

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Declaration of General Ruling (State Wage Case 2023) [2023] QIRC 263*

PARTIES: **QUEENSLAND COUNCIL OF UNIONS**
and
TOGETHER QUEENSLAND, INDUSTRIAL UNION OF EMPLOYEES
and
THE AUSTRALIAN WORKERS' UNION OF EMPLOYEES, QUEENSLAND
(applicants)
v
STATE OF QUEENSLAND (OFFICE OF INDUSTRIAL RELATIONS)
and
LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND LTD
(respondents)

FILE NOS: B/2023/46; B/2023/47; B/2023/48

PROCEEDING: Application for Declaration of General Ruling

DELIVERED ON: 12 September 2023

HEARING DATE: 31 August 2023

MEMBER: Davis J, President, O'Connor VP, Power IC

ORDERS: **1. Pursuant to s 463 of the IR Act it is declared that upon the proper construction of s 459A of the IR Act that:**

(a) any order or component of a ruling made pursuant to s 459A(2) may only apply to the employees or class of employees, described in s 459A(1)(b), whose wages would equal or exceed the wages payable under a certified agreement, determination or directive issued under the *Public Sector Act 2022* (Qld); and

(b) any order or component of a ruling made pursuant to s 459A(2) of the Act may take effect from the date of the general ruling made under s 458 of the Act.

LEGISLATION: *Industrial Relations Act 2016, s 3, s 4, s 458, s 459, s 459A, s 460, s 463, s 464, Schedule 5*
Industrial Relations and Other Legislation Amendment Act 2022
Industrial Relations Act 1999, s 287, s 288, s 686, s 687
Public Sector Act 2022, s 308

Public Service Act 2008, s 52, s 54

CASES: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, cited

Australian Hotels Association v and United Workers' Union [2020] FWCFB 1574, cited

R v A2 (2019) 269 CLR 507, cited

The Queensland Public Sector Union of Employees v Queensland Fire and Rescue - Senior Officers Union of Employees (2009) 192 QGIG 39, cited

Together Queensland Industrial Union of Employees v State of Queensland (Queensland Corrective Services [2022] ICQ 6, (2022) 314 IR 166, followed

APPEARANCES: Mr C Massy, Counsel directly instructed by Mr M Thomas, for Together Queensland, Industrial Union of Employees (applicant in B/2022/47).

Mr N Tosh, for the Queensland Council of Unions (applicant in B/2022/48).

Mr G Taylor, for The Australian Workers' Union of Employees, Queensland (applicant in B/2022/46).

Mr C Murdoch, KC and with him Dr M Brooks, Counsel and Mr L Grant, Counsel, Crown Law for the State of Queensland (Office of Industrial Relations), first respondent.

Mr C Lowe, for The Local Government Association of Queensland Ltd, second respondent.

Background

[1] Together Queensland, Industrial Union of Employees (TQ),¹ and the Queensland Council of Unions (QCU),² seek declarations pursuant to s 463 of the *Industrial Relations Act* 2016 (the IR Act) that upon the proper construction of s 459A:

(a) any order or component of a ruling made pursuant to s 459A(2) may only apply to the employees or class of employees, described in s 459A(1)(b), whose wages

¹ Application in Existing Proceedings filed by Together Queensland, Industrial Union of Employees on 7 August 2023.

² Application in Existing Proceedings filed by the Queensland Council of Unions on 7 August 2023.

would equal or exceed the wages payable under a certified agreement, determination, or directive issued under the *Public Sector Act 2022* (Qld); and

- (b) any order or component of a ruling made pursuant to s 459A(2) of the Act may take effect from the date of the general ruling made under section 458 of the Act.

[2] It is not in dispute that the two issues requiring determination are:

- (a) to what extent may an order under s 459A(2) be made; and
- (b) when does any order made under s 459A operate.

Statutory Provisions

[3] Section 3 of the IR Act identifies the main purpose of the IR Act to be as follows:

"3 Main purpose of Act

The main purpose of this Act is to provide for a framework for cooperative industrial relations that -

- (a) is fair and balanced; and
- (b) supports the delivery of high-quality services, economic prosperity and social justice for Queenslanders."

[4] Section 4 sets out how the purpose of the IR Act is to be achieved in, relevantly, the following terms:

"4 How main purpose is primarily achieved

The main purpose of this Act is to be achieved primarily by -

- (a) supporting a productive, competitive and inclusive economy, with strong economic growth, high employment, employment security, improved living standards and low inflation; and

...

- (d) providing for a fair and equitable framework of employment standards, awards, determinations, orders and agreements; and

...

- (f) providing for a guaranteed safety net of fair, relevant and enforceable minimum employment conditions through the Queensland Employment Standards; and

- (g) ensuring wages and employment conditions provide fair standards in relation to living standards prevailing in the community; and
- (h) promoting collective bargaining, including by -
 - (i) providing for good faith bargaining; and
 - (ii) establishing the primacy of collective agreements over individual agreements; and
- ...
- (o) being responsive to emerging labour market trends and work patterns; and
- (p) providing for effective, responsive and accessible mechanisms to support negotiations and resolve industrial disputes; and ..."

[5] Section 458 of the IR Act sets out the power of the Full Bench to make general rulings as follows:

"458 Power to make general rulings

- (1) The full bench may make general rulings about -
 - (a) an industrial matter for employees bound by an industrial instrument if multiple inquiries into the same matter are likely; or
 - (b) a Queensland minimum wage for all employees.
- (2) The full bench must ensure a general ruling about a Queensland minimum wage for all employees is made at least once each year.
- (3) Before conducting a hearing about the ruling, the full bench must -
 - (a) give reasonable notice, in the way it considers appropriate, of its intention to conduct the hearing; and
 - (b) give all interested persons an opportunity to be heard."

[6] Section 459 of the IR Act identifies the requirements for a general ruling in the following terms:

"459 Requirements for general rulings

- (1) A ruling -
 - (a) must state a date (the *stated date*) on and from which it has effect; and

- (b) has effect as a decision of the full bench on and from the stated date.
- (2) A ruling may exclude from the operation of any of its provisions -
 - (a) a class of employers or employees; or
 - (b) employers or employees in a particular locality; or
 - (c) an industrial instrument or part of an industrial instrument.
- (3) As soon as practicable after making a ruling, the registrar must publish a notice of the ruling and the stated date on the QIRC website.
- (4) The notice, on and from the stated date, replaces a notice of a ruling on the same subject matter previously published.
- (5) The ruling continues in force until the end of the day immediately before the stated date for a subsequent ruling on the same subject matter."

[7] Section 459A was inserted by the *Industrial Relations and Other Legislation Amendment Act 2022*. That section of the IR Act gives the Commission a discretion not to apply a general ruling to the wages payable to employees, or a class of employees, under an award. Section 459A relevantly provides:

"459A Provision about general ruling for State wage case

- (1) This section applies if -
 - (a) the commission makes a general ruling under section 458(1)(a) that increases the wages payable to employees under 1 or more awards; and
 - (b) applying the increase to the wages payable to employees, or a class of employees, under a particular award would result in the wages payable to the employees under the award equalling or exceeding the wages payable to employees in relation to the same employment under—
 - (i) a certified agreement or arbitration determination; or
 - (ii) a ruling under the *Public Service Act 2008*.
- (2) Without limiting section 459(2), the ruling may provide that the increase does not apply to the wages payable to the employees, or the class of employees, under the award."

[8] Section 460 of the IR Act provides as follows:

"460 Relationship with industrial instruments

- (1) If a ruling takes effect while an industrial instrument, other than an industrial instrument or part of an industrial instrument excluded under section 459(2), is in force -
 - (a) the industrial instrument is taken to be amended so it is consistent with the ruling on and from the stated date; and
 - (b) the amendment has effect as an industrial instrument on and from the stated date.
- (2) The registrar may amend an industrial instrument taken to be amended under subsection (1) as the registrar considers appropriate -
 - (a) on an application made under the rules; or
 - (b) on the registrar's own initiative.
- (3) This section applies despite chapter 3."

The construction of s 459A

[9] In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*,³ the High Court discussed the approach to be taken in finding the meaning of the text:

"This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."⁴

[10] The High Court has warned of approaching the task of statutory construction by reference to what a judge might regard as desirable policy, imputing that to the legislation and then characterising that as the purpose of the legislation.

[11] The purpose of s 459A as it relates to the "State wage case" is expressed in the second reading speech to the *Industrial Relations and Other Legislation Amendment Bill 2022*:

"Clause 43 inserts a new section 459A (Provision about general ruling for State wage case) to provide the Commission with express discretion when considering whether to apply a State Wage Case general ruling to

³ (2009) 239 CLR 27, [47].

⁴ See the recent summary of the principles of statutory construction explained in *R v A2* (2019) 269 CLR 507 at [32]-[44] and [162]-[163].

awards. A unique feature of the Queensland industrial relations jurisdiction is that awards, including increases to rates of pay, can be amended by a variety of means, including through rolling up of provisions from expired agreements. Section 145 provides for the flow-on of clauses (including clauses regarding rates of pay) in a certified agreement or determination into a parent award on application to the Commission. The State Wage Case also facilitates increases in awards when the Commission determines to flow on the outcome. Since 2011 the full bench of the QIRC has mirrored the outcome of the Fair Work Commission's Expert Panel in its decision in the Annual Wage Review and all awards, regardless of whether they have received rate increases through other means have been increased. As of result of SWC outcomes being flowed on to all awards and the unique features under the IR Act, from time to time some award rates have exceeded the relevant agreement or determination rates for employees, most specifically in relation to public sector awards. Clause 43 provides the QIRC with discretion to limit the application of a State Wage Case increase so that it does not apply to an award or awards that would result in the increase exceeding award rates above the agreement or determination. This amendment is consistent with of [sic] the main purposes of the Act in relation to the primacy of collective bargaining as the means for determining wages and conditions for employees." (emphasis added)

[12] There are three jurisdictional facts identified in s 459A(1)(a) and (b). Under s 459A(1)(a) and (b) the Commission must be satisfied:

- (a) the Commission has made a general ruling under s 458(1)(a);
- (b) the general ruling 'increases the wages payable to employees under 1 or more awards'; and
- (c) whether applying the increase to wages payable to employees under one or more awards in fact results in those wages *equalling or exceeding the wages payable to employees in the same employment under a certified agreement or arbitration determination, or vis a directive under the Public Sector Act 2022.*

[13] For the purpose of s 459A(1)(a), "wages" is defined in Schedule 5 of the IR Act as follows:

"*wages* means—

- (a) an amount payable to an employee for—
 - (i) work performed, or to be performed, by the employee; or
 - (ii) a public holiday; or
 - (iii) leave the employee is entitled to; or

- (iv) termination of employment; or
- (b) a salary; or
- (c) an amount payable from wages for the employee, with the employee's written consent."

- [14] The State of Queensland submit that whilst the IR Act broadly defines the term "wages", on a proper construction, s 459A is confined to "salary" as opposed to allowances.
- [15] Consistent with s 141(1)(a) of the IR Act, the Commission must ensure that the Award provides for fair and just wages. As was observed in *Australian Hotels Association v and United Workers' Union*⁵ fairness is to be assessed from the perspective of the employees and employers covered by the modern award in question.
- [16] Whilst s 459A(1) is concerned with the jurisdictional preconditions, s 459A(2) deals with the power which may be exercised if the jurisdictional preconditions are satisfied.
- [17] Section 459A(1)(a) requires a general ruling which increases the wages payable to employees under one or more awards. Section 459A(1)(b) is concerned with employees or a class of employees, whose wages under the award would exceed the rates payable under the certified agreement, arbitration determination or directive under the *Public Sector Act 2022*.
- [18] The discretion under s 459A(2) is triggered when the Commission is satisfied the matters in s 459(1)(a) and (b) exist.
- [19] We accept the discretion under s 459A(2) may only be exercised in a "binary manner". In other words, the Commission is not afforded a discretion under s 459A(2) to apply only part of the increase to wages.
- [20] It is accepted that in respect of s 459A(1)(b) it is incumbent upon the State of Queensland and the Local Government Association of Queensland to identify the awards which may be impacted by any general ruling. Equally, it is accepted that the onus rests on a party who seeks an order under s 459A(2) to persuade the Full Bench that it has jurisdiction to do so.

⁵ [2020] FWCFB 1574.

- [21] Whilst the issue of the relevant considerations in exercising the discretion under s 459A(2) was briefly canvassed during oral argument before the Full Bench, it is accepted that this is a matter requiring more detailed and considered submissions.

The effect of Ministerial Directive 12/12

- [22] Ministerial Directive 12/12 "State Wage Case and Certified Agreements" was made under the repealed *Public Service Act* 2008 (PS Act). It provides that where a State Wage Case general ruling has the effect that an award will provide for a higher wage than a certified agreement for employees under that award, the award rate will prevail. The Directive operated to ensure employees obtain the benefit of the higher wage rate in an award where a certified agreement otherwise applies.
- [23] The directive provides as follows:

- | | |
|-----------------------------------|--|
| "1. TITLE: | State Wage Case and Certified Agreements |
| 2. PURPOSE: | This ruling provides that State Wage Cases do not increase the wages paid under certified agreements. |
| 3. LEGISLATIVE PROVISIONS: | Sections 52 and 54 of the <i>Public Service Act</i> 2008. Section 687 of the <i>Industrial Relations Act</i> 1999. |
| 4. APPLICATION: | This directive applies to all public service employees who are covered by a certified agreement. |
| 5. DEFINITIONS: | <i>award</i> is as defined in the <i>Industrial Relations Act</i> 1999 (Qld)

<i>certified agreement</i> is as defined in the <i>Industrial Relations Act</i> 1999 (Qld)

<i>State Wage Case</i> means a Ruling or a Statement of Policy of the Queensland Industrial Relations Commission made under section 287 or 288 of the <i>Industrial Relations Act</i> 1999 (Qld) about the Queensland minimum wage |

- 6. RULING:** A State Wage Case does not increase the wages paid under a certified agreement.
- However, where a State Wage Case has the effect that an award provides for wages which are greater than a certified agreement that applies to the employees covered by the award, the award wages prevail.
- 7. EFFECTIVE DATE:** This directive is to operate from 30 November 2012.
- 8. VARIATION:** This directive can be varied by-
- the Minister responsible for industrial relations; or
 - legislation.
- 9. INCONSISTENCY:** Sections 52 and 54 of the *Public Service Act 2008* and sections 686 and 687 of the *Industrial Relations Act 1999* apply when there is an inconsistency between an act, regulation or industrial instrument.
- 10. SUPERCEDES:** None.
- 11. PREVIOUS REFERENCES:** None."

[24] The making of Ministerial directives and the relationship between directives and industrial instruments (which include certified agreements)⁶ is governed by ss 52 and 54 of the *Public Service Act 2008* which provide:

"52 Relationship between directives and industrial instruments

- (1) This section applies if a directive deals with a matter all or part of which is dealt with under an industrial instrument.
- (2) The industrial instrument prevails over the directive to the extent of any inconsistency between the directive and the industrial instrument.
- (3) For subsection (2), a directive is not inconsistent with an industrial instrument to the extent that the remuneration and conditions of employment provided for in the directive are

⁶ *Public Service Act 2008*, s 4 and Schedule 4, Dictionary; *Industrial Relations Act 2016*, s 6 and Schedule 5, Dictionary.

at least as favourable as the remuneration and conditions of employment provided for in the industrial instrument.

(4) In this section—

directive includes—

- (a) a directive as applied by a regulation made for section 23; and
- (b) a decision made in the exercise of a discretion under a directive.

54 Rulings by industrial relations Minister

(1) The industrial relations Minister may make rulings about—

- (a) the remuneration and conditions of employment of non-executive employees; or
- (b) other matters under this Act that the Minister may make a ruling about.

(2) However, a ruling under subsection (1)(b) may only be made for non-executive employees.

(3) To remove any doubt, it is declared that the industrial relations Minister can make a ruling about the remuneration or conditions of employment of a public service employee who is covered by an industrial instrument.

(4) In this section—

non-executive employees means public service employees other than—

- (a) chief executives, senior executives or senior officers; or
- (b) other public service officers on contract whose remuneration is equal to, or higher than, the remuneration payable to a senior officer."

[25] Pursuant to s 308(2) of the *Public Sector Act 2022*, the Directive remains valid until such time as it is either amended or repealed under s 308(2)(c) of the Act. It has been neither amended nor repealed.

[26] Directive 12/12 would apply to wage rates after the Commission exercises its discretion under s 459A(2) and the ruling takes effect. As was considered in *Together Queensland Industrial Union of Employees v State of Queensland (Queensland Corrective Services)*⁷ the determination would be undertaken as follows:

⁷ [2022] ICQ 6, (2022) 314 IR 166.

"[48] The directive, and s 52 of the PS Act, require a twostep task. Firstly, it is necessary to consider the effect of the directive. Secondly, it is necessary to consider whether the directive is inconsistent (as the term is defined in s 52(3) of the PS Act) with the certified agreement.

[49] To determine the first question, it is necessary to:

1. identify the wages payable under the Award;
2. apply the State Wage Case increases to the Award wages;
3. identify the wages payable under the certified agreement;
4. compare the Award wages as increased by the State Wage Cases to the wages payable under the certified agreement;
5. determine whether the Award 'provides for wages which are greater than [the] certified agreement'."

[27] The discretion provided for in s 459A(2) is enlivened should the outcome of the inquiry be that the Award provides higher wages than the certified agreement.

When does an order made under s 459A(2) take effect

[28] Historically, the State Wage Case is heard before 1 September each year and the decision takes effect from 1 September. This provides all interested parties with some certainty with respect to the timing of the operation of State Wage Case decisions from year to year.

[29] The parties accept that if the discretion conferred by s 459A(2) is exercised, it would take effect from the operative date of the general ruling. We agree.

Making declarations

[30] The Commission's power to make declarations is contained in s 463 of the IR Act. Section 463 relevantly provides:

"463 Power to make declarations about industrial matters

- (1) The commission may, on application by an entity mentioned in section 464, make a declaration about an industrial matter.
- (2) The commission may make the declaration whether or not consequential relief is or could be claimed.
- (3) Subject to chapter 11, part 6, a declaration made by the commission under this section is binding in a proceeding under this Act.

464 Who may apply for declaration

The following may make an application mentioned in section 463—

- (a) a person who may be directly affected by the declaration;
- (b) an inspector;
- (c) an organisation of employees or employers of which a person mentioned in paragraph (a) is a member, if it is acting with the person's written consent;
- (d) an organisation of employees or employers who may be directly affected by the declaration."

[31] The Full Bench's power to make declaratory orders under s 463 of the IR Act is discretionary. The wide power conferred on the Commission by s 463 to make a declaration, is limited only by the requirement that it relates to an industrial matter.⁸ An industrial matter is defined in s 9 of the IR Act.

[32] The Union parties have filed applications for a general ruling seeking a variation to all awards and a variation to the Queensland minimum wage. There is no dispute that this is an industrial matter as defined in s 9 of the IR Act. Nor is there any dispute that the applicants meet the description of a "person" who may apply for a declaration pursuant to s 464 of the IR Act.

[33] The Full Bench recognises that the applications raise the issue of the proper construction of s 459A of the IR Act, a new provision inserted into the Act in 2022. The Full Bench further accepts that the issuing of the declaration would assist in the efficient and expeditious resolution of the substantive application and any future applications; better inform the way in which the parties advance their case; and how the discretion ought to be exercised under the section.

[34] The Full Bench is of the view that it is appropriate for it to exercise its discretion to issue the declaration sought.

Order

[35] Pursuant to s 463 of the IR Act it is declared that upon the proper construction of s 459A of the IR Act that:

⁸ *The Queensland Public Sector Union of Employees v Queensland Fire and Rescue - Senior Officers Union of Employees* (2009) 192 QGIG 39.

- (a) any order or component of a ruling made pursuant to s 459A(2) may only apply to the employees or class of employees, described in s 459A(1)(b), whose wages would equal or exceed the wages payable under a certified agreement, determination or directive issued under the *Public Sector Act 2022* (Qld); and
- (b) any order or component of a ruling made pursuant to s 459A(2) of the Act may take effect from the date of the general ruling made under s 458 of the Act.