



Industrial Relations Commission New South Wales

Case Name **CROWN EMPLOYEES (ADMINISTRATIVE AND CLERICAL OFFICERS - SALARIES) AWARD 2007 AND ORS**
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996

Medium Neutral Citation: [2016] NSWIRComm 1028

Hearing Date: 12 January 2016

Date of Decision: 24 June 2016

Jurisdiction: Industrial Relations Commission

Before: Stanton C

Decision: Application for the insertion of a no extra claims clause in awards pursuant to s 19 Review dismissed

Catchwords: Section 19 Review – purpose of review – relevant principles – purpose of proposed clause – award making and award variation powers – s 146C of Act – Industrial Relations (Public Sector Conditions of Employment) Regulation 2014 – exercise of Commission’s discretion – application should proceed pursuant to s 17 of Act.

Legislation Cited: Industrial Relations Act 1996
Fair Work Act 2009 (Cth)

Cases Cited: Crown Employees (Public Sector – Salaries 2015) Award
Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award and Crown Employees (Teachers in TAFE and Related Employees) Salaries and Conditions Award [2008] NSWIRComm 209
Crown Employees Wages Staff (Rates of Pay) Award 2011 and others [2015] NSWIRComm 7
Industrial Relations (Public Sector Conditions of Employment) Regulation 2014
Principles for Review of Awards – State Decision [1998] NSWIRComm 661; (1998) 85 IR 38
Public Service Association and Professional Officers’

Association Amalgamated of NSW v Director of Public Employment (2012) 87 ALJR 162; (2012) 293 ALR 450; (2012) 228 IR 316; [2012] HCA 58
Public Service Association and Professional Officers Association Amalgamated Union of New South Wales v Roads and Maritime Services [2015] NSWIRComm 16

Category: Principal judgment

Parties: Industrial Relations Secretary of New South Wales
New South Wales Rural Fire Service
Public Service Association and Professional Officers' Association Amalgamated of New South Wales
Unions NSW

Representation: Mr M Eastman of Counsel for the Industrial Relations Secretary of New South Wales
Mr R Mouwad for New South Wales Rural Fire Service
Mr D Smith for the Public Service Association and Professional Officers' Association Amalgamated of New South Wales
Ms S Davis for Unions NSW

File Number(s): 2016/5749 (see Appendix A for other additional award applications)

Publication Restriction:

JUDGMENT

- 1 Section 19 of the *Industrial Relations Act 1996* relevantly provides that awards of the Commission must be reviewed at least once every three years:

19 Review of awards

- (1) The Commission is required to review each award before September 2001 and subsequently at least once in every 3 years.
- (2) The purpose of a review is to modernise awards, to consolidate awards relating to the same industry and to rescind obsolete awards.
- (3) The Commission must take account of the following matters in the review of awards:
 - (a) any decision of the Commission under Part 3 or any other test case decision of the Commission,
 - (b) rates of remuneration and other minimum conditions of employment,
 - (c) part-time work, casual work and job-sharing arrangements,
 - (d) dispute resolution procedures,
 - (e) any issue of discrimination under the awards, including pay equity,
 - (f) any obsolete provisions or unnecessary technicalities in the awards and the ease of understanding of the awards,
 - (g) any other matter relating to the objects of the Act that the Commission determines.

- (4) The Commission must also take account of the effect of the awards on productivity and efficiency in the industry concerned.
 - (5) During a review of awards, relevant industrial organisations and any other parties to the awards may make submissions on any of the matters being reviewed.
 - (6) The Commission is to make such changes to awards as it considers necessary as a result of a review.
- 2 In October 2015, the Commission commenced a structured review of the Commission's awards for the purposes of conducting the required s 19 Review.
- 3 The majority of public sector awards reviewed by the Commission contained a pre-existing no extra claims clause. However, there were a number of awards that did not. Against that backdrop, the Industrial Relations Secretary pressed that in conducting the s 19 review, the following clause should be inserted into those awards:

The No Extra Claims clause (Clause 8) contained in the Crown Employees (Public Sector – Salaries 2015) Award shall apply to employees covered by this Award.

- 4 Clause 8 of the *Crown Employees (Public Sector – Salaries 2015) Award* relevantly provides:

8. No Extra Claims

- (i) Other than as provided for in the Industrial Relations Act 1996 and the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014, there shall be no further claims/demands or proceedings instituted before the NSW Industrial Relations Commission for extra or reduced wages, salaries, rates of pay, allowances or conditions of employment with respect to the Employees covered by

the Award that take effect prior to 30 June 2016 by a party to this Award.

- 5 The position pressed by the Industrial Relations Secretary concerning this group of awards was opposed by the Public Service Association and Professional Officers Association Amalgamated Union of New South Wales (the PSA) and Unions NSW.
- 6 In the absence of agreement, directions for arbitration on the question whether this group of awards, set out in Appendix A to this decision, should contain a no extra claims clause were made and the matter was set down for arbitration on 12 January 2016.
- 7 Mr M Eastman appeared for the Industrial Relations Secretary of New South Wales. Mr R Mouwad appeared for New South Wales Rural Fire Service. Mr D Smith appeared for the PSA and Ms S Davis for Unions NSW pursuant to s 215 of the Act.
- 8 The principle contest between the parties was whether or not the s 19 review process enabled the Commission to include new terms or provisions in the awards such as a 'no extra claims clause' in those public sector awards of the Commission which, for whatever reasons, do not contain such provisions.

Submissions

Industrial Relations Secretary

- 9 The Industrial Relations Secretary submitted nine general propositions apply in relation to no extra claim clauses:
 - (i) It is open to the Commission to insert a no extra claims clause as a matter of discretion: *Crown Employees Wages Staff (Rates of Pay) Award 2011*. At [25], the Full Bench stated:

However, the proposition that, in order to give effect to that policy, the creation and insertion in each award of a 'no extra claims' provision was required is not correct. First, it is not justified by the terms of the Regulation itself as a matter of construction. Secondly, and fundamentally, the requirement to give effect to the policy expressed in the Regulation – and specifically, that an award allowed no extra claims during its term – is already satisfied by the making of a valid award, without need for more.

(ii) The Commission is not 'required' by the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2014* (the Regulation) to insert a no extra claims provision because that requirement is already satisfied by the making of the award: *PSA v Roads and Maritime Services* [2015] NSWIRComm 16 at [45]. That case concerned an appeal against a decision of Staff J where as a matter of discretion, his Honour inserted a no extra claims clause in the Award. On appeal, the Full Bench determined that the Commission was not required to include the clause. However, its inclusion was inconsistent with the legislation.

(iii) No extra claims clauses have a practical utility in reminding parties of the settled nature of the award during its nominal term. In *PSA v Roads and Maritime Services* at paragraph [42], the Full Bench observed:

The appellant speculated that, if that were the proper construction of the clause, there would be no work for it to do. The PSA did accept that the clause would operate in relation to over award claims. We would also observe that the utility of such clauses in reminding parties of the settled nature of the award during its nominal term has long been recognised. The clause does have both legal and practical utility.

(iv) The decision of the Full Bench in *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award and Crown Employees (Teachers in TAFE and Related Employees) Salaries and Conditions*

Award [2008] NSWIRComm 209 at [16] determined that the inclusion of a no extra claims clause was valuable in providing certainty to the industrial parties as to their rights and obligations during the life of an industrial instrument:

The purpose of no further claims commitments is to ensure certainty during the life of the relevant industrial instrument. That is to say, all matters agreed or arbitrated upon represented a settled arrangement for the term of the award or agreement. Depending on the terms of the commitment, employers could plan and act on the basis that during the life of the award or agreement, they would not incur any additional labour costs or industrial action in support of extra claims, nor would they be required to divert resources to dealing with such claims. Employees and their unions would not face claims to cut wages or alter to their detriment employment conditions prescribed by the award or agreement.

Moreover, the legislation does not provide that the Commission can validly make an award that allows an extra claim: *Crown Employees Wages Staff (Rates of Pay) Award 2011* at [23]:

The 'valid' making of an award is here to be understood not merely in its general sense of an award lawfully made pursuant to the Commission's powers under s 10 of the Act, but further in the specific context of s 146C, and in particular s 146C(3), which provides that an award or order does not have effect to the extent that it is inconsistent with the obligation placed on the Commission by s 146C, and, necessarily, by the regulations made pursuant to that section. It is, on the face of the Act, not possible to validly make an award that allows an 'extra claim'.

- (v) A validly made award will necessarily, of itself, resolve all issues that are the subject of the proceedings because an award or order can only be made if it does precisely that: *Crown Employees Wages Staff (Rates of Pay) Award 2011* at [20]:

A validly made award or order of the Commission will necessarily, of itself, resolve all issues the subject of the proceedings because an award or order can only validly be

made if it does precisely that. There can be, as counsel for the majority of the respondent unions conceded, no 'residual' matters remaining in relation to any proceedings once a valid award is made in the proceedings. That is the clear effect of the Regulation.

- (vi) Generally awards should as far as possible be construed in a way consistent with the legislation that authorises them: *PSA v Roads and Maritime Services* [2015] NSWIRComm 16 at [34]:

As a general proposition awards will be construed, should there be any doubt or ambiguity, as far as possible so as to be consistent with the legislation which authorises them. As to the general principles of award construction see *Transport Workers' Union of New South Wales v Linfox Australia Pty Ltd (No 2)* [2014] NSWIRComm 57 at [40] - [41] and *State Transit Authority of New South Wales v Australian Rail, Tram and Bus Industry Union, New South Wales Branch, Bus and Tram Division* [2014] NSWIRComm 41 at [26] - [31]. As to principles of construction of statutory instruments, see *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [69] - [70]. These various principles emphasise the importance of context. Context includes the source of the power to make the award and the limits on that power.

- (vii) An appropriately worded clause can properly be consistent with s 19 of the Act;
- (viii) If extra claims are made the Commission will follow the law and reject them: *Crown Employees Wages Staff (Rates of Pay) Award 2011* at [28]:

Should an application be made during the term of an award which either proceeded on the basis that a matter had been reserved or made a claim which was in the nature of an 'extra claim', the Commission would simply deal with such an application according to law, that is, by rejecting it.

- (ix) The absence of a no extra claims provision does not permit extra claims to be made: *Crown Employees Wages Staff (Rates of Pay) Award 2011* at [25]:

However, the proposition that, in order to give effect to that policy, the creation and insertion in each award of a 'no extra claims' provision was required is not correct. First, it is not justified by the terms of the Regulation itself as a matter of construction. Secondly, and fundamentally, the requirement to give effect to the policy expressed in the Regulation – and specifically, that an award may allow no extra claims during its term – is already satisfied by the making of a valid award, without need for more.

10 The Industrial Relations Secretary submitted that the Full Bench in the *Principles for Review of Awards – State Decision* [1998] NSWIRComm 661; (1998) 85 IR 38 at 43, determined that the statutory scheme provides that the awards which come to the Commission for review under s 19 must, in the first instance, be reviewed in the context of the power given to the Commission to make awards under the Act. At 44, the Full Bench set out a number of propositions that apply in relation to s 19 reviews:

- (a) There is an obligation to ensure that the relevant award is consistent with the current statutory framework. The Full Bench stated at 44:

The 1996 Act is the third major piece of legislation this decade to govern the making of awards by this Commission and its predecessors. Section 19 of the 1996 Act itself had no predecessor in the *Industrial Relations Act* 1991 or the *Industrial Arbitration Act* 1940. It follows, necessarily in our view, that comprehended in the s 19 review process in 'modernising' awards is an obligation to ensure that the awards are made consistent with the current statutory framework.

- (b) The Full Bench also cautioned at 44 that care must be taken to ensure that the award review process and the award variation processes of the Act are not to be confused:

Applications brought by award parties in order to meet the needs of employers and employees in the circumstances of a particular industry or enterprise are pursued and determined in accordance with the provisions of the 1996 Act, particularly s 10, together with other applicable legislation and applicable principles, including those established in State Wage Case decisions, State decisions and test case decisions. By way of contrast, the process established by s 19 has a stated and

limited purpose - namely 'to modernise awards, to consolidate awards relating to the same industry and to rescind obsolete awards'. In s 19(3) and (4), matters which the Commission must take into account in giving effect to that purpose are specified.

Care must be taken, it seems to us, to ensure that those two processes are not confused.

- (c) The Full Bench considered at 44 that the award review process is not an alternative to nor a substitute for ordinary applications for new awards or variations to existing awards:

We immediately remark that it follows from this statutory framework that the review process established by s 19 of the 1996 Act gives the Commission a particular role in reviewing awards which is different to the opportunity which parties to awards themselves are given, by the other sections mentioned, to bring forward applications for the making of new awards or the variation of existing awards. Section 19 is neither an alternative to nor a substitute for such applications.

- (d) While s 19 requires many things, it does not require a review that the award has achieved fair and reasonable conditions of employment in practice, having regard to its operation since it was made: *Crown Employees (Public Service Conditions of Employment) Award 1997* [2001] NSWIRComm 22 where at [19] her Honour, Schmidt J determined:

I have reached that conclusion reluctantly and only after it became apparent that the effect of the provision had in reality been intended and agreed by the parties. While s 19 requires many things, it does not require a review that the Award has achieved fair and reasonable conditions of employment in practice, having regard to its operation since it was made. In this case, such an exercise would require consideration, not only of the Award provision and its operation in practice for particular employees, but also the operation in practice of the Departmental agreements in relation to flexible working hours contemplated by the Award. In this respect the observations of the Full Bench of the Commission in *Principles for Review of Awards - State Decision 1998* (1998) 85 IR 38 at 46 bind me...

- 11 The Industrial Relations Secretary submitted the central issue between the parties was whether the application to insert a no extra claims clause in the

awards was within the powers available under s 19. In that regard, the Industrial Relations Secretary argued there is no express limitation in s 19 that prevents the insertion of a no extra claims clause. Rather, s 19(6) permits the Commission to make “such changes to awards as it considers necessary”.

12 The Full Bench in the *Principles for Review of Awards – State Decision* case determined the principles for the conduct of award reviews. It is clear from those principles that the Commission will not entertain applications for award variations that could, or should, be put by way of ss 10 or 17.

13 The Industrial Relations Secretary contended the purpose of the award review process was to “modernise awards, to consolidate awards relating to the same industry and to rescind obsolete awards as provided by s 19(2)”. The award consolidation and the power to rescind obsolete awards were not relevant to these proceedings. However, the Full Bench at 43–44 understood the term “modernise” to comprehend “both bringing the award up to date and making it contemporary”:

We particularly emphasise this point because we were variously addressed on the meaning of the word ‘modernise’ as used in s 19(2), where the purpose of the review process is specified to be to ‘modernise awards, to consolidate awards relating to the same industry and to rescind obsolete awards’. ‘Modernise’ is not a defined term but is a word which is used with its ordinary meaning, to be understood in its statutory context as comprehending both bringing the award up to date and making it contemporary.

14 The Industrial Relations Secretary submitted that the Full Bench also considered at 44 that the Commission was obliged to ensure that awards are made consistent with the current statutory framework:

The 1996 Act is the third major piece of legislation this decade to govern the making of awards by this Commission and its predecessors. Section 19 of the 1996 Act itself had no predecessor in the *Industrial Relations Act* 1991 or the *Industrial Arbitration Act* 1940. It follows, necessarily in our view, that comprehended in the s 19 review process in ‘modernising’ awards is an obligation to ensure that the awards are made consistent with the current statutory framework.

The Regulation

15 It was the Industrial Relations Secretary's submission that the current statutory framework necessarily encompasses s 146C and the terms of the Regulation. Relevant to this matter was the fact that the policy declared in the Regulation is part of the body of law which the Commission is required to apply in proceedings before it: *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 87 ALJR 162; (2012) 293 ALR 450; (2012) 228 IR 316; [2012] HCA 58 where at [43] the High Court Stated:

The second question relates to the constitutional character of a regulation of the kind referred to in s 146C. That question is shortly answered. A regulation of the kind referred to in s 146C declares a policy in the sense explained above and attaches legal consequences to it, including the Commission's duty to give effect to it. The policy becomes part of the body of law which the Commission is required to apply in the proceedings before it.

16 Accordingly, the precise issue before the Commission is whether the Commission should exercise its discretion to make the variation to the awards sought given it is permissible, valuable and appropriate to include a no extra claims provision in the relevant awards.

New South Wales Rural Fire Service

17 Mr Mouwad supported the submissions of the Industrial Relations Secretary.

Public Service Association and Professional Officers Association Amalgamated Union of New South Wales

18 The position of the PSA was that the Commission should refrain from inserting a no extra claims clause into each of the awards subject to this particular application by the Industrial Relations Secretary.

19 The PSA considered the *Principles for Review of Awards – State Decision* relevantly provide that s 19 is an administrative process to review awards and is limited in scope. It should not consider variations that do not have the consent of all the parties. Moreover, the s 19 process is confined to

consideration of matters necessary to give effect to legislative requirements. In short, there are no discretionary grounds before the Commission upon which it should consider inserting the no extra claims clause sought.

20 The s 19 review of awards is not and should not be considered as an adversarial process. The s 19 review is conducted at the initiative of the Commission pursuant to statute and not by a party or parties. It is an administrative process where award review variations are made by consent.

21 The Full Bench in *Principles for Review of Awards – State Decision* determined procedures under s 19 were different to the making of awards pursuant to s 10 or the variation or rescission as provided by s 17. At 44 of that decision, the Full Bench stated:

...s 19 of the 1996 Act gives the Commission a particular role in reviewing awards which is different to the opportunity which parties to awards themselves are given, by the other sections mentioned, to bring forward applications for the making of new awards or the variation of existing awards. Section 19 is neither an alternative to nor a substitute for such applications.

22 The s 19 review limits what the Commission may insert into awards where certain conditions of employment, such as ordinary hours of employment or sick leave, conditions required to be provided in awards under s 21 of the Act have been omitted. In that regard, the PSA submitted the Full Bench in the *Principles for Review of Awards – State Decision* made it clear there was no general discretion available to the Commission under s 19 to insert into awards conditions which the Commission might consider that a 'modern' award should contain. At 44 of that decision, the Full Bench stated:

We observe also that the Commission is not given a general discretion in s 19 to insert into an award being reviewed any other conditions which the Commission might consider a 'modern' award should contain. The review directed by s 19 concerns the provisions of existing awards. Unless properly arising from the matters specified in s 19 itself, during a review the Commission is not at liberty to insert into awards other conditions not already contained therein. If award parties wish to advance such matters they must, in our view, utilise the other provisions of the Act to which we have referred.

- 23 The PSA contended the proper course for the Industrial Relations Secretary to follow was to seek an award variation pursuant to s 17 of the Act. It is inappropriate for the Commission to exercise its discretion and vary the awards in the terms sought by the Industrial Relations Secretary.
- 24 The PSA submitted a no extra claims provision was a not legislative requirement as pressed by the Industrial Relations Secretary. Shortly stated, the Industrial Relations Secretary contended that s 146C, an amendment to the Act that post-dates the *Principles for Review of Awards – State Decision*, needs to be considered as part of the s 19 award review process to give practical effect to the statutory framework. It is also contended that there was an obligation on the Commission to consider government policies made through the provision of s 146C and the Regulation.
- 25 The PSA also contended the inclusion of matters arising from the introduction of s 146C and clause 6(1)(d) of the Regulation may be permissible under the s 19 Award review process where it meets the terms of s 19(6), that is, “to be necessary as a result of the review”. Accordingly, whether the Commission considers it necessary to include a no extra claims provision to ensure the awards are compliant with s 146C and the Regulation is a matter of discretion.
- 26 It was the PSA’s case that the Industrial Relations Secretary had failed to outline how the awards subject to this application were deficient in giving effect to the provisions of government policy as they relate to the Regulation, the Act or the *New South Wales Public Sector Wages Policy 2011*.
- 27 With reference to the *Crown Employees Wages Staff (Rates of Pay) Award 2011* case, the PSA submitted the Commission had determined that no additional claims could be made where an award is properly made under the Act. At [23], the Full Bench stated it was not possible to make an award that allows for an ‘extra claim’:

The ‘valid’ making of an award is here to be understood not merely in its general sense of an award lawfully made pursuant to the Commission’s powers under s 10 of the Act, but further in the specific context of s 146C, and

in particular s 146C(3), which provides that an award or order does not have effect to the extent that it is inconsistent with the obligation placed on the Commission by s 146C, and, necessarily, by the regulations made pursuant to that section. It is, on the face of the Act, not possible to validly make an award that allows an 'extra claim'.

Moreover, at [26] the Full Bench identified that the extent of the legislation is met "without the insertion of any 'no extra claims' clause":

That is, cl 6(1)(d) of the Regulation, properly read, achieves its evident legislative intention without the insertion of any 'no extra claims' clause.

- 28 Given the consent nature of s 19, the Commission should not exercise its discretion and vary the awards in the terms sought by the Industrial Relations Secretary.

Unions NSW

- 29 Unions NSW opposed the Industrial Relations Secretary's application. Shortly stated, Unions NSW contended:

- (1) the legislative framework for s 19 award reviews does not provide for the inclusion of a no extra claims provision;
- (2) the awards are consistent with all relevant legislative requirements for their operation;
- (3) the current legislative and regulatory frameworks make the inclusion of a no extra claim provision superfluous and redundant; and
- (4) the meaning of modern awards advanced by the Industrial Relations Secretary's submission in this matter is not supported by a proper reading of s 19 of the Act and has no basis in any authorities advanced in support of the Secretary's submission.

- 30 The Act provides a distinct and specific process for the conduct of reviews falling within the scope of s 19. The distinct and specific processes outlined within the section derive from the purposes of s 19, which must be

distinguished from those sections of the Act which provide for variations and changes to awards of the kind sought by the Industrial Relations Secretary.

31 Section 19(3)-(4) of the Act establishes clear and enumerated matters which the Commission must take into account in the review of awards. The provision sought by the Industrial Relations Secretary does not fall within those matters. Rather, it properly falls within the scope of matters subject to ss 10 and 17 of the Act.

32 In the *Principles for Review of Awards – State Decision*, the Full Bench at 44 drew attention to the importance of distinguishing between the obligations and responsibilities of the Commission in s 19 reviews and those matters which fall properly within the scope of ss 10 and 17:

...the review process established by s 19 of the Act gives the Commission a particular role in reviewing Awards which is different to the opportunity which parties to the Awards are given, by [ss 10 and 17] the other sections mentioned...Care must be taken...to ensure those two processes are not confused.

33 Against that backdrop, Unions NSW submitted it was incorrect to suggest that a no extra claims provision could be inserted into the awards pursuant to the s 19 review process.

34 Unions NSW submitted the terms of no extra claims provisions have historically been the subject of bargaining or arbitration as provided by ss 10 and 17 – and prior to the insertion of s 146C of the Act and the making of the Regulation. Subsequent to those legislative changes, no extra claims provisions have continued to be the subject of bargaining and arbitration.

35 Unions NSW submitted that neither s 146C nor the Regulation provides that a no extra claims provision must be included in awards. Moreover, the legislative changes do not refer to the conduct of s 19 reviews or otherwise alter in any way the settled jurisprudence of the Commission for the conduct of s 19 reviews.

36 Unions NSW considered the observations made by the Full Bench in the *Principles for Review of Awards – State Decision* at 46 concerning the discretion of the Commission to alter or vary awards under review, were made in response to submissions put by various parties to those proceedings concerning the extent of discretion permitted under s 19 to deal with “omissions” from awards, such as provisions governing part-time and casual work:

...the Commission is not given a general discretion in s 19 to insert into an award being reviewed any other conditions which the Commission might consider a “modern” award should contain. The review directed by s 19 concerns the provisions of existing Awards.

...the Commission is not at liberty to insert into Awards other conditions not already contained therein. If award parties wish to advance such matters they must, in our view, utilise the other provisions of the Act to which we have referred.

37 Unions NSW submitted the terms of the no extra claims provision sought by the Industrial Relations Secretary does not fall within the “omitted” matters contemplated by the Full Bench. It was, of course, open to the Industrial Relations Secretary to make an application to vary the awards under s 17.

38 It would be contrary to the principles established for the conduct of s 19 reviews for the Commission to include the provisions sought by the Industrial Relations Secretary.

39 The position of Unions NSW concerning the application and obligation arising from s 146C of the Act as advanced by the Industrial Relations Secretary was that the Commission should not place undue weight on those submissions. Rather, the Commission is obliged to ensure that awards are made consistent with the current statutory framework, including s 146C and the terms of the Regulation (6)(d), which relevantly provides:

6 Other policies

...
(d) Awards and orders are to resolve all issues the subject of the proceedings (and not reserve leave for a matter to be dealt with at a later time or allow extra claims to be made during the terms of the award or order). However,

this does not prevent variations made with the agreement of the relevant parties.

...

- 40 Unions NSW further submitted none of the awards subject to these proceedings were inconsistent with the terms of s 146C or the Regulation. Moreover, an award does not require the inclusion of a no extra claims provision to be valid: *PSA v Roads and Maritime Services*.
- 41 Unions NSW contended the current legislative and regulatory framework, including s 146C and the Regulation provide that an award may not be varied during its term other than by consent of both parties. The inclusion of a no extra claims provision would add unnecessary technicality to the awards and is unnecessary.
- 42 Unions NSW argued the merit of including a no extra claims provision was not supported by the authorities relied upon by the Industrial Relations Secretary. Shortly stated, the Full Bench in *PSA v Roads and Maritime Services* recognised that Staff J had given reasons for inserting a no extra claims provision at first instance. The Full Bench did not re-examine the merit of those reasons advanced by His Honour.
- 43 In relation to the *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award* and *Crown Employees (Teachers in TAFE and Related Employees) Salaries and Conditions Award* matters, referred to by Staff J in *PSA v Roads and Maritime Services*, Unions NSW submitted the applicant in those cases sought an expedited hearing for a wage claim during the nominal life of the awards which already contained a no extra claims provision. The matter was also determined prior to the s 146C amendment or the making of the Regulation. Unions NSW also contended that in that case, Boland J, President did not refer to the value of a no extra claims provision *per se*, but rather, the value of not permitting additional claims to be made during the life of an award, as currently provided by the Regulation.

44 With specific reference to the Industrial Relations Secretary's submission that the inclusion of a no extra claims provision would "modernise" the awards, the position of Unions NSW was that the Industrial Relations Secretary had confused the s 19 review process with the award modernisation provided under the *Fair Work Act 2009*. In that regard, attention was drawn to the reference by the Full Bench in the *Principles for Review of Awards – State Decision* concerning the meaning of the term, "modernisation". At 44, the Full Bench observed:

Modernisation is not a defined term but is a word which is used with its ordinary meaning, to be understood within its statutory context as comprehending both bringing the award up to date and making it contemporary.

Consideration and Finding

45 Section 19 of the Act provides for the review of awards. Section 10 provides that the Commission may make an award in accordance with the Act setting fair and reasonable conditions of employment for employees. Section 17 provides the Commission may vary or rescind an award.

46 As a general proposition, the Full Bench in the *Principles for Review of Awards - State Decision* stated, *inter alia*, that the s 19 review process has a stated and limited purpose, namely, "to modernise awards, to consolidate awards relating to the same industry and to rescind obsolete awards."

47 Section 19(6) provides that after hearing the parties, the Commission may make such changes to the award it considers necessary as a result of the relevant award review. Consistent with the *Principles for Review of Awards - State Decision*, those changes have historically included the redrafting of clauses and the modification (or removal) of provisions to remove ambiguity or enhance clarity, assist in the better understanding of the award, the updating of various allowances and the like.

48 The decision of the Full Bench in *Principles for Review of Awards – State Decision* determined at 44 that the award review process was not an

alternative or a substitute for ordinary applications for new awards or variations to existing awards. The Full Bench further stated:

We observe also that the Commission is not given a general discretion in s 19 to insert into an award being reviewed any other conditions which the Commission might consider a 'modern' award should contain. The review directed by s 19 concerns the provisions of existing awards. Unless properly arising from the matters specified in s 19 itself, during a review the Commission is not at liberty to insert into awards other conditions not already contained therein. If award parties wish to advance such matters they must, in our view, utilise the other provisions of the Act to which we have referred.

49 The Industrial Relations Secretary pressed that the Full Bench had also determined that consistent with the statutory scheme, awards subject to s 19 review must, in the first instance, be reviewed in the context of the power given to the Commission to make awards under the Act. However, the Full Bench also observed that care must be taken to ensure the award review process and the award variation processes available under the Act are not to be confused.

50 Moreover, the Full Bench in the *Principles for Review of Awards – State Decision* considered the meaning of the term, “modernisation” at 44. Given that definition, albeit pronounced in 1998, I do not consider the inclusion of a no extra claim provision as pressed in these proceedings would be considered “as comprehending both bringing the award up to date and making it contemporary”, as envisaged by the Full Bench.

51 The Full Bench also determined at 46 that the Commission:

...is not at liberty to insert into Awards other conditions not already contained therein. If award parties wish to advance such matters they must, in our view, utilise the other provisions of the Act to which we have referred.

52 Against the backdrop that the High Court determined in the *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* case that the Regulation is part of the body of law which the Commission is required to apply in proceedings, the question is, should the Commission exercise its discretion and vary the awards by the

inclusion of a no extra claims clause in the terms sought by the Industrial Relations Secretary.

- 53 I have considered the written and oral submissions of the Industrial Relations Secretary, the New South Wales Rural Fire Service, the PSA and Unions NSW. Against that backdrop, the Industrial Relations Secretary and the New South Wales Rural Fire Service have urged the Commission to exercise its discretion and as part of the s 19 award review process, effectively vary those awards to include a no extra claims provision. The PSA and Unions NSW oppose that course of action.
- 54 I am also cognisant of the objects of the Act as set out under s 3 require the Commission to provide a framework for the conduct of industrial relations that is fair and just.
- 55 I do not consider that the s 19 award review process is the proper vehicle to include a no extra claims provision in the awards. The proper course for the Industrial Relations Secretary to follow is to make the necessary applications to vary the awards pursuant to s 17 of the Act. For the Commission to act otherwise would, in my view, put it outside the authority conferred by the Full Bench in the *Principles for Review of Awards - State Decision* for the proper conduct of s 19 reviews. Moreover, it is otherwise important to preserve the sanctity of that decision.
- 56 When the awards subject to this application were first made, the Commission was required to ensure that the proposed awards satisfied the statutory requirements for the making of awards in accordance with s 10. In my view, the appropriate time for the inclusion of a no extra claims provision was at the time the relevant application for the making of those awards or subsequent variations pursuant to s 17 were made.
- 57 The submissions of the Industrial Relations Secretary support the proposition that the Commission is not required by the Regulation to insert a no extra claims provision in an award. Those submissions also noted the Full Bench in

PSA v Roads and Maritime Services at [45] had stated the prohibition against a party making an extra claim was already satisfied by the making of the award.

58 The Industrial Relations Secretary quite rightly considers that it is open to the Commission, as a matter of discretion, to insert a no extra claims provision in an award. However, it is unnecessary. As the Full Bench observed in *Crown Employees Wages Staff (Rates of Pay) Award 2011* at [25]:

...the proposition that, in order to give effect to that policy, the creation and insertion in each award of a 'no extra claims' provision was required is not correct. First, it is not justified by the terms of the Regulation itself as a matter of construction. Secondly, and fundamentally, the requirement to give effect to the policy expressed in the Regulation – and specifically, that an award may allow no extra claims during its term – is already satisfied by the making of a valid award, without need for more.

59 While no doubt the inclusion of a no extra claims clause may act to remind the industrial parties that the terms and conditions of employment are settled during the nominal term of the award, the Regulation does not mandate such a provision on the grounds that requirement is already satisfied by the making of the award.

60 The authorities have determined that an award absent of a no extra claims provision does not allow a party to make an extra claim. In circumstances where a party makes an extra claim during the term of an award, "...the Commission would simply deal with such an application according to law, that is, by rejecting it": *Crown Employees Wages Staff (Rates of Pay) Award 2011* at [28].

61 The award review process is neither an alternative to nor a substitute for ordinary applications for new awards or variations to existing awards.

62 The application by the Industrial Relations Secretary for the Commission to include a no extra claims provision in the awards subject to these proceedings is dismissed.

- 63 The parties are directed to confer and finalise their negotiations concerning any outstanding matters subject to the s 19 review.
- 64 The Crown Employees (Administrative and Clerical Officers – Salaries) Award 2007 and the Awards listed in Appendix A to this decision are listed for award review finalisation on Tuesday, 2 August 2016 at 10.30am.

A handwritten signature in black ink, appearing to read 'John Stanton', written in a cursive style.

JD Stanton
COMMISSIONER

Appendix A

- 2016/5756 CROWN EMPLOYEES (DEPARTMENTAL OFFICERS) AWARD
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/5787 CROWN EMPLOYEES (GENERAL STAFF - SALARIES) AWARD 2007
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/5848 CROWN EMPLOYEES (LIBRARIANS, LIBRARY ASSISTANTS, LIBRARY TECHNICIANS AND ARCHIVISTS) AWARD
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6007 CROWN EMPLOYEES (MAJOR AND COMMUNITY EVENTS REASSIGNMENT) AWARD
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6135 CROWN EMPLOYEES (PUBLIC SECTOR - SALARIES 2015) AWARD
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6166 CROWN EMPLOYEES (PUBLIC SERVICE CONDITIONS OF EMPLOYMENT) REVIEWED AWARD 2009
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996

- 2016/6180 CROWN EMPLOYEES (PUBLIC SERVICE TRAINING WAGE) REVIEWED AWARD 2008
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6186 CROWN EMPLOYEES (SECURITY AND GENERAL SERVICES) AWARD 2012
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6242 CROWN EMPLOYEES (SENIOR OFFICERS SALARIES) AWARD 2012
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6268 CROWN EMPLOYEES (SKILLED TRADES) AWARD
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6270 CROWN EMPLOYEES DEPARTMENT OF FAMILY AND COMMUNITY SERVICES NSW (ABORIGINAL HOUSING AWARD) 2012
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6281 CROWN EMPLOYEES (TRADES ASSISTANTS) AWARD
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996

- 2016/6292 CROWN EMPLOYEES (HOME CARE SERVICE OF NEW SOUTH WALES - ADMINISTRATIVE STAFF) AWARD 2012
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6299 CROWN EMPLOYEES (TECHNICAL OFFICERS - TREASURY) AWARD
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6302 CROWN EMPLOYEES (PHYSIOTHERAPISTS, OCCUPATIONAL THERAPISTS, SPEECH PATHOLOGISTS AND MUSIC THERAPISTS) AWARD
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6307 CROWN EMPLOYEES (NSW DEPARTMENT OF FAMILY AND COMMUNITY SERVICES - COMMUNITY SERVICES DIVISION) AFTER HOURS SERVICE AWARD
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6308 CROWN EMPLOYEES (DEPARTMENT OF ATTORNEY GENERAL AND JUSTICE - ATTORNEY GENERAL'S DIVISION) (REPORTING SERVICES BRANCH) SOUND REPORTERS AWARD 2007
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996

2016/6315 CROWN EMPLOYEES (DEPARTMENT OF ATTORNEY GENERAL AND JUSTICE (JUVENILE JUSTICE) - 38 HOUR WEEK OPERATIONAL STAFF 2012) REVIEWED AWARD

Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996

2016/6323 CROWN EMPLOYEES (GENERAL MANAGERS, SUPERINTENDENTS, MANAGERS SECURITY AND DEPUTY SUPERINTENDENTS, DEPARTMENT OF ATTORNEY GENERAL AND JUSTICE - CORRECTIVE SERVICES NSW) AWARD 2009

Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996

2016/6328 CROWN EMPLOYEES (NSW DEPARTMENT OF TRADE AND INVESTMENT, REGIONAL INFRASTRUCTURE AND SERVICES) CASINO INSPECTORS TRANSFERRED FROM DEPARTMENT OF GAMING AND RACING AWARD

Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996

2016/6332 CROWN EMPLOYEES (NSW DEPARTMENT OF TRADE AND INVESTMENT, REGIONAL INFRASTRUCTURE AND SERVICES) EXHIBITION PROJECT MANAGERS AND PROJECT OFFICERS) AUSTRALIAN MUSEUM AWARD

Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996

- 2016/6949 CROWN EMPLOYEES (NSW DEPARTMENT OF TRADE AND INVESTMENT, REGIONAL INFRASTRUCTURE AND SERVICES) MUSEUM OF APPLIED ARTS AND SCIENCES - CASUAL GUIDE LECTURERS AWARD
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6952 CROWN EMPLOYEES (NSW DEPARTMENT OF TRADE AND INVESTMENT, REGIONAL INFRASTRUCTURE AND SERVICES) STATE LIBRARY SECURITY STAFF AWARD
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6975 CROWN EMPLOYEES (DEPARTMENT OF EDUCATION AND COMMUNITIES - SERVICES OFFICERS) AWARD
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6989 CROWN EMPLOYEES (SCHOOL ADMINISTRATIVE AND SUPPORT STAFF, GENERAL ASSISTANTS IN SCHOOLS) STANDDOWN AWARD
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/6990 CROWN EMPLOYEES (NSW POLICE FORCE SPECIAL CONSTABLES) (POLICE BAND) AWARD
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996

- 2016/7043 CROWN EMPLOYEES (CENTENNIAL PARK AND MOORE PARK TRUST BUILDING AND MECHANICAL SERVICES STAFF) AWARD 2012
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/7047 CROWN EMPLOYEES (NSW POLICE FORCE SPECIAL CONSTABLES) (SECURITY) AWARD
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/7052 CROWN EMPLOYEES HISTORIC HOUSES TRUST (GARDENS - HORTICULTURE AND TRADES STAFF) AWARD 2007
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/7055 CROWN EMPLOYEES (JENOLAN CAVES RESERVE TRUST DIVISION) SALARIES AWARD
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/7064 CROWN EMPLOYEES (RURAL FIRE SERVICE) AWARD
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/7065 CROWN EMPLOYEES (LORD HOWE ISLAND BOARD SALARIES AND CONDITIONS 2009) AWARD
- Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996

- 2016/7073 CROWN EMPLOYEES (PARKS AND GARDENS - HORTICULTURE AND RANGERS STAFF) AWARD 2007
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/7074 CROWN EMPLOYEES (RURAL FIRE SERVICE MAJOR INCIDENT CONDITION 2011) INTERIM AWARD
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/7079 TARONGA CONSERVATION SOCIETY AUSTRALIA SALARIED EMPLOYEES AWARD
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/7080 CROWN EMPLOYEES (SENIOR ASSISTANT SUPERINTENDENTS AND ASSISTANT SUPERINTENDENTS, DEPARTMENT OF ATTORNEY GENERAL AND JUSTICE - CORRECTIVE SERVICES NSW) AWARD 2009
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/7087 CROWN EMPLOYEES (SHERIFF'S OFFICERS) AWARD 2007
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996
- 2016/7094 CROWN EMPLOYEES (TIPSTAVES TO JUSTICES) AWARD 2007
Notice of Award Review issued pursuant to section 19 of the Industrial Relations Act 1996

2016/7105 CROWN EMPLOYEES (DEPARTMENT OF EDUCATION AND
COMMUNITIES - CATERING OFFICERS) AWARD

Notice of Award Review issued pursuant to section 19 of the
Industrial Relations Act 1996