QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Mackay Regional Council v Queensland Services, Industrial Union of Employees & Ors* [2021] QIRC 373
PARTIES:	**MACKAY REGIONAL COUNCIL** (applicant) **v** **QUEENSLAND SERVICES, INDUSTRIAL UNION OF EMPLOYEES AND OTHERS** (respondent)
FILE NO:	CB/2021/10
PROCEEDING:	Application in existing proceedings
DELIVERED ON:	4 November 2021
HEARING DATE:	18 October 2021
MEMBER:	Davis J, President, O'Connor VP, Hartigan IC
ORDER:	**Pursuant to s 180(2)(b) of the *Industrial Relations Act* 2016 (Qld), employees covered by the *Queensland Local Government Industry (Stream A) Award – State* 2017 and the *Queensland Local Government Industry (Stream B) Award - State* 2017 be granted an interim wage increase of two per cent at the current rate of pay to take effect as and from 1 July 2021**
CATCHWORDS:	INDUSTRIAL LAW - QUEENSLAND -AGREEMENTS - application in existing proceedings for interim wage increase - where application for help to make a Certified Agreement - where full bench to arbitrate disputed matters - where employer opposes interim wage increase - where full bench has express power to order increase in wages before making an arbitration determination pursuant to s 180(2)(b) of the *Industrial Relations Act* 2016 (Qld) - where an interim wage increase of two per cent is granted *Industrial Relations Act* 2016 (Qld), s 175, s 177, s 180 *Industrial Relations Act* 1999 (Qld), s 149 *Chief Executive of the Public Service Commission v The President of the Industrial Court of Queensland & Anor* [2014] QSC 122 *Metal Trades Award*, 1952 (1966) 116 CAR 713
APPEARANCES:	M Robertson for the Queensland Services, Industrial Union of Employees R Francisco for the Mackay Regional Council J White for the Plumbers & Gasfitters Employees' Union of Employees, Queensland

P Dunbar for the Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland
L Midson for The Electrical Trades Union of Employees Queensland
B Mathey for The Australian Workers' Union of Employees, Queensland
J Lipscombe for the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland

[1] Application CB/2021/10 was filed by the Mackay Regional Council (the Council) on 29 April 2021 in the Queensland Industrial Relations Commission (the Commission) for help to make a Certified Agreement under s 175(1)(b) of the *Industrial Relations Act* 2016 (Qld) (the IR Act). That application is listed for hearing before the full bench in Mackay on 19, 20 and 21 January 2022.

[2] The agreed question to be determined has been formulated by the parties as follows:

> "Should Council employees under the *Queensland Local Government Industry (Stream B) Award – State* 2017 and *Queensland Local Government (Stream C) Award – State* 2017, have their own agreement?"

[3] On 1 October 2021, the Queensland Services, Industrial Union of Employees (QSU) filed an application in existing proceedings seeking the following:

> "An order for an interim 2% wage increase to be applied from 1 July 2021 for all employees employed subject to the *Queensland Local Government Industry (Stream A) Award - State* 2017 and the *Queensland Local Government Industry (Stream B) Award - State* 2017."

[4] The Industrial Registry issued directions[1] for all parties to file and serve submissions and any evidence in response to the application in existing proceedings by 4.00 pm on 11 October 2021, with submissions and any evidence in reply to be filed by 12.00 pm on 15 October 2021.

[5] On 11 October 2021, the Council provided a response to the application in existing proceedings.

[6] On 15 October 2021, the QSU filed submissions in reply to the Council's response.

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1 On 6 October 2021.

[7] On 18 October 2021, the application in existing proceedings was listed for hearing. The application was opposed by the Council.

Relevant legislation

[8] Section 177 of the IR Act provides for an arbitration between the negotiating parties in circumstances where the process of conciliation has been and was likely to remain unsuccessful. It is not in dispute that the circumstances have arisen to engage s 177 of the IR Act.

[9] Section 177 of the IR Act relevantly provides as follows:

> "**177 Referral to arbitration by conciliating member**
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> (1) This section applies if -
>
> (a) the commissioner conciliating the matter (the conciliating member) considers
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> (i) a negotiating party has tried to negotiate with the other parties; or
>
> (ii) if the negotiating parties have been negotiating - the parties have tried to reduce the scope of the matters at issue between the parties; and
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> (b) the conciliating member -
>
> (i) is satisfied the negotiating parties have been negotiating for at least the minimum period; and
>
> (ii) does not consider there is a reasonable likelihood of further conciliation or negotiation resulting in the parties reaching agreement on the matters at issue within a reasonable period.
>
> (2) The conciliating member may refer the matter to arbitration by giving written notice of the referral to the president and each negotiating party.
>
> (3) The notice of the referral must not include any information other than -
>
> (a) the names of the negotiating parties; and
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> (b) a statement that conciliation has not been successful and the matter is referred to arbitration."

[10] Section 180 of the IR Act prescribes that the full bench must determine the matters in dispute as follows:

> "**180 Full bench to arbitrate disputed matters**
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> (1) The full bench must determine the matters in dispute by arbitration.
>
> (2) To determine the matters in dispute, the full bench -
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> (a) may give directions or make orders of an interlocutory nature; and
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> (b) without limiting paragraph (a), before making an arbitration determination may order an increase in wages payable to employees; and
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> (c) may make any other order, or exercise another power, the full bench considers appropriate to determine the disputed matters.
>
> (3) The full bench must ensure an arbitration determination -
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> (a) includes the provisions and other matters it would be required to include if the determination were a proposed bargaining instrument the subject of a part 5 application; and
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> (b) includes any increase in wages ordered by the full bench under subsection (2)(b) or agreed by the parties during the arbitration.
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> (4) In determining the matters in dispute, the full bench must consider at least the following -
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> (a) the merits of the case;
>
> (b) the likely effect of the proposed arbitration determination, and any matters agreed between the negotiating parties before or during the arbitration, on employees and employers to whom the proposed arbitration determination will apply."

Power to grant

[11] Section 180(2)(b) of the IR Act gives the full bench an express power, in determining the matters in dispute, to order an increase in wages payable to an employee before making an arbitration determination.

Matters to be considered

[12] In considering an application for an interim wage increase, the Commission must consider the matters referred to in s 180(4)(a) and (b) of the IR Act.

[13] In the matter of *Chief Executive of the Public Service Commission v The President of the Industrial Court of Queensland & Anor*,[2] the applicant sought to review a decision of the then President of the Industrial Court and sought relief, including declaratory relief, that the proper construction of s 149 of the *Industrial Relations Act* 1999 (Qld) did not authorise an interim wage increase. The decision under review had determined that the Commission was empowered to make an order for an interim wage increase under s 149(2) *Industrial Relations Act 1999* (Qld). The history of the matter was that the Together Union had applied to the Commission for an interim order, on the basis that it was an order of an interlocutory nature, pursuant to s 149A of the *Industrial Relations Act* 1999 (Qld). At first instance, the Commission held that it had no power to make such an interim order. The then President of the Industrial Court, upon appeal from that ruling by the Commission, disagreed. Hall P held that there was a power and remitted the matter to the Commission. There was a related question of whether, if there was power to order an interim wage increase, it could be exercised only after a consideration of certain matters within s 149(5) of the *Industrial Relations Act* 1999 (Qld). The President of the Industrial Court did not decide that question.

[14] The question was, however, considered by McMurdo J (as his Honour then was) on the review of the decision who held:

> "Any consideration of an application for an interim wages increase would have to include a consideration of the likely ultimate outcome of the arbitration. It could not be thought that the Commission could award an interim wages increase with no regard to the merits of the respective cases. In turn, that assessment of the likely outcome of the arbitration would require the Commission to consider everything which might bear upon that outcome. In particular, it would require the Commission to consider the matters specified within s 149(5). That is consistent with the words of s 149(5) because the Commission, when assessing the likely outcome of the arbitration, would be 'considering the matters at issue'. Thus it would be open to the Commission to order an interim wage increase if the Commission was satisfied that the increase would not exceed what might ultimately be ordered. But to reach that point, the Commission would have to consider the matters in s 149(5)."[3]

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2 [2014] QSC 122.

3 *Chief Executive of the Public Service Commission v The President of the Industrial Court of Queensland & Anor* [2014] QSC 122, [36].

[15] Section 180(4)(a) and (b) of the IR Act are in similar terms to the now repealed s 149(5) of the *Industrial Relations Act* 1999 (Qld). Adopting similar reasoning to that of McMurdo J with respect to the operation of s 149(5) of the *Industrial Relations Act* 1999 (Qld), s 180(4)(a) and (b) of the IR Act are matters that must be considered in an application for an interim wage increase.

Council's submissions

[16] The Council submits that the QSU had not, between the parties, requested an interim wage increase and the first notification the Council received in relation to the matter was the initiation of these proceedings in this Commission. Prior to making this application and without requesting an increase, the QSU communicated the following email, in part, to the staff:

> "… So that you won't be without a pay rise until the QIRC makes its Determination in the future, we have made an application to the QIRC that they make an order for an interim pay rise of 2% backdated to 1 July 2021 for all Stream A Award and Stream B Award employees. …"[4]

[17] The Council contends that the approach adopted by the QSU is not in accordance with the good faith bargaining provisions provided for in s 173 of the IR Act:

> "**173 Parties must negotiate in good faith**
>
> (1) The negotiating parties must negotiate in good faith.
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> (2) Without limiting subsection (1), each party must do the following things -
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> (a) attend and participate in bargaining meetings;
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> (b) disclose relevant information, other than confidential or commercially sensitive information, in a timely way;
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> (c) genuinely consider proposals made by other parties and -
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> (i) respond in a timely way; and
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> (ii) give reasons for the party's response;
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> (d) not engage in capricious or unfair conduct that undermines freedom of association or the collective bargaining process.

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4 Council submissions filed on 11 October 2021, [2].

> (3) Subject to subsections (1) and (2), the negotiating parties may make an agreement about procedures or principles for the conduct of the bargaining process."

[18] Other than referring to the QSU's application, which the Council contends was made without notice, the Council does not particularise the basis upon which it argues the QSU has failed to comply with s 173 of the IR Act by making this application. Given that s 180(2)(b) of the IR Act provides that a party may seek an interim increase in wages before the final determination, the application in and of itself did not amount to a failure to negotiate in good faith.

[19] The Council submits, that the unions have not operated as a single bargaining unit for the duration of the bargaining period which has created additional delays and is largely the reason for these proceedings. Delegates of the QSU have submitted affidavits as a part of these proceedings to this effect, outlining the detrimental impact this has had on negotiations.[5]

[20] Any delay in bargaining, or with respect to the time taken for a final determination are matters we will consider further below.

Coverage of the QSU

[21] The Council further submits, that the QSU only has coverage of employees employed under the *Local Government Industry (Stream A) Award – State* 2017 (Stream A Award), however, have made representations on behalf of employees employed under the *Local Government Industry (Stream B) Award – State* 2017 (Stream B Award) as well. Further, the QSU is aware a portion of the workforce is covered by the *Local Government Industry (Stream C) Award – State* 2017 (Stream C Award), and these employees have been intentionally excluded by the QSU.[6]

[22] The application by the QSU does not include any representations regarding employees employed under the Stream C Award and Council do not support a wage increase which excludes the entirety of employees who are covered by the Stream C Award. The Council submits that this is an arbitrary delineation which directly contradicts the "one team culture" that Council promotes.[7]

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5 Council submissions filed on 11 October 2021, [5].
6 Council submissions filed on 11 October 2021, [6]-[7].
7 Council submissions filed on 11 October 2021, [8], [9].

Existing offers

[23] The Council submits wage increases have been tabled and the current offers are still alive. The Council state they have not ceased bargaining with the unions and that negotiations in relation to the new Certified Agreement have stalled at the union's behest. The Council provided evidence of the unions' refusal to continue bargaining.[8]

[24] In their submissions, the Council stated administrative increases were provided to all employees covered by the Certified Agreement on 20 April 2021 and paid effective as from 1 July 2020. The administrative increases are provided as follows:

> "a. a $250.00 increase to the base salary of Stream B and Stream C employees and a 1% increase; and
>
> b. a 1% increase to all Stream A employees."

[25] The administrative increase was calculated in this way to achieve an increase for all employees, but also recognise that market conditions required an uplift to the wages of employees covered by the Stream B and Stream C Awards.[9]

[26] At the time of filing the QSU application, the Council submits that it was considering whether to give a further administrative increase to all employees covered by the Certified Agreement, on the basis that the Council had expected a new Certified Agreement to have been bargained for and in force by this time.

[27] The Council submits that the application by the QSU should not be subject to a determination and is not relevant to the current proceedings.

Continuation of negotiations between parties

[28] The Council submits that the QSU's application is reflective of Council's existing and tabled offer, which has been rejected. The tabled offer indicated a two per cent increase for all staff covered by the Certified Agreement and a further $250 increase to the base salary of Stream B and Stream C employees. The Council states this offer was contingent on several other factors which were and remain the subject of negotiation.

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8 Council submissions filed on 11 October 2021, [10]-[13].
9 Council submissions filed on 11 October 2021, [15].

[29] The Council submits the QSU's rejection of this offer and subsequent application for the same pay increase demonstrates an unwillingness to negotiate in good faith regarding a proposed new Certified Agreement as required in s 173 of the IR Act

[30] It is contended by the Council that the merits of the case, as well as the likely effect of the proposed determination on employees, requires the Commission to consider all the relevant facts regarding the question of whether, and to what extent, there should be an interim wage increase. That material is not before the Commission and is not required to be put before the Commission as the question being arbitrated is:

> "Should MRC (the Council) employees under the *Queensland Local Government Industry (Stream B) Award - State* 2017 and *Queensland Local Government Industry (Stream C) Award - State* 2017 have their own agreement?"

[31] The Council submits that no determination should be made in relation to the QSU's application, and that the Council reserves the right to determine an administrative increase in a manner and format that the Council deems acceptable. In the alternative, the Council submits that the parties should be referred to negotiation to determine the quantum of any increase.

QSU's submissions in reply

[32] In response to the Council's submissions, the QSU submits that other than the contents of the communication in Annexure A of the Council's submissions, the contentions are false.[10]

[33] The QSU notes that the provisions of s 180(2)(b) of the IR Act are not subject to the provisions of s 173 of the IR Act.

[34] In response to the Council's submission as to delays caused by the unions not operating as a single bargaining unit, the QSU notes the primary reason for the negotiations being "delayed" has been the request by a number of organisations engaged in the bargaining for separate agreements and the failure of the Council to agree to that request.

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10 Applicant's submissions in reply filed 15 October 2021, [3].

[35] In their opposition to differential wage increases, the QSU submits the resolution of that matter is not dependent on the resolution of the issue concerning the number of agreements.

[36] The QSU submits their constitutional coverage extends through the three Queensland Local Government Industry Awards (Stream A, Stream B and Stream C), however, as far as can be determined by reference to job titles, the QSU's current membership is confined to the Stream A and Stream B Awards.

[37] The QSU has made its application within an existing proceeding in accordance with its membership coverage. This is entirely consistent with the organisation's coverage and entitlement to commence proceedings.

[38] The QSU states that the submissions of Council having tabled wage increases and not ceased bargaining, completely miss the point of the application for an interim wage increase.

[39] In their submissions, the QSU states the increase sought is consistent with the longstanding approach to the awarding of interim wage increases and referred to the conclusions of Moore J and Winter C in the *Commonwealth Conciliation and Arbitration Commission and the Metal Trades Award*, 1952 in support of their submissions:

> "5. We agree that interim increases in margins should be cautious. Nothing should be done by us which will impede the making of the final award."[11]

[40] The QSU submits that the two per cent increase sought as an interim increase will not impede or in any way confine the consideration by the full bench of what should be the final increases determined in these proceedings. A two per cent interim increase paid from 1 July 2021 will ensure that the employees covered by the Certified Agreement receive a timely wage increase, rather than having to wait four to five months or more for the outcome.

[41] As for the employees covered by the Stream C Award, the QSU states those employees have representation through a number of organisations entitled to and capable of representing their interests.

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11 *Metal Trades Award*, 1952 (1966) 116 CAR 713.

[42] The QSU submits that a decision by the Council to pay an interim increase of two per cent to all employees whose employment is the subject of the proceedings for a Determination, would obviate the need for this application in existing proceedings and any other applications.

Consideration

Should an order increasing wages on an interim basis be made?

[43] As noted above, in considering whether an interim increase in wages should be made, the full bench must have regard to the matters referred to in s 180(4)(a) and (b) of the IR Act.

[44] At the hearing of the matter, the Council's representative relevantly set out the Council's opposition to the application as follows:

> "It's our position that we reject the 2 percent, and as advanced in our submissions, we believe this should be a matter for MRC to determine in respect of adequate wage increase to the employees. We believe that we have shown, historically, good faith in relation to providing administrative increases to our employees, and on that basis, you know, we believe that in the first instance, this should be referred back to MRC to make a determination in relation to that wage increase."[12]

[45] In essence, the Council submits that, despite the full bench having an application for an interim wage increase before it, the full bench should defer making such a decision and refer the matter back to the Council to determine whether an increase in wages can be made administratively.

[46] As established above, the full bench is empowered by s 180(2)(b) of the IR Act to determine, before making an arbitration determination, an interim increase in wages. The full bench will determine the application before it in accordance with such powers.

[47] As to merit, the material put before the full bench, including that submitted by the Council, is that the terms of the interim increase in wages sought by the QSU is in keeping with the previous offers made by the Council.

[48] The Council's submissions may be summarised as follows:

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12 T 1-14, ll 23-29.

(a) the Council's current offer has a tabled wage increase "in line" with the QSU's request; and

(b) the Council has demonstrated a willingness to provide staff with an administrative increase, and at the time the application was filed, was considering a further administrative increase to all employees covered by the Certified Agreement.

[49] Accordingly, whilst the quantum of the interim increase to wages was resisted by the Council, on the Council's own submissions, it is not averse to an administrative increase in wages to the relevant employees. Indeed, the Council states that it was contemplating taking such a step at the time the application was filed. Further, the Council submitted that it proposed an offer to Stream A employees, which included, *inter alia*, a two per cent increase in wages. The Council has provided no sound or meaningful basis for its position to resist the application.

[50] These are matters which fall in favour of the exercise of the full bench's discretion to grant an interim increase in wages by two per cent to the relevant employees.

Scope of the arbitration determination

[51] During the course of the hearing, a further issue arose with respect to the scope of the matters in dispute to be determined at the arbitration of the substantive application.

[52] During the course of the hearing of the interim application, it became apparent that the parties had disparate views regarding the matters in dispute to be dealt with at the hearing listed before the full bench of the Commission in Mackay on 19, 20 and 21 January 2022.

[53] The Council submitted that the arbitration hearing be limited to matters with respect to the determination of whether the Certified Agreement be split in two. The Council proposed that, pending that outcome, the parties return to bargaining.

[54] The QSU submitted that it was not concerned with whether the Certified Agreement was split in two.

[55] On 3 September 2021, the QSU filed material in the Industrial Registry that identified the terms on which the QSU proposed be granted in the determination of the dispute.

The proposed terms dealt with matters including, for example, rostered days off, salary and wages, and allowances.

[56] It appears, at this juncture, that the parties are not aligned as to the subject matter of the matters in dispute to be determined by the full bench in accordance with s 180(1) of the IR Act.

[57] In order for the parties to prepare for the hearing, the subject matter of the matters in dispute to be determined by the full bench must be clarified in advance of the hearing listed in Mackay on 19, 20 and 21 January 2022. To that end, a Directions Order will be issued separately requiring the parties to file and serve written submissions addressing this matter.

[58] It follows from the above, that in addition to the length of time the parties have been in bargaining, there is also the potential that a final determination will not be made for some several months. Indeed, the position of the Council at the hearing, was that it sought orders that the Certified Agreement be split in two and following that, the parties be directed to continue negotiating. Such a proposal has the potential to further delay finalisation of the Certified Agreement beyond several months. The potential delay to the finalisation of the Certified Agreement, together with the delay already incurred, is a further matter which weighs in favour of the exercise of the discretion to grant a two per cent increase in wages.

Stream C

[59] The application made by the QSU is made only with respect to its members who are Stream A Award and Stream B Award employees.

[60] The Council contends that the QSU only has coverage of those employees employed under Stream A of the Award. The QSU responds that their constitutional coverage extends through the Stream A, Stream B and Stream C Award, however, as far as can be determined by reference to job titles, the QSU's current membership is confined to the Stream A and Stream B Award employees.

[61] Accordingly, consistent with its coverage, the QSU was entitled to commence the application within an existing proceedings with respect to the Stream A Award and Stream B Award employees.

[62] The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland (CFMEU) and the Australian Workers' Union of Employees, Queensland, (AWU) who each appeared before the full bench at the hearing of the interim application, indicated that they supported the orders sought in the application and, further, that they would respectively file an application seeking an interim wage increase in respect of their members who are covered by the Stream C Award.

[63] The full bench's determination with respect to an interim wage increase is limited to the terms of the application that has been filed by the QSU, being the only application currently before the full bench. Any application made by a relevant union for an interim wage increase in respect of Stream C Award employees will be dealt with on its own terms, should such an application be filed in due course.

[64] Accordingly, we consider it appropriate to make the order sought with respect to the Stream A Award and Stream B Award employees only. Since the hearing of the application, the AWU has informed the Commission that an administrative increase of two and a half per cent has been made to Stream C employees.

Conclusion

[65] In our view, issuing orders in the terms sought by the QSU in its application in existing proceedings will not impede the making of the final determination. For the reasons referred to above, we consider it is appropriate in the circumstances of this matter to grant the interim increase in wages to Stream A Award and Stream B Award employees, effective from 1 July 2021, before making an arbitration determination.

Order

[66] Pursuant to s 180(2)(b) of the *Industrial Relations Act* 2016 (Qld), employees covered by the *Queensland Local Government Industry (Stream A) Award – State* 2017 and the *Queensland Local Government Industry (Stream B) Award – State* 2017 be granted an interim wage increase of two per cent at the current rate of pay to take effect as and from 1 July 2021.