

REPORT

and

DETERMINATION

under

SECTION 13

of the

STATUTORY AND OTHER OFFICES

REMUNERATION ACT, 1975

COURT AND RELATED OFFICERS GROUP

12 October 2011

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## **COURT AND RELATED OFFICERS GROUP**

### **OVERVIEW**

1. Mr Alex Smith AO resigned as the Statutory and Other Offices Remuneration Tribunal effective from 30 June 2011. The Governor, pursuant to section 6(2) of the Statutory and Other Offices Remuneration Act 1975 (the Act), appointed Ms Helen Wright as the new Tribunal for a term of three years from 12 July 2011.
2. Pursuant to section 13 of the Statutory and Other Offices Remuneration Act 1975 (The Act), the Tribunal is required to make an annual determination on the remuneration payable to office holders listed in the Schedules of the Act.
3. The office holders listed in the Schedules fall into three broad Groups: judicial offices (Judges and Magistrates); court related offices (Crown Prosecutors, Public Defenders, Court Related Commissioners etc) and tribunals (Guardianship Tribunal, Mental Health Review Tribunal etc); and statutory offices (Auditor General, Ombudsman, Clerks of the Parliament etc). The Tribunal is also required to make determinations on the remuneration packages for the NSW Senior Executive Service.
4. For administrative practicalities, the Tribunal has always grouped the various offices into broadly similar groups. Prior to 1995, there were three Groups viz. The Judges Magistrates and Related Group, The Tribunals, Court Officers and Related Group and The Senior Executive Services Group. The Tribunal generally determined remuneration increases consistently across the three Groups.

5. In 1995, the Tribunal amended the title of the Tribunal Court Officers and Related Group to the Public Office Holder Group to better capture the breadth of offices in this Group.
  
6. In 2002, the Tribunal undertook a fundamental review of the Court Related Office Holders and concluded that they were in part responsible for the inefficiencies in the NSW Court System. The Tribunal decided that this Group should be included with the Judges and Magistrates Group. As a consequence since then the Court Related Office Holders have received remuneration increases identical to the percentage increases received by Judges and Magistrates.
  
7. Judges and Magistrates in NSW receive increases in remuneration equivalent to those provided by the Commonwealth Remuneration Tribunal to Federal Judges and court related office holders. This arrangement has existed since 1989 when a Communiqué from the Council of Australian Governments provided that the salaries of State and Territory Supreme Court Judges and Federal Court Judges should not exceed 85 per cent of the salary of a High Court Judge. Since the Commonwealth Remuneration Tribunal determines remuneration for the High Court Judges and the Federal Court Judges, State and Territory Tribunals have with very few exceptions followed the increases provided by the Commonwealth and applied that increase to State Supreme Court Judges. This arrangement is generally referred to in the Tribunal's reports as the "Nexus". In effect, the Nexus has provided State Judges with Commonwealth levels of annual increases.

## 2011 Review

8. The 2011 annual review has been conducted against the background of a significant legislative change which impacts on the Tribunal's ability to determine remuneration increases for office holders.
  
9. On 27 June 2011, the Parliament passed the *Parliamentary, Local Council and Public Sector Executives Remuneration Legislation Amendment Act 2011*. This Act amends the NSW Remuneration Tribunals' legislation so as to apply the same public sector wages cap that binds the Industrial Relations Commission to determinations of the remuneration for Ministers and other Members of Parliament, local Councillors and Mayors, statutory officers and public sector executives. Schedule 3 of the Act amends the SOOR Act by inserting Section 6AA to give effect to the Government's wages policy. This matter will be discussed in detail below.
  
10. One outstanding issue was foreshadowed in the Tribunal's 2010 annual Report and Determination: whether to pass on to the Judges Magistrates and Related Group the final 2 instalments which arose from the special determination made in July 2010. The background to this special determination was noted in the Tribunal's 2010 Annual Report and Determination:

***“...Final 3 percent from the Commonwealth Tribunal's 2009 Special Review***

*As noted above, the Commonwealth Tribunal, in its Report of 13 October 2009, signalled its intention to provide federal Judicial Officers with a work value increase of 6 percent. Four such increases (each of 1.5 percent) were to be provided – the first in November 2009 and the last in May 2011. Two increases have been made as noted in the Tribunal's 30 July 2010 Report. The Tribunal indicated in that Report its intention to indicate the timing of the final two instalments at the time of this current review.*

*To give effect to the Commonwealth Tribunal's intention of passing on the 6 percent increases by way of instalments requires the Tribunal to make separate determinations for each such instalment. As has already been noted two such*

*instalments have been made. Following the making of such instalments, the Commonwealth legislation requires that such determinations be laid before the Federal Parliament for 15 sitting days. This is what is commonly known as the “disallowance period” where either House may disallow a Tribunal determination. Following the expiry of the disallowance period, the determination becomes effective from its operative date.*

*As at the time of making this Determination, the Commonwealth Tribunal has not made a determination on the third instalment of its special increase. When it does make this determination, it will be required to be tabled in Federal Parliament for 15 sitting days. Given that there are less than 15 sitting days left in the current session of Parliament any such determination will not become effective until some time when Federal Parliament returns in 2011. The fourth instalment when made would require a similar process.*

*This means that the Tribunal is not in a position to make any further determination on this matter. The Tribunal considers that the most appropriate course is to review this matter as part of the 2011 annual review where it is expected that the outcome of the payment of the two final instalments will be known. Alternatively, the Tribunal could review these special increases by way of special reference from the Minister.”*

11. The Tribunal did not receive a special reference for this purpose, therefore this matter will be considered as part of the 2011 annual review.

### **Submissions Received**

12. Not surprisingly, the focus of submissions received from non judicial office holders centred around the application of the legislative change and the impact on the historic relativities of these office holders.
13. Office holders such as the Director for Public Prosecutions and the Solicitor General have noted the difficulty in making and identifying employee related savings for individual offices.

## **Workers Compensation Commission, President**

14. The submission from the President notes that the office of President, Workers Compensation Commission is not defined as a “judicial officer” in the *Judicial Officers Act 1986*. Therefore the office is not exempt from the provisions of section 6AA of the SOOR Act. The submission notes that this is anomalous as the *Workplace Injury Management and Workers Compensation Act 1998* stipulates that to be eligible for appointment as President the person must be a Judge of a Court of Record ie a judicial officer.

## **Crown Prosecutors**

15. The Crown Prosecutors have made 2 submissions to the Tribunal.

16. The first submission seeks to retain the existing relativities between the Crown Prosecutors and Judicial Office Holders and submits that the increases that apply to the Judicial Office Holders should continue to be extended to officers in the “related” group. The submission also seeks to increase the conveyance allowance which has not been adjusted since 1996.

17. The submission also seeks the passing on of the final 2 instalments of the 6 percent special increase referred to in the Tribunal’s special determination of July 2010.

18. The Crown Prosecutors note the legislative changes that have been put in place, and submit that recently they have achieved significant productivity savings. Their submission further notes that the reduction in the number of Crown Prosecutors since 2005 has also reduced employee related costs.

19. The second submission discusses the impact of Section 6AA of the SOOR Act in detail and provides further information on productivity efficiencies that have been achieved.

## Public Defenders

20. The submission from the Senior Public Defender seeks the flow on of the final two instalments referred to in the 2010 special determination.
21. The submission notes that an increase is justified on the basis of improvements in productivity, the introduction of legislation that removed life tenure for newly appointed Public Defenders, the increase in the relative seriousness of cases dealt with - in particular in the Supreme Court, and the need to ensure that remuneration is sufficient to recruit and retain officers in a specialised labour market.

## Government Submission

22. The Government submission contains (as is usual) the advice and views of the Department of the Attorney General and Justice (DAGJ). In respect of this group of office holders, the Government submission notes that:

*“...The Department [DAGJ] is also of the view that the Judges Magistrates and Related Group should consist only of Judicial Officers, as defined in the Judicial Officers Act 1986 and that other (non-Judicial) Officers should be placed into a separate group for remuneration purposes, notwithstanding the views of SOORT, as provided in the Special Determination for the Judges Magistrates and Related Group dated 30 July 2010.*

*Removing these non-Judicial Officers from the Judges Magistrates and Related Group would also be consistent with the Government’s position as outlined in Schedule 3 of the Parliamentary, Local Council and Public Sector Executives Remuneration Legislation Amendment Act 2011.”*

23. In respect of the two outstanding work value increases referred to in the Tribunal’s July 2010 Report and Determination, the submission notes:

*“The Department [DJAG] considers that these increases are historical, as they follow from the decision of the CRT [Commonwealth Remuneration Tribunal] in November 2009 and should flow on to NSW Judicial Officers.”*

The Government's position is summarised as follows

*"...The two outstanding work value increases of 1.5% should flow onto the NSW Judicial Officers only.*

*The 85 per cent nexus between State and Federal judicial remuneration and the internal relativities should be maintained for Judicial Officers as defined by the Judicial Officers Act 1986.*

*In addition, the Government recommends the Tribunal approve an increase of 2.5 for officers listed in the Related Officers Group."*

## **2011 Review**

### 24. Schedule 3 of the Parliamentary, Local Council and Public Sector Executives

Remuneration Legislation Amendment Act 2011 amends the SOOR Act by inserting a new Section to the Act (Section 6AA).

#### ***"6AA Tribunal to give effect to declared government policy on remuneration for public sector staff***

*(1) This section applies to the following determinations of the Tribunal:*

- (a) the determination under Part 3 of any alteration in the remuneration to be paid to office holders,*
- (b) the determination under Part 3A of any alteration in the remuneration packages for executive office holders.*

*This section does not apply to determinations relating to judicial officers (within the meaning of the [Judicial Officers Act 1986](#)) or to determinations relating to any office while held by a specified person.*

*(2) In making a determination to which this section applies, the Tribunal is to give effect to the same policies on increases in remuneration as those that the Industrial Relations Commission is required to give effect to under section 146C of the [Industrial Relations Act 1996](#) when making or varying awards or orders relating to the conditions of employment of public sector employees."*

### 25. Section 146C of the IR Act provides

***“...146C Commission to give effect to certain aspects of government policy on public sector employment***

- (1) The Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees:
  - (a) that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission, and*
  - (b) that applies to the matter to which the award or order relates.**
- (2) Any such regulation may declare a policy by setting out the policy in the regulation or by adopting a policy set out in a relevant document referred to in the regulation.”*

26. The current policy on wages pursuant to section 146C (1)(a) of the IR Act is articulated in the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011. Clause 6 of the Regulation provides;

*“...Other policies*

- 1. The following policies are also declared, but are subject to compliance with the declared paramount policies:
  - (a) Public sector employees may be awarded increases in remuneration or other conditions of employment that do not increase employee-related costs by more than 2.5% per annum.*
  - (b) Increases in remuneration or other conditions of employment that increase employee-related costs by more than 2.5% per annum can be awarded, but only if sufficient employee-related cost savings have been achieved to fully offset the increased employee-related costs. For this purpose:
    - (i) whether relevant savings have been achieved is to be determined by agreement of the relevant parties or, in the absence of agreement, by the Commission, and*
    - (ii) increases may be awarded before the relevant savings have been achieved, but are not payable until they are achieved, and*
    - (iii) the full savings are not required to be awarded as increases in remuneration or other conditions of employment.**
  - (c) For the purposes of achieving employee-related cost savings, existing conditions of employment of the kind but in excess of the guaranteed minimum conditions of employment may only be**

*reduced with the agreement of the relevant parties in the proceedings.”*

27. Accordingly the Tribunal, when making a determination, must now apply the same public sector wages cap that binds the Industrial Relations Commission when making decisions relating to public sector wages. The effect of the Regulation is that public sector wages cannot increase by more than 2.5 per cent. Any increases beyond 2.5 per cent per annum can be awarded by the Industrial Relations Commission but subject to the requirement that:

*“...sufficient employee-related cost savings have been achieved to fully offset the increased employee-related costs.”*

28. This intent is confirmed by the Hon. Greg Pearce (Minister for Finance and Services, and Minister for the Illawarra) in the Minister’s Second reading Speech: Legislative Council, *Parliamentary Debates* (Hansard), 22 June 2011 at p. 3101 on the amendments to the Act where he stated;

*“This bill will extend the Government’s public sector wages policy to elected officials, State parliamentarians and local mayors and councillors, senior executives in the public service and statutory officeholders. The Government’s public sector wages policy is about delivering fair wage increases to hardworking public servants. It is also about ensuring that the State budget can be brought under control. This legislation means that we can get on with the business of delivering the infrastructure and services which this State needs and which its people deserve. Last week this Parliament passed the Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011. That legislation requires the Industrial Relations Commission to give effect to the Government’s wages policy when making decisions relating to public sector salaries. The reasons that bill was necessary are the very same reasons that it is now appropriate to extend the policy to other officeholders who are paid from the public purse. If the policy is good enough for public servants it is certainly also good enough for senior executives and for elected officials. That is why, for the first time, the Government’s wages policy will be formally extended to apply to elected officials and senior bureaucrats.”*

*“... Finally, schedule 3 to the bill extends the policy to determinations of executive remuneration made by the Statutory and Other Offices*

*Remuneration Tribunal, SOORT. This means that the Government's wages policy will apply to the Chief Executive Service, the Senior Executive Service and statutory officeholders whose remuneration is determined by the Statutory and Other Offices Remuneration Tribunal Act [sic]. ..As with other public servants, any increase above 2.5 per cent will be payable only where productivity savings have been achieved. To pass on any increase the tribunal will need to be satisfied that these savings have been achieved and are attributable, at least in part, to the category of officers concerned."*

29. The intent of Parliament is clear. Section 6AA is intended to apply the 2.5 per cent pay increase cap to all office holders except for Judicial Officers, within the meaning of the Judicial Officers Act. The effect of the amendment to the Act is to remove the Tribunal's discretion to determine any increase beyond 2.5 per cent for officers other than judicial officers unless there are employee-related cost savings sufficient to meet the additional employee related costs.
30. The exclusion of judicial officers from this policy effectively means that historical relativities for office holders such as the Solicitor General, the Director of Public Prosecutions and the Crown Advocate will be severed, as that relativity will be severed for all other non judicial office holders in this Group.
31. The legislation came into effect in July 2011. The Tribunal understands that the validity of the legislation is currently before the Industrial Relations Commission and that the Commission has held hearings and has reserved its decision. Further, if the legislation remains in place it will fall on the Tribunal to ascertain whether sufficient employee-related savings have been achieved. The Tribunal will need to develop a robust methodology to make such assessments. It will also be necessary for the Tribunal to address the apparent anomalies of office holders who cannot demonstrate, at least in relation to their own particular offices, employee-related cost savings eg single office holders such as the Solicitor General, the Crown Advocate and the Director and Deputy Directors of Public Prosecutions. A further question which will arise is - where employee-related cost savings have been achieved in a particular group - how broadly the application of those savings should be spread. For example, if Crown Prosecutors as a group can demonstrate employee-related cost savings sufficient to fully offset the increased employee-

related costs of any increase greater than 2.5% if given to Crown Prosecutors, is it fair and reasonable (and the intent of the legislation) that the particular group alone should benefit accordingly. Or should the Tribunal's methodology take into account also the employee-related costs of the Solicitor for Public Prosecutions and the Director and the Deputy Directors of Public Prosecutions, given that they all operate within (and the employee-related costs savings have been achieved within) the Office of the Director of Public Prosecutions and perhaps they should all benefit. It will be apparent that there are many issues for the Tribunal to address.

32. These are questions that the Tribunal will need to resolve. In doing so it will seek the advice of the Government and in particular, will seek assistance in developing a methodology to assist in the assessment of employee-related cost savings that will be sufficiently robust for the Tribunal to be satisfied as to the quantum of employee-related cost savings that have been achieved, and which may justify an increase beyond 2.5 per cent where appropriate, but also how widely or narrowly the cost savings should be attributed within any given group.
33. There remains the issue of the final two instalments of the 6 per cent that was to have been passed on to these office holders.
34. The Tribunal in the Report of the Special Determination of 30 July 2010, had considered that sufficient efficiencies had been demonstrated to warrant the passing on of the additional 6 per cent in four instalments each of 1.5 per cent. When the 2010 Annual determination was made the Commonwealth had yet to pass on the third and fourth instalments. These were to be considered as part of the current annual review. Section 6AA of the Act has now superseded the 2010 Special Determination and the 2010 Annual Determination. For any increase now to be passed on to this or any other non judicial group of office holders, employee-related cost savings sufficient to offset any additional employee-related costs will have to be demonstrated and achieved.

35. In summary, the Tribunal considers that the legislation now precludes the passing on of the final 3 per cent special increase to non judicial office holders.

### **President, Workers Compensation Commission**

36. The Tribunal has examined the relevant legislation and notes that section 369(1) of the Workplace Injury Management and Workers Compensation Act 1988 provides, in respect of the qualification for appointment as President.

*“...A person is eligible to be appointed as President only if the person is a Judge of a court of record.”*

37. While this office is not a judicial officer within the definition contained in the Judicial Officers Act 1983, it is clear that the office holder must be a judicial officer to hold the appointment as President of the Commission. The Tribunal considers, therefore that the exclusion of the President from the definition in the Judicial Officers Act is clearly an anomaly and would urge the Government to review this matter. The Tribunal will determine an annual increase for this office consistent with the levels of increase provided to other judicial officers. The remuneration for the President of the Workers Compensation Commission is listed in the Judges and Magistrates Determination.

### **Conclusion**

38. Section 6AA has had a significant impact on the way this Tribunal makes its determinations. The Tribunal notes that the legislation has been passed by Parliament and it is the role of the Tribunal to undertake its duties consistently with the legislation. This Tribunal will continue to do.

39. Section 6AA has now provided for different remuneration considerations for the judicial and non judicial members of the Judges Magistrates and Related Group. For this reason, the Tribunal will now formally create a new Group for remuneration

purposes called the Court and Related Officers Group who like all other office holders (except for judicial officers) will be subject to the provisions of section 6AA of the Act.

### **Conveyance Allowance**

40. The Tribunal has undertaken a review of the conveyance allowance and found that an increase is warranted. On that basis the allowances have been increased by 2.5 per cent.

41. Office holders in this Group were eligible to receive the conveyance allowance when their remuneration was determined as part of the Judges, Magistrates and Related Group. The Tribunal has determined that office holders within the Court and Related Officers Group shall continue to receive this Allowance. While the level of Allowance historically has been based on the remuneration levels of Supreme Court Judges, District Court Judges and Magistrates this arrangement will no longer apply. To ensure these officers are not disadvantaged the Tribunal proposes to retain the existing levels of Conveyance Allowance as determined for them and provide increases consistent with the Tribunal's existing methodology.

42. Pursuant to section 13 of the Act the Tribunal, having regard to the views of the Assessors, determines that the salaries of each of the officers listed in Appendix 1 shall be increased by 2.5 per cent effective on and from 1 October 2011.

### **The Statutory and Other Offices Remuneration Tribunal**

(signed)

**Helen Wright**  
12 October 2011

**DETERMINATION No 1****REMUNERATION OF COURT AND RELATED OFFICERS GROUP – effective from 1 October 2011**

	Salary \$ per annum	Conveyance Allowance (1)
Chairperson, Law Reform Commission	\$377,760	\$22,550
Solicitor-General	\$377,760	\$22,550
Director of Public Prosecutions	\$377,760	\$22,550
Crown Advocate	\$339,980	\$20,330
Deputy Director of Public Prosecutions	\$339,980	\$20,330
Senior Crown Prosecutor	\$305,980	\$16,235
Senior Public Defender	\$305,980	\$16,235
Deputy Senior Crown Prosecutor	\$275,380	\$16,235
Deputy Senior Public Defender	\$275,380	\$16,235
Solicitor for Public Prosecutions	\$275,380	\$16,235
Deputy Presidents, Workers Compensation Commission	\$275,380	\$16,235
Senior Commissioner Land and Environment Court	\$264,430	\$16,235
Crown Prosecutor	\$251,590	\$16,235

Public Defender	\$251,590	\$16,235
Commissioner Land and Environment Court	\$249,320	\$16,235
Acting Deputy President Workers Compensation Commissioner	\$1,145 per day	

**CONVEYANCE ALLOWANCE**

- (1) The Conveyance Allowance determined here shall not count towards pension or for superannuation purposes.

**DETERMINATION No 2**

**ANNUAL LEAVE LOADING OF COURT AND RELATED OFFICER GROUP ON – effective from 1 October 2011**

Annual Leave Loading

An annual leave loading shall be payable on the same terms and conditions as are applicable to officers and employees of the Public Service of New South Wales, as set out in Section 6-16.12 to 6-16.16 of the Personnel Handbook, to each of the following office holders:

**The Statutory and Other Offices  
Remuneration Tribunal**

(signed)

**Helen Wright**

12 October 2011