



**INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES**

**2024/00211169**

**STATE WAGE CASE 2024**

**SUBMISSIONS IN REPLY OF THE AUSTRALIAN PARAMEDICS ASSOCIATION (NSW)**

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

**INTRODUCTION**

1. The APA has prepared these submissions in reply to those of the:
  - a. Industrial Relations Secretary filed, 3 September 2024 ("the Secretary"),
  - b. The Fire Brigade Employees Union, filed 3 September 2024 ("the FBEU"),
  - c. Local Government NSW, filed 3 September 2024 ("LGNSW"), and
  - d. Unions New South Wales, filed 3 September 2024 ("Unions NSW").
2. The parties' submissions demonstrate that there is substantial common ground on the issues before this Commission. The core of the differences appears to centre largely around the exercise of the Commission's discretion since the changes to the Act, and, of specific note, the abolishment of 146C. The President has already dealt with these discretionary issues in a broad way in *Health Secretary, NSW Ministry of Health v New South Wales Nurses and Midwives Association*:<sup>1</sup>

*"[24] I note that the recent removal of the so-called "wages cap" from the Act has effectively restored the arbitral powers of the Commission. The fact that the Association and the Health Secretary have a dispute currently before the Commission which has not yet proceeded to the first stage of conciliation of the very issues that are motivating the Association's planned industrial action is, to my mind, a powerful factor in exercising the discretion to ensure that the parties utilise, in the first instance, the principal means by which their differences should be resolved in our system in this State, namely, by conciliation and arbitration in this Commission."*

3. The Commission is entrusted with discretion to exercise powers in relation to wage fixation. In the absence of any good reason, the Commission should exercise its powers. The Wage Fixing Principles ("WFPs") should set out the broad guidelines for that exercise.

**THE CONSENSUS**

4. The APA makes submissions below on several specific points of consensus between the parties.

#### *Question 1*

5. There is a broad consensus amongst the parties that the WFPs should be retained.<sup>1</sup> There is also consensus that the principles should be amended, albeit with differences in the approach to amending the principles.

#### *Question 3*

6. There is consensus amongst the parties of the importance of maintaining the value of real wages.<sup>2</sup> All parties support the principle that wages should, at a minimum, maintain their real value.
7. The consensus position of the parties is that the value of real wages should be maintained. The question then becomes, what is the best way to give effect to this position.
8. LGNSW state [56-57] that there does not need to be a specific real wages principle because the Commission is already bound to consider increases to maintain a real value of award rates of pay.
9. It is not clear what mechanism they say the Commission is bound by. The primary method by which such an adjustment has been made has been under the special case principle. The APA says this is not sufficient, for the reasons outlined in its Submissions in Chief at [27-28].
10. In its submissions, LGNSW states that the reason a specific principle should not be accepted is due to adoption of Annual Wage Review ("AWR") through State Wage Cases at [57-66]. LGNSW's submission should not be accepted. The APA submits that current WFPs expressly exclude the application of AWR adjustments to the bulk of Awards covering employees employed under NSW industrial instruments and as such could not be said to facilitate a real wages adjustment.
11. The Secretary submits that it is supportive of maintaining real award rates of pay. However, the Secretary submits that a distinct principle to this effect is not necessary. The APA submits that the reasons for this are flawed, in particular:

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<sup>1</sup> See Submissions of the Secretary at [3-5]; Submissions of the FBEU at [35-39]; Submissions of LGNSW at [26-44]; and Submissions of Unions NSW at [2].

<sup>2</sup> See Submissions of the Secretary at [10]; Submissions of the FBEU at [44]; Submissions of LGNSW at [56-66]; Submissions of Unions NSW at [54-61].

- a. Firstly, nothing in the current wage fixing principles allows for discrete consideration of the maintenance of the real value of wages.
- b. Secondly, it is not appropriate for such an adjustment to be dealt with as a special case for the reasons outlined in paras [27-28] of APA's original submissions.
- c. Thirdly, the Wage Fixing Principles do not mandate how the Commission exercises its functions as stated at [10] of the Secretary's submissions.

12. At [24], the Secretary states that the special case principle will be met where there are: *"special attributes which warrant its approval despite the restrictive considerations imposed generally by the WFP."* This is entirely inconsistent with the submission that the economic adjustment can be adequately addressed by the special case principle.

13. The bases upon which the Secretary has stated that an economic adjustment principle should not be included in the WFPs should not be accepted. It is the position of the APA that Commission is more than capable of (and should be empowered to) balance its various obligations and exercise its discretion in wage fixing functions.

14. The APA submits that the maintenance of the real value of wages is a matter that should be a discrete consideration for the Commission.

15. The APA submits that it is necessary for the Wage Fixing Principles to be amended to include an economic adjustment principle. This will provide the Commission the opportunity to consider it as a discrete issue in exercising its functions in wage fixation.

#### *Question 7*

The Parties broadly agree that the Commission must consider the retention and attraction of staff. However, the parties disagree as to the extent to which this should be codified in the WFPs.

#### *Question 8*

16. The Parties broadly agree that the Commission must consider the fiscal position and outlook of the government.<sup>3</sup> However, the parties disagree as to the extent to which this should be further codified in the WFPs.

#### RESPONSE TO THE SECRETARY

18. APA makes the following submissions in reply to the Secretary's submissions.

#### *Question 7*

17. At [41] of its Submissions, the Secretary submits that the 'strategies' required to attract and retain skilled staff are not limited to wage increases, and that wage increases for an entire sector may not be warranted by skill shortages in small cohorts only. APA broadly agrees with this position.
18. However, APA submits that although there are many factors that relate to the retention and attraction of skilled staff, the reality is that the Commission's primary function in exercising this object is through wage fixing. Further, APA submits that the Commission does not solely set wages for an entire sector, it often sets them for discrete and often small employee groups.<sup>4</sup> The Commission must be able to take the objects of the *Industrial Relations Act 1996* (NSW) ("the Act") into consideration. In the absence of amendment, the WFPs are no longer consistent with the legislative framework.
19. At [44] of its Submissions, the Secretary contends that the Government's employer prerogative in determining which attraction and retention strategy to adopt, when, and in what circumstances, would be unduly interfered with by setting prescriptive wage fixing principles.
20. The APA submits that the Commission is required to give consideration to the objects of the Act when exercising its functions and therefore cannot leave this issue to the Government to address. Where it is demonstrated that low wages are a contributing factor to attraction and retention, it is within the ambit of the Commission to address this through wage fixing.
21. At [46] of its Submissions, the Secretary submits that the current Principle 8 should broadly remain the same.

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<sup>3</sup> See Submissions of the Secretary at [47]; Submissions of the FBEU at [62]; Submissions of LGNSW at [83]; and Submissions of Unions NSW at [88], Submissions of the APA at [54].

<sup>4</sup> See, for example, discussion of critical care paramedics in *Operational Ambulance Officers (State) Award* (No 4) [2016] NSWIRComm 2.

22. The APA submits that, per [53] of its Submissions in Chief, it seeks a minor amendment to remove the reference at 8.5.1., which states that “Claims that are based substantially on ... attraction and retention ... will not be countenanced, except as provided in *Re Public Hospital Nurses (State) Award (No 3)* [2002] NSWIRComm 325 (2002) 121 IR 28 and *Re Health Employees Pharmacists (State) Award* [2003] NSWIRComm 453; (2003) 132 IR 244” (“the Pharmacists Case”). APA further submits that the Pharmacists Case specifically related to work value increases as a result of staffing shortages, and therefore falls outside the scope of the current exclusion in the WFPs.

### RESPONSE TO LGNSW

23. The APA wishes to specifically address submissions made LGNSW pursuant to the orders of the Full Bench in the Decision.

#### *Background*

24. At [11], LGNSW’s submissions note that the changes to Chapter 2A of the Act have the potential to impact on Local Government employers and employees. This does not acknowledge that, prior to the changes to the Act, the WFPs expressly prohibited the advancement of a wage claim with emphasis on the matters referred to in Chapter 2A. The changes to the Act, therefore, mark a significant departure from existing practice.

25. The result of this is that LGNSW’s submissions suggest the de facto adoption of Government Policy into the WFPs despite the fact that the policy would otherwise not apply to this group of employees.

#### *Question 1*

26. LGNSW’s submissions acknowledge the importance of the Wage Fixing Principles (“WFPs”) industrially, at [37] and support the retention of the principles subject to some amendments, at [40].

27. APA concurs with LGNSW; however, it disagrees with a number of the specific amendments proposed. This is addressed below.

#### *Question 2*

28. LGNSW's submissions argue that the onus should be retained on applicants seeking different conditions or rates of pay to rebut a presumption that existing awards set fair and reasonable terms of employment, at [45].
29. APA submits, that per [13] of its Submissions in Chief, pursuant to the decision, Awards inevitably and almost immediately may start becoming unfair for a variety of reasons. Similarly, at [49] of its submissions, LGNSW acknowledges that, for a variety of reasons, Awards may not set fair and reasonable conditions. It runs contrary to this point to suggest that the onus should be retained on applicants to rebut the presumption that existing awards set fair and reasonable terms of employment.
30. LGNSW's submissions argue, at [46], that, by definition, Awards must set fair and reasonable conditions of employment and that there is no power for the Commission to make Awards that do not do so. APA submits, per [15] of its Submissions in Chief that the Commission's powers were limited by the constraints imposed by Section 146C of the Act, when it was in effect. Section 146C required the Commission to give effect to certain aspects of NSW Government Policies, including the Government Sector Wages Policy/ Regulation, which only permitted increases of 2.5% per annum and did not account for increases in work value or productivity and efficiency.
31. APA also reiterates, per [11] of its Submissions in Chief, that Section 10 of the Act can only be read as to empower the IRC to make an Award setting fair and reasonable conditions at the time at which the Award is made. The Commission does not have the gift of clairvoyance and can only be expected to make the best decision at a point in time. This was illustrated in the *Public Sector Salaries 2020 Case*,<sup>5</sup> where the Commission made a cost-of-living adjustment of 0.3% on the basis of projected inflation to ensure that there was not a reduction in employees' real wages. The actual rate of inflation for the period was 1.6%. The Commission should be empowered to make adjustments and unions and employees should not be required to rebut a presumption where economic forecasts or other matters considered at the time an Award is made turn out to be incorrect.
32. LGNSW's submissions argue, at [51], that the onus should be retained because it is precedent. APA submits that it is important that the WFPs adapt to the environment and context of the time.
33. LGNSW's proposed amendments to the WFPs are substantial and some without any proper basis [see i.e. min wage]. There can be no sensible contention that the doctrine of *stare decisis* should be invoked for answering question 2, but not for the

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<sup>5</sup> *Application for Crown Employees (Public Sector – Salaries 2020) Award and Other Matters (No 2) [2020] NSWIRComm 1066, (2020) 301 IR 321 at [31 (2)]*.

remaining amendments proposed by LGNSW. Such a submission should be given little weight.

*Question 4*

34. LGNSW state at [67] that Principle 7 does not need to be maintained on the basis that:

- a. “[I]n the local government sector there are no award/agreement free employees (but for General Managers), so this clause has no work to do.”
- b. They do not “believe that there are any significant number of low paid non award employees employed by the NSW Government.”

35. APA submits that this is not a sound reason to abolish the principle. The fact that there may be any of these group of employees is reason enough to maintain the principle.

*Question 6*

36. LGNSW adds qualifiers to the special case principle at [79]; in particular, that the proposed claim must be in the public interest. This addition of qualifiers which do not exist the *Re Operational Ambulance Officers (State) Award* [2001] NSWIRComm 331; (2001) 113 IR 384 undermines this existing jurisprudence.

37. To amend the WFPs in the form suggested at [79(ii)] of LGNSW’s submissions would be incompatible with Section 17 (c) – (d) of the Act by requiring the Commission to be satisfied that it is *in the public interest* to vary an Award rather than *not contrary to the public interest*.

*Question 7*

38. LGNSW states at [81-82] that the attraction and retention of staff is outside of the scope of the WFPs and not for consideration under a particular section of the Act. APA submits, as outlined at [50-51] of its Submissions in Chief, that failure by the Commission to give consideration to attraction and retention is contrary to object 3(i).

*Question 9*

39. LGNSW states that Subprinciple 8.3 (Productivity and Efficiency Considerations) should be removed in its entirety in [85-86] of their submissions. APA submits that it is entirely inappropriate for the principle to be abolished in favor of utilizing a NSW

Government Policy to define productivity. The WFPs have a long history in jurisprudence. They are utilized in wage fixation by employers, industrial representatives and the Commission and as should remain independent. As such, it would be entirely inappropriate for the Commission as the independent arbiter to adopt the definition of productivity constructed by the NSW Government into the WFPs. To do so would undermine decades of jurisprudence.

#### *Question 10*

40. LGNSW argues at [87-88] that the negotiation principle has been superseded by Chapter 2A and should be removed from the WFPs. The APA disagrees with this, for the reasons outlined in its Submissions in Chief at [65-77].

#### *Amendments to the WFPs*

41. LGNSW details proposed amendments to the WFPs in Appendix A of its submissions. APA provides the following submissions on LGNSW's proposed amendments:

- a. *Principle 6*: It is unclear on what basis LGNSW seeks to remove this principle. Further, the term "Minimum Adult Wage", used by LGNSW, is not defined in the WFPs.
- b. *Principle 7*: Per [35] of these Submissions in Reply, amendments to this principle should not be accepted.
- c. *Subprinciple 8.3*: Per [39] of these Submissions in Reply, this subprinciple should not be deleted.
- d. *Subprinciple 8.4*: Per [36-37] of these Submissions in Reply, the amendments to this subprinciple should not be accepted.
- e. *Subprinciple 8.5 Exclusions*: the removal of the reference to "attraction and retention" in this subprinciple is consistent with APA's Submissions in Chief at [49-53]. Further, we agree with the deletion of this subclause in whole.
- f. *Principle 9*: Per [40] of these Submissions in Reply, the removal of this principle should be rejected.
- g. *Principle 10*: the removal of this principle should be rejected for the grounds outlined in APA's Submissions in Chief at [65-77].



- h. *Subprinciple 13.2*: the removal of this subprinciple should be rejected as it is without proper basis and its deletion does not provide certainty for the parties.

A handwritten signature in black ink, appearing to read 'Bree Jacobs', with a stylized, cursive script.

**Bree Jacobs**  
**Industrial Lead, Australian Paramedics Association (NSW)**  
**30 September 2024**