

REPORT

and

DETERMINATION

under

SECTION 13

of the

STATUTORY AND OTHER OFFICES

REMUNERATION ACT, 1975

PUBLIC OFFICE HOLDERS GROUP

9 November 2012

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Public Office Holders 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 Public Office Holders Group comprises those public offices listed in the Schedules of the Act (except for the Judges and Magistrates Group and the Court Related Officers Group), which have been grouped together by the Tribunal for remuneration purposes. The remuneration for the majority of office holders in this Group is determined as a fixed salary amount. Employer on-costs, such as the Superannuation Guarantee Levy, are additional to the salary amount determined. This Group also comprises a small number of office holders who, pursuant to Section 11A of the Act, have elected to receive, and for whom the Minister has approved access to, remuneration packaging arrangements identical to the SES.
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

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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.

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. The Tribunal's Report and Determination of 2011 for the Public Office Holders 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.
6. During the past year the Tribunal has made three special determinations in respect of three new offices in the Public Office Holders Group: the Workcover Independent Review Officer, the Public Service Commissioner, and the Mental Health Commissioner.
7. The above special determinations of the Tribunal were published in the Government Gazette and tabled in Parliament.

Section 2 Submissions Received

Government Submission

8. The Government's submission recommends that this Group receive an increase of 2.5 per cent.
9. That recommendation is consistent with the 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.

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Ombudsman

10. The Ombudsman has requested that the Tribunal review the remuneration for this position having regard to changes that have occurred in the role and responsibilities since the Tribunal last reviewed the position in 2004. The Ombudsman submits that since 2004 significant changes, including new responsibilities associated with public interest disclosures and convening and supporting the NSW Child Death Review Team, have had an impact on both the office and the position of Ombudsman.

Section 3 2012 Review

11. 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.
12. 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.
13. 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

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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.

14. 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 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").
15. 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.
16. 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.
17. 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.
18. 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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19. 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".
20. In finding savings sufficient to fund increases above 2.5 per cent, it appears that public 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.
21. Office holders within the Public Office Holders 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.
22. 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

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the adjustment after the commencement of its operation (which would normally be prospective)."

23. 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.
24. No office holder has made a submission regarding employee-related cost savings for consideration by the Tribunal in its 2012 review. 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.
25. 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" Mr Chris Eccles, Director General of the Department of Premier and Cabinet, in correspondence of 18 October 2012, provided the following views 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

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employee-related costs provided to the relevant organisation. In effect, this 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.”

26. 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”.*
27. 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.
28. 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.
29. 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.
30. 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, even a change of position.
31. On that basis, the Tribunal considers that it is not precluded from making a determination to increase the remuneration payable to a public 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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32. 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.
33. The Tribunal will, as requested by the Ombudsman, engage external experts to carry out a work value assessment of the current role of the Ombudsman. This may take some time and it would be appropriate for the result of that review to be considered during the 2013 review (which will commence earlier than previously), together with those requests deferred during the 2011 review if the relevant office holders choose to again lodge submissions for consideration.

Section 11A Office Holders

34. Historically, when an officer has elected to receive employment benefits pursuant to section 11A of the SOOR Act, the Tribunal has determined a total remuneration package payable to that office holder. Determinations which provide for a total remuneration package are listed separately (Determination No.2) from those determinations which are expressed as a salary only (Determination No.1).
35. For the 2012 determination the Tribunal will continue to identify, in Determination No.2 of the Public Office Holders report and determination, those offices which are held by individuals who have elected to receive a total remuneration package pursuant to section 11A. The Tribunal will also make a salary-only determination for those particular offices and list that salary in the general determination for Public Office Holders in Determination No. 1. This is to ensure that a current determination exists for these roles should the incumbent officer revoke his/her election or if a new officer is appointed to the role.

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Section 4 Conclusion

36. Section 6AA has had a significant impact on the way this Tribunal makes its determinations. The Tribunal, after considering the views of the Assessor, considers that an increase of 2.5 per cent is appropriate and so determines.

37. Pursuant to Section 13 of the Statutory and Other Offices Remuneration Act 1975, as amended, 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 in respect of the Public Office Holders and Determination 2 in respect of Section 11A Office Holders.

The Statutory and Other Offices

Remuneration Tribunal

Helen Wright

Dated: 9 November 2012

Determinations for the Public Office Holders Group

Determination No 1

Determination of the remuneration the Public Office Holders Group Effective on and from 1 October 2012

Salary	\$ per annum
Public Service Commissioner	\$460,045
Commissioner Police Integrity Commission	\$438,725
Auditor General	\$427,955
Ombudsman	\$426,855
Commissioner, NSW Crime Commission (Note 1)	\$423,540
Assistant Commissioner, NSW Crime Commission	\$401,255
Full time Member and CEO, Independent Pricing and Regulatory Tribunal (Note 1)	\$381,465
President, Mental Health Review Tribunal	\$346,355
Electoral Commissioner (Note 1)	\$333,115
Valuer General (Note 1)	\$308,150
Workcover Independent Review Officer	\$307,500
Deputy President Mental Health Review Tribunal	\$303,025
Information Commissioner	\$300,480
Privacy Commissioner	\$289,975
Chairperson, Consumer Trader and Tenancy Tribunal	\$281,500
Mental Health Commissioner	\$278,800
President, Guardianship Tribunal	\$275,625
Parliamentary Budget Officer	\$274,790
Principal Claims Assessor (Motor Accidents Compensation Act)	\$273,725
Deputy Chairperson Consumer Trader and Tenancy Tribunal	\$260,350
Deputy Chairperson, Law Reform Commission	\$258,475
Commissioner, Law Reform Commission	\$247,890
Deputy President Administrative Decisions Tribunal	\$247,890
Clerk of the Legislative Assembly	\$241,330
Clerk of the Parliaments	\$241,330
Executive Manager, Parliamentary Services	\$241,330

Determinations for the Public Office Holders Group

Salary	\$ per annum
Registrar Workers Compensation Commission	\$241,330
Senior Arbitrator, Workers Compensation Commission (legally qualified)	\$223,995
Deputy President, Guardianship Tribunal	\$215,640
Senior Member, Consumer Trader and Tenancy Tribunal	\$212,490
Deputy Clerk, Legislative Assembly	\$207,170
Deputy Clerk, Legislative Council	\$207,170
Senior Arbitrator, Workers Compensation Commission (not legally qualified)	\$206,295
Arbitrator, Workers Compensation Commission (legally qualified)	\$197,770
Chairperson, Local Land Boards	\$197,730
Registrar, Aboriginal Land Rights Act 1983	\$191,390
Assessor (Civil Claims)	\$183,125
Member, Consumer Trader and Tenancy Tribunal	\$183,125
Arbitrator, Workers Compensation Commission (not legally qualified)	\$177,795
Chairperson, Board of the Aboriginal Housing Office	\$142,895
Member of the New South Wales Aboriginal Land Council (Note 2)	\$127,485
Chairperson, Infrastructure NSW	\$73,545
President Mental Health Review Tribunal (part time daily rate)	\$1,440
Deputy President Mental Health Review Tribunal (part time daily rate)	\$1,260
Senior Member, Consumer Trader and Tenancy Tribunal (part time daily rate)	\$880
Assessor Civil Claims (daily rate)	\$760
Member, Consumer Trader and Tenancy Tribunal (part time daily rate)	\$760

Note 1 The Public Office Holders of these public offices have elected to be provided with employment benefits pursuant to section 11A of the Act and the remuneration packages are listed in Determination 2.

Note 2 The Chairperson shall receive an allowance of 10% (i.e. a total of \$140,230 per annum) and the Deputy Chairperson shall receive an allowance of 5% (i.e. a total of \$133,860 per annum).

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.

Determinations for the Public Office Holders Group

Determination No 2

Determination of Remuneration of Public Office Holders Who Have Elected to be Provided With Employment Benefits Pursuant to Section 11a of the Act Effective on and from 1 October 2012

The Tribunal determines that the remuneration packages per annum for Public Office Holders who have elected to be provided with employment benefits pursuant to section 11A of the Act shall be:

Public Office Holder	Remuneration
Commissioner, NSW Crime Commission	\$441,690
Full time Member and CEO, Independent Pricing and Regulatory Tribunal	\$398,880
Electoral Commissioner	\$350,530
Valuer General	\$325,565

The Statutory and Other Offices

Remuneration Tribunal

Helen Wright

Dated: 9 November 2012