

REPORT

and

DETERMINATION

under

SECTION 13

of the

STATUTORY AND OTHER OFFICES

REMUNERATION ACT, 1975

COURT AND RELATED OFFICERS GROUP

9 November 2012

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# Court and Related Officers Group

## 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 13 of the *Statutory and Other Offices Remuneration Act 1975*, (the SOOR Act), requires the Statutory and other Offices Remuneration Tribunal to make a determination of the remuneration to be paid to office holders on and from 1 October in that year. "Remuneration" is defined in section 10A as salary or allowances paid in money.
2. The Court and Related Officers Group comprises those public offices, listed in the Schedules of the Act (except for the Judges and Magistrates Group and the Public Office Holders Group), which have been grouped together by the Tribunal for remuneration purposes. The remuneration for these office holders is determined as a fixed salary amount. Employer on-costs, such as the Superannuation Guarantee Levy, are additional to the salary amount determined.
3. In determining the remuneration for office holders in this group, and following amendments to the SOOR Act in 2011, the Tribunal is now 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 employees.

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4. The current policy on wages pursuant to section 146(1)(a) of the *Industrial Relations Act 1996* is articulated 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.
5. Prior to the 2011 determinations, the court and related office holders, such as the Director of Public Prosecutions and the Crown Prosecutors, were included in the Judges, Magistrates and Related Group for remuneration purposes. As a consequence of that grouping the court and related office holders received remuneration increases identical to the percentage increases received by judges and magistrates.
6. The amendments to the SOORT Act, which provide for the Tribunal to apply the same public sector wages cap that binds the Industrial Relations Commission, explicitly exclude Judicial Office Holders as defined by the *Judicial Officers Act 1986*. For this reason, for the 2011 determinations the Tribunal separated the officers previously grouped as the Judges, Magistrates and Related Group into two separate groups being those defined as judicial office holders by the *Judicial Officers Act 1986* in the Judges and Magistrates Group, and the remaining office holders forming the new Court and Related Officers Group.
7. The Tribunal's Report and Determination of 2011 for the Court and Related Officers Group provided a general increase of 2.5 per cent which was consistent with the NSW Wages Policy and reflected the NSW Government's intent, pursuant to section 6AA of the SOOR Act and the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011.

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### **Section 2 Submissions Received**

#### **Government Submission**

8. The Government submission recommends the Tribunal approve an increase of 2.5 per cent for the Court and Related Officers Group.
9. This recommendation is consistent with the NSW Wages Policy and reflects the NSW Governments' intent, pursuant to section 6AA of the SOOR Act and the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011.

#### **Director of Public Prosecutions**

10. The Director of Public Prosecutions has requested that the offices of the Director of Public Prosecutions and the Solicitor General receive the same salary as a Supreme Court Judge. This arrangement would reinstate the previous salary relativity that existed between these positions but has subsequently been broken as a result of the provisions of section 6AA. This salary relativity had existed since the creation of the position in 1986. The Director of Public Prosecutions has advised that there are good reasons for that historical nexus and for continuing it into the future. The Director of Public Prosecutions also submits that it is not practical for individual office holders, such as himself and the Solicitor General, to demonstrate employee-related cost savings.

*"It is clear from the Regulation that the demonstration of employee-related savings would normally occur in the context of proceedings on behalf of large groups of employees before the Industrial Relations Commission. Such proceedings will never be commenced by single statutory office holders such as the Director of Public Prosecutions and the Solicitor General."*

#### **Solicitor General**

11. The Solicitor General's submission states that it would be highly desirable to re-align the remuneration of the Solicitor General and the Director of Public Prosecutions with that of a judge of the Supreme Court. There were good reasons for this alignment including the status of the two offices in question and the fact that these

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are the only non-judicial offices that provide an entitlement to the judicial pension under the *Judges' Pensions Act 1953*.

### Deputy Directors of Public Prosecutions, Crown Prosecutors

12. The Deputy Directors submit their appropriate remuneration should be the same as the percentage relative to judicial office holders before the enactment of section 6AA of the SOOR Act. This would have equated to the remuneration level of a District Court Judge.
13. The Senior Crown Prosecutor, Deputy Senior Crown Prosecutors and Crown Prosecutors submit their appropriate remuneration should be at the same percentage level as previously existed relative to the remuneration of the Director of Public Prosecutions.
14. The joint submission highlights that the salary relativities which previously existed between officers in the Judges and Magistrates Group and the Court and Related Officers Group were severed following the 2011 amendments to the SOORT Act. The submission makes the following statement in respect of how those changes have impacted upon the relativities within the Court and Related Officers Group:

*"The Director of Public Prosecutions has always (until last year) been remunerated at the same level of a Justice of the Supreme Court. Deputy Directors were remunerated at 90% of the Directors remuneration. This percentage equated to the remuneration of a District Court Judge. Without any consultation the amending legislation has resulted in a substantial difference in the remuneration levels between the Deputy Directors and District Court Judges. The difference occurred without any identifiable change in our "work value or responsibilities" when compared to that of judicial officers."*

15. The submission also states:

*"SOORT recognised that the Government's legislation had altered the status quo by removing us from the judicial category. SOORT also raised, but left unanswered, the question of how and in what circumstances employee-related cost savings could be demonstrated, so as to justify an increase above the 2.5% ceiling...."*

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*We respectfully ask SOORT to undertake a work value assessment between the various office holders or alternatively devise a system consistent with the intentions outlined in last year's determination."*

### Solicitor for Public Prosecutions

16. The submission outlines the role of the Solicitor for Public Prosecutions and details operational efficiencies that have been achieved. Mr Kavanagh also advised:

*"The fact that we have been able to meet these increased demands with reduced resources is indicative of greater efficiency in the allocation of resources. I am confident that savings in real terms in employee-related costs will be readily identifiable whichever system of methodology is ultimately adopted...."*

*It is hoped that in the near future the Tribunal will work with Government to develop such a methodology, and that the process will enable the Tribunal to undertake a retrospective assessment for the 2011-2012 year as well as for the future."*

The Tribunal notes from Mr. Kavanagh's submission that the Office of the Director of Public Prosecutions has since 2008 been implementing recommendations made by the Auditor General to describe, count, measure and analyse its work to better explain its efficiency, and by 2010 the Public Accounts Committee was able to report that *"The Committee considers that the changes that have been made in relation to improving information management and management practices places the ODPP in a better position to be able to demonstrate its efficiency and encourages the Office to continue"*. The Public Defenders have given an example of changes in work practices which have achieved significant cost savings over the alternative of using private barristers funded by Legal Aid.

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### Section 3 2012 Review

17. 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 meet the additional employee-related costs.
18. 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 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.
19. 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.
20. 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. The

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Tribunal also identified the need to address whether the amendments to the SOOR Act preclude the Tribunal from making any further adjustments in remuneration based on changes in work value. Historically, the annual determination has provided for a general increase to all eligible office holders ("general increase") and, where warranted, an additional increase for a particular office based on changes in its role or responsibilities ("work value increase").

21. 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.
22. The Tribunal previously has been able to determine increases greater than 2.5 per cent, and those increases may have been granted to individual office holders or groups of office holders based on productivity savings achieved across an organisation. Submissions received this year from individual office holders and on behalf of groups of office holders argued that increases beyond 2.5 per cent could be funded from a reduction in employee related costs and/or productivity savings.
23. 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. Submissions outlining savings attributable only to productivity factors will not be sufficient to meet the policy requirements specified in the Regulation.
24. 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".
25. 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

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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".

26. In finding savings sufficient to fund increases above 2.5 per cent, it appears that court and related office holders will need to find employee-related costs savings, such as changes to leave entitlements, elimination of leave loading, reduction of travelling allowances etc.
27. Office holders within the Court and Related Officers Group are not employed under an industrial instrument. Their conditions of employment are determined by the relevant legislation and, in some instances, negotiated with the relevant Minister at the time of appointment. Any changes to these conditions aimed at reducing employee-related costs and contributing to savings, would need to be approved by the relevant Minister and, in some cases, may need to be effected by legislative amendments.
28. 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)."*

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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. 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.
31. In respect of whether the Tribunal may, having regard to the amendments to the SOOR Act, also consider any possible increase in remuneration based on a “work value increase” as distinct from a “general increase”, the following views were provided in correspondence of 18 October 2012 by Mr Chris Eccles, Director General of the Department of Premier and Cabinet, in his capacity as Assessor assisting the Tribunal:

*“As you will be aware, the objective of the Government’s wages policy is to limit the increase in overall public sector employee-related costs to 2.5 per cent, and to apply this policy equitably across all public sector employees and other public officials.*

*With that in mind, the Government considers that it would be open to the SOORT to determine a ‘work value’ increase in the remuneration for a particular office holder beyond the 2.5 per cent where this is appropriate having regard to significant changes in the particular office’s role and responsibilities.*

*However, to ensure consistency with the wages policy, any such increase will not of itself result in any corresponding increase in the allocation for employee-related costs provided to the relevant organisation. In effect, this*

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*means that while a work value increase beyond 2.5 per cent may be made, it would need to be offset by employee-related costs savings elsewhere."*

32. The wages policy that applies to the IRC and to the Tribunal is that: *"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 cent per annum"*.
33. The question that arises is whether a work value increase, that is, an increase that the Tribunal considers appropriate because of a change in a particular office's role and responsibilities, is subject to the wages policy and, in particular, to the 2.5 per cent cap on remuneration increases.
34. Although not free from doubt, it seems that it is open to the Tribunal to approach its determinations on the basis that the 2.5 per cent cap does not necessarily apply in such cases.
35. The existence of the policy does not mean that any individual public sector employee or group of employees cannot receive an increase in remuneration above 2.5 per cent. For example, an individual public sector employee may be entitled to a greater than 2.5 per cent increase if the individual moves up within the salary band for his or her position, if his or her position is re-graded or if he or she is appointed to a more highly-graded position.
36. By analogy it would seem reasonable to the Tribunal that an increase in remuneration for a particular office that is attributable solely to a change in role or responsibilities is not different from a re-grading of a public sector position or, where the change is significant, a change of position.
37. On that basis, the Tribunal considers that it is not precluded from making a determination to increase the remuneration payable to a court and related office holder or group of office holders in an amount greater than 2.5 per cent, where changes in work value warrant an increase greater than 2.5 per cent.

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38. Nevertheless the Tribunal is aware that, although Section 11(3) of the SOOR Act provides for an automatic appropriation from the Consolidated Fund to pay remuneration determined under the SOOR Act (for office holders listed in Schedule 1), that does not necessarily mean that employee related budgets will be increased to take account of increased remuneration payable. Therefore a determination based on a “work value’ increase will not necessarily cut across the objective of the Government's wages policy, because an organisation’s budget may not be increased by the amount of increased employee-related cost greater than 2.5 per cent that would result from a work value increase determined by the Tribunal, unless employee-related cost savings sufficient to offset that increase are found within the relevant organisation.

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

39. The office of President, Workers Compensation Commission is not defined as a “judicial officer” in accordance with the *Judicial Officers Act 1986*. 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.

40. 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 1986* is clearly an anomaly and would again urge the Government to review this matter. The Tribunal has determined 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.

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### **Conveyance Allowance**

41. The Tribunal has undertaken a review of the conveyance allowance. In determining the quantum of this allowance the Tribunal applies the average of leasing, on road and running costs for a range of vehicles which may be leased by office holders in the Court and Related Officers Group.
42. The Tribunal's analysis has shown that there has been no substantial change in the costs for leasing the sample motor vehicles over the last 12 months and considers that the Allowance should not be increased at this time.

### **Section 4 Conclusion**

43. Section 6AA has had a significant impact on the way this Tribunal makes its determination. The Tribunal notes that the legislation has been passed by Parliament and it is the obligation of the Tribunal to undertake its duties consistently with the legislation. On that basis the Tribunal, after considering the views of the Assessor, considers that an increase of 2.5 per cent is appropriate and so determines.
44. Pursuant to Section 13 of the *Statutory and Other Offices Remuneration Act 1975* the Tribunal determines that the remuneration to be paid to office holders on and from 1 October 2012 shall be as specified in Determination 1.

### **The Statutory and Other Offices**

#### **Remuneration Tribunal**

**Helen Wright**

9 November 2012

**Determination of the Remuneration of Court and Related Officers Group  
Effective on and From 1 October 2012**

**Determination No 1**

Salary	\$ per annum	Conveyance Allowance (1)
Chairperson, Law Reform Commission	\$387,200	\$22,550
Director of Public Prosecutions	\$387,200	\$22,550
Solicitor-General	\$387,200	\$22,550
Crown Advocate	\$348,480	\$20,330
Deputy Director of Public Prosecutions	\$348,480	\$20,330
Senior Crown Prosecutor	\$313,630	\$16,235
Senior Public Defender	\$313,630	\$16,235
Deputy Presidents, Workers Compensation Commission	\$282,260	\$16,235
Deputy Senior Crown Prosecutor	\$282,260	\$16,235
Deputy Senior Public Defender	\$282,260	\$16,235
Solicitor for Public Prosecutions	\$282,260	\$16,235
Senior Commissioner Land and Environment Court	\$271,040	\$16,235
Crown Prosecutor	\$257,880	\$16,235
Public Defender	\$257,880	\$16,235
Commissioner Land and Environment Court	\$255,550	\$16,235
Acting Deputy President Workers Compensation Commission	\$1,170 per day	-

**Conveyance Allowance**

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

# **Determination of the Remuneration of Court and Related Officers Group Effective on and From 1 October 2012**

## **Determination No 2**

### **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 6-15.11 to 6-15.16 of the Personnel Handbook, to each of the office holders listed above who are provided, as a condition of their employment with approved annual leave.

### **The Statutory and Other Offices**

#### **Remuneration Tribunal**

**Helen Wright**

9 November 2012