

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999

Section 130 – Review of Awards

Together Queensland, Industrial Union of Employees

And

Public Service Commission

And

Others

Matter No. A/2013/04

AWARD REVIEW EXERCISE

MATTER

The proposed removal of “signpost” directive clauses from State Government Awards of the Queensland Industrial Relations Commission.

SUBMISSIONS ON BEHALF OF THE PUBLIC SERVICE COMMISSION

These supplementary submissions arise as a consequence of:

- earlier written submissions (and attachments) lodged by the Public Service Commission (PSC) on 30 January 2013 in Matter No. A/2010/01. This was in response to a request made by a Full Bench of the Queensland Industrial Relations Commission (QIRC) on 15 November 2012 for the PSC to lodge with the Full Bench, written submissions in relation to a discrete matter concerning the insertion of Directives of the Minister responsible for industrial relations or PSC Chief Executive in State Government Awards of the QIRC, in toto or partially);
- an invitation by the Full Bench of the QIRC, who is responsible for Matter No. A/2013/01 (i.e. the Award Review Full Bench), to raise other matters the relevant parties wished to have dealt with by the Award Review Full Bench (this invitation is outlined in section 6 of the Statement issued by the Award Review Full Bench dated 10 May 2013); and
- a Statement issued by the Award Review Full Bench dated 5 August 2013, directing the PSC to file and serve on all organisations who provided written submissions on the matter, a further written submission in respect of the new issues that the PSC raised at the hearing on 19 July 2013, by close of business 31 August 2013.

It is important to note that in the PSC's written submissions (and attachments), lodged with the QIRC on 30 January 2013 in Matter No. A/2010/01, the PSC asserted the following points in summation:

- Whilst in theory it is possible for the QIRC to replicate applicable Directive provisions in relevant Awards, it should not do so for the reasons set out in the written submissions (and attachments) lodged by the PSC with the QIRC on 30 January 2013 in Matter No. A/2010/01.
- Awards are the repository of the views of the QIRC in respect of matters within their power and jurisdiction, made and published as such, and are not a comprehensive collation of all employment conditions that may be in force at any time.
- Directives are not within the jurisdiction or province of the QIRC to decide, and they should not be published within Awards as if they were.
- Bringing Directives into Awards will not collect in one document all of the terms that apply to employment of employees, and many other sources of such entitlements will remain outside Awards and published in their respective source documents.
- If this Full Bench determines that, during the Award review process, it has the capacity to deal with the issue of amending Awards to include Directive provisions, the PSC contends that it is impractical and inappropriate for this Full Bench to do so, as the stated objective of maintaining Awards in a contemporary state and without redundant material will actually be defeated by the propensity of such Directives to be amended and/or repealed on a regular basis.

Contrary to the commentary contained in the Statement of the Award Review Full Bench dated 5 August 2013, it is not the intent of the PSC, as part of this Award Review process, to seek the abolition of all references to Directives in any industrial instrument of the QIRC.

At the hearing on 19 July 2013, the PSC on behalf of the State of Queensland, proposed that, in addition to its written submissions (and attachments), lodged with the QIRC on 30 January 2013 in Matter No. A/2010/01, the Award Review Full Bench, in conjunction with the relevant parties, undertake a process by which they identify and make obsolete those clauses, contained in applicable State Government Awards, which:

- refer the reader of the Award to a ruling (i.e. a Directive) of the Minister responsible for industrial relations or PSC Chief Executive, relating to a particular industrial matter (e.g. overtime meal allowance); and
- do not, by virtue of the Award clause alone, apply the relevant Directive to those employees, in toto or partially, covered by the Award.

It is not the intent of the PSC, as part of this Award Review process, to seek the abolition of clauses contained in State Government Awards which by virtue of the Award clause alone, applies a Directive to those employees, in toto or partially, covered by the Award.

As a means of providing the Award Review Full Bench and the parties (who the PSC have received written submissions from in relation to Matter No. A/2013/04) with greater clarity as to the particular type of State Government Award clauses the PSC is proposing, in these submissions, that the Award Review Full Bench should make obsolete, the PSC has compiled a number of examples (see **Attachment A**).

The particular provisions contained in Attachment A and tendered for the Award Review Full Bench and the parties' information are drawn from the *Queensland Public Service Award – State 2012* and relate to Directives issued by the Minister responsible for industrial relations

on the topics of Overtime Meal Allowance, Motor Vehicle Allowance, Locality Allowance and Annual Leave (see **Attachments B to E**).

The PSC is aware of a range of other comparable provisions contained within the *Queensland Public Service Award – State 2012* and other State Government Awards of the QIRC. But for the purpose of these submissions it is considered appropriate to only highlight the tendered provisions as they simply serve to provide the members of the Award Review Full Bench and the relevant parties with examples of the Award clauses the PSC is referring to as part of these written submissions.

It is the PSC's view that the particular type of State Government Award clauses outlined in Attachment A, simply act as a signpost for readers of the Award and point the reader to the Directive of the Minister responsible for industrial relations or PSC Chief Executive, which relates to the particular industrial matter specified in the Award clause in question. Signpost Award clauses, such as those identified in Attachment A, do not, by virtue of the Award clause itself, make the related Directive applicable to those employees, in toto or partially, covered by the Award. The related Directive performs that function through the individual Directive's application clause.

In light of this, it is the PSC's strong view that the removal of such signpost Award clauses would not stop the respective Directive from applying to those employees covered by the Award and Directive. Again, this is because the Directive itself performs the function of applying the Directive to certain groups of employees and not other groups of employee, not the signpost Award clause in question.

Consequently, it is the PSC's view, prima facie, that signpost Award clauses contained in State Government Awards serve no utility in specifying the express Award conditions and Award entitlements of employees covered by such Awards.

A subsequent but inevitable question that is raised as a consequence of the relief sought by the PSC in these written submissions is whether the construction of such signpost Award clauses provide a safety net (advertently or inadvertently) that is enlivened if a Directive is repealed. That is, if a Directive, which applies to a certain group of employees, is repealed by the Minister responsible for industrial relations or the PSC Chief Executive, and an Award applying to that same group of employees contains a signpost Award clause, do employees still retain entitlements under the last issued Directive?

In relation to that question, the PSC respectfully submits that if the Minister responsible for industrial relations or PSC Chief Executive were to repeal a previously issued Directive which was the subject of a signpost Award clause, there would no longer be an issued Directive to be referred to by the signpost Award clause. In the PSC's view the previously issued Directive which has been subsequently repealed would simply cease to exist and the signpost Award clause would perform no function other than to potentially mislead readers of the Award as to their applicable entitlements.

The PSC respectfully contends that there is no substance in the argument that the construction of such signpost Award clauses provide a safety net (advertently or inadvertently) that is enlivened if a Directive subject to that signpost Award clause is repealed by the author (whether it be the Minister responsible for industrial relations or PSC Chief Executive).

Section 24AA of the *Acts Interpretation Act 1954* provides that if an Act authorises or requires the making of an instrument or decision, the power includes the power to repeal the instrument or decision (see **Attachment F**).

To that end, the Minister responsible for industrial relations and PSC Chief Executive are granted the authority under sections 53 and 54 of the *Public Service Act 2008* (i.e. an Act) to make a decision (i.e. a ruling issued in the form of a Directive) in relation to the a range of employment conditions pertaining to public service employees.

By virtue of sections 53 and 54 of the *Public Service Act 2008* authorising the Minister responsible for industrial relations and PSC Chief Executive to issue such Directives, section 24AA of the *Acts Interpretation Act 1954* provides that the Minister and PSC Chief Executive have similar vested powers to repeal Directives. The word "repeal" itself is widely defined in s.36 of the *Acts Interpretation Act 1954* and for an instrument such as a Directive the term includes, amongst other things, the ability to "revoke" or "rescind" the instrument.

Accordingly, in repealing a Directive subject to a signpost Award clause, the PSC contends that this action effectively obliterates the previously issued Directive completely from the records as though it had never been issued.

In light of this view, the PSC contends that if an instance occurs where a Directive, which applies to a certain group of employees, is repealed, and an Award applying to that same group of employees contains a signpost clause pertaining to that Directive, employees would not retain entitlements under the last issued Directive as that last issued Directive would, by virtue of being repealed, simply no longer exist.

That being the case, the PSC's strong view is that signpost Award clauses contained in State Government Awards serve no utility in specifying the express conditions and entitlements of employees covered by such Awards.

Further to the abovementioned considerations, if the QIRC are to retain such signpost clauses in State Government Awards, the PSC contends that those Award clauses:

- would exacerbate the issue of inconsistencies between Awards and Directives, particularly if Directives are repealed by the industrial relations Minister or PSC Chief Executive; and
- will contribute to the confusion experienced by employees, covered by the Award but expressly excluded from the application of a Directive, in attempting to understand their relevant entitlements.

With respect to past decisions of the QIRC concerning the Award Review process, the PSC acknowledges that in a decision of the QIRC on 7 November 2001, in relation to Award Review Round 1, (i.e. the November 2001 decision) (see **Appendix G**), Commissioner Edwards, Commissioner Bechly and Commissioner Swan made express commentary with regard to an issue between the parties concerning the manner in which Directives made in accordance with the *Public Service Act 2008* may be reflected in Awards. Specifically in the November 2001 decision the Full Bench noted that:

"The Directives referred to set certain entitlements of those covered by the awards. It may be of some assistance in the capacity of those covered by the award to better understand the

contents of Directives to have summary in simple form included in the award rather than a bald reference to the Directive itself.

Any such inclusion should refer back to the Directive as the source of entitlement.”

The PSC does not concur with the views articulated by the Full Bench in the November 2001 decisions.

The PSC contends that Awards are not intended to be a current roadmap or index of all employee entitlements. Employee entitlements are to be found in Awards, Directives, the *Industrial Relations Act 1999*, the *Public Service Act 2008*, certified agreements, and numerous other Acts and Regulations. There appears to be no basis for bringing only two of those sources together in Awards, so that Awards issued and published by the QIRC contain the judgements of the QIRC, and also a reference to other conditions that fall into the purview of the PSC Chief Executive or Minister responsible for industrial relations, and which potentially displace the views of the QIRC on those topics.

Further to this, the PSC understands that in Case B1733 of 1999 (170 QGIG 58) that same Full Bench of the QIRC, whilst conducting Award Review Round 1, noted in an earlier decision that *“It is not the intent of the Award review process under s. 130, nor of decisions made by the Commission as constituted, to establish outcomes that result in the enhancement of existing Award provisions.”* See **Attachment H**.

With regard to that statement, the PSC understands that the reverse position would also likely be adopted by the Award Review Full Bench. That is, it is not the intent of the Award review process under s. 130, nor of decisions made by the Commission as constituted, to establish outcomes that result in the reduction of entitlements contained in existing Award provisions.

However, the benign nature of signpost Award clauses mean that their removal, in the PSC’s view, would not reduce an employee’s Award entitlements. This is because the type of Award clause in question does not by itself provide any entitlement.

In light of these submissions, it is the PSC’s view that Awards of this Commission should be modernised so that they do not contain unnecessary provisions such as signpost Award clauses. To that end, the PSC stands willing and ready to assist the parties in determining and participating in an appropriate process to make obsolete signpost Award clauses contained in State Government Awards.