Industrial Relations Commission
New South Wales

2024 JEFF SHAW MEMORIAL LECTURE

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JUSTICE INGMAR TAYLOR

PRESIDENT OF THE INDUSTRIAL RELATIONS COMMISSION OF NSW

Introduction

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

2 It is an honour to celebrate the life and achievements of arguably this State's greatest industrial relations practitioner – both as advocate and parliamentarian.

3 I had the privilege of being led by Jeff Shaw early in my career at the Bar. I started my career at HB Higgins Chambers, the chambers which Jeff founded in 1987. At that time, he was Attorney General and Minister for Industrial Relations. It is common for Attorneys General to intervene in constitutional cases. It is uncommon for an Attorney to appear in person. Jeff, while Attorney, often did so in those cases that interested him. I think he enjoyed playing hooky from his day job. I was lucky enough to be his junior in more than one of those cases.

4 After he resigned from judicial office and returned to the Bar in 2004, my office was next door to Jeff's, and I continued to appear as his junior.

5 Jeff was the consummate industrial advocate and a formidable intellectual. Prior to becoming Attorney General he regularly appeared in the NSW Commission, usually for employees and unions. In his obituary of Jeff, Justice Walton, the former President of the Commission, wrote movingly about Jeff's love for industrial law: "His passion for this area of the law came with his understanding that it could be a force for the betterment of ordinary working women and men. What was foremost in his thinking was the pursuit of fairness and, ultimately, social justice. … A correlate to these philosophies was his active support for trade unions, and, particularly at an international level, for the protection of trade unionists."[1]

6 As the Attorney General and Minister for Industrial Relations from 1995 to 2000, Jeff authored the *Industrial Relations Act 1996* (NSW). In his second reading speech for the Bill, Jeff Shaw stressed that the Government had made a conscious effort to streamline and simplify the legislation and to draft it in plain language. As a result, the Bill was about half the size of the legislation it replaced.[2] The Act remains a model of legislative clarity, brevity, and plain speaking.

7 In the inaugural Jeff Shaw Memorial Lecture in 2011, former President of the Commission Roger Boland acknowledged that the Act established "an unparalleled framework for the conduct of industrial relations that is fair and just". He continued, "It delivered fair and reasonable wages and employment conditions through the award system, it provided an efficient and very effective system of conciliation and arbitration for resolving industrial disputes—something not available federally, it gave individuals access to remedies for unfair dismissal and appeal rights to public servants in respect of promotion and discipline, access to remedies for unfair contracts, protection for outworkers, it enabled test cases on such matters as pay equity, job security

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1 Hon Justice Michael Walton, "The Hon Jeffrey William Shaw QC (1949–2010)" (Winter 2010) *Bar News* 138, 139.

2 New South Wales, *Parliamentary Debates*, Legislative Council, 23 November 1995, 3845.

and reasonable hours, it encouraged representative bodies of employers and employees by giving them a principal role in the industrial relations system."[3]

8 The 1996 Act also integrated the Industrial Court into the Commission, as the Commission in Court Session. That reform was undone in 2016, when the Industrial Court was abolished, and its jurisdiction transferred to the Local, District and Supreme Courts.

9 It is then fitting that I am addressing you at this Memorial Lecture in my capacity as the President of the Commission, as my appointment to the revived Industrial Court was made possible by the amendments last year that, almost word for word, restored the *Industrial Relations Act* to the text as drafted by Jeff Shaw.

10 Jeff was a staunch advocate of NSW's system of industrial arbitration. In fact, Jeff's first speech in Parliament, which was in opposition to a Bill to amend the previous Industrial Relations Act, began with him saying how pleased he was that his first speech was in defence of our system of industrial arbitration.[4] It is no surprise that five years later, his Act established an industrial relations system that emphasised the role of conciliation in resolving industrial disputes and the use of arbitration where parties cannot reach agreement.

11 To this end, the Act equips the Commission with a wide range of powers to resolve disputes promptly, fairly, and with a minimum of legal technicality. In simple and direct language, unburdened by the myriad of mandatory considerations found in the equivalent federal legislation ten times its size, the Act confers on the Commission powers to resolve disputes by setting actual conditions of employment by reference to the simple criteria that they be fair and reasonable.

12 Last year's amendments also repealed the section that empowered the Government to impose what became known as the wages cap, which limited the Commission from increasing public sector wages by more than 2.5% per

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3 Hon Justice Roger Boland, Jeff Shaw Memorial Lecture, 26 May 2011.
4 New South Wales, *Parliamentary Debates*, Legislative Council, 4 June 1990, 4904.

annum, unless the union could show that there were employee-related cost savings or productivity increases. An effect of the wages cap was to make it more difficult for the Commission to conciliate, because the Government would not accept recommendations to resolve disputes in a manner that was inconsistent with the wages cap.

13 The removal of the wages cap reinstates Jeff Shaw's intention to give the Commission a broad and unfettered power to arbitrate where conciliation is unsuccessful. In turn, the existence of that arbitral power means the Commission is better able to encourage parties to resolve their dispute during conciliation rather than proceeding to arbitration, allowing us to fulfil our primary duty to "do everything that seems to be proper" to resolve disputes by conciliation.[5]

14 Tonight, I will talk about what the restoration of the Commission's powers, as Jeff Shaw envisaged, means for the resolution of industrial disputes in NSW. I want to sketch out how the Commission intends to meet its statutory duties to make awards that are fair and reasonable, regularly modernise and consolidate awards, and promote workplace efficiency and productivity.

State Wage Case 2024 and Wage Fixing Principles

15 Let me start by talking about the Commission's current review of the Wage Fixing Principles.

16 Section 51 in the Act provides that a Full Bench can make a State Decision setting principles for the purposes of awards, if it is satisfied that it is consistent with the Act's objects and if there are good reasons for doing so. Section 21 provides that award conditions are to be set with regard to any such Principles. The Commission has used the Wage Fixing Principles as a framework to set wages and employment conditions since the 1983 State Wage Case.[6] They are

5 *Industrial Relations Act 1996* (NSW), s 134(1).
6 (1983) 5 IR 1.

a coherent set of rules that provide consistency and predictability to wage fixation.

17 The Principles derive from a period when there was more comity between the federal and state systems of industrial relations. In 1983, Bob Hawke's Government and the ACTU entered into the first Prices and Incomes Accord. The parties saw the Accord as the best way to achieve sustainable wage growth while minimising inflation. They supported a centralised wage fixation system that maintained real wages for workers and allowed for wage increases in line with increases in productivity and efficiency, with the trade-off that unions committed to not pursuing extra claims during the life of an award.

18 The Australian Industrial Relations Commission, the federal industrial tribunal at the time, set eleven principles for determining national wage adjustments that would give effect to the Accord in the National Wage Case that year.[7] The first Principle stated that the federal Commission would adjust award pay every six months to keep up with CPI, unless it was persuaded not to do so. The second Principle required the federal Commission to turn its mind to whether there should be a wage increase due to increases in productivity and efficiency. The third Principle said that the federal Commission would not approve an application for a wage adjustment to an award unless the unions party to that award undertook to not pursue any extra claims other than in accordance with the Principles. This Principle is a precursor to the modern "no extra claims" commitment clause in NSW awards today.

19 The NSW Commission adopted all of the federal Commission's Wage Fixing Principles, and over the 1980s and 1990s it continued to adhere as closely as possible to the federal Commission's principles and orders. But, after the *Work Choices* legislation was introduced and the Commonwealth and NSW wage fixing systems started to diverge, it became harder for the NSW Commission to align its Principles with the federal system. Wage Fixing Principles are now

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7 *National Wage Case 1983* (1983) 4 IR 429.

obsolete at the federal level because the Fair Work Commission has to consider mandatory statutory objectives when it sets minimum or modern award wages.

20 The Commission is currently reviewing our Wage Fixing Principles to make sure that they are fit for purpose. The last substantial review of the Principles happened in 2010. This is the Commission's first opportunity to review the Principles since the restoration of its wage fixing functions. It is also occurring against a background of the amendments requiring the Commission to consider two new matters when exercising our powers: first, the object of encouraging strategies to attract and retain skilled staff where there are skill shortages, and second, the fiscal position and outlook of the Government when we exercise a function about public sector employees.

21 I will not disclose the outcome of the reserved decision in the State Wage Case. I can say that every party that appeared in the proceedings submitted that there should be changes to the Principles.

Cost of living

22 Awards ossified during the 11 years of the wages cap. Every year, other than in 2021, the Government offered the maximum available 2.5% increase on a rollover basis, and unions, unable to obtain more, consented to awards simply being remade with the higher rates. The consequence was more significant than merely denying a generation of young industrial officers necessary experience in industrial negotiation and arbitration. It meant that the Commission was deprived of the capacity to ensure that wages did not fall behind in real terms.

23 The existing Wage Fixing Principles contain no express principle to maintain the real value of award wages. That is because, as I noted earlier, they derive from principles that were set on an assumption of regular CPI increases.

24 Against that background, one particular area the Commission asked the parties to address in the 2024 State Wage Case is whether and how the existing Principles should address the need for wages to keep up with the cost of living.

The OECD's latest Employment Outlook in July found that real wages in Australia are 4.8% lower than they were before the pandemic, which is one of the largest drops in real wages among OECD countries. That has a big impact on the lives of all workers, especially for workers on low wages or whose work has been undervalued on a gendered basis long before the pandemic. Over time, workers should be able to enjoy better living standards.

Award modernisation

25 The wages cap also meant that for 11 years there was little incentive for the parties to examine whether awards needed to be updated, and by so doing create a vehicle by which the Commission could examine and update the awards. The result is a need to carefully examine how public sector awards can be modernised and, at least in some areas, consolidated.

26 Starting next year, the Commission will begin to review awards in batches, pursuant to section 19. I envisage a process that is initiated by the Commission but substantially led by the parties, which examines how awards can be modernised and consolidated. 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.

27 Consistent with the Commission's obligation to modernise awards and ensure fair terms and conditions, we will also consider initiating State decision proceedings to determine further test case standards for public sector awards.[8] There are some conditions, such as the right to superannuation or workers

[8] A Full Bench of the Commission may make a State decision setting principles or provisions for the purposes of awards, if it is satisfied that it is consistent with the objects of the Act and that there are good reasons for doing so: *Industrial Relations Act 1996* (NSW), s 51.

compensation pay top-up, which are absent from many State awards. There are other standard conditions, for example long service leave, which are commonly found in State awards but in terms that vary, even for employees working alongside each other. Setting test case standards is a further means to ensure that conditions in awards are fair and reasonable and fit for purpose.

"No extra claims" commitments

28 The last issue that I have had cause to consider because of the State Wage Case, as well as the creation and review of several new awards, is the meaning and application of "no extra claims" commitments.

29 When a new award is made by arbitration, the Commission will not ordinarily countenance further claims during the life of that award that would undermine the industrial settlement reached. An award does not need to contain a "no extra claims" clause for that to be the case.

30 When an award is made by consent, it is appropriate if not essential that any no extra claims commitments are given in clear terms, again to ensure industrial stability throughout the life of an award.

31 As I said, when they were first introduced in the 1980s, a no extra claims commitment was given to the Commission as the price to obtain a CPI increase. The commitment merely constrained unions from making extra claims *that were not in accordance with the Wage Fixing Principles*.

32 Over time, no extra claims commitments sought as the price of a consent award variation have evolved, to the point that they are a clause commonly found in the award itself. Further, in recent times such commitments are routinely sought in wide and ambulatory terms. They seek to prevent a party from making any claim at all during the nominal term of the award, whether in proceedings or otherwise, and have done so even where the only change that gave rise to the commitment was to increase rates in line with changes in the cost of living.

33 Now, the wording of a no extra claims commitment for a consent award is a matter for the parties. The commitment can be broad and comprehensive or it can exclude claims in respect of particular subjects, often called “leave reserved” matters.

34 An award can contain text that records the existence of an agreement, commitment or undertaking to make no extra claims. However, it is not appropriate to have within an award a clause that makes it a civil penalty offence to make an industrial claim or bring a proceeding under the Act. Nor should such clauses prevent participating in proceedings or bargaining to modernise the award.

Resolving disputes and mutual gains bargaining

35 I have talked so far about the Commission’s approach to modernising our awards and setting fair terms and conditions.

36 The other major statutory priority of the Commission is the efficient and effective resolution of industrial disputes in general. As I said at the start, Jeff Shaw designed a system of dispute resolution that emphasised the role of conciliation. I have also alluded to the amendments that inserted the new Chapter 2A last year, which provides for mutual gains bargaining. Chapter 2A anticipates that parties adopt a collaborative approach to bargaining, are willing to work together to solve problems, and create or strengthen good relationships with each other. Parties can give written notice to the Commission of an intention to start mutual gains bargaining, or the Commission can make a recommendation to the parties to undertake mutual gains bargaining.

37 I am encouraged by the fact that parties, since those amendments, have been proposing “no extra claims” commitments that expressly permit consensual negotiations, including by means of mutual gains bargaining, during the nominal life of an award.

38 It is my belief that such consensual negotiations during the life of a multi-year award can positively change not only the terms of the award, but also the

relationships of the parties. This has the real potential to bring about improvements in productivity and efficiency, for the mutual benefit of the people of NSW and the workers covered by the award.

Arbitration

39 While our priority is to resolve disputes by conciliation, if disputes have to proceed to arbitration, the Act allows the Commission to "determine its own procedure" and to do so in a way that enables it to "act as quickly as is practicable" and "with a minimum of legal technicality".[9] Of course, the Commission also has to act in a way that upholds natural justice and procedural fairness. I would now like to talk about a few tools that the Commission has at its disposal to ensure that arbitration is done fairly, quickly, and inexpensively.

40 First, the Commission can make or vary an award. Now, the word "award", as it is commonly used, typically is understood to be a document that sets out the complete terms and conditions of employment that apply to workers in a sector or industry. The Act, however, defines a "State award" to have a much broader meaning. A "State award" is any order of the Commission under the Act that sets conditions of employment, and the Act allows the Commission to make or vary an award to resolve an industrial dispute.[10]

41 Let's say, for example, that there is a dispute notified about whether nurses in a particular ward at Westmead Hospital are being given appropriate breaks. The Commission's focus will be on resolving it by conciliation, including by issuing a recommendation, sometimes with a short statement of reasons to allow the parties to understand the reasons for the recommendation. That will usually be sufficient. But if the dispute has to be arbitrated, the Commission could deal with the dispute in a number of ways. It could vary the existing award, inserting a term that deals with breaks, either generally or at Westmead Hospital. That is the usual approach. Alternatively, the Commission could make an order binding on Westmead Hospital that requires going forward a particular

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9 *Industrial Relations Act 1996* (NSW), ss 162(1), 162(2)(a), 162(2)(g).
10 *Industrial Relations Act 1996* (NSW), ss 28A, 136(1)(b).

method of work that resolves the particular dispute.[11] There are certain minimum requirements for such an award. It must be in writing,[12] have a nominal term,[13] and not provide terms that provide unequal remuneration or conditions of employment for men and women.[14] But where there is already an award that applies to the relevant workers there is no requirement for the new award to be comprehensive.[15]

42 Second, not every arbitration needs to be a full conventional hearing, preceded by filing witness statements and submissions and involving cross-examination of witnesses. The Act provides that the Commission can determine its own procedure, is to act as quickly as is practicable, may require evidence or argument to be presented in writing, and can decide on the matters on which it will hear oral evidence or argument.[16] Procedural fairness must be provided, but the form it takes will be affected by the circumstances. Urgent or straightforward matters can proceed expeditiously and can be determined without the need for significant preparation time before hearing.

43 Further, it is open to the Commission to conduct arbitration proceedings in a manner that the parties agree upon. The most suitable approach to arbitration will depend on the nature of the dispute. The "BlueScope Model" of arbitration was one example of this. It was a method of consent arbitration where issues in dispute were sequentially resolved either by agreement or, following short submissions, by an ex-tempore private binding determination by the Commission, subsequently reflected in a new consent award.[17]

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[11] The Commission in the exercise of its arbitral function cannot determine past rights. That is a function for the Industrial Court. Note however *Industrial Relations Act 1996* (NSW), s 176(3), which allows the Commission when constituted by a judicial member to, in effect, convert the proceedings into judicial proceedings in order to consider applications for back-pay or declarations.

[12] *Industrial Relations Act 1996* (NSW), s 13(1).

[13] *Industrial Relations Act 1996* (NSW), s 16.

[14] *Industrial Relations Act 1996* (NSW), s 23.

[15] There is no need for a dispute resolution clause if there is an existing award that contains one: *Industrial Relations Act 1996* (NSW), s 14(2).

[16] *Industrial Relations Act 1996* (NSW), s 162(2).

[17] The "BlueScope Model" originated from the proceedings in *Re Notification under section 130 by the Minister for Industrial Relations of a Dispute between BHP Billiton and the Australian Workers' Union NSW and others re proposed strike action* [2002] NSWIRComm 378. For a description of the nature of the Model, see *Operational Ambulance Officers (State) Award* [2008] NSWIRComm 168.

44 While the parties can agree on the most efficient means of determining a dispute, in my view it is preferable to conduct even fast arbitrations only on the record and in open court, and with short published reasons so that both the parties and other interested persons can understand, at least in summary form, what led to the outcome and to assist the later interpretation of the relevant clauses.

45 Consent arbitration methods of that type rely on providing the Commission with the power to determine matters without requiring a full hearing. They expend fewer resources, are fast and reduce the potential for the relationship breakdown between parties that can occur during long, drawn out disputes.

46 There are two takeaways here about the Commission's approach to resolving disputes. The first is that the Commission will "do everything that seems to be proper to assist the parties" to achieve resolution by conciliation. The prospect of the matter otherwise being determined by arbitration provides parties with a significant encouragement to resolve the dispute in conciliation. The second is that if disputes do need to be arbitrated, the Commission has a broad capacity to shape the procedure of arbitration proceedings to suit the dispute before it, including by making an award or conducting proceedings in a manner agreed to by the parties. This is consistent with Jeff Shaw's intention for his Act to provide "a coherent, non-legalistic and workable framework" for dispute resolution and industrial action.[18]

Conclusion

47 It has been a pleasure to reflect upon Jeff Shaw's lasting impact upon the Industrial Commission, and the revitalisation of the industrial principles which he so adamantly defended.

48 I want to end with a quote from an article that Jeff wrote for the Law Society Journal in 2000 about the practice of law in the new century. The first sentence

[18] New South Wales, *Parliamentary Debates*, Legislative Council, 23 November 1995, 3850.

read: “Lawyers, as a class, are not loved.”[19] There are, however, exceptions. Jeff Shaw – as an advocate, Attorney General, husband, father, and friend – was certainly one of them.

[19] Jeff Shaw, “Former Attorney General Reflects on the Practice of Law in the New Century” (December 2000) *Law Society Journal* 70.