Industrial Relations Commission
of New South Wales

Case Title:	Re Crown Employees Wages Staff (Rates of Pay) Award 2011 & Ors
Medium Neutral Citation:	[2013] NSWIRComm 53
Hearing Date(s):	17 June 2013
Decision Date:	25 June 2013
Jurisdiction:	Industrial Relations Commission of New South Wales
Before:	Boland J, President, Walton J, Vice-President, Tabbaa C
Decision:	We find that having regard to our textual analysis of cl 6(1)(a) of the Regulation, the context in which that text appears in the Regulation, the purpose of s 146C and the Regulation and the extrinsic materials that assist in elucidating the purpose of cl 6(1)(a), the increases in remuneration or other conditions of employment referred to in that provision are only those increases resulting from an award or order made or varied by the Commission either by consent or in arbitration proceedings.
Catchwords:	AWARDS - Applications to vary or make new industrial instruments applying to public sector employees in respect of increases to remuneration - STATUTORY INTERPRETATION - Section 146C of the Industrial Relations Act 1996 - Industrial Relations (Public Sector Conditions of Employment) Regulation 2011- Threshold issue - Whether for the purpose of cl 6(1)(a) of the Regulation an increase in employer superannuation contributions under Commonwealth law is an increase in employee-related costs to be taken into

account in determining whether the cap of 2.5 per cent has been exceeded - Relevant principles of statutory interpretation - Whether the 2.5 per cent increase available under cl 6(1)(a) of the Regulation may be discounted by an increase in the cost of guaranteed minimum conditions provided for under cl 5 of the Regulation - Held that an increase in employer contributions under Commonwealth law is not an increase for the purpose of cl 6(1)(a) - Held the increases under cl 6(1)(a) relate to increases resulting from an award or order made or varied by the Commission either by consent or in arbitration proceedings

Legislation Cited:

Industrial Relations (Public Sector Conditions of Employment) Regulation 2011
Industrial Relations Act 1996
Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 (Repealed)
Public Sector Employment and Management Act 2002
Superannuation Guarantee (Administration) Amendment Act 2012 (Cth)

Cases Cited:

Australian Education Union v Department of Education and Children's Services [2012] HCA 3; (2012) 285 ALR 27
Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32; (2012) 220 IR 445; (2012) 290 ALR 647
Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Thelander [2012] HCA 56; (2012) 293 ALR 412
Health Employees Conditions of Employment (State) Award and other Awards [2011] NSWIRComm 129; (2011) 208 IR 201

HSU east and Director-General, Department of Finance and Services [2012] NSWIRComm 112
Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales and Department of Education and Communities [2013] NSWIRComm 32

Crown Employees (Public Sector - Salaries 2011) Award (No 3), Re [2011] NSWIRComm 104; (2011) 210 IR 458
Shergold v Tanner [2002] HCA 19; (2002) 209 CLR 126
The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment [2012] HCA 58; (2012) 293 ALR 450
Public Service Association and Professional Officers' Association Amalgamated Union of NSW v Director of Public Employment [2011] NSWIRComm 143

Texts Cited:

Category: Interlocutory applications

Parties:
Audit Office of New South Wales (Applicant in matter 258 of 2013)
Australian Institute of Marine and Power Engineers (Respondent in 264 and 413)
Australian Salaried Medical Officers' Federation (New South Wales) - (Applicant in matters 352, 357 of 2013 and Respondent in matters 371, 372, 375, 398, 430, 433, 442 of 2013)
Australian Workers Union (Applicant in matters 324, 325, 401 and Respondent in 256, 257 and 263)
Construction, Forestry, Mining and Energy Union (New South Wales Branch) - (Applicant in matters 403, 404, 405 and 406 of 2013)
Electrical Trades Union (Respondent in matters 256, 257, 324, 325, 403, 404 and 406 of 2013)
Fire Brigade Employees Union (Intervenor)
Health Services Union NSW (Applicant in matters 367 to 387 and 424 to 442)
Landcom (Applicant in 261 of 2013)
NSW Ministry of Health (Applicant in matters 398 and 422 to 442 and Respondent in 352 and 367 to 387)
NSW Teachers Federation (Intervenor)
Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales (Applicant in matters 256

	to 263 and 342 of 2013) Secretary of the Treasury (Respondent in 256, 257, 260, 262, 263 and 342) The Australian Workers' Union, New South Wales (Applicant in matters 324, 325 and 401 of 2013) Unions NSW (Respondent in all matters) United Services Union (Respondent in matter 257 of 2013) United Voice (Respondent in matters 256 and 324 of 2013)
Representation	
- Counsel:	Mr M Gibian of counsel for PSA in matters 256 to 263 and 342 of 2013 Mr A Slevin of counsel for HSU in matters 367 to 387 and matters 424 and 442 Mr J Nolan of counsel for Unions NSW; USU, NSW Teachers Federation, ETU, FBEU, ASMOF, United Voice, CFMEU in matters 371, 372, 375, 401, 403, 404, 406, 430, 433, 442, 256, 257, 263, 324, 325, 352, 357 and 398 Mr P Kite, SC with Mr A Britt of counsel for the Secretary of the Treasury (Respondent in matters 256, 257, 260, 262, 263, 324 and 342)
- Solicitors:	Mr T Craft for Director General, NSW Ministry of Health (Applicant in 398 and 422 to 442 and Respondent in 352, 367 to 387) Mr D Lloyd for Landcom in matter 261 of 2013 Ms C Seymour for Audit Office of NSW in matter 258 Mr J Fallone for AIMPE in matters 264 and 413
File number(s):	IRC Matters 256 - 263, 342, 324, 325, 352, 357, 367- 387, 398, 401, 403 - 406, 422 - 442 of 2013
Publication Restriction:	

DECISION OF THE COMMISSION

1 The issue before the Full Bench in these proceedings is whether salaries and allowances under a total of 61 public sector awards, agreements and determinations may be increased by 2.5 per cent or 2.25 per cent. The difference may be small, but the underlying issue is significant.

2 Having filed 39 applications to vary the awards, agreements and determinations pursuant to s 17 of the *Industrial Relations Act* 1996 ("the Act"), the union parties contended that the salaries and allowances provided for under those instruments should be increased by 2.5 per cent from 1 July 2013 in accordance with what is allowable under the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 ("the Regulation").

3 The employer parties, primarily represented by the Secretary of the Treasury ("the Secretary") as the employer of staff in the public service for the purposes of industrial proceedings (see s 129 of the *Public Sector Employment and Management Act* 2002), contended that the increase of 0.25 per cent in the charge percentage under Schedule 1 of the *Superannuation Guarantee (Administration) Amendment Act* 2012 (Cth) ("2012 Act") that takes effect from 1 July 2013 is an "employee-related cost" for the purpose of cl 6(1)(a) of the Regulation (it is noted that the charge percentage will further increase so that by 1 July 2019 it will stand at 12 per cent compared to its current rate of 9 per cent).

4 Therefore, according to the employer parties, the cost of the increase in the superannuation charge percentage must be taken into account pursuant to cl 6 of the Regulation when the Commission awards an increase in remuneration or other conditions of employment in any of the public sector instruments. It follows from the employers' case that the 2.5 per cent increase allowable under the Regulation would be discounted by 0.25 per cent, resulting in an increase of 2.25 per cent.

5 Consistent with that approach, 22 of the applications before the Full Bench are applications by the Health Ministry for new awards to incorporate an increase of 2.25 per cent.

6 The process that led the applications to vary to come before the Full Bench may be found in the transcript of proceedings before Harrison DP on 29 April 2013, before Boland J, President on 17 May 2013 and before Walton J, Vice-President on 27 and 29 May 2013. The applications were referred to the Full Bench pursuant to s 193 of the Act to deal with the issue described above as a threshold issue.

Relevant legislation

7 On 17 June 2011, the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act* 2011 ("the Amendment Act") was assented to. The Amendment Act amended the Act by, *inter alia*, inserting s 146C which provides:

> **146C Commission to give effect to certain aspects of government policy on public sector employment**
>
> (1) The Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees:
>
> > (a) that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission, and
> >
> > (b) that applies to the matter to which the award or order relates.
>
> (2) Any such regulation may declare a policy by setting out the policy in the regulation or by adopting a policy set out in a relevant document referred to in the regulation.
>
> (3) An award or order of the Commission does not have effect to the extent that it is inconsistent with the obligation of the Commission under this section.

(4) This section extends to appeals or references to the Full Bench of the Commission.

(5) This section does not apply to the Commission in Court Session.

(6) This section extends to proceedings that are pending in the Commission on the commencement of this section. A regulation made under this section extends to proceedings that are pending in the Commission on the commencement of the regulation, unless the regulation otherwise provides.

(7) This section has effect despite section 10 or 146 or any other provision of this or any other Act.

(8) In this section:

award or order includes:

(a) an award (as defined in the Dictionary) or an exemption from an award, and

(b) a decision to approve an enterprise agreement under Part 2 of Chapter 2, and

(c) the adoption under section 50 of the principles or provisions of a National decision or the making of a State decision under section 51, and

(d) anything done in arbitration proceedings or proceedings for a dispute order under Chapter 3.

conditions of employment -see Dictionary.

public sector employee means a person who is employed in any capacity in:

(a) the Government Service, the Teaching Service, the NSW Police Force, the NSW Health Service, the service of Parliament or any other service of the Crown, or

(b) the service of any body (other than a council or other local authority) that is constituted by an Act and that is prescribed by the regulations for the purposes of this section.

8 The Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 was made pursuant to s 146C. It was promulgated on 22 June 2011. The Explanatory Note to the Regulation stated that the object of the Regulation was to declare the Government's public sector policies for the purposes of s 146C of the Act. Further, that the section required the

Commission to give effect to such policies when making or varying awards or orders relating to the remuneration or other conditions of employment of public sector employees.

9 The Regulation declares, for the purposes of s 146C of the Act, aspects of government policy that are to be given effect to by the Industrial Relations Commission when making or varying awards or orders. Clause 6 provides:

> **6 Other policies**
>
> (1) The following policies are also declared, but are subject to compliance with the declared paramount policies:
>
> > (a) Public sector employees may be awarded increases in remuneration or other conditions of employment that do not increase employee-related costs by more than 2.5% per annum.
> >
> > (b) Increases in remuneration or other conditions of employment that increase employee-related costs by more than 2.5% per annum can be awarded, but only if sufficient employee-related cost savings have been achieved to fully offset the increased employee-related costs. For this purpose:
> >
> > > (i) whether relevant savings have been achieved is to be determined by agreement of the relevant parties or, in the absence of agreement, by the Commission, and
> > >
> > > (ii) increases may be awarded before the relevant savings have been achieved, but are not payable until they are achieved, and
> > >
> > > (iii) the full savings are not required to be awarded as increases in remuneration or other conditions of employment.
> >
> > (c) For the purposes of achieving employee-related cost savings, existing conditions of employment of the kind but in excess of the guaranteed minimum conditions of employment may only be reduced with the agreement of the relevant parties in the proceedings.
> >
> > (d) Awards and orders are to resolve all issues the subject of the proceedings (and not reserve leave for a matter to be dealt with at a later time or allow extra claims to be made during the term of the award or order). However, this does not prevent variations made with the agreement of the relevant parties.

(e) Changes to remuneration or other conditions of employment may only operate on or after the date the relevant parties finally agreed to the change (if the award or order is made or varied by consent) or the date of the Commission's decision (if the award or order is made or varied in arbitration proceedings).

(f) Policies regarding the management of excess public sector employees are not to be incorporated into industrial instruments.

(2) Subclause (1) (e) does not apply if the relevant parties otherwise agree or there are exceptional circumstances.

(3) The *relevant parties* in relation to a matter requiring agreement under this clause are the employer and any other party to the proceedings that is an industrial organisation of employees with one or more members whose interests are directly affected by the matter.

10 The reference to "declared paramount policies" in cl 6 of the Regulation draws attention to cll 5 and 7 of the Regulation:

5 Paramount policies

The following paramount policies are declared:

(a) Public sector employees are entitled to the guaranteed minimum conditions of employment (being the conditions set out in clause 7).

(b) Equal remuneration for men and women doing work of equal or comparable value.

...

7 The guaranteed minimum conditions of employment

(1) For the purposes of this Regulation, the *guaranteed minimum conditions of employment* are as follows:

(a) Unpaid parental leave that is the same as that provided by the National Employment Standards.

(b) Paid parental leave that applies to the relevant group of public sector employees on the commencement of this clause.

(c) Employer payments to employee superannuation schemes or funds (being the minimum amount prescribed under the relevant law of the Commonwealth).

(2) The *guaranteed minimum conditions of employment* also include the following:

(a) Long service or extended leave (being the minimum leave prescribed under Schedules 3 and 3A of the *Public Sector Employment and Management Act* 2002 or the *Long Service Leave Act* 1955, whichever Act is applicable to the employment concerned).

(b) Annual leave (being the minimum leave prescribed under the *Annual Holidays Act* 1944).

(c) Sick leave entitlements under section 26 of the Act.

(d) Public holiday entitlements under the *Public Holidays Act* 2010.

(e) Part-time work entitlements under Part 5 of Chapter 2 of the Act.

11 Additionally, cll 8 and 9 of the Regulation are relevant:

8 Meaning of employee-related costs

For the purposes of this Regulation, *employee-related costs* are the costs to the employer of the employment of public sector employees, being costs related to the salary, wages, allowances and other remuneration payable to the employees and the superannuation and other personal employment benefits payable to or in respect of the employees.

9 Meaning of employee-related cost savings

(1) For the purposes of this Regulation, *employee-related cost savings* are savings:

(a) that are identified in the award or order of the Commission that relies on those savings, and

(b) that involve a significant contribution from public sector employees and generally involve direct changes to a relevant industrial instrument, work practices or other conditions of employment, and

(c) that are not existing savings (as defined in subclause (2)), and

(d) that are additional to whole of Government savings measures (such as efficiency dividends), and

(e) that are not achieved by a reduction in guaranteed minimum conditions of employment below the minimum level.

(2) Savings are *existing savings* if they are identified in a relevant industrial instrument made before the commencement of this Regulation (or in an agreement contemplated by such an industrial instrument) and are relied on by that industrial instrument, whether or not the savings have been achieved and whether or not they were or are achieved during the term of that industrial instrument.

12 In introducing the Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011 the Hon Greg Pearce MLC (Minister for Finance and Services and Minister for the Illawarra) in the Second Reading Speech stated, *inter alia*:

Underpinning the need for fiscal restraint is the Government's wages policy. The policy was first introduced by the previous Labor Government in 2007, but that Government failed to implement it. The New South Wales Coalition Government will continue the key provisions of the wages policy introduced by the former Labor Government. However, the Coalition Government has proposed changes to the way the wages policy operates to ensure that the key requirements of the wages policy are actually followed. Our policy and legislative response will ensure that wage increases of 2.5 per cent are available each year to our hardworking public sector employees. Increases in excess of 2.5 per cent are available but will be required to be funded through employee-related savings.

Key elements of the policy require that any increases to employee-related expenses exceeding 2.5 per cent per annum, including wages, allowances, superannuation and conditions of employment, must be funded through employee-related cost savings that have been achieved. Details of the savings measures used to fund increases in excess of 2.5 per cent are to be detailed in the award or agreement where that is appropriate. New awards or agreements should not predate the expiry of existing instruments, back-payment of wage increases is not to occur other than in exceptional circumstances, and awards and agreements must contain clear and comprehensive no extra claims clauses.

The Industrial Relations Commission has rejected key aspects of the 2007 wages policy on a number of occasions. In the 2008 public servants salaries case the Government accepted the Industrial Relations Commission's strong recommendation for the settlement of the Public Service Association's claim. The recommendation provided for increases of 4 per cent per annum

over three years and committed the Government and the union to achieving a range of employee-related cost offsets that were not identified at the time. The Government and the union then reflected the commission's recommendations in a memorandum of understanding. A subsequent decision by the commission in 2010 regarding the interpretation of the memorandum constrained the areas of employee-related cost savings the Government was able to pursue, severely limiting the opportunity for public sector agencies to pursue significant savings through industrial reforms.

...

The reference to the Government's policy on conditions of employment is intended to be broad enough to enable all relevant elements of the public sector wages policy to be included in the declaration made under the regulations. It will be appreciated that while the focus of the wages policy is on ensuring appropriate restraints on the quantum of pay increases, as outlined above, in order to do so the policy may also refer to other relevant conditions of employment, such as increased leave entitlements or a new classification structure. The commission will be required to give effect to the Government's policy only where any such declared policy applies to the matter before it. These will be matters arising in the public sector. Clearly, this requirement will not apply to, for example, matters relating to local government employers and employees.

Under the current framework of the Industrial Relations Act, the Industrial Relations Commission is required to have regard to a range of matters in the exercise of its functions. These include the objects of the Act in section 3, the instruction in section 10 to make awards setting fair and reasonable conditions of employment for employees, the public interest provisions in section 146, and the state of the economy of New South Wales and the likely effect of its decisions on that economy, also in section 146. That is already in the Act. The commission also applies a set of wage fixing principles that set out the circumstances in which wage increases can be awarded. These are applied when the commission deals with public sector awards, which are not affected by the minimum wage increase set in the general State Wage Case.

...

As outlined earlier, the Government's wages policy is designed to ensure fiscal discipline and to protect the budget bottom line, therefore ensuring that services and other commitments of the Government to the citizens of this State are able to be delivered.

...

The intent of the amendment is to ensure that the wages policy or the Government's fiscal strategy is not rendered ineffective by decisions of the Industrial Relations Commission. The proposed amendments will ensure that the commission makes decisions that

> properly take account of and give effect to wages policy, so minimising pressure on the State's budget.

13 The Bill was the subject of an unsuccessful disallowance motion (Legislative Council, 3 August 2011). In the course of the debate the Minister responsible for the legislation stated:

> The regulation also makes clear that existing conditions of employment in excess of the minimum conditions can only be reduced with the agreement of the relevant parties in the proceedings. Labor's 2007 wages policy had no protections for conditions of employment. Despite the scaremongering from the Opposition, our policy is more transparent than Labor's 2007 policy by clearly guaranteeing the 2.5 per cent increase and minimum conditions. It allows unions, as representatives of the workforce, the flexibility to decide what they determine to be conditions of employment they are willing to put on the negotiating table for increases above the guaranteed 2.5 per cent. If they are happy with the 2.5 per cent increases and their current conditions of employment then nothing changes.

Submissions

14 The parties filed written submissions in accordance with the Commission's directions.

Secretary

15 The Secretary, supported by the other employer parties, contended that the increase in employee-related costs by not more than 2.5 per cent per annum means any increase in such costs. The essence of the Secretary's position was expressed in his written submissions in the following terms:

> The payment of additional superannuation pursuant to Schedule 1 of the 2012 Act falls clearly within the definition of employee-related costs in the Regulation. The cost of superannuation for the Respondent in respect of most employees will increase by 0.25%.

> Absent employee-related cost savings, public sector employees may be awarded increases in remuneration or other conditions of employment that do not increase employee-related costs by more than 2.5% per annum.
>
> The text of Clause 6(1)(a) makes clear that the annual limit of net increase in employee-related costs is 2.5%. Nothing in the text confines the consideration to increases to "employee related costs" that flow only from the particular award or order of the Commission. The focus is clearly on the costs to Government of Public Sector employment as held by the Commission.... The costs of the particular award are relevant in that global context.
>
> This interpretation is harmonious with the definition of "employee related costs" which quite clearly includes matters which potentially could be included in awards or orders of the Commission but also includes costs to the employer of the employment of public sector employees, being costs related to the salary, wages, allowances and other remuneration payable to the employees and the superannuation and other personal employment benefits payable to or in respect of the employees. ([Secretary's] emphasis) which may not be prescribed by award.
>
> Further this interpretation is consistent with the definition of "employee related costs savings" which, other than being identified in an award or order, do not actually need to be the subject of a result from a variation to an existing award and/or order (see Clause 9 of the Regulation).

16 The Secretary's position was supported by the Health Ministry, LandCom and the Audit Office.

PSA

17 The principal union claiming an increase of 2.5 per cent and opposing the Secretary's position was the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales ("the PSA"). The PSA made application to vary nine awards, including the pivotal Crown Employees (Public Sector – Salaries 2008) Award. Its basic propositions were that:

(a) The restriction on the powers of the Commission precludes it awarding increases in remuneration or other conditions of employment *that* increase employee-related costs by more than 2.5% per annum. Increases in employee-related

costs other than the cost of the increased remuneration awarded by the Commission do not limit its jurisdiction.

(b) In any event, the restriction imposed by clause 6(1)(a) and (b) is "*subject to*" the compliance with the paramount policy that employees are entitled to the "*guaranteed minimum conditions of employment*", including the making of employer superannuation contributions in accordance with relevant Commonwealth legislation.

(c) In the alternative, even if it is necessary for the costs associated with the increase in superannuation contributions to be taken into account, only the effect of increased superannuation contributions upon the increase in remuneration or other conditions of employment awarded by the Commission could be relevant.

18 The PSA was supported by the Australian Institute of Marine and Power Engineers.

HSU

19 Supporting the PSA was the Health Services Union, New South Wales ("the HSU"), which had made an application to vary 21 awards to increase salaries and allowances from 1 July 2013 by 2.5 per cent. In doing so, the HSU expressed its position to be as follows:

> The HSU submits that, contrary to the submissions filed by the Secretary of the Treasury, Regulation 6(1)(a) does not require the costs associated with the "SGA Amendment Act" to be taken into account for the purposes of the applications because:
>
> (a) The restriction imposed by clauses 6(1)(a) and 6(1)(b) of the Regulation is "*subject to*" compliance with the paramount policy that employees are entitled to the "*guaranteed minimum conditions of employment*", which are found in clause 7, including the making of employer superannuation contributions in accordance with relevant Commonwealth legislation.
>
> (b) The restriction on the powers of the Commission brought about by the operation of s146C only precludes the awarding of increases in remuneration or other conditions of employment that increase employee-related costs by more than 2.5% per annum. Increases in employee-related costs resulting from sources other than the award

> or order made by the Commission do not limit the Commission's jurisdiction.

In the alternative, if it is necessary for the costs associated with the SGA Amendment Act to be taken into account, the Commission need only take into account the increase in costs that is attributable to the award variations sought in the applications. The increase in costs associated with the variations will be the additional superannuation cost that arises because wages have increased.

Unions NSW

20 Unions NSW, the peak council for employees, and its affiliated unions supported and adopted the PSA's submissions. In addition, Unions NSW focused on the paramount policies defined by the Regulation that guarantee minimum conditions of employment including superannuation. Unions NSW submitted the correct approach to the application of the statutory scheme involved the following steps:

> **Clause 5** of the *Industrial Relations (Public Sector Conditions of Employment) Regulation* 2011 (Regulation) contains "paramount polices" which include (inter alia) the guaranteed minimum conditions of employment;
>
> **Clause 7** of the Regulation lists the prescribed minimum Commonwealth superannuation contribution as a *guaranteed minimum condition of employment*. As already noted, this is not limited by reference to a particular point in time so (must) be taken to mean the rate prescribed from time to time under the Commonwealth legislation; and,
>
> **Clause 6** of the Regulation contains the 2.5% cap on increases to employee-related costs but 6 (1) states: "The following policies are also declared, but are **subject to compliance with the declared paramount policies**".

Having regard to its elements, and its plain words, the scheme can only be read to mean that the guaranteed minimum conditions of employment (including the minimum Commonwealth superannuation contribution) are *not* to be taken into account when applying the 2.5% cap on employee-related costs because clause 6 (1) clearly states the cap is "subject to compliance with the declared paramount policies". 'Subject to' means 'dependent or conditional upon'. Apart from the general sense to be taken from of the plain words of the Regulation, the use of the word "paramount" reinforces this interpretation because it *mandates*

> compliance with the minimum conditions of employment. The word 'paramount' means 'more important than anything else'. The policy should be interpreted accordingly.

Approach to statutory interpretation

21 A Full Bench of this Commission recently considered the correct approach to statutory interpretation in *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales and Department of Education and Communities* [2013] NSWIRComm 32 at [24]. In doing so, the Full Bench referred to three decisions of the High Court, namely, *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Thelander* [2012] HCA 56; (2012) 293 ALR 412, *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3; (2012) 285 ALR 27 and *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; (2012) 220 IR 445; (2012) 290 ALR 647. The key principles distilled by the Full Bench from these authorities were as follows:

> (1) The legal meaning of a provision of a statute is to be ascertained by processes of statutory construction: *Certain Lloyd's Underwriters* at [25] per French CJ and Hayne J. Thus, the fundamental object of statutory construction is to ascertain legislative intention: *Certain Lloyd's Underwriters* at [88] per Kiefel J. However, the use of the metaphor 'legislative intention' must not mislead. This expression must be understood as the intention that the courts will impute to the legislature by a process of construction: *Certain Lloyd's Underwriters* at [88] per Kiefel J. The duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have: *Certain Lloyd's Underwriters* at [25] per French CJ and Hayne J (applying *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355; (1998) 72 ALJR 841; (1998) 153 ALR 490 at [78] per McHugh, Gummow, Kirby and Hayne JJ);
>
> (2) Ordinarily, the legal meaning of a provision of a statute will correspond with the grammatical meaning, but not always: *Certain Lloyd's Underwriters* at [25] per French CJ and Hayne J and at [68] per Crennan and Bell JJ (applying *Project Blue Sky* at [78] per McHugh, Gummow, Kirby and Hayne JJ). Nontheless, the process of statutory construction must begin with a textual analysis of the words of a provision - that is, a consideration of the ordinary and grammatical meaning of the words: *Australian Education Union* at

[26] per French CJ, Hayne, Kiefel and Bell JJ; *Barclay* at [41] per French CJ, Crennan, Gummow and Hayne JJ; *Certain Lloyd's Underwriters* at [23] per French CJ and Hayne J. Although that initial step may involve the construction of the words of a provision in question when read in the context of the statute as a whole: *Certain Lloyd's Underwriters* at [88] per Kiefel J. Thus, the legal meaning is ascertained by reference to the language of the statute viewed as a whole: *Certain Lloyd's Underwriters* at [26] per French CJ and Hayne J and [88] per Kiefel J. The purpose of the statute resides in its text and structure: *Certain Lloyd's Underwriters* at [25] per French CJ and Hayne J;

(3) Context may also be considered "in a broader sense as including the general purpose and policy of the legislation, in particular the mischief to which the statute is directed and which the legislature intended to remedy.": *Certain Lloyd's Underwriters* at [88] per Kiefel J;

(4)The context and purpose of a provision are important to its proper construction. Legal meaning may be ascertained by reference to general purpose, consistency and fairness: *Certain Lloyd's Underwriters* at [24] per French CJ and Hayne J;

(5) The determination of the purpose of a statute or a particular statutory provision may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, if appropriate, reference to extrinsic materials: *Certain Lloyd's Underwriters* at [25] per French CJ and Hayne J. Whilst consideration of extrinsic materials should not displace the clear meaning of the text of a provision, the purpose of a provision may be elucidated by appropriate reference to them: *Certain Lloyd's Underwriters* at [70] per Crennan and Bell JJ;

(6) It is conceivable that the context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with their literal or grammatical meaning: *Certain Lloyd's Underwriters* at [68] per Crennan and Bell JJ quoting *Project Blue Sky* at [78] per McHugh, Gummow, Kirby and Hayne JJ;

(7) Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted: *Certain Lloyd's Underwriters* at [25] - [26] per French CJ and Hayne J and [70] per Crennan and Bell JJ. In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose: *Australian Education Union* at [27] - [28] per French CJ, Hayne, Kiefel and Bell JJ.

22 We adopt those principles for the purpose of these proceedings and we note that both the PSA and the Secretary accepted that the summary of principles in *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales and Department of Education and Communities* was a proper reflection of the law.

Consideration

Differences between the parties

23 To refine the essential difference between the competing parties a little more sharply: the employer parties contend that the annual limit of net increase in employee-related costs is 2.5 per cent regardless of whether that flows from an award or order or from some other source of "employee-related costs" as defined in cl 8 of the Regulation. The purpose of imposing this ceiling was to "limit employment costs in the public sector": *Re Crown Employees (Public Sector - Salaries 2011) Award (No 3)* [2011] NSWIRComm 104; (2011) 210 IR 458 at [34] and to achieve "fiscal restraint" via the Government's wages policy: *Health Employees Conditions of Employment (State) Award and other Awards* [2011] NSWIRComm 129; (2011) 208 IR 201 at [49]. Accordingly, if an employee-related cost such as superannuation increases by 0.25 per cent, in determining any increase in remuneration the Commission remains bound to observe the ceiling on costs of 2.5 per cent unless any increase above 2.5 per cent is offset by employee-related cost savings.

24 On the other hand, the union parties contend that the correct interpretation of the relevant statutory provisions, having regard to the text and context, is that the restriction imposed by the Regulation on the powers of the Commission does not extend to any requirement to have regard to the effect of increases in employee-related costs other than those the Commission itself may award. That is, the restriction:

> [O]nly precludes it *awarding* increases in remuneration or other

conditions of employment *that* increase employee-related costs by more than 2.5 per cent per annum. The powers of the Commission to award increases in remuneration or other conditions of employment are not affected merely because employee-related costs increase or decrease for reasons other than an order or award made by it.

PSA's analysis correct

25 We consider the union parties' approach to the construction of cl 6(1) of the Regulation (and s 146C of the Act) is correct and in that respect we concur with the PSA's analysis in its written submissions:

(a) Section 146C(1) requires the Commission, *when making or varying any award or order*, to give effect to any policy on conditions of employment "that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission" and "applies to the matter to which the award or order relates." That is, the section (and any policy declared by Regulation) is directed only at the making or varying of an award or order by the Commission.

(b) Clause 4 of the Regulation and the Explanatory Note make clear that its purpose is to declare aspects of government policy that are required to be given effect to by the Commission for the purposes of section 146C of the Act. That is, the only purpose of the Regulation is to set out policies required to be given effect to by the Commission when making or varying an award or order.

(c) Clause 6(1)(a) declares as a policy to be given effect to by the Commission that public sector employees "may be *awarded* increases in remuneration or other conditions of employment *that* do not increase employee-related costs by more than 2.5% per annum." It is increases in remuneration or conditions of employment that are *awarded* (that is, by award or order of the Commission) *that* may not increase employee-related costs by more than 2.5% per annum. The clause, on its terms, does not apply more broadly.

(d) Clause 6(1)(b) declares as a policy that "increases in remuneration or other conditions of employment *that* increase employee-related costs by more than 2.5% per annum can be *awarded*", but "only if sufficient employee related costs savings have been achieved to fully offset *the increased employee-related costs*." It is again clear that the employee-related costs referred to are *the increased employee-related costs* resulting from increases in

remuneration or other conditions of employment awarded by the Commission.

(e) Other parts of the Regulation make clear that the Regulation is directed at and operates upon awards and orders of the Commission. For example, clause 6(1)(d) requires "awards and orders" to resolve all issues the subject of the proceedings. Clause 6(1)(e) similarly indicates that the "changes in remuneration or other conditions of employment" dealt with in clause 6 are those resulting from an award or order made or varied by the Commission either by consent or in arbitration proceedings.

Ordinary and grammatical meaning of words in cl 6(1)(a)

26 Consistent with the High Court authorities referred to above, the process of statutory construction must begin with a textual analysis of the words of a provision - that is, a consideration of the ordinary and grammatical meaning of the words. Context may also be considered "in a broader sense as including the general purpose and policy of the legislation, in particular the mischief to which the statute is directed and which the legislature intended to remedy". Whilst consideration of extrinsic materials should not displace the clear meaning of the text of a provision, the purpose of a provision may be elucidated by appropriate reference to them: *Certain Lloyd's Underwriters* at [70] per Crennan and Bell JJ.

27 Moreover, we agree with the PSA's submission that:

> It is relevant to the process of construction that the effect of section 146C and the Regulation is to limit the jurisdiction of the Commission. The conferral on a court or tribunal of a statutory power to make orders should be construed broadly, not confined by implications not apparent from the words of the conferral themselves: *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72 at [11]; *Owners of Shin Kobe Maru v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185, 202-203 and 205.
>
> A conferral of jurisdiction upon a court or tribunal will not be taken to have been withdrawn, unless the withdrawal of jurisdiction is clear and unmistakeable.

In this last respect, the PSA referred to *Shergold v Tanner* [2002] HCA 19; (2002) 209 CLR 126 at [34].

28 Clause 6(1)(a) of the Regulation provides:

> Public sector employees may be *awarded increases* in remuneration or other conditions of employment *that* do not increase employee-related costs by more than 2.5% per annum (our emphasis).

29 Public sector employees may be awarded increases in remuneration or other employment conditions, but it is those "*awarded increases*" "*that*" are not to increase employee-related costs by more than 2.5 per cent per annum. The increase in the superannuation charge percentage of 0.25 per cent is not an "awarded increase"; it is an increase that has no connection whatsoever with an order or award of the Commission. It is an increase derived from Commonwealth legislation.

30 This approach to the construction of cl 6(1)(a) is supported by cl 6(1)(b), which declares as a policy that "Increases in remuneration or other conditions of employment that increase employee-related costs by more than 2.5% per annum can be awarded", but "only if sufficient employee-related costs savings have been achieved to fully offset the increased employee-related costs." It is clear that the increases in remuneration, etc, that increase employee-related costs are those increases awarded by the Commission.

31 Further support is found in s 146C(1), which requires the Commission, "when making or varying any award or order", to give effect to any policy on conditions of employment "that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission" and "applies to the matter to which the award or order relates." That is, as the PSA submitted, s 146C(1) (and any policy declared by Regulation) is directed only at the making or varying of an award or order by the Commission.

Secretary's approach to interpretation

32 The Secretary's contention was that the text of cl 6(1)(a) made clear that the annual limit of net increase in employee-related costs was 2.5 per cent. It was submitted that nothing in the text confined the consideration to increases to "employee related costs" that flow only from the particular award or order of the Commission. The focus, it was said, was on the costs to Government of public sector employment.

33 The Secretary's approach was that the plain meaning of the words, "... employees may be awarded increases in remuneration or other conditions of employment that do not increase employee-related costs by more than 2.5% per annum", was that the Commission could award such increases provided those increases did not increase employee-related costs by more than 2.5 per cent. As the increase of 0.25 per cent in the superannuation charge percentage was an employee-related cost, the Commission would impermissibly (in the absence of employee-related cost savings) be increasing employee-related costs in the public sector by more than 2.5 per cent if it granted the award variations sought by the union parties.

34 We do not consider this interpretation to be correct. For the reasons we have explained, cl 6(1)(a) refers to "awarded increases" and by the use of the word "that" it is those increases that are not to increase employee-related costs by more than 2.5 per cent per annum. The word 'that' is a relative pronoun. It appears in cl 6(1)(a) in the relative clause "that do not increase employee-related costs by more than 2.5% per annum" and, in that respect, defines "award increases in remuneration or other conditions of employees". The word 'that' is used grammatically in that clause to convey the legislative intention that award increases will be restrained. No other subject (or object) is identified.

35 It would have been a simple matter for the legislature, if its intention were as the Secretary submitted, to declare a policy to the effect proposed by

the Secretary, namely, that "the Commission may award public sector employees increases on the condition the increases do not increase employee-related costs by more than 2.5 percent per annum" or "increases in the remuneration or other conditions of employment for public sector employees shall not increase employee-related costs by more than 2.5% per annum." Instead, in promulgating cl 6(1)(a), the legislature chose to link increases in employee-related costs to increases in remuneration, etc, awarded by the Commission and not to increases at large.

36 We note the definition of "employee-related costs" in cl 8 of the Regulation as being "the costs to the employer of the employment of public sector employees" and include "costs related to ... superannuation". The fact cl 6(1)(a) provides that public sector employees may be awarded increases in remuneration or other conditions of employment that "do not increase employee-related costs by more than 2.5% per annum" and that superannuation is an employee-related cost, does not assist the employers. As we have explained, it is only "employee-related costs" that increase by reason of an award or order of the Commission that are limited to 2.5 per cent per annum. Whilst the increase in the superannuation charge percentage is an employee related cost it is not an increase awarded or ordered by the Commission.

37 The scope of the definition of "employee-related costs in cl 8 has not been tested, but on its face it appears to be reasonably wide. According to the Health Ministry, relying on advice from the Treasury (in the attachment to the document "M2011-10 Wages Policy Schedule 2"), employee-related costs would include payroll tax and workers' compensation costs.

38 Conceivably, if the increase in employee-related costs referred to in cl 6(1)(a) was to be interpreted as such costs arising regardless of the cause or source, a significant range of "costs to the employer of the employment of public sector employees..." would be required to be taken into account in determining whether an increase in employee-related costs impinged on

the availability of the 2.5 per cent increase, perhaps even setting the increase at nought.

39 In that respect, it would not appear to be consistent with the legislation that public sector employees would be exposed to such an extensive degree of having the 2.5 per cent discounted in relation to matters that might be related to the cost of employment, but in respect of which employees play no part and derive no benefit.

40 Moreover, we note that there is a significant number of public sector employees who are members of the State Superannuation Scheme or State Authorities Superannuation Scheme. Those schemes are defined benefit schemes and it seemed to be common ground that the employer would not incur any additional cost as a consequence of the increase in the superannuation charge percentage. Nevertheless, on the Secretary's submissions, those employees under the defined benefit schemes would be required to forfeit 0.25 per cent of the amount available to them under cl 6(1)(a).

41 It is not our position that increases in employee-related costs from a source other than an award or order of the Commission cannot be taken into account in determining increases in remuneration or other employment conditions. In addition to s 146C and the Regulation, the Commission retains a residual discretion to set fair and reasonable conditions of employment pursuant to s 10 of the Act and s 146(2) of the Act imposes the following obligations:

> (2) The Commission must take into account the public interest in the exercise of its functions and, for that purpose, must have regard to:
>
> (a) the objects of this Act, and
>
> (b) the state of the economy of New South Wales and the likely effect of its decisions on that economy.

Purpose of fiscal restraint

42 The Secretary relied heavily on the purpose of the legislation, that being fiscal restraint and in that respect reference was made to *Health Employees Conditions of Employment (State) Award and other Awards* [2011] NSWIRComm 129; (2011) 208 IR 201 at [49] and *HSU east and Director-General, Department of Finance and Services* [2012] NSWIRComm 112 the Full Bench at [50] and [52] where the Full Benches referred to the legislature's objective of fiscal restraint.

43 Our approach to the interpretation of cl 6(1)(a) of the Regulation is consistent with the purpose of fiscal restraint. That restraint is achieved by ensuring that any increases in remuneration or employment conditions the Commission may award do not increase employee-related costs by more than 2.5 per cent.

44 It would appear that the Government's expectations regarding fiscal restraint have been met. In that respect, we note what was said in the 2013-2014 Budget Statement at 1-4, 1-11 and 4-17:

> The wages policy is a key element, given that employee expenses account for nearly one-half of budget expenses. The impact of the wages policy is clearly evident in employee-related cost growth rates over the forward estimates in this Budget. Expenses have now come in under budget for three consecutive years...
>
> ...
>
> With employee-related expenses accounting for nearly one-half of budget expenses, this area continues to be a key focus in the Government's expense restraint. The 2013-14 Budget continues to deliver the benefits of the *NSW Public Sector Wages Policy 2011*.
>
> ...
>
> In June 2011 the NSW Public Sector Wages Policy 2011 (the Wages Policy) was released and continues to provide annual employee related cost increases of 2½ per cent while allowing for higher increases where employee-related cost savings have been

> achieved. The policy reiterates that additional increases are only paid where required savings have been realised.
>
> The policy has seen a significant moderation in employee expense growth along with an increased focus on expenditure limits for the costs of labour.

45 Fiscal restraint is not an absolute term. What the Secretary was, in effect, contending was that there should be further fiscal restraint. Our view, however, is that the approach we have taken to the interpretation of the Regulation is consistent with the legislative purpose of fiscal restraint and, indeed, has achieved that purpose and that the Secretary's approach is not consistent with the ordinary grammatical meaning of the words in cl 6(1)(a).

Background to the legislation

46 We mentioned earlier the principle that whilst consideration of extrinsic materials should not displace the clear meaning of the text of a provision, the purpose of a provision may be elucidated by appropriate reference to them.

47 The employer parties are undoubtedly correct in submitting that the purpose of s 146C and the Regulation was to "limit employment costs in the public sector" and to achieve "fiscal restraint". As we noted earlier, Full Benches of this Commission have recognised that purpose. It is evident from the Minister's Second Reading Speech that the Government was concerned to limit the Commission's discretion under the Act in the making of awards and orders so that any increase to public sector wages and salaries and changes to employment conditions was in accordance with the Government's view as to what were appropriate adjustments.

48 In the second reading speech the Minister gave an example of the 2008 public servants' salaries case where the previous government accepted the Commission's non-binding recommendation for the settlement of the PSA's claim at the time. The recommendation provided for increases of 4

per cent per annum over three years and once the parties had agreed on that outcome the Commission made appropriate orders varying the relevant awards. This was said to be an example of the Commission rejecting key aspects of the previous government's wages policy, such policy, it might be noted, being aspirational and having no particular status at law in contrast to the Act, which imposed certain functions and duties on the Commission as to how it was to exercise its award making powers.

49 Hence, it is apparent that the current Government felt compelled, in the interests of fiscal restraint, to limit the Commission's discretion and to direct the Commission as to what was an appropriate outcome. It did so in the form of s 146C and the Regulation, both which have been held to be constitutionally valid: *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* [2012] HCA 58; (2012) 293 ALR 450 and *Public Service Association and Professional Officers' Association Amalgamated Union of NSW v Director of Public Employment* [2011] NSWIRComm 143.

50 We refer to this background because it assists in understanding the purpose of the legislation, in placing the text in context and in determining whether there is any support for a particular interpretation of the text of the legislation in question.

51 In the present case the background to the legislation demonstrates quite clearly that in seeking to achieve fiscal restraint and to manage its Budget according to its priorities, the Government was concerned to do that through the mechanism of limiting the Commission's powers to make orders or awards that increased employee-related costs by more than 2.5 per cent unless any increase beyond 2.5 per cent was offset by employee-related cost savings. That is to say, any increase in remuneration or conditions of employment awarded by the Commission (by way of an order or award) is not to increase employee-related costs by more than 2.5 per cent per annum.

52 There is no indication in any of the extrinsic material that suggests it was the legislature's intention in promulgating the Regulation that, in addition to limiting the Commission's powers in the manner described, the ceiling of 2.5 per cent per annum was to be subject to discounting in circumstances where employee-related costs, derived from some source other than an award or order of the Commission, exceeded 2.5 per cent.

Finding

53 We find that having regard to our textual analysis of cl 6(1)(a) of the Regulation, the context in which that text appears in the Regulation, the purpose of s 146C and the Regulation and the extrinsic materials that assist in elucidating the purpose of cl 6(1)(a), the increases in remuneration or other conditions of employment referred to in that provision are only those increases resulting from an award or order made or varied by the Commission either by consent or in arbitration proceedings.

Paramount policies

54 Reference was made to the paramount policies in cl 5 of the Regulation, one of those being that "Public sector employees are entitled to the guaranteed minimum conditions of employment (being the conditions set out in clause 7)". The "guaranteed minimum conditions of employment" in cl 7 include "employer payments to employee superannuation schemes or funds (being the minimum amount prescribed under the relevant law of the Commonwealth)".

55 As we have made plain, what the employer parties seek to do is offset the 2.5 per cent increase in cl 6(1)(a) of the Regulation by the amount of increase in the superannuation charge percentage that is a "guaranteed minimum condition of employment".

56 We do not find it necessary to determine this issue in light of our finding regarding the interpretation of cl 6(1)(a). We would observe, however, it does seem curious in the absence of any express intention, that the legislature's intention was to defray any increase in the cost of guaranteed minimum employment conditions by reducing the amount of wage increase available under cl 6(1)(a). There is some merit in the PSA's submission that the guaranteed minimum conditions and the benefit bestowed under cl 6(1)(a) are separate and distinct entitlements and that the 2.5 per cent limit on increases in remuneration or other conditions of employment under cl 6(1)(a) applies only to increases that exceed the "guaranteed minimum conditions of employment", including the making of minimum employer superannuation contributions required by Commonwealth law.

Directions

57 The applications that are the subject of these proceedings are referred to Boland J, President for the purpose of disposing of them in accordance with this decision.

58 The applications are listed before his Honour at 10.00 am on Friday, 5 July 2013. In the meantime, the parties are directed to confer on the extent of any agreement or disagreement regarding the applications with a view to presenting the Commission with a consent position if that is practicable.

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