANE PAINGAKULAM, DEPUTY PRESIDENT

Introduction

1 I would first like to acknowledge the Gadigal People of the Eora Nation, on whose traditional lands this conference is taking place. I pay my respect to their elders and to any First Nations people who are with us this afternoon.

2 I thank the Industrial Relations Society (***IRS***) for inviting me to speak today. Our Commission has longstanding historical connections with the Society. The late Commissioner John Stanton was the Chairperson of the Newcastle Branch of the IRS from 2000 until 2002. He wrote that the Newcastle Branch had been pivotal in the establishment of Commission premises in Newcastle. There is also my predecessor, former Deputy President Rod Harrison, who was appointed to the Commission following his strong involvement in the Newcastle Branch of the IRS, of which he is now a Life Member.

3 The IRS has asked me to give an "Update on developments in NSW". Where to begin! Last July, the Industrial Relations Commission in Court Session – that is, the Industrial Court of New South Wales – was re-established as a superior court of record by the *Industrial Relations Amendment Act 2023* (NSW). The Amendment Act effectively restored to the Court the powers it had prior to its abolition in 2016. We regained the jurisdiction to resolve industrial disputes and make declarations of right which had been transferred to the Supreme Court in 2016, along with the jurisdiction to hear prosecutions for summary work health and safety offences, which had been transferred to the District Court in 2011. We have even regained the use of the Industrial Court's historical premises, the Chief Secretary's Building in Bridge Street in the city.

4 The Commission is currently constituted by three Presidential Members – President Ingmar Taylor, Vice President David Chin, and myself as Deputy President – and Senior Commissioner Constant and Commissioners O'Sullivan, McDonald, Muir and Webster. Last December we swore in three Acting Judges and Acting Deputy Presidents – Justice Robert Hulme, Justice Monika Schmidt AM and Justice Peter Kite. We expect that the Government will recommend two further full-time Commissioners to commence in around late March.

5 The number of the Commission's decision-makers is growing to keep up with our increasing workload. For the last six months of 2023 prior to the Court's re-establishment, compared to the last six months of 2024 after the Court's re-establishment, the number of civil proceedings lodged in the Industrial Commission increased from 389 to 475. That is a 22% increase. In our very first month, we received 48 applications to make new awards and 2 applications to vary existing awards. You can also see in the table a sharp increase in the number of industrial dispute proceedings.

6 If you count Work Health and Safety (***WHS***) proceedings, the number of matters filed increased from 389 to 610, which is a 57% increase. Our WHS jurisdiction is averaging about one filing per business day.

7 We like to be kept busy. But we are mindful that our larger workload should not impact parties in the form of longer waiting times for reserved decisions. The *Industrial Relations Act 1996* (NSW) (***IR Act***) requires the Commission to "provide for the resolution of industrial disputes … *in a prompt and fair manner*".[1]

8 To this end, we have published a new protocol regarding delivery and delay in decisions. Our aim is to hand down all decisions within 3 months of the final hearing date or close of written submissions, or a maximum of 6 months for large or complex matters such as appeals. The number of decisions which

[1] *Industrial Relations Act 1996* (NSW), s 3(g) (emphasis added).

exceed this timeframe will be reported in our Annual Report. You can see on the slide the details for making enquiries in relation to outstanding decisions.

9 I am proud to say that the Commission is already starting to see improvements in how efficiently we are handing down decisions. If we look at a comparison between the first six months of 2024 and the last six months of 2024, the percentage of decisions that have not been handed down 12 weeks after the final hearing date or close of written submissions dropped from 27% to 20%, even though the number of decisions handed down increased from 41 to 59. The Commission is committed to ensuring that justice is done fairly, quickly, and efficiently. That is reflected in the fact that over half of the civil proceedings that were lodged in the Commission in 2024 were finalised before hearing through conciliation.

10 In that vein, and in the spirit of today's event for practitioners, my speech today will be focusing on what industrial parties need to know about the re-established Industrial Court. First, I will speak about the major cases and key principles handed down by the Commission since last July, as well as the functions that the Commission is exercising in Court Session. Then I will speak about what parties can expect from the Commission over the coming months. Finally, I will touch on the institutional changes that the Commission has introduced since its reconstitution to benefit the broader industrial community.

Major Cases

State Wage Case 2024 [2024] NSWIRComm 1, NSWIRComm 6, NSWIRComm 19, NSWIRComm 25

11 The first major case I will talk about is the 2024 State Wage Case, which was significant because it was the first State Wage Case to be determined after the repeal of the wages cap. The Amendment Act which revived the Industrial Court also repealed the wages cap which, for eleven years, had limited the Commission from increasing public sector wages by more than 2.5% per annum, unless the union was able to demonstrate employee-related cost savings or productivity increases. The wages cap had the effect of depriving

the Commission of its wage-setting function, because every year, other than in 2021, the Government offered unions the maximum available 2.5% increase, and unions had no choice but to consent to the award simply being remade with the higher rate.

12 The Court's re-establishment thus coincided with the restoration of the Commission's wage-setting function, ability to arbitrate significant industrial disputes, and capacity to maintain, over the long-term, the real value of wages.

13 The 2024 State Wage Case was heard in two Stages. Stage One concerned whether a limited number of minimum rates State award wages should increase in line with the Fair Work Commission's 3.75% increase to the National Minimum Wage and modern award minimum wages. The State awards were grouped into three categories. The parties reached consent positions for Category 2 and Category 3 awards. The parties also agreed that the wages in the Category 1 awards should receive a 3.75% increase. However, Unions NSW contended that the increases should take effect from 1 July 2024 and not be pro-rated, whereas the Industrial Relations Secretary contended that the increases should commence on the anniversary of the last increase. The Full Bench agreed with Unions NSW that the increase should take effect from 1 July 2024.

14 The Full Bench also identified that there was a need for these minimum rates awards to be reviewed for their ongoing utility, because it was uncertain as to whether many, if any, employees were covered by these awards, and whether the wages provided for in the awards needed to be adjusted in order to be "fair and reasonable", due to their decline in real value over at least the last five years. Commissioner McDonald is currently facilitating such a review into these minimum rates awards.

15 Stage Two of the State Wage Case concerned a review of the Wage Fixing Principles. The Wage Fixing Principles have been used by the Commission as a framework to set wages and employment conditions since 1983, due to the Commission's broad-ranging discretion to resolve disputes by making awards

that set conditions of employment. The Commission has revised the Principles many times since, but this was the first substantial review since the enactment of the wages cap. All the parties in State Wage Case 2024 submitted that there should be changes to the Principles. The Commission had to have regard to the repeal of the wages cap and a suite of other amendments to the *IR Act*. For example, the 2023 Amendment Act introduced a new object to the Act to encourage strategies to attract and retain skilled staff where there are skill shortages, and added a requirement that the Commission is to have regard to Government's fiscal position and outlook when it exercises a function relating to public sector employees. Another important amendment is the introduction of mutual gains bargaining provisions in Chapter 2A.

16 We published the finalised Principles, which we renamed the Award Making Principles, in *State Wage Case (No 4)* on 20 December 2024. We have made several significant changes.

(1) First, we inserted new Principle 2, which sets out the mandatory considerations to which the Commission must have regard when determining an application to make or vary an award.

(2) We amended the Productivity and Efficiency Principle. The previous Principle stated that employees can access a wage increase where they "have made a substantial contribution towards the attainment of the objectives of the employer … in seeking to become more competitive and/or efficient". The issue with that wording is that improvements in productivity and efficiency in public sector work is not always best measured against a yardstick of competition or efficiency. Therefore, we have amended the wording so that employees who have made a substantial contribution towards *improvements in quality of service* may also make a claim under this Principle. The new subprinciples in 11.2 and 11.3 now also include examples of circumstances in which productivity or efficiency improvements could arise. For example, productivity or efficiency improvements may arise if the same service is

delivered with fewer inputs. Improvements in productivity and efficiency might even arise if a better service is delivered with the same inputs.

(3) We amended the subprinciple which previously provided that claims that are based substantially on comparative wage justice, attraction and retention or community standards would not be countenanced except for a few exceptions. That subprinciple was partially inconsistent with the new object in the Act to encourage strategies to attract and retain staff where there are skill shortages. Under the new subprinciple, it is only claims which are based substantially on comparative wage justice that will not be countenanced. That being said, the Commission is mindful of long-standing authority that wage increases should be given by reference to the value of the relevant work. Increasing pay is only one of many ways to address problems with attraction and retention.

(4) We amended the Negotiating Principle to reflect the addition of mutual gains bargaining. We also added a new subprinciple that permits a party to request another party for relevant information to evaluate options or develop claims, and for that request to not be unreasonably refused.

(5) We amended the Gender Based Undervaluation Principle to ensure that the work value criteria in the Principles do not perpetuate historical or current gender biases.

(6) We also simplified the wording in the Special Case Principle and removed the Superannuation Principle.

17 The Full Bench also considered whether the Principles ought to be varied to have regard to changes in the cost of living. The Principles do not explicitly provide for award wage increases on the basis of inflation. The Full Bench considered that changes in the cost of living could be addressed by the introduction of a paid rates award adjustment for public sector awards, the value of which would be determined annually in each year's State Wage Case. Such an adjustment would not automatically apply to public sector awards, so as to

encourage bargaining between parties, but would be available upon application by parties to awards which are outside of their nominal term, which have not had an increase for 12 months, and where bargaining has been attempted but was unsuccessful.

18 However, most of the parties to the 2024 State Wage Case did not have the opportunity to consider this approach. The Full Bench decided that the Principles should include draft provisions outlining how a paid rates award adjustment would work, in the form of the new Value of Money Principle and the Paid Rates Adjustment Principle. In this year's State Wage Case, we will invite parties to make submissions on whether such an adjustment should be implemented.

Industrial Secretary & Ors v Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales & Ors (No 2) [2024] NSWIRComm 21

19 The second major case that the Commission has handed down is *Industrial Secretary v Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales (No 2)*,[2] which is the Commission's first determination of NSW public sector salaries following the repeal of the wages cap. The background to this case is that, just prior to the reconstitution of the Commission and Court in July last year, the PSA notified a number of disputes with the Industrial Relations Secretary, the Secretary of the Department of Education and the Secretary of Transport for NSW.

20 The principal dispute concerned a wage increase for 91,400 employees covered by the Crown Employees (Public Sector – Salaries 2022) Award, in addition to other awards covering Transport for NSW employees and school administrative and support staff. Prior to the hearing on interim relief in November 2024, the PSA and the NSW Government reached an agreement

[2] [2024] NSWIRComm 21.

resolving the principal public sector salaries dispute and the Transport Awards dispute.

21 In this decision, the Full Bench, comprised of Justices Taylor, Chin and myself, decided to vary the remaining 17 awards at issue to provide an interim increase in pay and pay-related allowances. The issue before us was whether the quantum of the interim increase should be 4%, as argued by the Unions, or 3%, as submitted by the Secretaries. The Full Bench had regard to the economic evidence regarding inflation, and mandatory considerations such as the fiscal position and outlook of the Government and the state of the NSW economy. We concluded that a 3.5% interim increase for a majority of the awards would be appropriate, and that a 3% increase would be appropriate for the Field Officers Award as the unresolved conditions forming part of that dispute carry the potential for significant increases in employee-related costs.

State Super Enterprise Agreement 2024-2027 [2024] NSWIRComm 8

22 The last major case I want to mention briefly is *State Super Enterprise Agreement 2024-2027*.[3] This case involved an application by the Industrial Relations Secretary seeking approval of an enterprise agreement between State Super and all non-executive employees of State Super.

23 An application for an approval of an enterprise agreement has to satisfy the requirements in Part 2 of Chapter 2 of the *IR Act*, the relevant rules of the Industrial Relations Commission Rules 2022, and the Principles for Approval of Enterprise Agreements.

24 This application suffered from a few basic defects. This is unfortunately not a rare occurrence. It is fairly common for applications for approval of enterprise agreements to require rectification. As Justice Taylor said in his judgment, "This slows down the approval process and adds to costs."[4] This issue should be of great practical concern for practitioners.

[3] [2024] NSWIRComm 8.
[4] [2024] NSWIRComm 8 at [81].

25 In the conclusion of the judgment, Justice Taylor set out a checklist of steps that parties need to take for their enterprise agreement to be approved under the *IR Act*. This is intended to assist parties to meet the statutory requirements, as well as Commission members reviewing applications for approval of enterprise agreements. The checklist includes steps that parties need to take prior to and during negotiations about the agreement, when drafting the text of the proposed agreement, and before filing the agreement with the Commission. There are further steps that parties need to take if the agreement is not made with one or more industrial organisations.

The Commission in Court Session

26 It is also worth touching on some of the types of claims the Commission has been hearing while in Court Session.

27 The full list of functions that the Commission can exercise while in Court can be found at s 153 of the *IR Act*. These include proceedings for declaratory relief; unfair contracts; contraventions of dispute orders; the registration and regulation of industrial organisations; breach of industrial instruments; and recovery of remuneration.

28 At the end of last month, I published the decision *Hossack v State of New South Wales*[5] relating to the operation of the remuneration cap in an unfair contract proceeding. At the beginning of March, Justice Chin published his decision *Police Association of NSW v Commissioner of Police, NSW Police Force*,[6] in which he made an order that the applicant was entitled to declaratory relief in proceedings relating to the interpretation of an award clause concerning incremental salary progression entitlements.

29 We have also started to hear federal underpayment claims in respect of private sector employees. Most civil penalty proceedings under the *Fair Work Act 2009* (Cth), including underpayment claims, can be heard by an "Eligible State or

[5] [2025] NSWIC 1.
[6] [2025] NSWIC 2.

Territory Court", one of which is "the Industrial Court of New South Wales". Justice Taylor published the Court's first decision in respect of this jurisdiction last Wednesday.[7] We are working on new forms and rules to streamline these types of applications.

30 The Industrial Court has jurisdiction to hear matters concerning the prosecution of offences under the *Work Health and Safety Act 2011* (***WHS Act***) commenced since 1 July 2024. The Industrial Court's jurisdiction is in relation to summary offences only. It does not extend to offences dealt with on indictment, such as the new Industrial Manslaughter offence found in s 34C of the *WHS Act* and Category 1 offences, where the defendant is an individual. Where the defendant is a corporation, such matters must be dealt with summarily unless the prosecutor elects to proceed on indictment.

31 Since our reestablishment on 1 July 2024, 158 WHS matters have been filed. As I mentioned at the outset, this represents approximately one new matter each and every working day. While the Court is yet to publish any decisions, pleas have now been entered in four matters. The first sentence hearing was heard on 28 February 2025. The first defended hearing has been set down for early June 2025. Four matters have been withdrawn. I therefore currently have 149 matters where a plea is yet to be entered, travelling in the WHS List. That list is heard on Monday mornings.

32 As many of you will be aware, the Court issued a new practice note on 1 July 2024 with the aim of shortening the time between the issue of the summons by the Court on the application of the prosecutor and the entry of a plea by the defendant. That practice note was updated on 24 September 2024, following feedback from the Industrial Court user group. A particular feature of the practice note is to require defendants to enter a plea at the Second Mention, with the expectation that they will have had the brief for at least 3 months at that point. The practice note provides for a Third Mention in exceptional cases. Any further adjournments require a Notice of Motion and affidavit in support. To

[7] *Australian Rail, Tram and Bus Industry Union v Pacific National Executive Services Pty Ltd* [2025] NSWIC 3.

assist defendants to meet those timetable targets, I am prepared to make orders for the provision of and response to requests for particulars and/or defence representations when the matter first appears for mention. The aim is also to encourage the parties to have conversations to focus on the matters which are actually in issue, at an early stage.

33 The practice note provides for the Court to progress the matter on the basis of a plea of not guilty where no plea of guilty is entered within the stipulated timeframe. This is a significant cultural change to what occurred in the District Court. Because delays in the progress of a matter are not always due to tardiness on the defence side of the bar table, the practice note provides for liberty to apply at 3 days' notice. This is primarily a tool to assist defendants who are hamstrung by delays occasioned by the conduct of the prosecutor. Use it. I am yet to list a matter for hearing in the absence of the entry of a plea by the defendant, because I have observed, in most cases, a concerted attempt by the parties to keep matters moving. I am grateful for their cooperation. I have therefore elected not to force the defendant's hand, particularly given the delays occasioned by the Christmas New Year/January break. However, as we are now reaching a point where there are a significant number of matters reaching second and third mention dates, I expect that it is only a matter of time before I do just that.

34 As an aside, the Court recognises that offences involving risks of a psychosocial nature are significantly more complex to consider and settle. I have said to parties appearing in such matters that it is not my expectation that they will adhere to the timeframes in the Practice Note. It is, however, my expectation that the parties will engage with each other productively to keep the matter moving forward. As the Court becomes more familiar with the rhythm of matters involving a psychosocial risk, I expect that we will issue a new practice note directed specifically to matters of that nature. To do so at this stage would be premature.

35 Another important matter of note is that at this stage the case management provisions for summary prosecutions found in ss 247A-247Y of the *Criminal*

Procedure Act do not apply in the Industrial Court. We have approached the government to effect changes to the legislation to enable us to have the benefit of those provisions. While we do not have a timeframe for that to occur, we understand that the legislative change has government support.

36 The final matter that I want to mention regarding *WHS Act* prosecutions is that parties appearing in *WHS Act* prosecution hearings in the Industrial Court should be aware that counsel are required to robe during hearings, sentencing hearings, interlocutory hearings and appeals. Wigs are not to be worn. The introduction of the wearing of robes for criminal matters heard in the Industrial Court aligns the practice of that court with what occurs in the criminal jurisdiction in other courts (apart from the Local Court).

Upcoming Major Cases

37 This year, we will be arbitrating several awards which will affect thousands of public sector workers across NSW. This week, the Commission is hearing evidence from the Australian Salaried Medical Officers' Federation about its application for an Interim Award for psychiatrists. The application includes a claim for a Psychiatry Attraction and Retention Allowance that is 25% of the sum of a psychiatrist's salary, special allowance and Level 1 Private Practice Allowance. Next week, we will hear final submissions from the Fire Brigade Employees Union about its applications for replacement Permanent and Retained Awards for firefighters, which feature significant alterations to wages and conditions, including a 20% wage increase over three years. And in October, we will be hearing evidence for the Nurses Award. These proceedings have understandably attracted a significant amount of public interest. They concern vital services and essential workers.

38 Furthermore, this year the Commission will begin to review awards in batches, pursuant to s 19 in the *IR Act*. The purpose of these reviews is to modernise awards, consolidate awards relating to the same industry, and rescind obsolete awards. They are vital in ensuring that our awards are up to standard and easy to understand.

39 Now, the Commission's Principles for Review of Awards were last set in 1998. At that time, this Commission still set awards for private sector employees who are now covered by the federal system, which means that our Principles are arguably no longer fit for purpose. The Commission will be commencing proceedings of its own motion to review those Principles in advance of reviewing the awards themselves.

40 In that process, the Commission will also need to determine how award reviews ought to be conducted, in light of the mutual gains bargaining process provided for by new Chapter 2A in the *IR Act*. The President said in a speech last year that he envisages a process that is initiated by the Commission but substantially led by the parties, which examines how awards can be modernised and consolidated. He said:

> "A Commission member could facilitate that process, potentially using mutual gains bargaining as provided for by the new Chapter 2A introduced in last year's Amendments. Any areas of disagreement that remain can be determined by arbitration if necessary. The resultant changes should generate improvements in productivity and efficiency, and any such mutual gains can be shared. I am very pleased that the HSU and the Health Secretary have been engaged in negotiations to that end for some time, which I am told should bear fruit during the first half of next year."[8]

41 Consistent with the Commission's obligation to modernise awards and ensure fair terms and conditions, we are also considering the initiation of State decision proceedings to determine further test case standards for public sector awards. Some conditions, such as the right to superannuation or workers compensation pay top-up, are absent from many State awards. The obvious ramification here is that a worker cannot bring a claim against their employer for the underpayment of their super in the same way that they are currently able to recover remuneration for the breach of a term in their award. Federal modern awards contain superannuation clauses which require employers to make contributions to at least the level required to satisfy their obligations under superannuation guarantee legislation, as a matter of course. That should be the

[8] Justice Ingmar Taylor, 2024 Jeff Shaw Memorial Lecture (Speech, 7 November 2024).

case for State awards, even if it is the case that public sector employers are likely to comply with federal superannuation obligations. Other standard conditions, for example long service leave, are commonly found in State awards but in terms that vary, even for employees working alongside each other.

42 Setting test case standards is a further means to ensure that conditions in awards are fair and reasonable and fit for purpose. The Commission is minded to commence such test cases later this year, subject to its capacity.

Institutional Changes

43 Finally, since July 2024, the Commission has introduced several institutional changes to ensure that our procedures are up-to-date and user-friendly.

44 We have issued six amended practice notes. The changes deal with an expansion of the range of forms and applications that can be filed using the online Registry, allowing all documents to be filed electronically, appearing in criminal proceedings in the Industrial Court, and the appropriate use of generative AI during proceedings. We have also issued updated usual directions and appeal directions.

45 We have established two user groups as consultation committees. The Industrial Relations Commission User Group is constituted by representatives of Unions NSW, Local Government NSW, the transport industry, the Crown, the Judges and Commissioners. The Industrial Court User Group is constituted by representatives of the Bar Association and Law Society, WHS regulators, and the Judges.

46 The Commission has also established a number of internal committees, namely the Education Committee, IT Committee, Rules Committee and Publication Committee.

47 The Education Committee is responsible for organising the Commission's seminar series, "Industrial Insights: Navigating the New Legal Landscape", which focuses on assisting practitioners to conduct matters before the

Commission. Last year we held two seminars. Former Deputy President Rod Harrison presented “A Practical Guide to Mutual Gains Bargaining” and I presented an introduction to “Work Health and Safety Act Prosecutions in the Industrial Court of New South Wales”.

48 We have two upcoming seminars planned for the first half of 2025, which will be held both in-person at the Chief Secretary’s Building and online. On next Wednesday, 26 March, Justice Chin and Commissioner Webster will give a presentation on the basics of appearing before the Commission as an advocate.

49 Two weeks after that, on 9 April, Commissioners McDonald and Muir will present on the issues that parties have to address when applying to the Commission for a new award or a variation of an award, especially when applying by consent. Our aim is to present on topics that may be less well understood by practitioners.

50 If the two seminars that I have mentioned pique your interest, you can register to attend on our website.

Conclusion

51 As you can see, there has been a lot happening at the Commission over the last several months. It behoves the Commission to respond to the significant legislative changes that took effect last year. Following the restoration of the Commission’s wage-setting capabilities and judicial face, the Commission has a pivotal role to play as a modern tribunal that sets fair conditions of employment and promotes productivity and efficiency in NSW.

52 In this regard, we have been greatly assisted by the industrial parties who have appeared before us. We look forward to continuing to receive assistance from parties in the upcoming matters that I have addressed today.

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