

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPL 1/2020 State Wage Case

Minister for Industrial Relations

Response to the Commission in Court Session's questions on notice



1. THE COMMISSION'S POWERS

All the submissions and evidence received by the Commission strongly suggest a high level of uncertainty as to the medium- and longer-term economic effects of the COVID-19 pandemic. In this context, the Commission may need to consider the constraints and all the options available to it in meeting the requirements of the statutory regime which provides for the State Wage order.

The Commission notes that:

- The *Industrial Relations Act 1979* (WA) requires the Commission to make a General Order before 1 July each year (s 50A(1)).
- That General Order is to:
 - a) set the minimum weekly rates of pay pursuant to sections 12 and 14 of the MCE Act (s 50A(1)(a)(i) and (ii); and
 - b) adjust rates of wages paid under awards (s 50A(1)(b)).
- The Commission *may*, in relation to awards generally or specified awards, *adjust* wages (s 50A(2)(a) –(d)).
- The State Wage order takes effect on 1 July in the year it is made and is applicable in respect of an employee or apprentice on and from the commencement of the first pay period on or after that date (s 50A(5)).
- The State Wage order shall not be added to or varied (s 50A(7)).

In this context:

- a) Is the Commission able to set the Minimum Wage and weekly rates of pay at their existing levels, that is, to not increase those rates?

Answer:

The Minister submits that s 50A(1)(a) of the *Industrial Relations Act 1979* (IR Act) confers a broad discretion on the Commission, subject to the requisite considerations in s 50A(3), to determine the appropriate minimum weekly rates of pay without reference necessarily to the minimum rates ordered in the previous year's State Wage order. Therefore, s 50A(1)(a) does not require the rates to be increased or decreased.

The Minister notes that pursuant to s 50A(1) the Commission is required before 1 July in each year to make a State Wage order:

- (a) setting –
 - (i) the minimum weekly rate of pay for employees who have reached 21 years of age and who are not apprentices (under section 12 of the MCE Act);
 - (ii) the minimum weekly rate or rates of pay applicable to apprentices (under section 14 of the MCE Act);

and

- (b) adjusting rates of wages paid under awards;
- (c) having regard to the statement of principles issued under paragraph (d) –
 - (i) varying each award affected by the exercise of jurisdiction under paragraph (b) to ensure that the award is consistent with the order; and
 - (ii) if the Commission considers it appropriate to do so, making other consequential changes to specified awards;

The meaning of “set” is varied, but in this context the Commission is determining or fixing the *Minimum Conditions of Employment Act 1993* (MCE Act) minimum rates of pay under s 50A(1)(a) of the IR Act. In so doing, there are, of course a range of matters the Commission is required to consider. However, there is no requirement in the IR Act for the Commission to increase those rates of pay each year.

The Commission can effectively set a minimum rate of pay without regard to the existing minimum rate, provided it considers those other statutory factors such as fairness, the needs of the low paid and similar. That is at the discretion of the Commission, taking into consideration all of the requisite matters. The Commission would be constrained in the exercise of its discretion if, in setting minimum rates of pay, it were required to always increase (or decrease) rates of pay. The Minister contends that is not the effect of s 50A(1)(a).

The Commission has consistently taken the view that “*the real value of the minimum wage should be maintained if the economic circumstances of the State permit it*”.¹ It is worth noting that maintaining the “real value” of the minimum wage does not necessarily require increasing the minimum wage, for example in a deflationary context.

In the 2009 State Wage Case decision the Commission maintained the current value of the minimum wage and award wages from the first pay period on or after 1 July 2009 until the first pay period on or after 1 October 2009, when the minimum and award wages were increased by \$12.30 per week. The Commission considered that it had met all of the considerations of s 50A “*by maintaining the value of the minimum wage by reference to movements in prices as measured by the CPI, as well as taking into consideration the movements of wages in the community generally*”. Of course, those movements have been upwards in recent decades and increases in the minimum wage have generally been the result.

- b)** What does it mean to *adjust* in s 50A(1)(b) and (2)(a) to (d), and does that require an *increase* in rates of wages?

Answer:

The Minister notes that the word “adjust” is used a number of times s 50A of the IR Act in the context of the State Wage order. The Minister submits that it is clear that sections 50A(1)(b), (2)(a) to (d) do not **require** an increase in rates of wages.

Section 50A of the IR Act was inserted in 2006 (by the *Labour Relations Legislation Amendment Act 2006*). The Explanatory Memorandum for the Labour Relations Legislation Amendment Bill 2006 at paragraph 66 stated that s 50A(1)(b) requires:

...the WAIRC to annually adjust award wage rates. That is, to increase or decrease award wage rates.

¹ Refer to the 2009 State Wage Case decision (2009 WAIRC 00375 at para 38).

While the Explanatory Memorandum only refers to increase or decrease, the section does not appear to limit the Commission's discretion to **only** increase or decrease award wage rates. The Explanatory Memorandum is silent on whether "adjust" can mean "no adjustment".

The State Wage order, pursuant to subsection (1)(b), is required to adjust the rates of wages paid under awards. There is clearly a nexus between paragraph (1)(a) 'setting' of MCE Act minimum rates and paragraph (1)(b) 'adjusting' award rates of wages. That much is clear in the way the Commission has historically applied the increase to the minimum wage when adjusting award rates. Whether by way of a flat rate or percentage increase, the adjustment of award rates has a direct connection with the minimum wage set under paragraph (1)(a).

The Oxford English Dictionary defines "adjust" as "*arrange, compose, harmonise; arrange suitably in relation to something else or to some standard or purpose*". The Macquarie Concise Dictionary defines adjust as "*to fit, as one thing to another, make correspondent or conformable*".

If the meaning of "set" gives the Commission a broad discretion as to the quantum of the minimum wage (taking into account the requisite considerations), then "adjust" allows the Commission to make the award rates conformable with the minimum wage.

The Minister submits that the use of the word "adjust" in s 50A(1)(b) gives the Commission discretion how to adjust award rates following the setting of minimum wage rates under the MCE Act.

The nexus between the minimum wage and award rates is not a coincidence, consideration of the factors in s 50A(3) is likely to give rise to similar, if not 'identical', outcomes. For example, economic conditions and the needs of the low paid do not differ in any substantial way whether the consideration is the setting of the minimum wage or the adjustment of awards. This is particularly so given that many awards have wage rates the same or marginally higher than the minimum wage, at least for some classifications.

If the minimum wage is set at a rate higher, lower, or the same as in the previous year's State Wage order, the Commission's adjustment of award rates could (and most likely would) be a corresponding adjustment of an increase, decrease or no adjustment at all.

- c)** Is there capacity to defer:
- i. the hearing of the State Wage case; or
 - ii. the commencement date of any increase?

Answer:

The Minister submits that the wording of s 50A(1) is clear – it requires the Commission to **make** a State Wage order before 1 July in each year. The order must be made before that date, however, the date an order is made and the actual terms of the order, including its operative date or dates, are distinct matters.

Section 50A(5) provides:

- (5) A State Wage order takes effect on 1 July in the year it is made and is applicable in respect of an employee or apprentice on and from the commencement of the first pay period of the employee or apprentice on or after that date.

Ordinarily, the Commission's substantive orders do not take effect immediately on the day the order is "made" as the order is made before 1 July. The State Wage order typically provides for an increase to minimum wages from the first pay period on or after 1 July.

However, there is nothing in s 50A that precludes operative terms of the order from taking effect at a later date. Of course, in deciding the terms of the order, including the timing of commencement of the substantive orders, the Commission is required to take into account all the matters in s 50A(3) and a deferral of any setting/adjusting that is ordered must be decided taking into consideration the requirements of s 50A(3).

Furthermore, the State Wage order when made must be certain as to its terms and commencement date/s of its terms as the order cannot be added to or varied (s 50A(7)).

This view is consistent with the approach of the Commission in the 2009 State Wage decision (2009 WAIRC 00375), where it decided to 'postpone' the increase to the minimum wage and award rates by three months. The Commission ordered that:

- (1) the minimum wage and award rates from the first pay period on or after 1 July 2009 were the same as ordered in the 2008 State Wage order; and
- (2) the minimum wage and award wages from the first pay period on or after 1 October 2009 were increased in accordance with the decision.

The effect of that decision was twofold; the Commission accepted both that the Commission:

- (1) was not required to order an **increase** (as it ordered the minimum wage and award rates remain the same as the previous year's State Wage order for three months); and
- (2) had the capacity to order that an increase/adjustment commence on a date other than the first pay period on or after 1 July.

The Minister submits that decision adopted the correct approach to the interpretation of those elements of s 50A of the IR Act.

- d)** Is s 50A amenable to the Commission's power under s 27(1)(n), such as to enable a delay in either the hearing or any increase? (In dealing with this question, the Commission draws attention to the *Robe River Iron Associate v Federated Engine Drivers' and Firemens' Union of Western Australia* (1986) 67 WAIG 315 (IAC) per Brinsden J at 317 and Kennedy J at 319; *United Voice v Director General, Department of Education* [2014] WAIRC 01361; (2014) 95 WAIG 13 at [154] - [158] and Kenner C).

Answer:

There are two aspects of this question that warrant consideration:

- (a) whether the capacity to "extend a prescribed time" allows for the extension of a date, mandated in legislation, by which the Commission must do something (in this case issue a State Wage order);
- (b) whether the introductory words in s 27(1) "Except as otherwise provided in this Act..." limit the application of s 27(1)(n) in the context of the issue of a State Wage order pursuant to s 50A.

The Minister submits that the requirement that the Commission make a State Wage order before 1 July in each year is not a "prescribed time" that the Commission may extend at its discretion.

Arguably, s 27(1)(n) allows the extension of certain timeframes. The authorities referred to confirm that a timeframe that the IR Act requires compliance with cannot be extended pursuant to s 27(1)(n) where compliance with the time limit is an essential preliminary to the exercise of the Commission's jurisdiction.

The authorities support the contention that s 27(1) applies to “machinery” provisions. In any event, “prescribed time” connotes a period of time within which an action must be taken, rather than a date by which an action must occur.

In the Minister’s view, the clearly mandated date by which the Commission is required to exercise its jurisdiction pursuant to s 50A is not subject to the exercise of the discretion to extend a “prescribed time” under s 27(1)(n).

The Minister also submits that s 27(1)(n) expressly provides “except as otherwise provided in this Act” and s 50A provides otherwise in requiring a State Wage order be made by a specified date.

2. IMPACT OF COVID-19 ON EMPLOYMENT

Under s 50A(3)(b) of the Act, the Commission is required to take into consideration the state of the economy of Western Australia and the likely effect of its decision on that economy and, in particular, on the level of employment, inflation and productivity. In relation to the employment effect of increases in minimum wages, in the *2017 State Wage Case Decision* [2017] WAIRC 00330; (2017) 97 WAIG 693, 255 – 257, the Commission in Court Session said:

255 Therefore, international research, insofar as it is relevant, confirms the conclusions reached by us in previous years. The effect of modest and regular increases in the minimum wage do not result in adverse employment effects. The Fair Work Commission says, in that context, that the research suggests its previous approach to what constitutes ‘modest’ may have been overly cautious. We note that in more prosperous times, the minimum wage and award wages in WA have been increased by more than the increases applied to the national minimum wage. This has recognised the relative strength of the Western Australian economy in comparison to the national economy, but also in the capacity of the economy to bear additional costs to assist in improving living standards.

256 Therefore, to provide the benefits to employees, the increase in the State minimum wage and award wages must be affordable by businesses, particularly the smaller businesses covered by the State system and should act as a stimulant rather than a further burden on businesses.

257 This is particularly important given the current and predicted relatively high level of unemployment. Award reliance in WA is the lowest of all jurisdictions.

(See too the observations of the Commission in Court Session in the *2015 State Wage Case Decision* [2015] WAIRC 00435; (2015) 95 WAIG 679, 95-100, concerning the research of the late Professor D Plowman, to the effect that aggregate demand in the WA economy, to a significant degree, moderates any minimum wage effect on employment).

In this context:

- a) Given the severe economic impact of the COVID-19 pandemic, especially on small businesses in the industry sectors of accommodation and food services, retail trade and a range of other industry services sectors, what is the likelihood of any increase in the State minimum wage, at least in the near term, having a negative effect on employment and underemployment, especially in the case of younger employees, on this occasion?

Answer:

While the available literature suggests that in normal economic circumstances, modest increases may have little adverse impact on employment, current conditions in the Western Australian economy are challenging, significantly increasing the likelihood that any increase in the minimum wage would adversely impact on employment and underemployment outcomes relative to a similar increase under normal conditions.

As noted in the Economic and Fiscal Update provided by the Western Australian Treasurer to State Parliament on 28 May 2020, baseline modelling by Treasury indicates that Western Australia's economy, as measured by Gross State Product, will contract by 5.1 per cent in the June quarter 2020, with a contraction of 3.1 per cent expected in 2020-21, before growth resumes in 2021-22.

ABS Weekly Payroll Jobs and Wages data indicate that the number of jobs in accommodation and food services, retail trade, and arts and recreation services in Western Australia declined by 26.1 per cent, 6.6 per cent, and 9.0 per cent respectively between 14 March and 2 May. This compares with an all industry reduction in jobs of 5.9 per cent over the same period, suggesting that conditions in these industries at present are particularly acute.

Labour Force data released by the Australian Bureau of Statistics for April 2020 indicates that employment declined by 62,300 persons. Of these, around half were aged 15-24 years, indicating that youth are particularly vulnerable in current economic and labour market conditions.

That minimum wage increases are likely to have greater impacts on employment in current challenging conditions, and that youth are more vulnerable in these conditions, is consistent with relevant literature on this issue.

b) What may be the consequences for employment and underemployment in the labour market once present stimulus measures such as the JobKeeper scheme are withdrawn or reduced in scope?

The consequences for employment and underemployment once present stimulus measures such as the JobKeeper scheme are withdrawn or reduced in scope very much depend on circumstances at the time. The Governor of the Reserve Bank of Australia in his evidence to the Senate Select Committee on COVID-19 hearings into the Australian Government's response to the COVID-19 pandemic, noted that:

"It may be that, in six months time, we [the Australian economy] bounce back well and the economy does reasonably well and these schemes, which were temporary in nature, can be withdrawn without problems. But, if the economy has not recovered reasonably well by then, we should perhaps be looking at an extension of the scheme, or modification in some way. At this point, I think it's too hard to say, because the outlook remains very uncertain, but it's going to be a critical point for the economy.

More generally, right through the next year to so, I think the economy is going to need support from both monetary and fiscal policy. There are certain risks if we withdraw that support too early".²

² Hansard of Senate Select Committee on COVID-19 hearing into Australian Government's response to the COVID-19 pandemic, Tuesday, 28 May 2020, pp. 3.

While the Governor did not specify those risks, clearly if support is withdrawn too early, the risk is that economic conditions will not recover as fast as desirable, with weaker conditions resulting in less favourable labour market outcomes. That could include weaker employment levels and higher underemployment rates.

3. INCAPACITY TO PAY

Under s 50A(3)(d) of the Act, the Commission is required to consider to the extent that is relevant, the capacity of employers as a *whole* to bear the costs of increased wages, salaries, allowances and other remuneration.

In this context:

- a) Does this mean that the Commission must award the same increase, if any, to all sectors of industry regardless of the capacity of any particular industry to bear the increase in costs?

The Explanatory Memorandum to the Labour Relations Legislation Amendment Bill 2006 stated:

“The ability of the WAIRC to make differing adjustments to different awards or within awards is codified in section 50A(2).” (para 66)

The Explanatory Memorandum further stated (at para 72):

“Proposed section 50A(2) is intended to clarify that while the WAIRC must adjust award wage rates under section 50A(1)(b), it has a broad discretion as to the form of this adjustment. Proposed section 50A(2) makes it clear that the WAIRC may adjust awards generally or may issue a State Wage order that has different effects on different awards.”

The Minister submits that the State Wage order may, as provided by s 50A(2) of the IR Act, have different effects on different awards.

The *Statement of Principles - July 2019*, at 1.1, provides that the Statement of Principles is to be applied and followed when the Commission is making or varying an award or making an order in relation to the exercise of jurisdiction under the Act to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment.

Principle 12 – Economic Incapacity of the *Statement of Principles – July 2019* provides that any respondent or group of respondents to an award may apply to reduce and/or postpone the variation which results in an increase in labour costs under this Statement of Principles on the ground of very serious or extreme economic adversity.

In this context:

- b) Does Principle 12 – Economic incapacity apply to the State Wage order and the amendments it makes to awards, or only to the other types of matters dealt with by the Principles, for example, Work Value?

Answer:

The Minister submits that the economic incapacity criteria outlined in Principle 12 applies to the State Wage order and the amendments it makes to awards.

- c) Given the nature of the businesses which are in the State industrial relations system and subject of the State Wage order, is it likely or reasonable that they will actually apply to the Commission under Principle 12, provide the detailed financial information required and be subject to scrutiny, or are they more likely to simply breach and take their chances?

Answer:

Different businesses are likely to address this issue in different ways. If wages are increased pursuant to the 2020 State Wage order, some employers in financial distress may consider pursuing an incapacity to pay application in the Commission. The Minister acknowledges there have been few such applications in recent years; however, there may be a greater appetite to do so in the present climate.

Other employers would be likely to pursue alternative strategies to minimise any negative impact of increased wages, should this occur in 2020. This may include:

- utilising more junior staff in preference to adult employees (to take advantage of lower wage rates);
- reducing opening hours;
- reducing the number of employees rostered on shifts;
- proprietors working additional hours themselves in place of employees.

The experience of the Department of Mines, Industry Regulation and Safety is that those employers who consciously comply with their industrial relations obligations will generally attempt to do so regardless of the circumstances, while those who are currently not complying with their obligations are likely to remain non-compliant.

The Minister contends it is unlikely that the Commission's decision in the 2020 State Wage Case would suddenly cause a large number of (currently compliant) employers to deliberately breach their employment obligations, notwithstanding they may be in a state of financial distress. In recent years, targeted inspection campaigns by Industrial Inspectors have found that particular industries have high levels of non-compliance at present, and it is unlikely that this year's State Wage order will significantly alter this.

d) In relation to the submission of the Chamber and Commerce and Industry that:

- i. The 'lack of capacity for employers to bear the cost of any minimum wage increase, (par 84); and
- ii. Whether any business likely to be affected by a wage increase might be said to have weathered the storm and whether a modest wage increase would be a 'breaking point'.

what is the evidence to support these contentions?

4. MEASURES OF PROFITABILITY

In previous State Wage Cases, the Commission has expressed interest in the measures of profitability, how profitability varies across industries and how the measures ought to be considered in determining an overall industry position. The Commission notes that recent media coverage has referred to the revenue flows into the mining industry, in particular, the iron ore and nickel businesses. It has noted that some of this flows to the businesses and contractors associated with those mining companies. The industry also provides significant benefits to the State's resources by the payment of royalties and other taxes and charges. (See *Resilient iron ore sector a shining light in troubled times*, Editorial, The West Australian, 22 April 2020, p3, and *BHP shows resilience in the Pilbara*, The West Australian, 22 April 2020, p53).

This is to be compared with a large amount of media attention on the losses of patronage and income to businesses the subject of the restrictions brought about by the COVID-19 pandemic, such as tourism, accommodation, catering and some retail. These latter businesses contain a large element of the businesses that are within the State jurisdiction and subject to the State Wage order.

In this context:

- a) How should the Commission weigh the significant differences between those industries and their capacity to bear additional labour costs?

Answer:

The Minister contends it would be appropriate for the Commission to give greater weight to those industries that are likely to be subject to the State Wage order in making its determination. While certain parts of the mining and resources industry are currently quite profitable, the overwhelming majority of businesses in this sector operate in the national industrial relations system and will not be affected by the outcome of the State Wage Case.

The Minister concurs that tourism, accommodation, catering and retail businesses are more likely to be subject to the State Wage order, particularly small and family businesses.

- b) Is there evidence of pent up demand in the economy or particular industries and sectors? If so, what is its likely effect?

Answer:

As noted in response to Question 2(a), baseline modelling by Treasury suggests that Gross State Product in Western Australia will contract by 5.1 per cent in the June quarter 2020, with a contraction of 3.1 per cent expected in 2020-21, before growth resumes in 2021-22. The contractions reflect the combined effect of restrictions on economic activity and weak demand.

While a number of indicators of activity have recovered from lows (and in some cases record lows) immediately following the introduction of restrictions on activity, in most cases, indicators remain well below pre-COVID levels. While there may be pockets of demand that have built up because households have not been able to make certain purchases due to restrictions on activity, household and business confidence remains well below pre-COVID-19 levels, consistent with soft overall conditions.

5. COST OF LIVING

We note WACOSS's submission and, in particular, the information and data provided about the cost of living and how it varies from household type to household type. Notably though, it sets out that costs such as housing and food vary geographically, across the State.

Most private sector awards and agreements of the Commission contain Location Allowances. These allowances are made up of 3 components, one of which is a prices component. The Commission, of its own motion, reviews these allowances each year to take account of changes in the prices.

- a) Should the Commission take account of Location Allowances in it determining the State Wage order?

Answer:

The Minister notes the current formula used to determine location allowances for individual towns in Western Australia has been in place since 1980 (60 WAIG 1141).

Location allowances are designed to compensate employees for the unique conditions associated with the cost of living, climate and isolation for particular locations in Western Australia. As location allowances are only payable to some employees for a specific purpose, the Minister contends they should generally not form part of the Commission's considerations in determining the State Wage order.

- b)** The Location Allowances General Order does not apply to award free employees, yet the cost of living is a consideration in the State Wage Case, applies to award covered employees and those award free employees covered by the State Minimum Wage.
- i. Should future Location Allowances General Orders be applied to award free employees?
 - ii. If so, should it form part of the State Wage Case each year, or be subject to a separate review?

Answer:

- i. The Minister submits there may be merit in considering the extension of the Location Allowance General Order to cover award free employees. Award free employees living in regional and remote towns that are currently included in the Location Allowance General Order face the same conditions regarding cost of living, climate and isolation as those working under awards, and there does not appear to be a strong rationale as to why such employees should not be afforded the same benefits.

Due to the age of many scope clauses in State awards, some employees engaged in occupations that would traditionally be considered 'award type work' are currently award free, which in turn makes them ineligible to receive a location allowance. Including such employees in the Location Allowance General Order would establish a degree of equity for affected employees working in regional areas.

While the Minister contends there may be merit in considering the extension of the Location Allowance General Order to award free employees, it is recommended that a separate review of this issue take place outside of the confines of the 2020 State Wage Case, enabling affected parties and organisations to have further input into the matter.

- ii. The Minister notes the existing process for issuing an updated Location Allowance General Order each year works well at present. However, there is no reason why this process could not be conducted as part of future State Wage Case proceedings each year, provided the Location Allowance General Order continues to be issued separately to the State Wage order.

6. GENERAL

The submission by UnionsWA, at 3.7, refers to a 'wage freeze'.

- a)** What evidence is relied on for reference to a wage freeze, and if there has been one, whether it had the effect submitted?
- b)** How does reference to a 'wage freeze' marry up with the quote at 3.2, which refers to a wage cut?

The Minister's submission

- c) Does the State Government intend to maintain its Wages Policy limitation of \$1,000 for government employees?

Answer:

The State Government continues to negotiate the replacement of industrial agreements under the \$1,000 wages policy.