QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 2016*

Queensland Council of Unions

*Applicant*

v

State of Queensland

*Respondent*

*Matter Nos. B/2023/46, B/2023/47 & B/2023/48*

# TOGETHER QUEENSLAND OUTLINE OF SUBMISSIONS IN REPLY

## INTRODUCTION

1. These submissions are made in response to the State of Queensland's outline of submissions dated 14 September 2023 (the **State's Submissions**). The position advanced by the State is that:

   (a) the economic conditions do not justify the adoption of the Fair Work Commission's annual wage review increase of 5.75% (the **AWR Decision**); and

   (b) irrespective of the quantum of any increase determined, in accordance with s. 459(2) of the *Industrial Relations Act* 2016 (Qld) (the **Act**) the Commission should, save for some minor exceptions, exclude all awards that apply to public servants from any general ruling because the wages of those employees are set by certified agreements.

2. Together Queensland, Industrial Union of Employees (**Together Qld**) opposes both of those contentions because:

(a) the State's Submissions in respect of the economic factor overstates the evidence and ignores that the prevailing economic conditions are consistent with the forecast on which the AWR Decision was based; and

(b) the contentions in respect of the exclusion of awards covering public service employees are inconsistent with the text of Chapter 3 of the Act, the scheme of the Act as a whole and the substance of the bargains struck between the parties.

ECONOMIC FACTORS

3. At [25] to [31] of the State's Submissions, the State submits that the prevailing economic conditions have changed from those which were prevalent at the time of the AWR Decision. Specifically, at [29] the State relies on slowing national economic growth, slower growth in employment, moderation in the inflation figures and moderation in Queensland's consumer price index.

4. Whilst there is some *actual* data available to the QIRC which was not available to the FWC when the AWR Decision was handed down, the currently available data is entirely consistent with the forecasts which were before the FWC. Annexure AS-1 to the affidavit of Alex Scott filed on 27 September 2023 sets out each of the measures identified in the State's Submissions and the forecasted measure which was before the FWC. The QCU has also filed a more detailed comparison of the data with its submissions.

5. Those comparisons reveal that the actual data relied upon by the State, as opposed to the forecasts before the FWC, is an insufficient basis to depart from the AWR Decision.

6. In any event, the State's Submissions misunderstands the consequences of the profound inflation challenges that have confronted employees in the last 12 months. On 1 September 2022 the State wage case was handed down. That increased wages by 4.6%. Since that time, annual inflation has been approximately 7.25%. The effect of that is that inflation in the past 12 months has

exceeded the wage increases by 2.6%. That means that the forecasted inflation of 3.75% for the 2023/2024 financial year, will leave Queensland workers some 6.4% behind from the last increase. That is, even if the factors relied upon at [29] in the State's Submissions represents improvement from the position which confronted the FWC when it handed down the AWR decision, an increase of 5.75% is more than justifiable in circumstances where that is necessary to remedy the effects of the substantial inflation since the last SWC which will persist until the next SWC.

7. Insofar as the State at [23] seeks to rely upon the decision of the Western Australian Industrial Relations Commission, that reliance is misplaced. The WAIRC expressly noted in its decision that inflation was tending lower in Western Australia from the national position.[1] That is not the position here. The effect of the evidence from the joint expert is that the economic conditions in Queensland mirror the national conditions.

8. At [24] the State relies upon the decision of the South Australian Employment Tribunal from December 2022. The basis for this reliance is not entirely clear. In that decision, the SAET departed from the 2022 Fair Work Commission because conditions were worsening. That does not support the position contended for by the State.

*Queensland Minimum Wage*

9. At [32] to [41] the State submits that the QIRC should not follow the FWC's lead in moving the Queensland minimum wage from the C14 to C13 level. The stated basis for this opposition is that the FWC noted that the move from C14 to C13 was an *interim* step.[2] The State's Submissions in this regard misunderstands the effect of the FWC's decision.

10. At [94] the FWC noted that the modelling revealed that a number of different household types earning the National Minimum Wage (**NMW**) fell below the

[1] *2023 State Wage Order* [2023] WAIRC 00330 at [94].
[2] See [38] of the State's Submissions.

60% poverty line. At [101] the FWC noted that the position was worse if the comparison was made with the Minimum Income for Healthy Living standard. At [107] the FWC noted that the NMW had not been established by reference to the needs of the low paid and had instead been set at the lowest classification available the C14 level.

11. At [108] the FWC also noted that that C14 level was an introductory rate which was conditional on time-based progression. That is, the progression from C14 to C13 in those awards was not depending upon the acquiring of new skills or qualifications but simply the progression of time in the role. At the conclusion of [108] the FWC held:

> *... A comprehensive review of the NMW should be undertaken by reference to the budget standards research and other relevant material to arrive at a NMW amount which is set having proper regard to the needs of the low paid and the other considerations in s 284. That is beyond the scope of the current Review, but we discuss later the interim measure we intend to take in this Review having regard to all the mandatory considerations in the minimum wages objective.*
>
> *[109] The application of the budget standards model to modern award classifications above C14 may also raise questions about whether modern award minimum wage rates are meeting the needs of the low paid.*

12. Then at [173] the FWC held:

> *[173] A wider review of the NMW in light of the budget standards research, the finalisation of the C14 review (which we anticipate will be completed later this year and will result in all C14 award classifications becoming genuinely transitional in nature) and other relevant matters (including the research being conducted as to gender segregation and undervaluation) is required. That wider review cannot be undertaken within the timeframe of the current Review. It is necessary therefore to identify an interim step that can be taken in this Review which gives appropriate weight to the needs of the low paid (s 284(1)(c)) but also balances this with the other mandatory considerations in the minimum*

*wages objective. The step we will take is to align the NMW with the current C13 rate, which is the lowest award rate which, apart from exceptions in a small number of awards, may apply to employees in respect of ongoing employment. This will result in a modest wage adjustment of 2.7 per cent.*

13. At [174] the FWC then held that the NMW should be increased by an additional 5.75%.

14. The FWC's observation about the movement being an interim step, read in context, should not be understood as suggesting that it is a step that might be undone. Rather, it was an acknowledgement that moving of the NMW from C14 to C13 would not address the persistent disadvantage that people on the NMW faced and that their needs were not being met by that rate. Put differently, it was an acknowledgment that more would need to be done in the future. Understood in that context, that observation does not represent a proper basis for the QIRC refusing to take that step at this time.

15. It should be noted that despite having an ample opportunity to identify any principled reason why the Commission should not move the Queensland minimum wage from C14 to C13, the State has not identified any basis. The closest the State comes to identifying a reason why the Queensland minimum wage should not be moved is that if it was moved in this way it would exceed the national minimum wage by $17.00 per week.[3] Two things should be noted about this.

16. *Firstly*, given the FWC's obvious concern that the NMW is not meeting the needs of the low paid, the QIRC should be comforted that the Queensland minimum wage is slightly higher.

[3] See [40] of the State's Submissions.

17. *Secondly*, the Queensland minimum wage has historically been set at a rate which was in advance of the NMW.[4] That has not presented any difficulty for the QIRC previously and, with respect, it should not on this occasion.

18. For those reasons, the State's Submissions in respect of the quantum of any increase and the question of whether the Queensland minimum wage should be moved from C14 to C13 should be rejected.

## IT IS FAIR AND JUST TO INCREASE THE RATES IN THE PUBLIC SERVICE AWARDS

19. This part of the submissions will deal with the State's contention that due to the presence of collective bargaining in respect of State Government employees, no increase in any public service awards should be granted. These submissions are to be found at [42] to [95] in the State's Submissions.

20. Before coming to the specific matters relied upon by the State, it is important to note that there are three fundamental difficulties with its contention.

21. *Firstly*, the contention is entirely inconsistent with the scheme of the Act. Aside from the continued assertion about the primacy of collective bargaining, the State's Submissions do not engage in any meaningful analysis of the text of the Act. Undoubtedly, that is because the text of the Act is against the State's position.

22. Section 3 of the Act sets out the Act's main purpose. Section 4 sets out how that purpose is to be achieved. Importantly, s. 4(d), (g) and (h) relevantly provide:

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

[4] The NMW in 2022 was set at the rate of $812.60 per week – National Minimum Wage Order 2022 at [4.1]. The Queensland minimum wage was set at the rate $850.50 per week - *Declaration of General Ruling (State Wage Case 2022)* [2022] QIRC 341 at [2](a).

*(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*

...

(Emphasis added)

23. In respect of sub-paragraph (d), it is important to note that the use of the word framework. In that framework no one type of instrument is identified as having primacy over the others.

24. In respect of sub-paragraph (h), whilst the promotion of collective bargaining is a means by which the Act's purpose is to be achieved, collective bargaining is only expressed to have primacy vis a vis individual agreement. That is, collective agreements are not expressed to have primacy as against the other instruments which form part of the fair and equitable framework.

25. In *Re Aurizon* (2015) 249 IR 55 at [144] and [145] the Full Bench of the FWC found, when considering the objects of the *Fair Work Act 2009* (Cth), that the means by which the Act are achieved are not to be given any particular hierarchy over one another.

26. Chapter 2 of the Act provides the provisions which establish the minimum conditions of employment which apply to all employees and employers. Section 18 provides that those condition cannot be displaced by industrial instruments unless the new provisions are more beneficial.

27. Chapter 3 provides for the making of Modern Awards. Section 141 sets out the general requirements for the Commission in exercising its power to make an

award, in particular, that section requires the Commission to ensure that a Modern Award provides for *fair and just* wages and employment conditions.

28. Chapter 4 of the Act provides for the making of collective agreements. Several things should be noted about collective agreements. *Firstly*, the making of certified agreements is not mandatory.

29. *Secondly*, whilst it is true that certified agreements apply to the exclusion of an applicable Modern Award[5], when certifying the agreements the Commission has to be satisfied that the employees covered by the collective agreements suffer no disadvantage.[6] That makes clear that the legislative scheme involves agreements which sit in advance or in betterment of the conditions offered under a Modern Award.

30. The effect of the foregoing is that the Act, when read as a whole, reveals a scheme whereby conditions are built one on top of another. The base level of conditions is those contained in the Queensland Employment Standard. The next level of conditions is those provided for in modern awards. From there, the top of the pyramid is certified agreements and/or determinations.

31. Whilst certified agreements or determinations reside at the top of the pyramid, the Act did not give the parties to a collective bargain carte blanche to agree on any terms. Importantly, certified agreements could not be inconsistent with the Queensland Employment Standards. Further, any certified agreement has to pass the no disadvantage test. The existence of the no disadvantage test in s. 199 of the Act indicates clearly that the parties were not to have complete freedom in respect of what they were to bargain. Their bargains were still to be subject of assessment against the minimum standards which had been determined by the independent umpire.

32. The State's Submission is, as a matter of principle, directly at odds with the scheme established by the Act. The effect of the State's Submissions is that once

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[5] See s. 19 of the Act.
[6] See ss. 199 and 210-213 of the Act.

parties have entered the stream of collective bargaining, the QIRC is relieved of the award setting obligations in respect of those employers and employees. The State offers no legislative basis for such a contention, and none exists.

33. The second substantial difficulty that the State faces is that its submissions are directly inconsistent with the text of the relevant provisions contained in ss. 141 and 142 of the Act.

34. There is no dispute that by application for a general ruling of the type that has been sought in this case requires the QIRC to vary an award in accordance with s. 147 of the Act. When exercising a power to vary an award the QIRC must comply with the requirements of ss. 141 and 142.

35. The first thing to be noted about s. 141(1) is that it imposes a mandatory obligation on the QIRC to ensure that a modern award provides for the matters set out in paragraphs (a) and (b). Whilst questions of what is *fair and just* and what are the *prevailing conditions* are broad evaluative of judgments, once those judgments are made the obligation imposed on the QIRC is a mandatory one. There is no discretion to withhold an amendment which answers the necessary description because of some nebulous concern about the effects that the variation might have on the bargaining behaviour of employers and employees.

36. It should also be noted that s. 141(1)(b) requires any award to *reflect* the prevailing employment conditions of employees covered or to be covered by the award. That is the award is to reflect, generally, the conditions enjoyed by persons who will be covered by it. That directly informs the consideration in s. 142(2)(a) concerning the need to have regard to the prevailing employment conditions of employee covered by the modern award. The reason that matter is considered under s. 142(2)(a) is because it is necessary for the QIRC to ensure that the award contains conditions which *reflect* those prevailing conditions.

37. Contrary to the State's Submissions, the prevailing conditions obtained by way of collective bargaining are not a basis on which the QIRC should be less inclined

to increase the award rates. The benefits obtained under collective agreements, if they prevail over time, are to be reflected in the award.

38. The most substantial difficulty for the State in its contention that the existence of collective bargaining, and the asserted adverse effects on collective bargaining, are reasons not to increase award wages is to be found in the text of ss. 141(2) and 142(2). In those sections the legislature has expressly identified the considerations that the QIRC must have regard to. Not one of those considerations includes the existence of collective bargaining or the effects on collective bargaining. It would have been a simple matter for such considerations to be included if they were relevant. However, when one has regard to the scheme of the Act it is unsurprising that they were not included.

39. It should be remembered that a similar argument was advanced by the State in *Declaration of General Ruling (State Wage Case 2019)* [2019] QIRC 169. This argument was rejected on the basis that there was no evidence to support any adverse effects on bargaining – see [73] to [74]. The same observations are apposite in this case.

40. The third substantial difficulty that the State's Submissions face is they fail to have regard to the effect of the collective bargaining between the parties. The bargains struck by the parties were that the wage rates would include either the amount specified in the agreement or the amount contained in the award if it was higher. An example of the clause can be seen at clause 2.10(6) of the *State Government Entities Agreement 2019* which relevantly provided:

> *"It is a term of this Agreement that no person covered by this Agreement will receive a rate of pay which is less than the corresponding rate of pay in the relevant parent award."*
>
> (Emphasis added)

41. Therefore, the award rates are the rates that the parties have *bargained* for. It cannot be an impediment to bargaining to increase awards simply because the

parties have agreed that those rates will apply. They are simply giving effect to the bargain that has been reached between the parties. The parties have chosen to incorporate the awards into their bargains.

42. It was, of course, open to the parties to have excluded the operation of the award from their bargains. If they had chosen to do so, they would have needed to satisfy the QIRC that the agreements passed the no disadvantage test. However, provided that could be done, the parties could have chosen to exclude the operation of the award from the relevant employees.

43. Insofar as Directive 12/12 might alter the position, it is to be remembered that the Directive is issued by a member of the Executive. That is, it is a burden voluntarily assumed by the employer. It is a matter which they are at liberty to withdraw at any moment. However, the presence of that voluntarily assumed burden, is not a consideration which the QIRC should take into account when exercising its mandatory statutory duties. That is, the fact that the employer has chosen to impose additional obligations upon itself should not result in the QIRC adopting an unorthodox approach to the exercise of its statutory powers.

44. To this effect in *Declaration of General Ruling* (State Wage Case 2018) [2018] QIRC 113 the Full Bench observed at [45]:

> *[45] In so deciding, we note that while our decision will directly affect only some 6,000 award-reliant employees in the Queensland jurisdiction it will indirectly affect some 200-500 local government employees and approximately 19,000 public sector employees whose conditions of employment - via the terms of certified agreements or Directive 12/12: State Wage Case and Certified Agreements - include provisions which will entitle them to receive all, or part, of the 3.5 per cent wage and allowance adjustment delivered by this decision. However, the indirect effect of this decision is as a result of decisions made by the employers of such employees, not this Commission.*
>
> (Emphasis added)

45. For those reasons the QIRC should not accept the State's Submissions that the mere existence of collective bargaining or the contention that any adverse effect on bargaining are reasons why the QIRC should not apply any general ruling to the public service awards.

46. In the circumstances where in *Declaration of General Ruling (State Wage Case 2022)* [2022] QIRC 341 the QIRC made a determination as to what wages were fair and just, and having regard to the joint economic evidence as to the prevailing conditions in Queensland since that time, and in circumstances where there have been no other material changes, it follows that it must be fair and just to increase the public sector awards by an amount to reflect the increase in the cost of living increases endured by the employees covered by those awards.

## RESPONSE TO STATE'S SUBMISSIONS

47. The following responds to specific submissions made by the State in support of its contention that no increase should be granted to the awards applying to public servants.

*Collective bargaining sets new wage rates*

48. At [42] to [48] of the State's submissions, general submissions are made in support of the contention that where there is collective bargaining, no increase to the award rates should be made.

49. It should be noted that aside from asserting that it is not appropriate for an increase to be made where there is collected bargaining, those submissions do not develop any principled reason why the matters asserted should be accepted. For the reasons identified above at [19] to [46] those submissions should not be accepted.

*The AWR is directed to a different population of employees to Queensland public sector*

50. At [49] to [52] the State submits that the AWR Decision is directed at a different cohort of workers to the State wage case. In particular the State relies upon the

fact that 20.5% of the national workforce are reliant on modern awards for their terms and conditions.

51. The difficulty with the State's Submissions in this regard is it is not comparing apples with apples. Whilst it is true that 20.5% of the national workforce are covered by modern awards, there are a substantial number of employees whose employment is covered by enterprise agreements which would otherwise be covered by modern awards.

52. There is no suggestion that the AWR Decision should exclude from its operation any variation to awards where the employees are covered by an enterprise agreement. For example, public servants in Victoria are the subject of Federal awards and Federal enterprise agreements. Similarly, Commonwealth public servants are the subject of both the modern award and the enterprise agreements covering their relevant department. Despite that, the underpinning modern awards are varied each year. That is undoubtedly because it is necessary for the modern awards to be updated on an annual basis so that they are relevant to the bargains that are being struck for the purposes of the better off overall test.

***Bargaining sets wages and conditions***

53. At [53] to [56] the State advances the general principle that where wages have been settled through bargaining or determination there should be no change in the underlying award. The rationale for this purported principle is set out at [55] of the State's Submissions. The State's Submissions should not be accepted for three reasons.

54. *Firstly*, for the reasons described above, it is directly inconsistent with the scheme of the Act and finds no support in the provisions of ss. 141 and 142 of the Act.

55. The State seeks that the QIRC effectively read words into the Act which are not present and do not meet the test described in *Taylor v. Owners – Strata Plan 11564* (2014) 253 CLR 531 per French CJ, Crennan and Bell JJ at [35] to [40] and per

Gageler and Keane JJ (assenting in the result, but not as to the relevant principles) at [65].

56. *Secondly,* the State's Submissions wilfully overlook the nature of the bargain struck between the parties. All of the bargain outcomes include a provision which requires the employer to pay either the wages expressed in the certified agreement or the wages payable under the relevant award if it is higher. The effect of this is that the wages which have been bargained for are those contained in the relevant award. In circumstances where that is the bargain it is disingenuous to now submit that the award should be held back because the parties have reached a bargain.

57. Similarly, an increase in the award will not distort the starting position for bargaining. This contention fundamentally misunderstands the role that the award plays in setting a safety net on top of which bargaining commences. In any event, in circumstances where the parties have expressed their bargain for the award wages to be applicable, there is no distortion because the parties' bargain has expressly embraced this proposition.

58. *Thirdly,* that "principle" would mean that once parties reached a collective agreement the underpinning award should never be the subject of any variation. If that were the case within two or three rounds of bargaining the no disadvantage test would be completed denuded of any operation. That is not what the legislation provides for.

59. It should also be noted that the evidence from Mr Alex Scott is to the effect that by reason of the employer's historical and ongoing unilateral imposition of a wages policy, there has not been real bargaining concerning wage rates.[7] That is, the union has been generally unsuccessful attempts to move government away from the predetermined wage rates. Further, the experience of the union in respect of arbitration has been wholly unsatisfactory.[8]

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[7] See [9] of the affidavit of Alex Scott dated 27 September 2023.
[8] See [10] of the affidavit of Alex Scott dated 27 September 2023.

60. The suboptimal outcome for bargaining for public servants in respect of wage rates can also be seen from the evidence of Professor Mitchell. The bargaining outcomes in the "Core" Agreements for the last decade have tracked consistently below the wage price index and have represented real wages growth of only 1.22% over that time.[9] This is despite there being credible evidence to suggest that the public sector productivity for the same period has run at an average of 3.4% per annum.[10]

61. The effect of this is even if the State was right that the existence and the outcomes from bargaining should be taken into account, the evidence as to the suboptimal results produced by bargaining in respect of wage rates is a powerful factor against the contention that no increase should be granted because of the bargain outcomes.

*Prevailing employment conditions*

62. At [57] to [67] the State makes a number of submissions about both low paid employees and relevance of prevailing employment conditions.

63. The submissions are [59] should not be accepted. The OO3-1 classifications under the Youth Detention Centres Award - State 2016 do not represent the entry level rate in the Public Sector. The correct entry level rate is the AO2-1/OO2.1 level.[11] Those entry rates are substantially lower and significantly closer to the definition of low paid. If the award is not increased, having regard to the current inflationary factors, those classifications will go perilously close to meeting the definition of low paid.

64. At [60] to [67] the State makes a number of submissions about other benefits contained in the various certified agreements. The State submits that those benefits relevant to assessing the prevailing employment conditions of the relevant employees.

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[9] Centre of Full Employment and Equity Report - Queensland State Wage Case, September 2023 at [81]
[10] Centre of Full Employment and Equity Report - Queensland State Wage Case, September 2023 at [123] to [126].
[11] See [44] to [50] of the affidavit of Alex Scott dated 27 September 2023.

65. With respect, these submissions misunderstand the nature of the consideration identified at s. 142(2)(a) of the Act. The reference to the consideration of the prevailing employment conditions of employees covered by the modern award must be read in the context of s. 141(1)(b) of the Act. That is, the overriding obligation of the Commission when exercising its award variation powers is to ensure that the award *reflects* the prevailing conditions. That is why it is a consideration in s. 142(2) of the Act.

66. The fact that the certified agreements contain monetary payments which are not contained in the relevant award, is a factor in support of the award wages being higher. It is necessary for the award wages to be higher to reflect the prevailing conditions which are not found in the award.

67. Even if the State's contention was correct, the mere fact that the certified agreements contain additional payments which are not contained in the award, such as cost of living payments and various allowances, those maters were bargained for *and* agreed in circumstances where the parties had agreed that the wage rates would be either the rates contained in the certified agreements or the higher rates contained in the award. That is, the parties expressly understood that those benefits would be payable on top of a higher award rate. No provision was made for the cost of living payments to be offset against any higher wages which might be granted in the State wage case because of cost of living pressures.

68. The parties' deliberate choice as to structure of their bargain should not affect how the QIRC approaches the exercise of its powers under ss.141 and 142 of Act.

*Additional benefits*

69. At [68] to [72] the State makes a number of submissions in respect of purported additional benefits conferred by bargaining. Aside from superannuation, parental leave and long service leave, those additional "benefits" are all legislative requirements imposed on the employer. Those are minimums which the Parliament has determined that employees should enjoy. They are not benefits conferred by the employer.

70. Insofar as the State points to the increased superannuation, parental leave and long service leave, those are all voluntarily assumed burdens. They are conditions which the employer is at liberty to withdraw from. In any event, so far as they are provided universally to people covered by the award, they are part of the prevailing employment conditions and the award should reflect those conditions.

71. Properly understood, the matters pointed to at [68] to [72] of the State's Submissions are not matters which count in mitigation of the appropriate annual increase to the award rate.

*Alleged distortion of the bargaining position*

72. At [73] to [77] the State submits that an increase in the award rate will distort the bargaining position. These submissions fundamentally misapprehend the scheme of the legislation. The role of the award is to provide a safety net from which bargaining is in advance of. The fact that the award rates are consistently higher than the rates specified in the agreements for is an indication that bargaining, and at least so far as it relates to wage rates has malfunctioned.

73. Contrary to the submission at [77] the reasons that the employee receives two increases in any one year is because the first rate "negotiated" with the employer was insufficient to exceed what the Commission decided was a fair and just safety net. At that time the second rate or fall-back rate negotiated commenced applying. The effect of the State's submission is that it should receive some credit for making an offer of an increase based on the award rate rather than some nominal rate which was not payable by law. Why the State should receive any such credit is less than clear.

74. Ultimately, the State finds itself in no different position than any other employer who bargains either under the State system or the Federal system. The modern award provides the starting point from which offers are made.

*Proposed award rates will be fair and just*

75. At [78] to [85] the State makes some submissions concerning the effect of:

(a) the clauses which provide for the wage rates to be the higher of either the rates in the agreement or the award; and

(b) Directive 12/12.

76. At [82] the State makes the curious submission that *neither the relevant clauses nor Directive 12/12 were intended to produce a situation whereby despite the process of collective bargaining providing for increases to agreements, the State wage case increases became payable.* This submission cannot be sustained.

77. It is well established that in the case of documents such as certified agreements or instruments such as the directive, intention is to be ascertained objectively.

78. The relevant part of Directive 12/12 being clause 6 provides as follows:

> *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.*

79. The relevant clause from the certified agreements is in the following terms:

> *"It is a term of this Agreement that no person covered by this Agreement will receive a rate of pay which is less than the corresponding rate of pay in the relevant parent award."*

80. The obvious, and undeniable intention, revealed by the words used in both Directive 12/12 and the clauses is that if the award rates are higher than the rates provided for in the certified agreement, the award rates will be payable. There is no basis for any contention that the result which has obtained from the Directive/clauses is not what was intended.

81. The submission in [84] is correct. Depending on the operative date of the relevant certified agreement, employees may receive an increase on that operative date as provided for in the agreement. Then those employees may receive a smaller subsequent increase, by reason of the terms of the agreements, if the State wage case results in minimum award rates which are higher than the expressed rates in the certified agreement. That is exactly what the parties have bargained for.

82. The submission at [85] does not follow. The *Department of Education Certified Agreement 2022* was certified on 24 May 2023.[12] The initial pay rise provided for under that agreement was backdated to 1 September 2022.[13] Because the effective date of the 2022 State wage case was 1 September 2022, in accordance with government wages policy the 4% pay rise applied to the rates payable under the award, because those were the rates being received by employees. That meant that upon the certification of the *Department of Education Certified Agreement 2022*, employees under agreement were from its first year of operation 4% better off than the minimum rates contained in the award. When the second pay rise of 4% occurs on 1 September 2023, those employees will still be in excess of the award rates if the Commission awards an increase of 5.75%.[14]

***Arbitration is not relevant***

83. At [86] to [89] the State makes a number of submissions which do not appear to lead anywhere.

84. At [86] and [87] the State makes submissions about the existence of arbitration. The provision for arbitration is, of course, a function of Chapter 4 of the Act which is concerned with collective bargaining. The existence of arbitration has nothing to say about how the QIRC is to exercise its functions under Chapter 3.

85. At [88] and [89] the State submits that the system provides for awards to be varied with the consent of the parties to include rates from a certified agreement. No submission is to be made as to what is to be drawn from this. The fact that

[12] See [55](c) of the affidavit of Alex Scott dated 27 September 2023.
[13] See [55](c) of the affidavit of Alex Scott dated 27 September 2023.
[14] See [57] of the affidavit of Alex Scott dated 27 September 2023.

the award may be varied with the consent of the parties to include certified agreement rates is consistent with Together Qld's submissions that the legislation embraces the notion that the award should reflect the prevailing conditions.

*Potential effects on bargaining*

86. At [90] to [95] the State makes a number of submissions about the alleged potential effects on bargaining if the increase of 5.75% is granted.

87. The submission at [90] appears to proceed on the basis that the intention behind both Directive 12/12 and the relevant clauses is that they are only to operate where there are significant delays in either bargaining or the agreement being certified. That submission is not supported by the text of the relevant clauses or Directive. What has been bargained for by the parties is that if the award rate is higher, then it will apply. That is, the higher award rate is the bargained rate.

88. At [91] the State submits that if the rate of 5.75% is granted then 22 of 35 certified agreements would be impacted by the State wage case. Whilst that is true, the extent of any impact will vary from agreement to agreement and classification to classification. Exhibit AS19 to the affidavit of Mr Scott sets out the classifications in various awards/certified agreements and the impacts of an increase of 5.75%. In the case of the Core agreement, all classifications will be impacted. In the case of Health, none will be impacted, in the case of Transport and Main Roads only the classifications between AO2(4) to AO3(1) will be affected. In Education none will be affected. In Youth Detention and Corrective Services all classifications will be affected.

89. The submission at [95] that this will result in bargaining being usurped is not correct. It ignores that the application of the State wage case is a bargained outcome. The outcome which will obtain if an increase of 5.75% is granted is that the award rate will be the rates which are paid to those affected employees. That is precisely what the parties have bargained for.

## CONCLUSION

90. For the reasons set out above, the State's Submissions should be rejected.

91. The economic position prevailing in Queensland presently is not materially different than that which was forecasted when the AWR Decision was made. Accordingly, having regard to the similarity in economic conditions prevailing in Queensland to the Federal position, an increase of 5.75% is justified in the circumstances.

92. The State's Submissions that no increase should be awarded to awards where the employees are collectively bargaining is misconceived. It is inconsistent with the scheme of the Act and the text of ss. 141 and 142 of the Act. Further, the application of the award rates as the effective rate of pay for employees is exactly what they have bargained for. With respect, the QIRC should not interfere in that bargain and should approach its award setting functions in an orthodox way.

**C A MASSY**

Counsel for Together Queensland

28 September 2023