

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Declaration of General Ruling (State Wage Case 2023) (No 3)*
[2024] QIRC 111

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: Declaration of General Ruling

DELIVERED ON: 10 May 2024

HEARING DATE: 9, 10, 11 October 2023
23 November 2023
20 December 2023

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

ORDERS:

1. **Except as otherwise provided in these orders, the wages or salaries for full time adult employees in all state awards shall be increased by 5.75%.**
2. **The above increases operate on and from 1 September 2023.**

LEGISLATION: *Fair Work Act* 2009, s 134
Industrial Relations Act 2016, s 3, s 4, s 458, s 459, s 459A, s 460
Industrial Relations and Other Legislation Amendment Act 2022

CASES: *Annual Wage Review 2022-23* [2023] FWCFB 3500
Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland and Others v Brisbane City Council [2017] QIRC 087
Declaration of General Ruling (State Wage Case) 2014 [2014] QIRC 129
Declaration of General Ruling (State Wage Case 2020) [2020] QIRC 131
Declaration of General Ruling (State Wage Case 2022) [2022] QIRC 340
Declaration of General Ruling (State Wage Case 2023) [2023] QIRC 263
New South Wales v Commonwealth (2006) 229 CLR 1
Shop, Distributive and Allied Employees Association v The Australian Industry Group [2017] 272 IR 88
Together Queensland Industrial Union of Employees v State of Queensland (Queensland Corrective Services [2022] ICQ 6; (2022) 314 IR 166

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 instructed by Crown Law for the State of Queensland (Office of Industrial Relations), first respondent.
Mr A Herbert, Counsel directly instructed by the Local Government Association of Queensland Ltd, second respondent.

Reasons for Decision

Background

- [1] Together Queensland, Industrial Union of Employees (TQ),¹ the Queensland Council of Unions (QCU),² and The Australian Workers' Union of Employees, Queensland (AWU)³ have applied to the Queensland Industrial Relations Commission (the Commission) seeking the following:
- (a) a general ruling to amend all state awards to increase wages by 5.75 per cent;
 - (b) a general ruling to amend all state awards to increase the existing allowances which relate to work conditions, which have not changed by 5.75 per cent;
 - (c) an increase to the Queensland Minimum Wage (QMW) by 5.75 per cent; and
 - (d) a determination that items (a) to (c) herein be operative from 1 September 2023.
- [2] Specifically, regarding the QMW, the QCU seeks the following from the Commission:
- (a) an increase that reasonably considers the adjustment made by the FWC to align the national minimum wage with the CI3 classification rate (instead of the CI4 classification rate); and
 - (b) if the rationale for the adjustment is also relevant in the context of the Queensland system, an increase to the QMW that appropriately addresses the matter for the purposes of the Queensland system (but is at least 5.75%).
- [3] On 17 November 2023, pursuant to s 458(1) of the IR Act the Commission advised the parties it had determined to apply a 5.75% adjustment to wages and applicable allowances, with an operative date of 1 September 2023.
- [4] On 28 March 2024 the Commission made a declaration by way of General Ruling in respect of all modern awards of the Commission. It also made the following orders:
1. The wages or salaries for full-time adult employees in all state awards shall be increased by 5.75 per cent.
 2. Monetary allowances (other than expense related allowances) in all state awards that relate to work or to conditions which have not changed, and service increments, are to be increased by 5.75 percent.
 3. The minimum wage rate per week for all full-time employees in Queensland is \$882.80.
 4. The above increases operate on and from 1 September 2023.

¹ Application filed by Together Queensland, Industrial Union of Employees on 12 June 2023.

² Application filed by the Queensland Council of Unions on 12 June 2023.

³ Application filed by The Australian Workers' Union of Employees, Queensland on 9 June 2023.

5. Reasons for the above orders will be published at a later date.

- [5] The reasons which follow form the basis for the giving of the Declaration of General Ruling and the orders issued by the Commission.

The legislative parameters

- [6] Section 3 of the *Industrial Relations Act 2016* (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.

- [7] 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 ...

- [8] 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.

- [9] 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.

- [10] 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.

Approach to determining the 2023 State Wage Case

- [11] Historically, the parties to these proceedings have submitted that the principles from the Fair Work Commission (FWC) Expert Panel's Review decision be adopted in respect of the QMW, and that any award rate increases should also reflect the FWC approach.
- [12] The Commission in *Declaration of General Ruling (State Wage Case) 2014*,⁴ held that the scope of the Commission's work has narrowed and that unless there are cogent reasons for not doing so, the Full Bench should follow the ruling of the Federal Tribunal, with any necessary or desirable modifications, having regard to the particular circumstances of Queensland.
- [13] The Commission's 2014 wage decision relevantly reads:
- [12] This Commission has historically attached considerable weight to the National Wage/Annual Wage Review decisions of its federal counterpart, whilst always having regard to the particular economic conditions of the state of Queensland at the time. A significant reason for having regard to the decisions of the federal tribunal (now called the Fair Work Commission) is because the federal commission has the benefit of considerable material about the economic position of Australia. In the federal Annual Wage Review parties present detailed statistical data in relation to the Australian economy and to the economies of the various states and territories. The decision of the Fair Work Commission affects the majority of award reliant employees throughout Australia, including those in Queensland.
 - [13] Given that this year the unions' claims essentially mirror the increase awarded by the Fair Work Commission and that none of the parties, other than the LGAQ, sought an outcome greatly at variance with that of the Fair Work Commission, the scope of our inquiry has been significantly narrowed. Indeed, the LGAQ submitted that, unless there are convincing reasons to depart from the Fair Work Commission's ruling, that ruling should be adopted. The other parties' submissions also made significant mention of the decision of the Fair Work Commission. Having regard to the submissions of the parties in these proceedings, we broadly agree that, unless there are cogent reasons for not doing so, we should follow the

⁴ [2014] QIRC 129 [12]-[13].

ruling of the federal tribunal, with any necessary or desirable modifications, having regard to the particular circumstances of Queensland.⁵ (emphasis added).

- [14] However, in the *Declaration of General Ruling (State Wage Case 2022)*, it was recognised that whilst the Full Bench will have regard to the FWC conclusions, in exercising its statutory function, the Full Bench is required to bring an independent mind to the task of determining whether, in all the circumstances, the FWC's determination ought to be properly adopted. As the Full Bench observed:
- [55] There is no principle of law that the FWC's ruling must be accepted unless there are cogent reasons for departure. There is no principle of law that the correctness of the FWC's ruling must be accepted at all in a Queensland State Wage Case.
- [56] Australia's constitutional arrangements are such that the Commonwealth controls significant economic power. Income tax is controlled nationally. By the use of the corporation's power commercial activity is largely centrally controlled. The Work Choices case⁶ is an example. The result is that many economic factors have nationwide influence.
- [57] Therefore, evidence of the economic impact of factors upon the national industrial environment will generally be relevant to determination of the Queensland State Wage Case. The FWC considers these matters and consequently its determination will be relevant to the State Wage Case.
- [58] It is a mistake to assume that the FWC's determination can be a substitute for a proper forensic inquiry into the impact of economic factors upon the wages of workers in Queensland who are not national system employees.⁷
- [59] If the forensic exercise is to commence with receipt into evidence of the FWC ruling, then it is necessary to receive evidence identifying relevant differences between the national workforce and Queensland workers who are not national scheme employees. It is also necessary to identify economic and perhaps social conditions which may be peculiar to Queensland and relevant to the Full Bench's determination of the State Wage Case. Once those things are identified, proper evidence (expert if necessary) should be led as to their impact upon the issues in the State Wage Case.⁸
- [15] In preparing for this year's State Wage Case (SWC), the Full Bench embarked on a series of conferences with the aim of reaching a consensus on the approach to be adopted in the proper conduct of the hearing.
- [16] Moreover, the Conferences assisted the parties to narrow the issues and to identify and marshal relevant evidence on the economic features which might distinguish Queensland's industrial system from the Commonwealth's industrial system.
- [17] To facilitate the proper conduct of the proceedings before the Full Bench, a Directions Order was issued on 31 July 2023 seeking, in particular, submissions and any affidavit

⁵ *Declaration of General Ruling (State Wage Case) 2014* [2014] QIRC 129.

⁶ *New South Wales v Commonwealth* (2006) 229 CLR 1.

⁷ *Industrial Relations Act* 2016, s 8(2).

⁸ *Declaration of General Ruling (State Wage Case 2022)* [2022] QIRC 340.

evidence and supporting material, relevant to the question of how the Full Bench should exercise its discretion under s 459A of the IR Act.

- [18] As is evident from these reasons, and the reasons given in *Declaration of General Ruling (State Wage Case 2023)* [2023] QIRC 263, the 2023 SWC is a more involved process than it has been in the past. The focused and forensic approach adopted by the Commission will lead to some parameters being set for the proper conduct of the SWC in future years.

State Wage Case 2023

Prevailing economic conditions

Fair Work Commission Annual Wage Review 2021-22 Decision

- [19] The FWC handed down its Annual Wage Review (AWR) decision on 2 June 2023, providing increases to the National Minimum Wage (NMW) award wages and allowances.
- [20] The FWC provided an increase to award wages of 5.75% and with respect to the NMW provided a realignment of the NMW from the C14 rate to the C13 rate and a further increase of 5.75% on the realigned rate.
- [21] The FWC decision ended the alignment between the NMW and the C14 classification wage rate on the basis that the C14 rate "*did not constitute a proper minimum wage safety net for award/agreement free employees in ongoing employment*".⁹ The FWC described this as an interim step pending a wider review concerning the needs of low paid award/agreement free employees.
- [22] The FWC also increased modern award minimum wages by 5.75%. The FWC noted that this increase will "*not maintain the real value of modern award minimum wages nor reverse the reduction in real value which has occurred over the last two years*"¹⁰ however determined that it is the most that can reasonably be justified in the current economic circumstances.
- [23] The parties filed joint expert evidence analysing the economic position in Queensland by reference to the indicators provided to the FWC's Annual Wage Review.
- [24] A Queensland Statistical Report (QSR) was produced for these proceedings by Adept Economics providing data comparable to that presented in the FWC's AWR. A Report to the Commission for the 2023 SWC ('the SWC Report') was prepared by Professor David Peetz. This report considered, inter alia, the relevance and significance of the

⁹ [2023] FWCFB 3500 at [8].

¹⁰ Ibid at [9].

economic indicators provided in the AWR Statistical Report (ASR) and the QSR for the SWC.

[25] Although the ASR covers employees in the private and public sectors, and the SWC covers only public sector employees, the economic considerations are similar. The SWC Report noted the sectoral difference between the state and federal systems so the 'needs of the low paid' may be felt differently due to the different wages received by employees in the two sectors. The SWC Report states that these needs are already taken into account by the FWC when it makes its AWR decision as demographically similar groups also exist within the national jurisdiction. The SWC Report notes that 'a public sector worker on a low wage has similar needs to a private sector worker on a low wage'.

[26] The SWC Report considered the economic considerations taken into account by the FWC and compared that data with the economic data contained in the QSR. The considerations were:

- economic growth;
- economic forecasts by the RBA, the IMF and in the Commonwealth Budget;
- inflation;
- the labour market, including unemployment, underemployment, labour force participation and employment growth;
- wages growth, measured in various ways;
- business conditions and outlook; and
- productivity and unit labour costs.

[27] The AWR also considered data on the following matters:

- the earnings and living standards of the low paid;
- gender equality;
- job security; and
- collective bargaining.

[28] The QSR notes that there is an unavoidable problem of a high degree of sampling error with Queensland-specific data. Due to the smaller sampling sizes, data for Queensland will have higher relative sampling errors compared with data for Australia.

Economic growth

[29] The SWC Report indicates annual and quarterly state final demand growth following a pattern that is not different enough to the national Gross Domestic Product (GDP) growth patterns to warrant special consideration.¹¹

¹¹ Exhibit 2 - SWC Report at [106].

Economic forecasts by the RBA, the IMF and in the Budget

- [30] The SWC Report indicates that gross state product growth will accelerate from weak levels in 2022-23 to more substantial patterns in later years, whereas the national projections for GDP are slightly reversed, slowing from a solid rate in 2022-23 to weaker performance in later years. The SWC Report notes however that on some other key variables such as the Wage Price Index (WPI), the differences between national and Queensland forecasts are minimal.¹²

Inflation

- [31] Annual inflation is slightly lower in Brisbane than nationally, however the two have followed broadly similar patterns over recent years.¹³
- [32] The inflation forecast in the Queensland budget is 3¾% in 2023-24, and 3% in 2024-25 which is slightly higher than part of the RBA forecast referred to in the AWR decision of 3.6% over the year to the June quarter 2024 and 3.0% over the year to the June quarter 2025. The SWC Report notes that the difference could be the effect of different measurement systems being year-on-year versus year-to-the final quarter.¹⁴
- [33] Notably, the gap in inflation between non-discretionary and discretionary items has been slightly worse in Queensland than nationally.¹⁵

Labour Market

- [34] The labour market data in Queensland broadly reflects the FWC statement that the labour market remains 'close to its strongest point in about 50 years but has begun to show signs of weakening'. Underemployment in Queensland is slightly higher than the national average.¹⁶
- [35] Growth in Queensland employment has been similar to national employment growth, with the growth in total hours worked slightly lower than the national average.¹⁷
- [36] The Queensland Budget unemployment forecasts are consistent with those in the Commonwealth Budget and RBA forecasts, cited by the FWC in the AWR decision.¹⁸

¹² Exhibit 2 - SWC Report at [107].

¹³ Ibid at [108].

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid at [109].

¹⁷ Ibid at [110].

¹⁸ Noting that Qld starts from a slightly higher base and so higher than the national estimates in 2023-24 and 2024-25.

Wages Growth

- [37] The WPI grew by identical amounts in Queensland and nationally at 3.7% over the year to March quarter 2023.¹⁹
- [38] The RBA expects annual year-ended growth in the WPI to strengthen to 4 per cent over the year to June quarter 2024. Wage growth is then expected to slow to approximately 3.6 per cent by the end of 2025.²⁰
- [39] The FWC noted that wages growth is higher in the private sector than in the public sector at 3.8% to 3.0%.²¹ The data in Queensland, which excludes bonuses, indicates a smaller private-public gap of 3.8% to 3.7%.²²
- [40] It is noted that the average weekly ordinary-time earnings was not updated for 2023 and has been described as more erratic and subject to compositional change.²³
- [41] The average annualised wage increases in approved federal collective agreements were higher in Queensland at 4.0% in the March quarter 2023 than federally at 3.7%.²⁴ The SWC Report notes however that the 'approved agreement' series is more volatile than the 'current agreement' series and in the latter the gap is smaller and in most assessments over the past three years has not favoured Queensland.²⁵
- [42] The issue of wages growth in the context of purchasing power trends was considered in the report provided by Professor William Mitchell ('the Mitchell Policy Report').²⁶ The Mitchell Policy Report compared movements in the *Queensland Public Service Officers and Other Employees Award - State 2015* (QPSOOE Award) to the national Federal Minimum Wage (FMW) and WPI in terms of purchasing power. This comparison indicated that the QPSOOE Award follows the FMW closely in purchasing power terms.²⁷
- [43] The Mitchell Policy Report also considered how wages growth derived from enterprise bargaining in the Queensland public sector compared in purchasing power terms with the growth of other wages. A comparison was made of the growth of the FMW, QPSOOE Award AO4-1 rate, Queensland State Government Entities Certified ('Core') Agreement AO4-1 rate and the national WPI in real terms from the March-quarter 2012 to the June-quarter 2023. By the June-quarter 2023, enterprise bargaining in the Queensland public sector had delivered a real wage gain of 1.22% since the March-quarter 2012. This

¹⁹ ASR Table 5.1, QSR Table 5.1a as cited in SWC Report at [112].

²⁰ Exhibit 10 - Affidavit of Dennis Molloy, 14 September 2023.

²¹ [2023] FWCF 3500 at [74] as cited in SWC Report at [112].

²² ABS, Wage Price Index, Australia, Tables 3b and 4b, March 2023 cited in Exhibit 2 - SWC Report at [112].

²³ Exhibit 2 - SWC Report at [113].

²⁴ Ibid at [113].

²⁵ Ibid.

²⁶ Policy Report No.23-05 Queensland State Wage Case, annexed to Exhibit 9 - Affidavit of William Mitchell of 25 September 2023.

²⁷ Ibid at [78]; Figure 8.

gain is described as 'almost identical' to the national WPI of 1.11% real gain. The growth in the FMW was 7.1% which was close to the award growth in real terms of 6.5%.²⁸

[44] In considering wages growth, the FWC decision noted the following:

Despite the recent pickup in growth, wages will have declined in real terms from the September quarter 2020, and are forecast to decline further through to the end of 2023, before starting to recover in the first half of 2024.²⁹

[45] As stated in the SWC Report, the FWC statement above could similarly apply to Queensland on the basis that the Queensland Budget forecasts for WPI growth are almost the same as the Commonwealth Budget forecasts.³⁰

Business Conditions

[46] Business bankruptcy rates have continued to decline both nationally and in Queensland in the period to March quarter 2023.³¹ Business survival rates in Queensland are slightly below the national average. Both the national data and that in Queensland indicate that the business entry rate exceeds the exit rate.³²

[47] The NAB quarterly business survey referred to by the FWC indicates that Queensland is generally tracking the national trend in business confidence and conditions, with Queensland showing slightly better business conditions and slightly weaker business confidence.³³

Productivity

[48] The FWC cited national accounts productivity data as showing a drop in labour productivity over the year to December quarter 2022 as a result of hours worked growing faster than GDP. Labour productivity grew in Queensland however due to faster growth in gross state product and slower growth in hours worked.³⁴

[49] Queensland's labour productivity has grown at 0.9% compared to the national average of 1.2%. In the previous multi-year productivity cycle, Queensland's average productivity at 1.9% was slightly higher than the national average of 1.7%.³⁵

²⁸Policy Report No.23-05 Queensland State Wage Case, annexed to Exhibit 9 - Affidavit of William Mitchell of 25 September 2023 at [81]; Figure 9.

²⁹ [2023] FWCFB 3500 at [80] cited in Exhibit 2 - SWC Report at [114].

³⁰ Queensland Government, Budget Paper BP-2, p 53 as cited in Exhibit 2 - SWC Report at [114].

³¹ ASR Chart 3.4, QSR chart 3.4 as cited in Exhibit 2 - SWC Report at [115].

³² ASR Charts 3.5 and 3.5a, QSR charts 3.5 and 3.5a as cited in Exhibit 2 - SWC Report at [115].

³³ NAB, Quarterly Business Survey (Q1 2023); [2023] FWCFB 3500 at [84] as cited in Exhibit 2 - SWC Report at [116].

³⁴ ASR Table 2.2, QSR Table 2.2; [2023] FWCFB 3500 at [86] cited in Exhibit 2 - SWC Report at [117].

³⁵ ASR Table 2.2, QSR Table 2.2; [2023] FWCFB 3500 at [86] cited in Exhibit 2 - SWC Report at [118].

Relative living standards and needs of the low paid

- [50] The benchmark for 'low paid' used by the FWC is two-thirds of the median adult full-time ordinary earnings. The national average is \$1017 per week being slightly higher than the Queensland average of \$1000 per week.³⁶
- [51] The NMW has trended upwards from December 2012 to late 2020, however it then declined in the years to December 2021 and December 2022. The QMW has followed a similar pattern. From December 2012 to December 2022, the real NMW grew by \$34.98 or 4.5%, and the real QMW grew by \$32.88 or 4.0%.³⁷

Gender equality

- [52] From the available data associated with three of the four measures used by the FWC, the gender pay gap in Queensland was greater than that nationally by between 3 and 10%.³⁸
- [53] The gap between male and female participation nationally was 8.7% however in Queensland the gap between male and female participation rates is lower at 6.9%.³⁹

Job Security

- [54] The FWC stated that most of the job growth in the 12 months to April 2023 was in full-time work, with full-time employment representing 72 per cent of the growth in Queensland and 90 per cent nationally.⁴⁰
- [55] The decline in the proportion of total jobs held by employees without leave entitlements (casuals) fell between August 2014 and August 2023 by 2 percentage points, however this decline is not observable in Queensland.⁴¹

Collective Bargaining

- [56] The number of employees covered at the national level by newly approved federal enterprise agreements rose by 67% between 2021 and 2022. In Queensland, employee coverage by newly approved agreements in the federal system increased by only 7% in 2022. The SWC Report described the number of 'approved' federal agreements as much more erratic and influenced by the timing of renegotiations than the number of 'current' federal agreements.⁴²

³⁶ ASR Table 8.2, QSR Table 8.2; [2023] FWCFB 3500 at [89] cited in Exhibit 2 - SWC Report at [119].

³⁷ ASR Table 9.1, QSR Table 9.1; [2023] FWCFB 3500 at [97] and [98] cited in Exhibit 2 - SWC Report at [120].

³⁸ ASR Table 11.1, QSR Table 11.1; [2023] FWCFB 3500 at [111] cited in Exhibit 2 - SWC Report at [121].

³⁹ ASR Table 6.1a, QSR Chart 6.1a; [2023] FWCFB 3500 at [140] cited in Exhibit 2 - SWC Report at [122].

⁴⁰ ASR Table 6.6, QSR Chart 6.6; [2023] FWCFB 3500 at [143] cited in Exhibit 2 - SWC Report at [123].

⁴¹ ASR Table 12.1, QSR Chart 12.1a; [2023] FWCFB 3500 at [144] cited in Exhibit 2 - SWC Report at [124].

⁴² Exhibit 2 - SWC Report at [126].

- [57] Changes in the public sector agreement coverage account for approximately one-tenth of the national decline in agreement coverage since 2014, with Queensland agreement coverage in the public sector over 98%.⁴³

Application of FWC economic assessment

- [58] The economic evidence indicates that the comparative assessment between the national economic data and available data for Queensland did not produce significant differences.⁴⁴ The conclusion of the SWC Report was that no large differences emerged between the patterns for Queensland and nationally and, accordingly no basis arose for considering the assessment does not apply to Queensland.

- [59] The evidence of Professor Peetz was:

Inevitably, there are differences between the economic and other data available for Queensland, and nationally. The surprising thing, for this author, is that the difference were not larger. Given the impact of sampling error on the award coverage data - it is impossible to be certain whether in reality there was, or was not, a meaningful difference in trajectories of award coverage in Australia and Queensland - it would take quite a large difference between a Queensland estimate and the national estimate on any particular matter for me to conclude that there was potentially something specific about Queensland that raised doubts about the relevance of the FWC's analysis of the economic situation to Queensland. I see no such large differences in the patterns for Queensland and nationally, and therefore conclude that, whatever the rights or wrongs of the FWC's analysis, there is no basis for considering it does not apply to Queensland.⁴⁵

- [60] Professor Peetz further observed:

It is not obvious that there is potentially something specific about Queensland that would raise doubts about the relevance of the FWC's analysis of the economic situation to Queensland. Whatever the rights or wrongs of that analysis, there appears no convincing basis for considering it does not apply to Queensland.⁴⁶

- [61] The State relied upon the affidavit of Mr Dennis Molloy, Deputy Under Treasurer, Queensland Treasury, which noted that the RBA's expectation that annual year-ended WPI growth would strengthen to four per cent over the year to the June quarter 2024 was also identified by the FWC.⁴⁷

- [62] In the affidavit evidence relied upon by the State a number of data references were the same or similar to that relied upon by the FWC in determining the AWR. In oral evidence, Mr Molloy confirmed that the forecast for employment growth and unemployment rate figures outlined in his affidavit are similar to the ones referenced by the FWC, albeit with a slightly different reference point.⁴⁸

⁴³ Exhibit 2 - SWC Report at [126].

⁴⁴ Exhibit 2 - SWC Report at [129].

⁴⁵ Ibid.

⁴⁶ Exhibit 2 - SWC Report at [163].

⁴⁷ TR3-19, LL10-17.

⁴⁸ TR3-18, L37-TR3-19, L3.

- [63] In circumstances where the economic data indicates that the economic analysis conducted by the FWC of the national economy is substantially the same as that of the Queensland economy, there is no cogent reason to depart from the FWC decision of a 5.75% increase.

Queensland Minimum Wage

- [64] The FWC noted that a number of different household types earning the NMW fell below the poverty line, with the position worse if compared with the Minimum Income for Health Living standard. The FWC further noted that the NMW had not been established by reference to the needs of the low paid but instead been set at the lowest classification at the C14 level.
- [65] The FWC decision provided a realignment of the NMW from the C14 rate to the C13 rate and a further increase of 5.75% on top of the realigned rate. The NMW was increased by a total of 8.6% to \$882.80 per week or \$23.23 per hour. The FWC decision determined that this realignment to C13 was an interim step pending a wider review.
- [66] The State contends that a realignment should not be made to the C13 rate until a comprehensive review can occur, noting the interim nature of the FWC decision. TQ submit that the interim nature does not suggest that the move from C14 to C13 might be reversed by the FWC, rather that more would need to be done in the future to address the persistent disadvantage faced by workers on the NMW.
- [67] The State submits that the QMW should not be moved as it would result in the QMW exceeding the NMW by \$17.00 per week. The decision by the FWC to provide an effective 8.6% increase to the NMW by moving the C14 rate to C13 along with the associated commentary by the FWC indicates concerns that the needs of the low paid are not being met by the NMW. TQ contend that in those circumstances a slightly higher QMW should address some of these concerns.
- [68] TQ submit that historically the QMW has been set at a rate in advance of the NMW which has not previously presented any difficulty in a state wage case.
- [69] The QCU referred to the FWC's view regarding the need for a wider review of the NMW and conceded that the same can likely be said about the QMW. The QCU submit however that an increase is necessary as an interim step, with this achievable via one of the following ways:
- increase of 8.6% - an increase to the QMW that is comparable to the overall increase to national minimum wage following the FWC's adjustment - i.e an increase of 8.6%; or

- aligning the QMW with a relevant C13 classification rate in a Queensland modern award and increasing the QMW by 5.75%.

- [70] The Local Government Association of Queensland (LGAQ) submitted that local authorities throughout Queensland suffer a common problem of attracting and retaining experienced and capable staff particularly in circumstances where private and public sector wages have increased more rapidly than those provided under the awards and enterprise bargaining agreements applying to the local government sector.⁴⁹ In this regard, the LGAQ submits that it is necessary to pay a wage which reflects local authorities' problem of attracting and retaining staff and, at the same time, is cognisant of the constraints and financial circumstances of individual local authorities, in particular First Nations councils.
- [71] It is accepted by the LGAQ that local government employees are entitled to be paid a fair and reasonable wage. However, the LGAQ submits that the NMW is equal to the C13 rate in modern awards and should be regarded by the Full Bench as the maximum figure that should be awarded.
- [72] In respect of the QMW, the Commission has determined that the minimum wage rate per week for all full-time employees in Queensland be set at \$882.80.
- [73] The Commission has taken the view that the general ruling should take effect from 1 September 2023. The continuation of this approach provides all interested parties with certainty with respect to the timing of the operation of state wage case decisions from year to year.

Other considerations

- [74] The State relied upon the affidavit of Mr Molloy, as representing the prevailing economic conditions. These conditions include slowing national economic growth in line with declining global economic growth, an expected deficit in 2023-24 and marginal surpluses in 2024-25, 2025-26, 2026-27 and slow growth in employment over the coming financial year. Mr Molloy's evidence outlines a moderation in the national inflation figures from the peak of 8.4% in December 2022 to 4.9 % in July 2023 and moderation in Brisbane's consumer price index to 3¾% in 2023-24 and 3% in 2024-25.⁵⁰
- [75] The State submits that there has been a change in the conditions following the FWC decision relating to the level of inflation. The FWC determined that the expected inflation rate to the June quarter was 6.3%, however the inflation rate in this quarter was in fact 6.0%.⁵¹

⁴⁹ Submissions of the Local Government Association of Queensland filed 14 September 2023, [25].

⁵⁰ Exhibit 10 - Affidavit of Dennis Molloy filed 14 September 2023, [26].

⁵¹ Exhibit 10 - Affidavit of Dennis Molloy filed 14 September 2023 at [23].

- [76] It is noted that the moderation in inflation was directly considered by the FWC expert panel with an express identification that inflation was expected to fall.⁵² It is also noted that the inflation rate for Brisbane has not moderated, remaining at 6.3%.⁵³
- [77] The evidence of Professor Peetz was that the difference between 6.3% and 6.0% in the inflation rate was not significant and he noted that inflation had both a retrospective and prospective effect. The submissions of TQ contend that following the 2022 SWC increase of 4.6%, inflation was approximately 7.25% resulting in inflation exceeding wages by 2.6%. Consequently, the forecasted inflation of 3.75% for the 2023-24 financial year will leave Queensland workers approximately 6.4% below the inflation rate. In these circumstances a 5.75% increase is justifiable.
- [78] Both the forecasted decline in economic growth and slow growth in employment referred to in Mr Molloy's affidavit had been considered in the AWR decision.⁵⁴
- [79] Mr Anthony James, Acting Assistant Director-General, Office of Industrial Relations gave evidence of the Cost-of-Living Adjustment payment ('COLA') incorporated in nineteen certified agreements, noting that it was a feature of public sector wages policy as recognition of cost-of-living pressure but is not part of the base wage.⁵⁵ TQ submits that payments such as COLA are bargained for and agreed as part of certified agreements and are not contained in the award.
- [80] The State submits that there are factors which distinguish the national and Queensland industrial jurisdictions in relation to the minimum wage determinations, with national employees predominantly award-reliant and 98.2 per cent of workers in the Queensland jurisdiction participating in collective bargaining. TQ submit that there is no suggestion that the FWC decision should exclude from its operation any variation to awards where the employees are covered by an enterprise agreement.
- [81] Submissions were also made by the State as to additional benefits conferred by bargaining however it was noted that many of these benefits are legislative requirements imposed on the employer. The references to increased superannuation, parental leave and long service leave are conditions assumed voluntarily by the employer.
- [82] The evidence before the Commission discloses there are no particular factors which would indicate the Queensland economic and social indicators are manifestly different from those experienced by equivalent workers in the Federal system, in fact, the evidence reveals they are remarkably similar.

⁵² FWCFB 3500 at [65], [69] and [70].

⁵³ Exhibit 10 - Affidavit of Dennis Molloy filed 14 September 2023 at [23].

⁵⁴ FWCFB 3500 at [157] and [71].

⁵⁵ TR3-27, LL32-37; Exhibit 11 - Affidavit of Anthony John James filed 14 September 2023, Exhibit TJ-3.

- [83] On balance, the Commission is of the view that an increase of 5.75 per cent should apply to the state awards and existing award allowances relating to work conditions which have remained unchanged.

The Exercise of the Discretion

- [84] It is submitted by the State that the result of the adjustment is that award wages will increase and, for some classes of employees, applying those increases would result in the wages payable to those employees under the award equalling or exceeding the wages provided for under their certified agreement.
- [85] Section 459A was inserted by the *Industrial Relations and Other Legislation Amendment Act 2022*. That section of the Act gives the Commission a discretion not to apply a general ruling to the wages payable to employees, or the 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.

- [86] 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*.

- [87] The discretion contained in s 459A is to limit the application of a SWC 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.
- [88] The second limb required to be satisfied for the application of s 459A, s (1)(b), is clearly premised on what would happen if the increase was applied in the ruling, not what happens after it is applied by the ruling. This is demonstrated by the future tense used in both s 459A(1)(b) and s 459A(2).
- [89] It follows that if the discretion under s 459A is exercised the increase will not apply, and will never have applied, to the relevant employees. The ruling will provide an award increase to only those employees who are not the subject of the exercise of the s 459A(2) discretion.
- [90] Whilst 'wages' is defined broadly in the IR Act, the term, on a proper construction, is confined to 'salary' as opposed to allowances. This is because this is the relevant comparator for the purposes of the exercise to be conducted under s 459A.
- [91] Therefore, whether there has been an 'increase in wages' requires an assessment to determine whether the general ruling increases the salary received.
- [92] The State seeks that the discretion be exercised in respect of the classes of employees outlined at Schedule A noting that:
- (a) the 5.75% increase will cause the Award wages for the classes of employees in Schedule A to exceed the wages in the Certified Agreement; and
 - (b) the classes of employees in Schedule A are all covered by Certified Agreements that are regularly negotiated.
- [93] However, the State does not seek the Full Bench to exercise the discretion under s 459A in respect to:
- (a) those reliant on the QMW;
 - (b) employees in the Queensland local government sector;
 - (c) Firefighters Award State 2016 and the Training Wage Award State 2016 and employees of the Rabbit Board;
 - (d) classes of state public sector employees under Certified Agreements where the increase would not cause the Award wages to exceed the wages under the Certified Agreement; and
 - (e) employees under the Major Sports Facilities Event Day Authority Agreement 2007.

- [94] TQ submits that the wages of the relevant employees identified by the State have been set through bargaining and all the certified agreements relevant to the employees include several clauses which detail the agreed wage adjustment mechanisms for the certified agreement rate of pay.
- [95] One of the agreed wage adjustment mechanisms in the relevant certified agreements ensures no employee receives a base rate of pay which is less than the corresponding rate of pay in the relevant parent award. In effect, the relevant employees are entitled, at a minimum, to be paid a certified agreement rate of pay that is equal to the corresponding award rate of pay.
- [96] Further, any increase as a result of the agreed wage adjustment mechanisms in the certified agreement cannot be characterised as a 'further increase'. What is contended by TQ is that the wage adjustment mechanism is simply operating as agreed.
- [97] On 12 August 2022, the Education, Employment and Training Committee tabled its Report into the Bill in Parliament. That Report included a recommendation the Bill be passed and included the following comments:

The committee notes the intent of cl 43 amendments to the IR Act to insert new s 459A to give effect to a recommendation from the Review Report. The committee also notes the concerns raised by the QCU and affiliated unions that the amendment would allow the QIRC to deny certain low-paid workers the same increase in any given year as that awarded for other low wage employees under the State Wage Case. The committee notes, however, that the scope for the QIRC ruling to limit the flow on of a State Wage Case to employees would only apply if the increase would result in wages payable under the award equalling or exceeding the wages payable to employees in relation to the same employment under a certified agreement or arbitration determination or a ruling under the *Public Service Act 2008*. This is an important principle to protect the primacy of collective bargaining.

The committee further notes that the QIRC retains discretion to limit any flow on of wages to employees from a State Wage Case, and that unions would have the right to be heard on such determinations. The committee also accepts that the existing provisions in s 459(2) of the IR Act do not adequately address the issues.

- [98] The Explanatory Note issued with the introduction of the Bill states:

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 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 a 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 the main purposes of the Act in relation to the primacy of collective bargaining as the means for determining wages and conditions for employees. (Underlining added.)

- [99] Section 145 provides for the flow-on clauses (including clauses regarding rates of pay) in a certified agreement or determination into a parent award on application to the Commission.
- [100] In such circumstances, by the operation of s 460(1), any relevant award is taken to have been amended so the award is consistent with the ruling on and from the stated date and the amendment has effect on and from the stated date.
- [101] The amendment of an award occurs contemporaneously with the making of the ruling. In those circumstances, the relevant award as it applies to particular groups of employees the subject of the exercise of the s 459A discretion is not increased as a result of the ruling.
- [102] The State contends that it bargained in good faith on the basis that all parties were alert to the operation of s 459A with the full knowledge of s 459A(2) and the discretion afforded to the Commission to not pass on any increase to certain employees. The State submits that notwithstanding a party's bargaining position or the terms of the certified agreement an industrial instrument will operate consistently with applicable legislative provisions, even if the parties bargained in the belief, it would not, or they were not alert to the fact it would.⁵⁶
- [103] The State argues that the Full Bench should exercise its discretion under s 459A of the IR Act. Central to the argument advanced by the State is the contention that the current situation affecting employees in the State public sector reflects the objects of the IR Act, namely, that the primary mechanism for achieving wage increases is through enterprise bargaining. The State maintains that there is no reasonable justification warranting a further increase to recently bargained Certified Agreements.
- [104] The State submits that in circumstances where wages payable to employees or classes of employees under awards relevant to the Queensland public sector have been settled through bargaining⁵⁷ or by determination of the Commission, no increase should be applied to those workers. The State takes that position for the following reasons:
- (a) those workers have already struck bargains;

⁵⁶ *Together Queensland Industrial Union of Employees v State of Queensland (Queensland Corrective Services)* [2022] ICQ 6.

⁵⁷ Section 163, IR Act 2016.

- (b) they have bargained for their wages and other conditions of employment where it was accepted, they are better off under the agreement than under the award (the 'no disadvantage test');
- (c) through collective agreements and other relevant instruments, Queensland public sector workers receive remuneration and additional benefits such as a cost-of-living allowance, 12.75% superannuation, enhanced parental and personal leave entitlements and permanency of employment;
- (d) an increase will distort the starting position for wage increases in bargaining;
- (e) an increase will result in rates of pay in excess of those required to be maintained at a fair and reasonable rate; and
- (f) many of those employees have had the benefit of flow on increases into their modern award from previous certified agreements.⁵⁸

[105] The State submits that it will be relevant for the Commission to consider the state of bargaining, in particular where in principle agreement has been reached between the parties, in light of the relevant provisions of the Act which contemplate giving primacy to the collective bargaining process, at the time of considering this provision.⁵⁹

[106] The State argues that it has provided additional or enhanced entitlements; enhancements to superannuation (12.75%); enhanced parental, personal and long service leave entitlements compared with the Queensland Employment Standards; and has undertaken reviews of casual and temporary employment terms and conditions.

[107] Moreover, the State has made a 3% COLA payment for 2023 and will do so for a further two years in circumstances where cost of living pressures measured through CPI exceed the wage increase payable under the Certified Agreement.

[108] The majority of relevant awards in scope of s 459A have received a flow-on under s 145 of the IR Act (and its predecessors) and SWC increases (except the *Miscellaneous Employees Award - State 2016*; *WorkCover Qld Employees Award - State 2015* and *Stadiums Qld Employees Award - State 2016*. The *Building Engineering and Maintenance Services (QG) Award - State 2016* received a partial flow on). These Awards have since updated such that with a further SWC increase they will exceed the wages the subject of contemporary bargaining.

[109] Further, if in the future there is a sustained slippage of the bargained for wages there are common provisions within most CAs and the operation of Ministerial Directive 12/12 to

⁵⁸ State of Queensland's Outline of Submissions for the State Wage Case Hearing filed on 14 September 2023 at [55].

⁵⁹ State of Queensland's Outline of Submissions on Declaration regarding the operation of section 459A of the Industrial Relations Act 2016 filed 14 August 2023 at [39].

ensure affected employees are not left behind. They will be paid the higher of the award or CA where a SWC increases the award rate.

- [110] Finally, the use of discretion under s 459A(2) is to be considered in each SWC. The State rejects what it describes as the 'catastrophised submission' of TQ. The discretion under s 459A(2) is only sought to be exercised in respect of one year and this is a discretion which intrinsically can only be exercised year on year. All that is sought in this application is that the increase is not passed on in respect of the 2023 SWC. Applying the discretion in one year does not restrict the Commission's capacity to exercise or not exercise the discretion in subsequent years if considered appropriate.
- [111] TQ properly concede that in the current circumstances, wages are primarily set through bargaining for most State public sector employees which includes the agreed mechanisms in certified agreements for recognising and addressing the wage adjustments arising from state wage cases.⁶⁰ Such a position reflects the reality of the current wage setting mechanism for public sector employees.
- [112] What is contended by TQ is that any exercise of a discretion by the Full Bench would need to be made only if that was for a compelling and overwhelming reason.⁶¹ Such an increase should not be made notwithstanding the effects on the scheme as a whole.⁶²
- [113] TQ argue that the discretion should not be exercised for the following reasons:
- (a) Firstly, it is submitted that collective bargaining relating to wages has 'malfunctioned'. In support of that argument, TQ makes particular reference to the evidence of Professor Mitchell and Mr Alex Scott. Over the last decade, bargaining outcomes have tracked below the WPI, with real wage growth of only 1.22%. TQ emphasise that the role of a modern award is to provide a safety net from which bargaining is in advance of.
 - (b) Secondly, if the Full Bench was persuaded to exercise its discretion, it will have the effect of breaking the internal relativities between classifications within existing awards.
 - (c) Thirdly, the exercise of the discretion would break existing relativities between different awards. The result would see a widening of the gap to approximately 6.25%.
 - (d) Fourthly, the order would, moving forward, undermine the scheme for collective bargaining. TQ contends that the safety net provides the base and if the order is made any future bargains will not have an accurate and fair safety net. It will be 5.75% lower than it ought to be.

⁶⁰ Together Queensland submissions filed 22 November 2023.

⁶¹ Ibid.

⁶² Reference is made to *Together Qld v State of Qld (Queensland Corrective Services)* [2022] ICQ 6 where the Full Bench concluded the General Ruling not apply to specific category of employees.

- (e) Fifthly, if the exercise of the discretion is made it will have no effect on employees who have done well in bargaining. For example, the Queensland Public Health Sector Certified Agreement (No 11) 2022 will not be the subject of any freeze in their award rate. Their safety net will increase. Whereas employees who have done worse in bargaining such as those under the Core Agreement will have a safety net which is 5.75% lower.
- (f) Sixthly, the award rates apply by virtue of the parties' bargain.⁶³

- [114] The QCU submits that the State has led no evidence. There is no basis as to why the discretion ought to be exercised; should the Commission exercise its discretion, there will be ongoing consequences for future SWCs as well as collective bargaining.
- [115] The assertion by the State that the IR Act prescribes a primacy in respect to collective bargaining is, in the submission of the QCU, erroneous. Rather the QCU submits that there is no primacy attached to the outcomes of collective bargaining over maintaining minimum wages in modern awards that are fair and just. Even if there were a primacy attached to collective bargaining, this does not mean that CAs exclusively reflect a bargained settlement. A bargained settlement can include a recognition of wage adjustments from a SWC and can include agreed mechanisms for addressing these matters. Wages are not exclusively set through bargaining as the State asserts.
- [116] The QCU contend that there is no 'Better off Overall Test' in the Act nor is there any 'fair and reasonable wages test'. As reflected in s 142(1) of the IR Act, the QCU argued that there is a duty on the Commission to establish and maintain minimum wages in modern awards that are fair and just.
- [117] The QCU maintain that the SWC increase will not cause award wages to exceed the wages payable under the Certified Agreement; employees are entitled to be paid a Certified Agreement rate equal to the corresponding award rate of pay; and currently with agreed wage adjustment mechanisms in relevant Certified Agreements, an award rate of pay cannot exceed a Certified Agreement rate.
- [118] If the Full Bench exercised its discretion under s 459A of the IR Act and determined that the increase will not apply to those employees for whom the increases would result in award wages increasing above those provided for under their certified agreement, the end result would be a ruling which increases some award rates, but not others.
- [119] The effect of an order pursuant to s 459A(2) would be to deny employees a minimum wage rate the Full Bench considers fair and just; and any order under s 459A(2) will adversely affect the minimum standard for approval of future Certified Agreements.

⁶³ Together Queensland submissions filed 22 November 2023.

- [120] The Modern Award will not contain rates that are fair and just which means the no disadvantage test will not be applied against a modern award as described in ss 141 and 142.
- [121] TQ argue that the State was on notice about s 459A and despite knowing the only discretion the Commission had, voluntarily accepted by putting these clauses in. The discretionary reason why the award should not go up is if the awards go up, we will have to pay them and that is what they have agreed to do.
- [122] TQ submit that the parties have bargained on the basis that a state wage case will provide increases and through negotiation, incorporated a promise to pay those increases into the bargain.
- [123] The Full Bench has determined a 5.75% increase is necessary to provide full, fair and just minimum wages. Should the Full Bench exercise the discretion, TQ submit that it would 'bifurcate either the wage rates or the wage rates which are applied'. It would create a scheme where the award had two effective rates for the same classification; it would destroy the internal award relativities and it would destroy the external award relativities. Moreover, it would undermine collective bargaining going forward.
- [124] Finally, TQ argue there is no evidence which suggests that the benefits identified by the State were provided in lieu of higher wage rates. The State submits there does not need to be evidence that those benefits were provided in lieu of higher wage rates.

Consideration

- [125] The discretionary power is enlivened once the Commission is satisfied of the existence of the jurisdictional facts identified in s 459A(1)(a) and (b). Both pre-conditions must exist.
- [126] Sections 458-460 of the IR Act provide the Commission with various powers in relation to 'general rulings'.
- [127] Section 458 of the IR Act confers the power to make a 'general ruling'. For present purposes, s 458 identifies two types of 'general rulings': (a) a general ruling under s 458(1)(a) for a wage adjustment across employees whose 'wages or salaries' are prescribed by an award; and (b) a general ruling under s 458(1)(b) and (2), for an adjustment to the QMW.
- [128] Section 459(1) requires that a ruling must state a date on and from which it has effect. It is open to the Commission to determine the appropriate date on and from which it would take effect. Section 459(1) contemplates that a general ruling being made in contrast to being in effect. Pursuant to s 459(1)(b) a ruling has effect as a decision of the Full Bench on and from the stated date.

- [129] Section 459(2) empowers the Commission to exercise a discretion to exclude certain employees from the operation of a general ruling.
- [130] Section 459A(1)(a) requires the Commission to determine whether the general ruling increases the wages payable to employees under 1 or more awards.
- [131] The third jurisdictional fact to be established by the Full Bench is determining 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 via a directive under the *Public Sector Act 2022*.
- [132] Section 459A(2) if engaged has the effect that the ruling will provide the increase to not apply to certain employees. In that regard, the Full Bench will undertake a consideration of the application of s 459A(2) prior to giving effect to the General Ruling.
- [133] Whilst the jurisdictional facts have been established and the discretion has been enlivened, the Full Bench has for the reasons which follow, decided not to exercise the discretion under s 459A of the IR Act.
- [134] The legislative intent as identified in the report of the Education, Employment and Training Committee and the Explanatory Memorandum to the Bill as expressed in s 459A is to limit the application of a SWC 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.
- [135] At the outset, we accept that the collective bargaining regime is the cornerstone of industrial relations in the Queensland public sector. As a Full Bench of this Commission said in *Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland and Others v Brisbane City Council*:⁶⁴
- It is tolerably clear that an important purpose of the [Chapter 4] is to facilitate and encourage collective bargaining and to give the process primacy in the setting of wages and conditions of employment.⁶⁵
- [136] The legislative scheme of the IR Act, so far as collective bargaining is concerned, is primarily contained within Chapter 4.
- [137] The purpose of the Act, as expressed in s 3 of the IR Act, is two-fold. First, it is to provide for a framework for cooperative industrial relations that is fair and balanced; and, secondly, it supports the delivery of high-quality services, economic prosperity, and social justice for Queenslanders.

⁶⁴ *Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland and Others v Brisbane City Council* [2017] QIRC 087.

⁶⁵ [2017] QIRC 087 [28].

[138] The way in which those purposes are achieved is set out in s 4, which, relevantly, provides:

- (h) promoting collective bargaining, including by -
 - (i) Providing for good faith bargaining; and
 - (ii) Establishing the primacy of collective agreements over individual agreements....
- ...
- (n) encouraging representation of employees and employers by organisations that are registered under this Act...

[139] The legislative scheme established under Chapter 4 is reflected in s 163 of the IR Act.

[140] The Commission has a statutory obligation under ss 141 and 142 to provide, amongst other things for fair and just wages and employment conditions.

[141] In exercising its statutory functions, the Full Bench is mindful of its overarching responsibility to ensure, amongst other things, that employees are covered by fair and reasonable wages that allow them to participate in society and that those who do not benefit from bargaining are not left behind.⁶⁶

[142] The Full Court of the Federal Court in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*⁶⁷ whilst in a different statutory context, dealt with the "modern awards objective" as expressed in s 134 of the *Fair Work Act* 2009. The Court observed:

- [48] ... What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a "fair and relevant minimum safety net of terms and conditions", they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters "must be determined by implication from the subject matter, scope and purpose of the" *Fair Work Act (Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40).

[143] The Full Bench has exercised its statutory functions under ss 141 and 142 and determined that an increase of 5.75% is fair and just. Notwithstanding that determination, the State seeks the Full Bench to exercise the discretion to withhold the increase from those employees whose wages increase beyond the rates in the applicable certified agreement in circumstances where it has determined a minimum wage rate it considers to be fair and reasonable.

⁶⁶ *Declaration of General Ruling (State Wage Case 2020)* [2020] QIRC 131, at [77].

⁶⁷ [2017] 272 IR 88.

- [144] The Full Bench accepts the State's argument that the primary mechanism for achieving wage increases is through enterprise bargaining, and further accepts the primacy of collective bargaining as the means for determining wages.
- [145] The wages of the relevant employees identified by the State have been set through the collective bargaining process. Wages for the present purposes are construed narrowly. That is confined to 'salary' as opposed to allowances.
- [146] The wage adjustment mechanisms in the relevant certified agreements ensures no employee receives a base rate of pay which is less than the corresponding rate of pay in the relevant parent award. In effect, the relevant employees are entitled, at a minimum, to be paid a certified agreement rate of pay that is equal to the corresponding award rate of pay.
- [147] The certified agreements which contain a flow-on clause have been the subject of collective bargaining. That outcome reflects the legislative scheme established under Chapter 4 as reflected in s 163 of the IR Act.
- [148] It was contended by the State that in the negotiations for the certified agreements, the union parties were aware of the discretion held by the Commission under s 459A. That is true. Equally, the State was aware that the Commission could under s 145 of the IR Act agree to the insertion of a flow-on clause into a certified agreement. Moreover, the parties to the negotiations, including the State were also aware of Directive 12/12.
- [149] The wage adjustment mechanism contained within the certified agreement is the product of bargaining. In short, it is a bargained outcome that the award rates will apply if they are higher. The State was on notice in respect of s 459A and despite knowing the only discretion the Commission had, voluntarily accepted, as part of the negotiated outcome, the insertion of the clauses.
- [150] In considering the exercise of the discretion conferred on the Commission, it is worth considering the role played by Directive 12/12. Relevantly, Directive 12/12 seeks to ensure that state wage case increases apply to wages so that employees working under a certified agreement do not receive wages less than specified by the relevant award. Where the wages are greater than those provided by the certified agreement, those wages apply.
- [151] As the Commission has previously observed,⁶⁸ the power vested in the Industrial Relations Minister is a discretionary one. There is no requirement upon the Minister to make rulings. The Directive remains in force until it is revoked and exists alongside and does not replace any award or certified agreement. Relevantly, for our purposes, the Directive deals with wages.

⁶⁸ *Declaration of General Ruling (State Wage Case 2023)* [2023] QIRC 263.

- [152] The Directive reflects, in our view, the intent of the employer, the State in respect of the outcome of a state wage case. That is, the Directive ensures that employees working under a certified agreement do not receive wages less than specified by the relevant award.
- [153] In our view, there is an absence of compelling discretionary grounds to justify withholding, what has been determined to be, wages which are fair and just. The current wage setting mechanism has been determined through the collective bargaining process. The result which flows from that process is that the relevant employees are entitled, at a minimum, to be paid a certified agreement rate of pay that is equal to the corresponding award rate of pay.

The Approach to Future State Wage Cases

- [154] As discussed above, the Declaration of General Ruling (State Wage Case 2023), recognised that whilst the Full Bench will have regard to the FWC conclusions, in exercising its statutory function, the Commission is required to bring an independent mind to the task of determining whether, in all the circumstances, the FWC's determination ought to be properly adopted.
- [155] It would be a mistake for the Full Bench to accept that the FWC's determination can be a substitute for a proper forensic inquiry into the impact of economic factors upon the wages of workers in Queensland who are not national system employees.
- [156] In undertaking the forensic task associated with the 2023 SWC, it has become apparent to the Full Bench that there is no significant difference in the economic patterns for Queensland and nationally. Indeed, the evidence of Professor Peetz observes that:

... [I]t would take quite a large difference between a Queensland estimate and the national estimate on any particular matter for me to conclude that there was potentially something specific about Queensland that raised doubts about the relevance of the FWC's analysis of the economic situation to Queensland.⁶⁹

- [157] The evidence before the Full Bench does not suggest that there is a basis for considering that the analysis undertaken by the FWC does not have application to Queensland. We accept that the FWC determination encompasses a consideration of the economic impact of a variety of factors upon the national industrial environment. The assessment of those factors as reflected in the FWC determination will generally be relevant to determination of the Queensland state wage case. It follows therefore, that the FWC will be a significant factor considered by the Full Bench in determining the state wage case.
- [158] Whilst future state wage cases will not be attended by the same level of detail it will nevertheless be necessary for the Full Bench to undertake an evaluative function having regard to the matters in ss 141 and 142 of the IR Act and assessing the qualities of the

⁶⁹ Exhibit 2.

safety net by reference to the statutory criteria to ensure that the Commission establishes and maintains wages that are fair and just. Equally, the Full Bench will need to be in receipt of evidence identifying relevant differences between the national workforce and Queensland workers who are not national system employees. It is also necessary to identify economic and perhaps social conditions which may be peculiar to Queensland and relevant to the Full Bench's determination of the state wage case. Once those things are identified, proper evidence (expert if necessary) should be led as to their impact upon the issues in the state wage case.

Conclusion

[159] For the reasons set out above, the Full Bench has determined that the Commission ought not to exercise its discretion pursuant to s 459A of the IR Act.

[160] The Full Bench makes the following orders:

1. Except as otherwise provided in these orders, the wages or salaries for full time adult employees in all state awards shall be increased by 5.75%.
2. The above increases operate on and from 1 September 2023.