

REPORT

And

DETERMINATION

Under

SECTION 24C

of the

STATUTORY AND OTHER OFFICES

REMUNERATION ACT, 1975

CHIEF EXECUTIVE AND SENIOR EXECUTIVE SERVICES

9 November 2012

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Chief Executive Service and Senior Executive Service

Introduction

Ms Jade Novakovic, who undertook the role of Assessor to the Tribunal (pursuant to section 7(1)(b) of the SOOR Act) did not seek reappointment when her term expired on 30 June 2012. This position is currently vacant and the Tribunal has undertaken the 2012 review without this additional assistance. The Tribunal would also like to acknowledge and express its appreciation of the considerable contribution of Mr Emanuel Sklavounos who undertook the role of Executive Officer to the Tribunal for a period of over ten years until his retirement in December 2011.

Section 1 Background

1. Section 24C of the *Statutory and Other Offices Remuneration Act 1975* (the SOOR Act) provides for the Tribunal to determine annual remuneration packages for the Chief Executive Service and Senior Executive Service (SES)¹ to take effect on and from 1 October in that year.
2. The SES was introduced in the NSW public sector in 1989. The key features of the SES are:
 - classification into 8 remuneration levels
 - minimum and maximum of each remuneration level determined by the Tribunal
 - conditions of employment being fixed by contract
 - individual performance agreements
 - annual increases in remuneration based on performance assessment

¹ Unless otherwise stated, the Chief Executive Service and the Senior Executive Service are referred collectively in the Report and Determination as SES.

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- remuneration packages expressed as total cost of employment, whether the amount is monetary remuneration for the executive office holder, or partly that remuneration and partly as the cost to the employer of the executive office holder of employment benefits.

Section 2 2011 Review

3. The 2011 annual review was conducted against the background of a significant legislative change which impacted on the Tribunal's ability to determine remuneration increases for certain office holders.
4. In determining the remuneration for SES officers, and following amendments to the SOOR Act in 2011, the Tribunal was required pursuant to Section 6AA 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 employee.
5. The current policy on wages pursuant to section 146(1)(a) of the *Industrial Relations Act 1996* is specified in the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011. The effect of the Regulation is that public sector wages cannot increase by more than 2.5 per cent. Any increase beyond 2.5 per cent can only be awarded subject to the requirement that sufficient employee-related cost savings have been achieved to fully offset the increased employee-related costs.
6. The Tribunal noted that unlike other public sector employees, the SES is not an employee group which can achieve collective employee related savings. In previous years when the Tribunal has awarded increases in excess of the wage policy of 2.5 per cent these increases have been awarded on the basis that it is the SES, as leaders in the sector, who are responsible for driving savings outcomes.

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7. The Tribunal advised that it would seek advice and assistance from the Government 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, and also how widely or narrowly the cost savings should be attributed within any given group.
8. The Tribunal's 2011 annual determination dated 12 October 2011 provided for a 2.5 per cent increase for each SES officer, subject to satisfactory performance.

Section 3 Submissions

Government submission

9. The Government's Submission recommends that the Tribunal approve an increase of 2.5 per cent for the SES. This recommendation is consistent with NSW Wages Policy and reflects the NSW Government's intent, pursuant to section 6AA of the SOOR Act and the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011.
10. The Government submission provides an overview of the recent economic performance and outlook for the State.
11. Leading in to the 2012-13 State Budget, there was a deterioration in the global economic outlook and a downgrade to the Australian outlook. Since mid-year, forecasts for Australian growth have also been revised down for 2013. The Reserve Bank of Australia at its October board meeting lowered the cash rate by 25 basis points and indicated that the 'labour market has generally softened somewhat in recent months' and 'on the back of international developments, the growth outlook for next year looked weaker'. For NSW, partial indicators of activity have

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lost momentum since mid-year and labour market conditions appear more subdued than was expected at Budget time.

12. The fiscal challenge faced by the Government, as highlighted in the Final Report of the Commission of Audit, is to return State finances to a sustainable position following a decade of expenses growth exceeding revenue growth. As the Commission of Audit report highlights:

“In relation to expenditure the NSW Public Service has felt under siege since 2005-06. At that time the State budget began deteriorating significantly and continued to do so, given the growth in expenditure which is well in excess of the growth in revenue. In response the Government established the Commission of Audit to review and benchmark current operating and capital expenditure. The objective of the Commission has been to identify opportunities to deliver improved services to the people of NSW in a more efficient and cost effective manner and to provide a sustainable budget position going forward”².

13. The 2011-12 Budget introduced a series of savings initiatives which lowered the forecast expenses growth to levels not seen in the prior decade. For the 2011-12 fiscal year the government expected to achieve expense growth approaching 2 percentage points below what was forecast for 2011-12. Lower expenses growth is expected again in 2012-13, with increases averaging just 3.3 per cent per annum over the four years to 2015-16.
14. The turnaround is required to provide the capacity to meet the Government’s key objectives of providing high quality services, while rebuilding the State’s economic and social infrastructure within sustainable fiscal settings. The foundation of the Government’s fiscal strategy is the new *Fiscal Responsibility Act 2012*. The object of the new Act is to retain the State’s triple-A credit rating.

² NSW Commission of Audit Government Expenditure, NSW Government, 4 May 2012, page 7.

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15. With employee related expenses accounting for nearly one-half of budget expenses, this area continues to be a key focus in the Government's expense restraint. Growth in this area of expenses is driven by increasing rates of pay, increased size of the workforce and changing composition of the workforce. The 2012-13 Budget provides for a further round of measures to better control employee expenses. The Labour Expense Cap strengthens the control over employee expense growth that started last year with the NSW Public Sector Wages Policy 2011.
16. The Government submission also makes the following comment about the challenges facing the SES over the coming year:

"The challenge for Chief and Senior Executive Service Officers in the NSW public sector over the upcoming year is delivering improved citizen-centric services to the people of NSW in a more efficient and cost effective manner while at the same time delivering the major reforms contained in NSW 2021.

Meeting this challenge is necessary to enable the Government to return to a sufficiently large operating surplus to fund a significant part of capital expenditure, build a buffer against adversity and ensure a gradual decline in state debt and unfunded super.

In this regard, there is a need for the CES and SES, like the rest of the NSW public sector, to demonstrate wage restraint and contribute to containment of expense growth."

17. The Government submission advises that the Public Service Commission is presently developing reform proposals for the executive structure of the NSW public service. The reforms are a response to the NSW Commission of Audit recommendation that the structure of executive employment required fundamental overhaul and that:

"the Public Service Commission should present reform proposals to the Government regarding the executive structure of the NSW public service (SES, Senior Officer and other executives) to:

- *establish a separate structure for clusters Directors General*

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- *create a new executive structure combining the SES and the Senior Officer classification and, as appropriate, other executive groupings' (Recommendation #45)."*

18. The Government has also advised that once the new executive arrangements are in place, consideration will be given to the development of a methodology to assist the Tribunal in assessing employee related savings that are advanced to justify an increase beyond 2.5 per cent for CES/SES.
19. The Government further recommends that there be no increase to the minimum and maximum rates of Recruitment and Retention Allowances.

Section 4 2012 Review

20. The introduction of section 6AA to the SOOR Act has had a significant impact on the way this Tribunal makes its determinations. The effect of the amendments to the SOOR Act in 2011 is to remove the Tribunal's discretion to determine any increase beyond 2.5 per cent for office holders other than judicial officers (within the meaning of the *Judicial Officers Act 1986*) unless there are sufficient employee-related cost savings to offset the additional employee-related costs.
21. The validity of the amendments to the *Industrial Relations Act 1996* was considered by the Industrial Relations Commission during 2011. The Public Service Association (PSA) applied for a declaration that the Amendment Act, or alternatively the Regulation, was invalid. On 31 October 2011 the Full Bench of the Industrial Court (Walton, Kavanagh & Backman JJ) unanimously dismissed the PSA's application (*The Public Service Association & Professional Officers' Association Amalgamated of NSW v Director of Public Employment & ORS Industrial Court of NSW [2011] NSWIRComm 143*). The matter is presently the subject of consideration by the High Court: *The Public Service Association & Professional Officers' Association Amalgamated of NSW v Director of Public Employment & ORS (S127/2012)*, but unless and until the High Court decides

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- otherwise, the legislation has effect and the Tribunal is obliged to apply the same policies on increases in remuneration as the IRC is obliged to apply.
22. Complexities arise because of the differences in the nature and functioning of the Tribunal (which usually makes determinations 'on the papers') and the IRC (which makes orders and awards following arbitrated proceedings), as well as differences in the types of decisions they make. The IRC makes generally applicable orders and awards to broad categories of employees. The Tribunal does likewise in respect of the Senior Executive Service, but for some public and statutory offices it makes specific determinations for individual offices.
 23. During the 2011 review the Tribunal identified the need to develop a methodology to assess whether officers affected by this determination can and have achieved employee related costs savings which may justify increases beyond 2.5 per cent.
 24. Prior to the amendments to the legislation the Tribunal, in determining the annual general increase, had regard to a number of factors including salary adjustments across both public and private sectors and movements in key economic indicators.
 25. The Tribunal previously has been able to determine increases greater than 2.5 per cent, and those increases have been based on productivity savings achieved across an organisation.
 26. However Section 146C and Regulation 2011 require something different from and greater than the kind of productivity savings which in the past, may have been claimed to have been achieved. Savings attributable only to productivity factors will not be sufficient to meet the policy requirements specified in the Regulation.
 27. Paragraph 8 of the Regulation defines "employee-related costs" as "costs related to the salary, wages, allowances and other remuneration payable to the employees and the superannuation and other personal employment benefits payable to or in respect of the employees".

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28. Paragraph 9 defines "employee-related cost savings" and whilst the language used is directed to the particular processes of the Industrial Relations Commission, much of it can be given a purposive interpretation to apply to the deliberations of the Tribunal, and the Tribunal must apply the same policies as the IRC must apply. Paragraph 6(1)(b) clarifies that there must be sufficient employee-related cost savings to fully offset any increased employee-related costs. In other words, any pay increase beyond 2.5 per cent must be matched by cost savings which neutralise the cost of the increase. Paragraph 6(1)(c) suggests the kinds of employee-related cost savings which may be relevant, in that it contemplates reduction (with the agreement of the relevant parties) in "existing conditions of employment of the kind but in excess of the guaranteed minimum conditions of employment".
29. The Tribunal has sought legal advice and has also met with judicial members of the Industrial Relations Commission to discuss and consider how these matters or some of them might be addressed. The Tribunal places on record its thanks to the Hon Justice Michael Walton, Vice President, and the Hon Justice Conrad Staff, of the Industrial Relations Commission for their assistance.
30. In making a submission in support of any increase above 2.5 per cent, it appears that the SES will need to find employee-related costs savings, such as the elimination of leave loading, reduction of travelling allowances - anything which is not protected as a minimum condition of employment.
31. SES Officers are not employed under an industrial instrument. Their conditions of employment are outlined in the relevant legislation or in the contract of employment. Any changes to these conditions aimed at reducing employee-related costs and contributing to savings, would need to apply to all affected SES office holders, would require consent of those office holders, and may require legislative change.

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32. Further, the Tribunal notes that the Industrial Relations Commission of NSW on 15 October 2012 ruled that any increases greater than 2.5 per cent in salaries payable on and from a particular date can only be offset by employee-related cost savings made after (not before) that date: *HSU East and Director-General, Department of Finance and Services [2012] NSWIRComm 112*. Para 36 of that ruling is as follows:

"These provisions tend to indicate that the savings must be achieved in a period or at a time corresponding with any wage adjustment made in conformity with the Regulation. We note that in industrial parlance the expression "fully offset" means that a given wage increase would be matched by cost savings or other savings having the effect of neutralizing the cost of the adjustment after the commencement of its operation (which would normally be prospective)."

33. The Tribunal understands that during the coming year the Government will provide assistance to the Tribunal to develop a methodology to assess employee-related cost savings which may justify a "general increase" above 2.5 per cent in appropriate circumstances. If and when an appropriate methodology is so established, the Tribunal will advise office holders. For the purposes of the 2013 review, and whether or not any such methodology has been established, but in order to provide office holders with sufficient opportunity to identify and demonstrate potential employee-related cost savings, the Tribunal will seek submissions much earlier in 2013 than has been past practice.

Recruitment Allowance and Retention Allowance

34. There will be no increase in the minimum and maximum rates of the Recruitment Allowance or the Retention Allowance at this time.

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Chief Executive Positions

35. During the 2011 annual review the Tribunal determined that three Chief Executive positions would receive remuneration in excess of the maximum of SES Level 8: the Director General of the Department of Premier and Cabinet, the Chief Executive Officer and Co-ordinator General of Infrastructure NSW and the Director General, Department of Trade and Investment, Regional Infrastructure and Services.
36. The Tribunal continues to support the view that additional remuneration for these positions is warranted and will determine an increase of 2.5 per cent consistent with section 6AA of the SOOR Act. The result of the Tribunal's determination in respect of these positions is contained in Determinations 2 to 4.

Section 5 Conclusion

37. The Tribunal after considering the views of the Assessor and having regard to the provisions of section 6AA of the SOOR Act, determines an increase of 2.5 per cent for all SES officers, effective on and from 1 October 2012.
38. Payment of the increase is subject to certification of an officer's satisfactory performance by the officer's CEO or in the case of CEOs the relevant Minister.

The Statutory and Other Offices Remuneration Tribunal

Helen Wright

Dated: 9 November 2012

Determinations of the Remuneration Packages of the Chief Executive Service and Senior Executive Service Effective on and from 1 October 2012

Determination No 1- Remuneration Package Ranges

The remuneration package ranges for executive office holders shall be:

CES/SES	Per annum range		
Remuneration Level 8	\$412,201	to	\$476,200
Remuneration Level 7	\$328,651	to	\$412,200
Remuneration Level 6	\$292,451	to	\$328,650
Remuneration Level 5	\$253,501	to	\$292,450
Remuneration Level 4	\$232,501	to	\$253,500
Remuneration Level 3	\$204,701	to	\$232,500
Remuneration Level 2	\$190,851	to	\$204,700
Remuneration Level 1	\$163,000	to	\$190,850

Determination No 2 – Director General, Department of Premier and Cabinet

The Tribunal determines that the remuneration package for the Director General Department of Premier and Cabinet shall be \$545,800 pa effective on and from 1 October 2012.

Determination No 3 – Chief Executive Officer and Co-ordinator General, Infrastructure NSW

The Tribunal determines that the remuneration package for the Chief Executive Officer and Co-ordinator General, Infrastructure NSW shall be \$525,315 pa effective on and from 1 October 2012.

Determinations of the Remuneration Packages of the Chief Executive Service and Senior Executive Service Effective on and from 1 October 2012

Determination No 4 – Director General, Department of Trade and Investment, Regional Infrastructure and Services

The Tribunal determines that the remuneration package for the Director General, Department of Trade and Investment, Regional Infrastructure and Services shall be \$521,375 pa effective on and from 1 October 2012.

Determination No 5 - Recruitment Allowance

To the remuneration package amounts determined above there may be added a Recruitment Allowance up to the maximum for each level as set out hereunder, subject to the approval of the Public Service Commissioner. The Allowance will apply for new SES offices and appointment renewals, where it has been established that a specific skill is necessary for recruitment purposes and the performance of the duties of the position.

Officers in receipt of a Recruitment Allowance are not eligible for payment of a Retention Allowance.

CES/SES	Maximum Allowance	
Levels 7 and 8	up to	\$43,000
Levels 5 and 6	up to	\$30,000
Levels 3 and 4	up to	\$23,000
Levels 1 and 2	up to	\$19,000

Determinations of the Remuneration Packages of the Chief Executive Service and Senior Executive Service Effective on and from 1 October 2012

Determination No 6 - Retention Allowance

SES Officers shall be eligible for a Retention Allowance up to the maximum for each level as set out hereunder. The Allowance will apply on and from the date of approval by the Public Service Commissioner and will accrue on an annual basis or part thereof and the total amount will be payable upon the completion of the term of appointment.

Officers in receipt of a Retention Allowance are not eligible for payment of a Recruitment Allowance.

CES/SES	Maximum Allowance	
Levels 7 and 8	up to	\$43,000
Levels 5 and 6	up to	\$30,000
Levels 3 and 4	up to	\$23,000
Levels 1 and 2	up to	\$19,000

Determination No 7 - Specialist Medical Skills

The Tribunal determines that the remuneration package ranges for offices identified as requiring specialist medical skills shall be:

Specialist Medical Skills	Per annum range		
Remuneration Level 6	\$301,250	to	\$369,000
Remuneration Level 5	\$299,950	to	\$355,500
Remuneration Level 4	\$294,800	to	\$342,200
Remuneration Level 3	\$281,300	to	\$326,450
Remuneration Level 2	\$264,000	to	\$306,350
Remuneration Level 1	\$243,500	to	\$279,550

Determinations of the Remuneration Packages of the Chief Executive Service and Senior Executive Service Effective on and from 1 October 2012

Determination No 8 – General Medical Skills

The Tribunal further determines that the remuneration package ranges for offices identified as requiring general medical skills shall be:

General Medical Skills	Per annum range		
Remuneration Level 2	\$211,950	to	\$245,950
Remuneration Level 1	\$194,850	to	\$223,600

The Statutory and Other Offices Remuneration Tribunal

Helen Wright

Dated: 9 November 2012