

SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL

STATE WAGE CASE 2019

JURISDICTION: South Australian Employment Tribunal – *Fair Work Act 1994* – Section 69 Minimum Standard of Remuneration – Section 100 adoption of principles affecting the determination of remuneration and working conditions

CASE NO/S: 2139 and 2140 of 2019

HEARING DATE: Written submissions received up to 19 August 2019

JUDGMENT OF: The Honourable President Justice Dolphin
Her Honour Deputy President Judge Kelly
His Honour Deputy President Judge Rossi

DELIVERED ON: 27 September 2019

CATCHWORDS:

*Minimum Standard for Remuneration (MSR) – Adoption of principles affecting the determination of remuneration and working conditions as determined by the Fair Work Commission (FWC) in its Annual Wage Review 2018-19 decision – Issue as to whether the Public Service (Recreation Leave Loading) Award should be varied, deferred until further order – Appeal pending with regards to that issue following the State Wage Case 2018 – All parties submit that the 3.0% increase as determined by the FWC should be adopted and applied – Economic and labour market factors considered – **Held:** MSR and minimum award rates should be increased by 3.0% – Increase to apply from the first full pay period commencing on or after 1 July 2019 – Declarations and orders to be made.*

Fair Work Act 1994 (SA) ss 69(3) and 100

Annual Wage Review 2018-19 [2019] FWCFB 3500

Annual Wage Review 2017-18 [2018] FWCFB 3500

State Wage Case 2018 - Variation of Public Sector (Recreation Leave Loading) Award [2019] SAET 65

State Wage Case 2018 (No. 2) [2019] SAET 170

SUBMISSIONS FROM:

SA Unions

The Treasurer

Chief Executive, Department of Treasury and Finance

Local Government Association of South Australia

- 1 These proceedings are known as the State Wage Case. Similar proceedings occur each year. In June 2019, the South Australian Employment Tribunal (SAET) initiated these proceedings under ss 69(3) and 100 of the *Fair Work Act 1994 (SA)* (FW Act).
- 2 The s 69(3) proceedings seek to establish the minimum standard for remuneration (MSR) with regards to contracts of employment governed by the FW Act.
- 3 The s 100 proceedings deal with the adoption of principles affecting the determination of remuneration and working conditions as determined at the Commonwealth level by the Fair Work Commission (FWC) in its annual wage review decision.
- 4 The usual result of State Wage Case proceedings is that declarations and orders are made.

The legislation

- 5 Sections 69(3) and 100 are set out below:

69(3) The minimum standard for remuneration in force under this section is a standard established by SAET in accordance with the following provisions:

- (a) SAET must establish a minimum standard for remuneration at least once in every year;
- (b) proceedings to establish the standard may be commenced by application by a peak entity, or by SAET acting on its own initiative;
- (c) a minimum standard for remuneration must—
 - (i) fix a minimum weekly wage for an adult working ordinary hours; and
 - (ii) fix a minimum hourly rate for an adult working on a casual basis; and
 - (iii) fix age-based gradations for juniors having regard to existing award conditions; and
 - (iv) cover such other incidental or related matters as should, in the opinion of SAET, be dealt with in the minimum standard.

...

100

- (1) SAET may, on its own initiative, or on the application of—
 - (a) the Minister; or
 - (b) the United Trades and Labor Council; or
 - (c) the South Australian Employers' Chamber of Commerce and Industry Incorporated,make a declaration adopting in whole or in part, and with or without modification, principles, guidelines, conditions, practices or procedures enunciated or laid down in, or attached to, a decision or determination of Fair Work Australia.
- (2) However, a declaration may only be made if the terms of the declaration are consistent with the objects of this Act.
- (3) A declaration under this section may be made on the basis that it is to apply in relation to (and prevail to the extent of any inconsistency with)—
 - (a) awards generally; or
 - (b) awards generally, other than a specified award or awards; or
 - (c) a specified award or awards (and no other awards).
- (4) In addition, a party to an award that is affected by a declaration under this section may, within 28 days after the declaration is made, apply to SAET to have the award excluded from the declaration (or a part of the declaration), despite the operation of subsection (3).
- (5) SAET may grant an application under subsection (4) on such conditions as SAET thinks fit.

The FWC decision

- 6 The *Fair Work Act 2009 (Cth)* requires that each financial year a FWC expert panel conduct and complete a review of the national minimum wage (NMW) and of modern award minimum wages.
- 7 On 30 May 2019 a FWC expert panel published its *Annual Wage Review 2018-19* review decision (the FWC Review decision).¹In that considered and detailed decision the expert panel determined to increase the NMW and modern award minimum wages by 3.0%.

¹ *Annual Wage Review 2018-19* [2019] FWCFB 3500 (the FWC Review decision).

The hearing of these proceedings

8 These proceedings were listed for an initial hearing on 1 July 2019. Interested parties attended and orders were made for the exchange of written submissions. The proceedings were also set down for formal hearing before this Full Bench, should such a hearing be necessary. However, given the content of the written submissions received, and at the request of the parties, the formal hearing date was vacated, with these proceedings to be determined on the papers.

The *Public Service (Recreation Leave Loading) Award* issue

9 In 2018 an issue arose as to whether any increase to wages ordered in the annual State Wage Case should apply to the *Public Service (Recreation Leave Loading) Award*. In the 2018 State Wage Case decision, delivered on 11 April 2019, a Full Bench determined that the relevant increase should apply to that Award.²

10 After hearing from the parties as to the content of the declaration and order to be made, on 1 May 2019 the Full Bench declared that the maximum loading to be applied to an employee during a period of recreation leave, or pro rata recreation leave, under the relevant clause of that Award would be increased by 3.5%, to the sum of \$912.97. That percentage increase being the amount as determined by the FWC in its 2017-18 Review decision and as ordered and declared by the Full Bench in the 2018 State Wage Case for the MSR and all other applicable awards.³

11 On 2 May 2019 a Notice of Appeal was filed in the Higher Courts Registry by the Treasurer of South Australia and the Chief Executive, Department of the Premier and Cabinet seeking that the Full Court of the Supreme Court of South Australia set aside the declaration made by the Full Bench on 1 May 2019.⁴

12 In the orders made on 1 July 2019 in these proceedings, it was determined that, the question of whether any declaration to be made in these proceedings that may flow on to the maximum amount of leave loading payable under the *Public Service (Recreation Leave Loading) Award*, would be deferred until further order. That is, pending the outcome of the appeal of the 2018 State Wage Case decision, on that issue, to the Full Court of the Supreme Court of South Australia.

² *State Wage Case 2018 - Variation of Public Sector (Recreation Leave Loading) Award* [2019] SAET 65 (the 2018 State Wage Case decision).

³ *Annual Wage Review 2017-18* [2018] FWCFB 3500; *ibid.*

⁴ *South Australian Employment Tribunal Act 2014* s 68(1) an appeal lies on the question of law against a decision of the Full Bench of SAET to the Full Court of the Supreme Court of South Australia.

- 13 With its appeal pending, the appellants made an application to stay the operation of the 2018 State Wage Case decision, with regards to the *Public Service (Recreation Leave Loading) Award*, until that issue was finally decided by the Full Court of the Supreme Court of South Australia. By judgment and orders dated 19 August 2019, it was determined that the stay order should be granted.⁵
- 14 As noted in the stay judgment, before an appeal from a decision of a Full Bench of SAET can commence, permission is required from a judge of the Supreme Court.⁶ At the time of the stay judgment, no such permission had been granted; it was assumed a decision in relation to same was pending. At the time of this judgment, the issue as to whether permission to appeal will be granted also has not been determined. Or, at least, we have not been made aware of any such decision. The issue being that, if permission to appeal is refused, the declaration made by the Full Bench on 1 May 2019 with regards to the *Public Service (Recreation Leave Loading) Award* will stand. Further, if permission to appeal is refused, then this Full Bench would soon thereafter go onto determine whether any increase afforded by these proceedings should flow on, as a matter of course, to the *Public Service (Recreation Leave Loading) Award*.

The submissions

- 15 The United Trades and Labor Council, trading as SA Unions, submitted that the principles from the FWC Review decision should be adopted, pursuant to section 100 of the FW Act, and that the 3.0% increase awarded by that decision should be applied to the MSR and to State minimum award wages. As for the relevant operative date, it was submitted that it should be the first full pay period commencing on or after 1 July 2019.⁷
- 16 SA Unions further submitted that proportionate adjustments should apply to juniors, apprentices and trainees and the adjustment in allowances and service increments should be in accordance with the 2018 State Wage Case decision.⁸
- 17 The Treasurer of the State of South Australia submitted that a 3.0% increase in the rates of remuneration payable under relevant awards, and allowances, would be an appropriate increase having regard to the role of awards as effective safety nets of fair and enforceable conditions for the performance of work by employees, including fair wages. As a matter of

⁵ *State Wage Case 2018 (No. 2)* [2019] SAET 170.

⁶ SAET Act s 68(2).

⁷ United Trades and Labor Council (SA Unions) *Outline of Argument*, filed on 31 July 2019 [4.3]-[4.5]&[4.10].

⁸ *Ibid* [4.6] and *Statement in Reply*, filed on 16 August 2019 [3].

consistency the Treasurer also supported maintaining 1 July 2019 as the operative date for increases awarded in these proceedings.⁹

- 18 The Chief Executive, Department of Treasury and Finance, supported the submissions made by the Treasurer in relation to the application of the FWC Review decision, 3.0%, and with regards to the operative date.¹⁰
- 19 The Local Government Association of South Australia also supported the adoption of the FWC Review decision such that the MSR and State minimum award wages should be increased by 3.0%. Further, that the operative date should be 1 July 2019, such that the relevant awards would all be varied from the first pay period commencing on or after that date.¹¹

The legislative context and purpose

- 20 Since the *Work Choices* era the South Australian industrial relations system has governed the employment of those persons within the State public sector and the local government sector. Also, it should be noted that the relevant provisions of the FW Act – ss 69(3) and 100 – predated the introduction of the FWC expert panel system to the national framework of industrial relations, as established by the eponymous 2009 Commonwealth Act. Accordingly, it is helpful to consider the general approach taken in State Wage Case decisions since the enactment of that Act. In the 2018 State Wage Case, the Full Bench set out the following history as to the context and purpose of the relevant provisions:

Since 2011 the general approach having regard to the objects has been as set out in the State Wage Case decision that year. In the *2011 State Wage Case and Minimum Standard for Remuneration*, the Commission¹² said:

... “The objects of the Act of particular relevance to the present exercise concern the provision of awards that are relevant, flexible and expressed in non-technical language; the maintenance of an effective safety net of fair and enforceable conditions for the performance of work by employees (including fair wages); encouraging enterprise agreements that are relevant, flexible and expressed in non-technical language; and promoting and facilitating employment and security in employment.

⁹ Treasurer, *Outline of Argument*, filed on 12 August 2019 [17]&[19].

¹⁰ Chief Executive, Department of Treasury and Finance, *Outline of Argument*, filed on 12 August 2019 [5]&[7].

¹¹ Local Government Association of SA, *Outline of Argument*, filed on 8 August 2019 [1]-[9].

¹² The *Industrial Relations Commission of South Australia* – prior to its dissolution, effective from 1 July 2017, the SAIRC was the body empowered to determine ss 69(3) and 100 proceedings.

The objects directed to the promotion of goodwill in industry and of the general welfare of the people of South Australia would appear to have less relevance in view of the limited scope and impact of any increase we award, although regard must always be had to economic circumstances.”

The same general approach has been taken since that time to the application of the FWC Annual Review decisions to the more confined circumstances of the State system. In this context the Commission and the Tribunal has taken into account the FWC’s analysis on each review of the national economic performance and outlook, of relevant social considerations such as the impact of any increase in minimum wages on inflation and employment, and of the effect of any increase on the need to encourage collective bargaining. It has been noted that as part of its analysis, the FWC has had regard to the extent to which the impact of annual wage review increases extended beyond award-reliant employees and employers.

An example of that approach can be seen in the *2014 State Wage Case and Minimum Standard for Remuneration*. Having considered the 2015 FWC Panel decision, the Commission said:

As has been noted in previous decisions of this Commission, although there is some degree of consistency between the broad categories as above identified by the FWC Panel, and the matters to which we must have regard under the objects of the Act in our approach to applications for a review of award wages and the MSR, the context for our consideration is significantly different. Matters such as the level of sophistication of industrial relations within the sectors covered by the State jurisdiction, as reflected in an entrenched culture of enterprise bargaining and a small number of award-reliant employees, means that the economic and social impact of any increase in award and non-award wages is more confined than in the Federal jurisdiction. Accordingly, the object of the Act of encouraging enterprise bargaining has more limited relevance.¹³

Economic and labour market considerations

21 In its 2018-19 Review decision the FWC expert panel noted that the number of Australian employees that have their pay set by award, as opposed to by a collective agreement or by individual arrangements, is estimated to be 2.2 million or 21.0% of all employees in Australia. In addition, adjustments to the NMW, or to a modern award minimum wage,

¹³ 2018 *State Wage Case* decision [51]-[53] (footnotes omitted).

would also affect other workers whose rate of pay was linked to the review decision or by reference to an award rate.¹⁴

- 22 As for economic factors, the FWC expert panel recorded that although the Australian economy had slowed somewhat, in the period from its previous Review, that overall the economy, and the labour market particularly, performed strongly. In that regard it was noted that the labour market experienced strong employment growth of 2.5% in the year to April 2019, with a declining unemployment rate and reducing youth unemployment rate. It was also said that the relevant business conditions in Australia were generally positive with strong business profit growths, positive business net entry rates and, in historical terms, high business survival rates.
- 23 The FWC expert panel also described that, notwithstanding a low rate of nominal wages growth, real wages had in fact seen an increase because of the reduction of inflationary pressure; which it was said, was non-existent.¹⁵ With regards to potential wage increases in that climate, the FWC expert panel concluded by saying:

In the 2016–17 and 2017–18 Review decisions, we expressed the view that modest and regular minimum wage increases do not result in disemployment effects or inhibit workforce participation. We affirm that view in this decision, with the benefit of further international research studies. Further, the evidence to date is that the increases we have awarded in the last 2 Review decisions were appropriate in the prevailing economic circumstances. However, we will continue to closely analyse the data in future reviews in order to identify any longer-term effects these increases may have had.¹⁶

And also

We are satisfied that the level of increase we have decided upon will not lead to any adverse inflationary outcome and nor will it have any measurable negative impact on employment. However, such an increase will mean an improvement in the real wages for those employees who are reliant on the NMW and modern award minimum wages and an improvement in their living standards. We acknowledge that the compounding effect of increases over time may have a cumulative effect which is not apparent in the short term. We will continue to closely monitor this in future reviews.¹⁷

- 24 As for its decision in relation to what increase to the NMW should be made, the FWC expert panel determined:

¹⁴ 2018-19 Review decision [3].

¹⁵ Ibid [84]-[90].

¹⁶ Ibid [91].

¹⁷ Ibid [82].

The factors identified above have led us to award an increase of 3.0 per cent. The NMW will be \$740.80 per week or \$19.49 per hour. The hourly rate has been calculated by dividing the weekly rate by 38, on the basis of the 38-hour week for a full-time employee. This constitutes an increase of \$21.60 per week to the weekly rate or 56 cents per hour to the hourly rate.¹⁸

The South Australian context

- 25 In its submission to the FWC expert panel, the South Australian Government urged a conservative and cautious approach in setting the NMW. It pointed to other available mechanisms to support growth in living standards and employment evident in its initiatives to; reduce the burden of payroll tax; improve skills and experience of South Australians by creating new apprenticeships and traineeships; creating a new technical College to prepare students for work in the defence sector; establishing a South Australian Productivity Commission; and, providing better interconnectedness with the National Electricity Market. It was said that these initiatives would benefit minimum wage and award reliant workers.¹⁹
- 26 In his submission, the Treasurer relied on the evidence of Mr Matthew Winefield, the Director, Economics in the Department of Treasury and Finance, set out in his affidavit of 12 August 2019. Mr Winefield made the point that South Australia is a small market economy where international and national developments have a significant bearing on the local economic conditions in the State. He set out information regarding international economic activity, which anticipated weakening global economic activity. In the national context, Mr Winefield said measured Gross Domestic Product (GDP) in the year to the March quarter 2019 (seasonally adjusted) was the lowest rate of growth since the year to the June quarter 2013. He also discussed the national labour market, population growth, the unemployment rate, the participation in employment rate and relevant Commonwealth Treasury forecasts.²⁰
- 27 With regards to the South Australian economy, Mr Winefield said that the measure of total spending by households, businesses and governments in the State is known as State Final Demand (SFD). He said that in real seasonally adjusted terms through the year to the March quarter 2019 the SFD rose by 1.8%. This percentage being lower than annual growth levels recorded in recent quarters. Also, Mr Winefield said that South Australian household consumption spending had softened (in line with the national

¹⁸ Ibid [78].

¹⁹ Treasurer Outline [9].

²⁰ Affidavit of Matthew James Winefield 12 August 2019 [1], [6]-[19].

trend) with a real seasonally adjusted growth rate of 1.0% in the year to the March quarter 2019.²¹

- 28 With regards to the housing construction sector in South Australia, Mr Winefield said following the high levels of activity in 2017-18 that this sector was now contracting. In seasonally adjusted terms, and compared to the year earlier this sector had contracted by 7.0%. Over the same period, the number of dwelling construction starts was down 34% compared to the year earlier, seasonally adjusted. Also in the year to June 2019, trend dwelling approvals were 22% lower than the year earlier. Although, this represented a stabilisation of sorts and that South Australia had generally not experienced housing price falls of the magnitude experienced in other Australian states.²²
- 29 As for South Australia's labour market, Mr Winefield said that trend employment was 1.7% higher to June 2019 as compared to the year earlier. Further, that the trend unemployment rate in June 2019 for South Australia was 5.9%, being above the national rate of 5.2%. With regards to South Australia's underutilisation rate (people who are employed but are working fewer hours than they desire) Mr Winefield said in June 2019 that rate was 14.7%, being above the national rate of 13.5% in trend terms.²³
- 30 As for inflationary pressures, Mr Winefield said that the consumer price index for Adelaide in the year to the June quarter 2019 was 1.4% higher than the previous year and that this figure was consistent with national measures, which remained below the Reserve Bank of Australia's target range of 2.0% to 3.0%. The Reserve Bank of Australia forecasts a rate of 2.0% into 2020 and 2021.²⁴
- 31 Mr Winefield deposed that to the March quarter 2019, total hourly rates of pay (excluding bonuses) for employees in South Australia rose by 2.1%; being just below the national average of 2.3%. The public / private split, of such South Australian wages over that period, was 1.8% for the public sector and 2.3% for the private sector.
- 32 Relying on commentary from the Reserve Bank of Australia and the Commonwealth Treasurer, Mr Winefield noted that there is still considerable spare capacity in the labour market despite strong employment growth over the past year or so. But, that a number of factors are potentially contributing to low wages growth, both in Australia and overseas. The future forecasts for wages sees growth up to 2.75% through

²¹ Ibid [20]-[22].

²² Ibid [23]-[25].

²³ Ibid [20]-[26].

²⁴ Ibid [27]-[29].

to the year to the June quarter 2020 and 3.25% through the year to the June quarter 2021.²⁵

- 33 The data sources relied upon by Mr Winefield were cited as being from the Australian Bureau of Statistics, the Commonwealth Budget, the South Australian Budget, the Reserve Bank of Australia and the International Monetary fund.²⁶

Affected employees

- 34 In its submission, SA Unions acknowledged that relatively few public sector employees would be directly affected by any increase to the MSR or to minimum award rates. But, it also acknowledged that some apprentices, trainees, juniors and employees on a supported wage, within the local government sector, would be so affected. SA Unions confirmed that the information provided reflected that the direct impact of these proceedings, on employees within the State industrial relations system, would be relatively low. The submission of SA Unions in this regard reflects the primacy of enterprise agreements within the State industrial relations system.²⁷
- 35 In his submission, the Treasurer said that the direct impact of any increase awarded in these proceedings would be low as there are only a few workers in the State industrial relations system that, in practice, receive the minimum wage, or who have wage increases linked to the outcome of these proceedings. Further that, as a result of enterprise bargaining in the public sector, very few employees received the minimum rates of remuneration that will be provided for in these proceedings. It was submitted that a 3.0% increase would have very little practical impact on employees' wages and to the State government's budget.²⁸
- 36 The submission of the Chief Executive, Department of Treasury and Finance, reflected the submission of the Treasurer saying that these proceedings would only directly affect a small number of the over 108,000 South Australian public sector employees.²⁹
- 37 Local Government Association of South Australia estimated that there were over 11,000 employees employed in the local government sector. With regards to the employees within that sector that may be affected by these proceedings, in its submission, the LGA said that lower paid award reliant employees continue to be engaged in such areas as health services, cafés, cleaning etc. As such, something in the order of just above 200 such

²⁵ [31]-[33] footnotes omitted.

²⁶ Appendix A.

²⁷ SA Unions Outline [3.1]-[3.4].

²⁸ Treasurer Outline [14]&[18].

²⁹ CE, DTF Outline [4] and Schedule A.

persons would be affected by these proceedings. Also, that eight rural councils have annual wage adjustments linked to award increases. And, as a result, approximately less than 300 of those employees will be directly affected by these proceedings. Therefore, the immediate and direct cost of any increase that may be awarded through these proceedings would be limited to only those 500 or so employees identified above.³⁰

- 38 In conclusion, and in contrast to the national matrix, where something in the order of 21.0% of employees will be affected by any increases to the NMW rate or to modern award minimum wages, in South Australia, given the prevalence of enterprise agreements, it is safe to conclude that relatively few employees will be directly affected by these proceedings. Given that, the outcome of these proceedings will have a restrictive impact on the actual rate of any particular employee remuneration and as such a very limited economic impression on the employing entity.

Consideration

- 39 Although the parties to these proceedings submit that the principles from the FWC Review decision should be adopted and, the MSR and minimum award rates increased by 3.0%, it is for this Full Bench to determine whether, in all the circumstances, that course should be followed.
- 40 In the face of a slowing economy, the FWC Review decision records that the Australian labour market performed relatively strongly. Business conditions are generally positive and despite a lower rate of wages growth, real wages had marginally increased due to decreasing inflationary pressure. In that climate, the FWC expert panel felt that increasing the NMW by 3.0% would not cause any adverse inflationary outcome, nor would it have any measurable negative impact on employment.
- 41 Whilst the FWC expert panel assessed the national context, nothing has been submitted in these proceedings that would warrant the separate consideration of the South Australian context. That is, no factors have been highlighted that would suggest that South Australia should be assessed differently than the nation as a whole. Indeed, the gravamen of submissions received is to the effect that there should be uniformity in South Australia with the national approach.
- 42 In South Australia, the unemployment rate and underutilization rate are marginally above the national average and the total hourly rates of pay (excluding bonuses) for employees are marginally below the national average. Inflation is consistent with national measures and is below the Reserve Bank of Australia's target range. These economic factors demonstrate that whilst the fundamentals of the South Australian labour

³⁰ LGA Outline [4]-[6] and Schedule A.

market may not be as strong as other States, that they are not so disproportional as to warrant individual attention.

- 43 Also, within the South Australian industrial relations system very few employees will be actually directly affected by any increase to the MSR or to minimum award rates. This is because enterprise agreements account for the vast majority of State employment contracts in any event. As highlighted by the Treasurer a 3.0% increase would have very little practical impact on remuneration and cost to Government.³¹
- 44 Accordingly, having regard to the applicable statutory principles of the FW Act, the economic and employment information referred to and in light of the agreed position set out in the submissions received, we determine that there are sound reasons to adopt the FWC's Review decision such that there will be an increase of 3.0% to the MSR and to minimum award rates. Such increases will apply from the first full pay period commencing on or after 1 July 2019.
- 45 Therefore, and as requested by them, we will hear from the parties as to the exact nature of the declarations and orders to be made, including the content of the relevant schedules consistent with previous State Wage Case decisions.

³¹ Treasurer Outline [18].