Industrial Relations Commission
New South Wales

Case Name:	**Applications for Variations to Crown Employees (Police Officers – 2017) Award and Paramedics and Control Centre Officers (State) Award**
Medium Neutral Citation:	[2021] NSWIRComm 1040
Hearing Date(s):	13 August 2020, 6, 7 and 8 October 2020, 13 November 2020 and 18 December 2020
Date of Orders:	3 May 2021
Date of Decision:	3 May 2021
Before:	Chief Commissioner Constant, Commissioner Murphy and Commissioner Sloan
Decision:	Orders that: (1) there be a 1.75% increase to the salaries and salary-related allowances in the Crown Employees (Police Officers – 2017) Award, with such increase to take effect from the first full pay period on or after 1 July 2020; (2) there be a 0.3% increase to the salaries and salary-related allowances in the Paramedics and Control Centre Officers (State) Award, with such increase to take effect from the first full pay period on or after 1 July 2020; and (3) employees covered by the Paramedics and Control Centre Officers (State) Award receive a payment equal to the difference between $1,000 and 0.3% of their annual base salary under that Award at the rate immediately prior to the increase required by order (2), such payment to be made within 28 days.
Catchwords:	EMPLOYMENT AND INDUSTRIAL LAW – Awards – applications for increases to salaries and salary-related allowances in two awards – discretion of Commission to award increases – principles to apply in setting award conditions – whether awards provide fair and reasonable conditions of employment –

	whether increases necessary to ensure awards continue to provide fair and reasonable conditions of employment – application of Wage Fixing Principles – consideration of the state of the economy of NSW
Legislation Cited:	*Bail Act 2013* (NSW) *Criminal Procedure Act 1986* (NSW) s 76A *Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014* (NSW) *Fiscal Responsibility Act 2012* (NSW) s 3 *Health Services Act 1997* (NSW) s 116 *Industrial Relations Act 1996* (NSW) ss 3, 10, 17, 146, 146C Industrial Relations (Public Sector Conditions of Employment) Regulation 2014 (NSW) cl 6 *Police Act 1990* (NSW) s 85
Cases Cited:	*Application for a New Award for Patient Transport Officers (No.2)* [2019] NSWIRComm 1066 *Application for Crown Employees (Public Sector – Salaries 2020) Award and Other Matters* [2020] NSWIRComm 1044 *Application for Crown Employees (Public Sector – Salaries 2020) Award and Other Matters (No 2)* [2020] NSWIRComm 1066 *Application for Crown Employees (Public Sector – Salaries 2020) Award and Other Matters (No 3)* [2020] NSWIRComm 1077 *City of Sydney Wages/Salary Award 2014* (2014) 247 IR 386; [2014] NSWIRComm 49 *Crown Employees (Police Officers - 2009) Award* [2012] NSWIRComm 23 *Crown Employees (Police Officers – 2009) Award (No 2)* [2012] NSWIRComm 104 *Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* (2004) 133 IR 254; [2004] NSWIRComm 114 *Elura Mine Enterprise (Consent) Award 2001* [2003] NSWIRComm 218 *In re Mineral Sands (State) Award* [1980] AR 107 *Kellogg (Aust) Pty Ltd v National Union of Workers, New South Wales* [2003] NSWIRComm 167 *KU Children's Services (Other Than Teachers) (State) Award 1998* [2000] NSWIRComm 94 *Maan v Minister for Immigration and Citizenship* (2009) 179 FCR 581 *O'Sullivan v Farrer* (1989) 168 CLR 210 *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary of New South Wales*

	[2021] NSWCA 64 *Re Crown Employees (Administrative and Clerical Officers State) Award and other Awards (No 2)* (1993) 52 IR 243 *Re Crown Employees (Teachers) Award* [1964] AR 463 *Re Crown Employees Wages Staff (Rates of Pay) Award 2011 (No 3)* (2013) 240 IR 24; [2013] NSWIRComm 109 *Re Operational Ambulance Officers (State) Award* (2001) 113 IR 384; [2001] NSWIRComm 331 *Re Pastoral Industry (State) Award* (2000) 104 IR 168; [2000] NSWIRComm 27 *Re Public Hospital Nurses (State) Award (No 4)* (2003) 131 IR 17; [2003] NSWIRComm 442 *Re: Application for a New Award for Patient Transport Officers* [2017] NSWIRComm 1024 *Secretary, NSW Ministry of Health v Health Services Union NSW* [2018] NSWIRComm 1007 *State Wage Case 2010* (2010) 201 IR 155; [2010] NSWIRComm 183 *State Wage Case 2019* [2019] NSWIRComm 1065 *Transport Industry – General Carriers Contract Determination* (2016) 257 IR 294; [2016] NSWIRComm 3 *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290
Category:	Principal judgment
Parties:	Police Association of New South Wales (Applicant in 2020/151448) Australian Paramedics Association (NSW) (Applicant in 2020/160506) Commissioner of Police (Respondent in 2020/151448) Health Secretary (Respondent in 2020/160506) Health Services Union NSW (Respondent in 2020/160506)
Representation:	Counsel: M Gibian SC with A Slevin (PANSW) M Latham (APA) I Taylor SC with M Easton and J McDonald (Commissioner of Police and Health Secretary) Solicitors: Crown Solicitor (Commissioner of Police and Health Secretary) Other: O Forsyth-Sells (HSU)

File Number(s):	2020/151448 and 2020/160506
Publication Restriction:	No

HEADNOTE

[This headnote is not to be read as part of the decision]

The Police Association of New South Wales ("PANSW") made an application pursuant to s 17 of the *Industrial Relations Act 1996* (NSW) ("Act") to vary the Crown Employees (Police Officers – 2017) Award ("Police Award"), the effect of which would be to increase the salaries and salary-related allowances provided for in that award by 2.5% with effect from 1 July 2020 ("PANSW Application").

The Australian Paramedics Association (NSW) ("APA") made an application pursuant to s 17 of the Act seeking a variation to the Paramedics and Control Centre Officers (State) Award ("Paramedics Award"), the effect of which would be to increase the salaries and salary-related allowances provided for in that award by 2.5% with effect from 1 July 2020. In the alternative, the application sought a new award pursuant to s 10 of the Act, which would be to the same effect ("APA Application").

The Commissioner of Police and the Health Secretary (together, "the Crown") opposed the PANSW Application and the APA Application respectively. The Crown contended that there should be no increase awarded in these proceedings. Its position was that the Applications must be considered in the context of the Government's stated position that through "pausing" wages in the New South Wales public sector for the 2020-21 financial year, savings of approximately $3 billion will be realised in the next four years; these funds will be placed into a new "Infrastructure and Job Acceleration Fund" which will be used for "smaller, shovel-ready projects touching every corner of the state"; investment in these projects will have a greater stimulatory effect on the New South Wales economy than a pay increase to public sector employees; and, for this reason the Commission should decline to award any increases to salaries or salary-related allowances in respect of the Police Award and the Paramedics Award.

Noting that these issues had been considered by the Commission in *Application for Crown Employees (Public Sector – Salaries 2020) Award and Other Matters (No 2)* [2020] NSWIRComm 1066 ("*Public Sector Salaries No 2*"), the Crown conceded that in light of the outcome in those proceedings it would be "open to the Commission to find that an increase of 0.3% would be appropriate to create equality across the public sector".

Section 10 of the Act empowers the Commission to make awards "setting fair and reasonable conditions of employment for employees". The PANSW contended that the assessment of what constitutes fair and reasonable conditions of employment in a particular year must commence with the presumption that public sector employees receive a 2.5% increase each year, consistent with the Government's wages policy reflected in cl 6 of the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014 (NSW) ("Regulation").

The PANSW contended that an increase of 2.5% was warranted having regard to the Wage Fixing Principles, presenting a "multifactorial case" relying on each of the work value, productivity and efficiency, and special case sub-principles.

The APA relied wholly on the special case sub-principle, contending that a 2.5% increase was justified having regard to the work of paramedics and control centre officers during the 2019-20 bushfires in New South Wales and in responding to the COVID-19 pandemic.

The PANSW and the APA also contended that on economic grounds the Commission should award an increase of 2.5% due to the stimulatory effect, in the form of increased spending, that an increase in wages would have on the New South Wales economy. This was said to be greater than the investment in infrastructure proposed by the Government. In any event, they argued that the economy of New South Wales was in a sufficiently sound state to be able to fund both the claimed salary increases and an increase in infrastructure spending.

The Commission held:

(1) There is no presumption that the outcome in *Public Sector Salaries No 2* will necessarily be applied to the Police Award and the Paramedics Award. That is, the Full Bench is not necessarily constrained by the outcome in *Public Sector Salaries No 2*. That matter was determined on the evidence presented to the Full Bench in those proceedings. The PANSW Application and the APA Application must be determined on the evidence adduced in these proceedings: [49].

(2) It would not be in the public interest to permit members of the PANSW and the APA to obtain a forensic advantage by having their respective Applications considered in isolation to the totality of the applications determined in *Public Sector Salaries No 2*. Further, such an approach would fail to give effect to the object contained in s 3(a) of the Act, namely the provision of a framework for the conduct of industrial relations that is fair and just: [56].

(3) No reason had been provided to depart from the approach taken by the Full Bench in Application for Crown Employees (Public Sector – Salaries 2020) Award and Other Matters [2020] NSWIRComm 1044 ("Public Sector Salaries No 1") and Public Sector Salaries No 2, on the question of whether there is a "presumptive outcome". There is no presumptive outcome in respect of the Applications. The employees do not come into these proceedings with an entitlement to a particular wage increase: [62].

(4) An argument that the sub-principles might operate in a manner analogous to costs savings, where the combined savings from a range of initiatives, which may not have affected all employees, might still be "pooled" into a fund to be used for salary increases from which they can all benefit, does not reflect a proper application of the Arbitrated Case Principles: [66].

(5) A party need not show that a 2.5% increase is warranted under the special case sub-principle *or* the work value sub-principle *or* the productivity and efficiency sub-principle. If the Commission is satisfied that the evidence justifies an increase under more than one sub-principle, the quantum of each such increase can be combined to form a total which can be awarded to the employees: [71].

(6) To adopt the "cumulative" approach urged by the PANSW it is necessary that the sections of the workforce that have seen an increase in their work value, or who have made a significant contribution to productivity and efficiency improvements, are sufficiently representative of the relevant workforce as a whole that the increases that flow from those elements might properly result in across-the-board salary increases: [73].

(7) The PANSW had discharged its onus of demonstrating that the PANSW Application attracts the special case sub-principle. This is on the same basis as was found to apply in *Public Sector Salaries No 2*: [79].

(8) In relation to the PANSW Application:

(a) for the purposes of considering the work value and productivity and efficiency sub-principles, the relevant datum point is 1 July 2011: [84];

(b) changes introduced as a consequence of the Re-engineering process do not justify an across-the-board wage increase under the work value sub-principle, but can be considered in the context of the productivity and efficiency sub-principle: [108];

(c) the Active Armed Offender reforms attract the work value sub-principle: [110];

(d) the measures claimed by the PANSW to attract the productivity and efficiency sub-principle have either delivered productivity or efficiency improvements to the NSW Police Force, or have made a substantial contribution towards the attainment of the objectives of the NSW Police Force to become more efficient. While the evidence falls short of establishing a "significant contribution" by employees to each measure, a sufficient case has been made out to attract the productivity and efficiency sub-principle: [190].

(9) The APA has made out a case attracting the special case sub-principle: [221].

(10) The Commission should have regard to the likely changes in the value of money over the life of the award. That is clearly consistent with the authorities. However, the authorities do not support the proposition that the Commission ought not to have regard to movements in inflation since the last increase to salaries and salary-related allowances in the relevant award. That was the approach taken in *Public Sector Salaries No 2* and no persuasive reason was offered as to why the Commission should approach these proceedings on any alternative basis: [289]-[290].

(11) The evidence demonstrates a need for restraint in the particular circumstances of the 2020-21 financial year, but that restraint does not preclude any increase being awarded: [296].

(12) The PANSW has established that the nature and extent of changes in the work of police officers since the datum point, reflected in findings as to the application of the work value and productivity and efficiency sub-principles, justifies an increase to the salaries and salary-related allowances contained in the Police Award. To that extent, the Police Award does not currently set fair and reasonable conditions of employment in that it does not currently reflect changes to the work

value of police officers, or their contribution to productivity and efficiency improvements, since 1 July 2011: [299].

(13) While the evidence calls for restraint in the particular circumstances of the 2020-21 financial year, this should not preclude the Police Award being varied to ensure that its terms are, and remain during its term, fair and reasonable: [300].

(14) The combined effect of the bushfires and the COVID-19 pandemic attract the special case sub-principle in respect of the APA Application. An award to employees covered by the Paramedics Award is warranted: [304].

(15) It would not "create equality across the public sector", or otherwise be fair and reasonable, to deny employees covered by the Paramedics Award an increase to their salaries and salary-related allowances in the same percentage awarded in *Public Sector Salaries No 2*: [306].

(16) The special circumstances of the case warrant the award of an additional one-off payment to employees covered by the Paramedics Award: [307].

(17) There are exceptional circumstances within the meaning of cl 6.2 of the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014 (NSW), permitting the retrospective operation of any increases: [318].

The Commission ordered that:

(1) The salaries and salary-related allowances in the Crown Employees (Police Officers – 2017) Award are to be increased by 1.3%, with such increase to take effect from the first full pay period on or after 1 July 2020: [319(1)].

(2) The salaries and salary-related allowances in the Paramedics and Control Centre Officers (State) Award are to be increased by 0.3%, with such increase to take effect from the first full pay period on or after 1 July 2020: [319(2)].

(3) Employees covered by the Paramedics and Control Centre Officers (State) Award are to receive a payment equal to the difference between $1,000 and 0.3% of their annual base salary under that Award at the rate immediately prior to the increase required by Order (2), such payment to be made within 28 days: [319(3)].

DECISION

1 On 21 May 2020 the Police Association of New South Wales ("PANSW") filed with the Office of the Industrial Registrar ("Registry") an application to vary the Crown Employees (Police Officers – 2017) Award ("Police Award"). The application was made pursuant to s 17 of the *Industrial Relations Act 1996* (NSW) ("Act"). The application sought an increase of 2.5% to the salaries and salary-related allowances provided for in the Police Award.

2 On 29 May 2020 the Australian Paramedics Association (NSW) ("APA") filed an application with the Registry. The application sought a variation to the Paramedics and Control Centre Officers (State) Award ("Paramedics Award") pursuant to s 17 of the Act to increase by 2.5% the salaries and salary-related allowances provided for in that award. In the alternative, the application sought a new award pursuant to s 10 of the Act, which would be to the same effect.

3 For ease of reference, we will refer to these applications as the "PANSW Application" and "APA Application" respectively. Where appropriate, we will refer to them jointly as "the Applications".

4 Each of the Applications was premised on the basis that the increases sought would operate from 1 July 2020. The cases presented by the PANSW and the APA anticipated that the new rates would apply for one year.

5 On 30 July 2020 the Full Bench ordered that the proceedings resulting from the PANSW Application and the APA Application be joined.

6 The respondent to the PANSW Application is the Commissioner of Police.[1] The respondents to the APA Application are the Health Secretary[2] and the Health Services Union New South Wales ("HSU"). For convenience, when we are referring to them in their capacity as respondents to these proceedings we will refer to the Commissioner of Police and the Health Secretary, separately or jointly as appropriate, as "the Crown".

7 The Crown opposed the Applications. It contended that there should be no increase awarded in these proceedings. However, it conceded that in light of the decision of the Full Bench in *Application for Crown Employees (Public Sector – Salaries 2020) Award and Other Matters (No 2)* [2020] NSWIRComm 1066 ("*Public Sector Salaries No 2*")[3] it would be "open to the Commission to find that an increase of 0.3% would be appropriate to create equality across the public sector".[4]

8 The hearing of the proceedings took place over six days between August and December 2020.

9 The PANSW read statements by:

(1) Kirsty Anne Membreno, Assistant Secretary – Industrial Services for the PANSW, dated 1 July 2020;

(2) Chief Inspector Guy Charles Guiana, Hunter Valley Police District, dated 28 June 2020;

---

[1] By s 85 of the *Police Act 1990* (NSW) the Commissioner of Police is to be the employer of non-executive officers for the purposes of any proceedings relating to non-executive officers held before a competent tribunal having jurisdiction to deal with industrial matters.
[2] By s 116(3) of the *Health Services Act 1997* (NSW) the Health Secretary may, subject to that and any other Act or law, exercise on behalf of the Government of New South Wales the employer functions of the Government in relation to the staff employed in the NSW Health Service.
[3] To assist with comprehension, we observe that this decision was variously referred to by the parties in their submissions as the "Public Sector Salaries case" (APA), the "Salaries Case" (HSU) and the "2020 Salaries Case Decision" (Crown)
[4] Crown's Closing Submissions at par 9

(3) Chief Inspector Jeffrey Andrew Budd, Oxley Police District, dated 28 June 2020;

(4) Chief Inspector Brendan Charles Gorman, Coffs/Clarence Police District, dated 1 July 2020;

(5) Sergeant William Munroe Watt, Operational Safety and Skills Command, dated 26 June 2020;

(6) Senior Constable Benjamin James Lee, Police Prosecutions Command, dated 29 June 2020;

(7) Leading Senior Constable Oliver Behrens, Surry Hills Police Area Command, dated 24 June 2020;

(8) Senior Constable Adam Piffarelli, Central West Police District, dated 26 June 2020;

(9) Sergeant Christopher Pieterse, Western Region – New England Police District, dated 26 June 2020;

(10) Sergeant Jacqueline Gorrie, Bankstown Police Area Command, dated 30 June 2020;

(11) Sergeant Steven Joseph Giffney, Chifley Police District, dated 30 June 2020;

(12) Senior Constable Fiona Anne Ozols, New England Police District, dated 29 June 2020;

(13) Sergeant Brett John Henderson-Smith, Coffs/Clarence Police District, dated 26 June 2020;

(14) Sergeant Jeffrey John Ludkin, Parramatta Police Area Command, dated 29 June 2020;

(15) Senior Constable Yuri Smart, State Technical Investigations Unit, dated 22 June 2020;

(16) Senior Sergeant Peter William Foran, Traffic and Highway Patrol Command, dated 25 June 2020;

(17) Leading Senior Constable Anthony Kassab, Police Transport Command Parramatta, dated 29 June 2020;

(18) Detective Sergeant Bryce Watson, Financial Crimes Squad Arson Unit, dated 1 July 2020;

(19) Sergeant Paul Ireland, Port Stephens/Hunter Police District, dated 1 June 2020;

(20) Senior Constable Peter Hughes, Youth and Crime Prevention Command, Brisbane Water Police District, dated 1 July 2020;

(21) Sergeant Courtney Webb, High Tech Crimes Branch of the Forensic Evidence and Technical Services Command, dated 1 July 2020;

(22) Sergeant Roger Campden, Murray River Police District, dated 1 July 2020;

(23) Retired Detective Superintendent Deborah Wallace, dated 1 July 2020;

(24) Detective Sergeant Phillip Malligan, Riverina Police District, dated 9 June 2020;

(25) Sergeant Sean Clarke, Crime Scene Services Branch of the Forensic Evidence and Technical Services Command, dated 29 June 2020;

(26) Sergeant Robert Minns, Wollongong Police District, dated 1 July 2020;

(27) Sergeant Ian Hanley Allwood, Port Stephens/Hunter Police District, dated 2 July 2020;

(28) Leading Senior Constable Marcus Backway, Rescue and Bomb Disposal Unit, dated 2 July 2020;

(29) Leading Senior Constable Huw Michael Crosby, Auburn Police Area Command, dated 3 July 2020;

(30) Senior Constable David Tazzyman, Mt Druitt Police Area Command, dated 2 July 2020;

(31) Sergeant Craig Ian Partridge, Campsie Police Area Command, dated 2 July 2020;

(32) Detective Sergeant Matthew Charles Harmer, New England Police District, dated 3 July 2020; and

(33) Dr Andrew Charlton, a director of AlphaBeta Advisors Pty Ltd, dated 1 July 2020 and 3 September 2020.

10 The APA read affidavits by:

(1) Scott Beaton, Station Officer, Gilgandra Ambulance Station, affirmed 29 June 2020;

(2) Padraig Alan O'Riordan, Aeromedical Control Centre Officer, affirmed 26 June 2020 and 30 July 2020;

(3) David Ipsen, Special Operations Paramedic Training Officer, affirmed 29 June 2020;

(4) Sean Allen, Special Operations Paramedic, affirmed 30 June 2020;

(5) Chris Kastelan, Paramedic, Terrigal Ambulance Station, affirmed 26 June 2020;

(6) Gary Wilson, Acting Station Officer, Gundagai Ambulance Station, affirmed 1 July 2020 and 10 August 2020;

(7) Grant Jennison, Paramedic, Richmond Ambulance Station, affirmed 29 June 2020 and 7 July 2020;

(8) Luke Frost, Critical Care Paramedic, Tamworth Helicopter Base, affirmed 30 June 2020;

(9) Jeffrey Andrew, Critical Care Paramedic, affirmed 29 June 2020 and 10 August 2020;

(10) James Rowland, Intensive Care Paramedic, Northmead Ambulance Station, affirmed 29 June 2020 and 11 August 2020;

(11) Linda Paterson, Paramedic, Springwood Ambulance Station, affirmed 29 June 2020;

(12) Gerry Pyke, Special Operations Paramedic Training Officer, Bankstown Ambulance Station, affirmed 10 August 2020;

(13) Tom Kiat, Industrial Officer for the APA, affirmed 1 July 2020 and 11 August 2020; and

(14) Dr Richard Denniss, Chief Economist for The Australia Institute, affirmed 3 July 2020, 12 August 2020, 4 September 2020 and 24 September 2020.

11 The HSU read a statement of Michael Grayson, a Station Officer at the Batemans Bay Ambulance Station, dated 1 July 2020.

12 The Crown read affidavits by:

(1) Assistant Commissioner Peter Elliott, Acting Director of Control Centres for NSW Ambulance, sworn 29 July 2020;

(2) Craig Knappick, Group Director, People and Culture in the NSW Police Force, affirmed 30 July 2020;

(3) San Midha, Deputy Secretary for the Policy & Budget Group of New South Wales Treasury, affirmed 26 August 2020 and 17 September 2020;

(4) Stephen Walters, Chief Economist for the New South Wales Treasury, affirmed 29 July 2020, 30 July 2020 and 17 September 2020; and

(5) Greg Houston, a founding partner at HoustonKemp. The Crown read two affidavits by Mr Houston each affirmed on 29 July 2020 and initially filed, respectively, in relation to the PANSW Application and APA Application, and one affirmed on 17 September 2020.

13 Of all of the witnesses, only Assistant Commissioner Elliott, Mr Knappick and Mr Midha were required for cross-examination in the "traditional" sense. Dr Charlton, Dr Denniss, Mr Walters and Mr Houston took part in an expert's conclave, in which Mr Midha also participated.

14 In addition to the statements and affidavits on which they relied, the parties adduced a large volume of other documentary evidence. It is not necessary to separately identify those documents.

15 At the conclusion of the hearing the parties provided the Commission with detailed written submissions (and in the case of the PANSW and the APA, further written submissions in reply). The Full Bench has been greatly assisted by those submissions.

16 On 23 December 2020, subsequent to the conclusion of the hearing, proceedings were initiated in the Supreme Court of New South Wales seeking judicial review of the decision in *Public Sector Salaries No 2*. As the Full

Bench in these proceedings has been required to consider many of the same issues arising in *Public Sector Salaries No 2*, we considered it prudent to await the outcome of the judicial review prior to publishing this decision. The Court of Appeal handed down its decision on 23 April 2021: *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary of New South Wales* [2021] NSWCA 64.

Applicable principles

Legislation

17 Section 10 of the Act empowers the Commission to make awards "setting fair and reasonable conditions of employment for employees". Section 17 empowers the Commission to vary or rescind an award, provided that it may only do so after the nominal term of the award if it considers that it is not contrary to the public interest to do so: s 17(3)(d). The nominal term in each of the Police Award and Paramedics Award has expired.

18 Section 146(2) of the Act requires the Commission to take into account the public interest in the exercise of its functions. For that purpose, it must have regard to the objects of the Act, and the state of the economy of New South Wales and the likely effect of its decisions on that economy.

19 The term "public interest" is not defined in the Act. In *O'Sullivan v Farrer* (1989) 168 CLR 210 the majority observed (at 216):

> "Indeed, the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable...given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view': *Water Conservation and Irrigation Commission (NSW) v Browning*, per Dixon J. at p 505."
>
> (Footnote omitted)

20 This passage from *O'Sullivan* has been cited with approval by the Commission in a number of cases: see *KU Children's Services (Other Than*

Teachers) (State) Award 1998 [2000] NSWIRComm 94 at [92]; *Elura Mine Enterprise (Consent) Award 2001* [2003] NSWIRComm 218 at [140]; *Kellogg (Aust) Pty Ltd v National Union of Workers, New South Wales* [2003] NSWIRComm 167 at [64].

21 The objects of the Act are set out in s 3, which for present purposes relevantly provides as follows:

> **3 Objects**
>
> The objects of this Act are as follows—
>
> > (a) to provide a framework for the conduct of industrial relations that is fair and just,
> >
> > (b) to promote efficiency and productivity in the economy of the State,
> >
> > ...
> >
> > (e) to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments,
> >
> > ...

22 Under s 146C(1)(a), the Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission. Such a policy is to be found in cl 6 of the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014 (NSW) ("Regulation"), which is relevantly in the following terms:

> **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, but only if employee-related costs in respect of those employees are not increased by more than 2.5% per annum as a result of the increases awarded together with any new or increased superannuation employment benefits provided (or to be provided) to or in respect of the employees since their remuneration or other conditions of employment were last determined.

(b) Increases in remuneration or other conditions of employment can be awarded even if employee-related costs are increased by more than 2.5% per annum, but only if sufficient employee-related cost savings have been achieved to fully offset the increased employee-related costs beyond 2.5% per annum. ...

Wage Fixing Principles

23 To provide guidance as to the making or varying of awards the Commission has over the years developed Wage Fixing Principles, which were most recently re-affirmed by the Full Bench in *State Wage Case 2019* [2019] NSWIRComm 1065 at Annexure A of Annexure 1. Those principles relevantly provide as follows:

1. Preamble

1.1 These principles have been developed to accommodate the changing nature of the jurisdiction of the Industrial Relations Commission of New South Wales (the "Commission") under the *Industrial Relations Act 1996* ("the Act") in light of the creation of a national system of private sector employment regulation, relevantly established by the *Industrial Relations (Commonwealth Powers) Act 2009,* the *Industrial Relations Amendment (Consequential Provisions) Act* 2010, the *Fair Work Act 2009* (Cth) and the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Cth).

1.2 The four primary aims of these principles are:

1.2.1 to provide a framework under which wages and employment conditions in the government and local government sectors of New South Wales remain fair and reasonable in accordance with the requirements of the Act, and economically sustainable having regard to the obligation of the Commission to take into account the public interest and, in doing so, having regard to the objects of the Act and to the state of the economy of New South Wales and the likely effect of the Commission's decisions on that economy;

1.2.2 to provide a framework that accommodates the interests of employers and employees and their representatives and ensures consistency of approach, certainty and predictability as to the principles that are to operate in respect of the fixation of wages and the setting of employment conditions;

1.2.3 to provide a framework in which all operative and non-operative awards within the Commission's jurisdiction are maintained up to date in respect of rates of pay and allowances; and

1.2.4 to protect the low paid.

1.3 Movements in wages and conditions must fall within the following principles.

...

8. Arbitrated Case

8.1 General

Any claim for increases in wages and salaries, or changes in conditions in awards, other than those allowed elsewhere in the Principles, will be processed as an Arbitrated Case by a Full Bench of the Commission unless otherwise allocated by the Chief Commissioner. In determining such an application, the Commission shall, subject to the relevant provisions of the Act, do so in accordance with the following criteria:

8.2 Work Value Considerations

(a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.

(b) In addition to meeting the test in (a), a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award structure but also against any external classification to which that structure is related. There must be no likelihood of wage leapfrogging arising out of changes in relative position.

(c) The foregoing circumstances are the only ones in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this Principle.

(d) In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.

(e) Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification, or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.

(f) The time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the *State Wage Case 1989* (1989) 30 IR 107 or the last work value inquiry or the date of a consent award where the parties have agreed pursuant to a consent award the wage increases reflect increases in work value, whichever is the later.

(g) Care should be exercised to ensure that changes that were, or should have been, taken into account in any previous work value adjustments or in a

structural efficiency exercise are not included in any work evaluation under this Principle.

(h) Where the tests specified in (a) are met, an assessment will have to be made as to how that alteration should be measured in monetary terms. Such assessment will normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work or the date of a consent award where the parties have agreed pursuant to a consent award that the wage increases reflect increases in work value.

(i) The expression *"the conditions under which the work is performed"* relates to the environment in which the work is done.

(j) The Commission will guard against contrived classifications and over-classification of jobs.

(k) Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other Principle of these Principles, will not be taken into account under this Principle.

(l) In arbitrating an application made under this Principle, the Commission is required to determine whether or not future State Wage Case general increases will apply to the award.

8.3 Productivity and Efficiency Considerations

Productivity and efficiency measures that have delivered substantial costs savings and/or productivity or efficiency improvements or which have made a substantial contribution towards the attainment of the objectives of the employer (including departments and agencies of the Crown) in seeking to become more competitive and/or efficient, to which employees have made a significant contribution, may constitute the basis for increases to wages and salaries or improvements in employment conditions without the requirement to make out a special case, provided that such measures, savings or improvements have not already been taken into account in previous wage adjustments.

8.4 Special Case Considerations

8.4.1 A claim for increases in wages and salaries, or changes in conditions in awards, other than those allowed elsewhere in the Principles, and which is not based on work value and/or productivity and efficiency pursuant to this Principle, will be processed as a special case in accordance with the principles laid down in *Re Operational Ambulance Officers (State) Award* [2001] NSWIRComm 331; (2001) 113 IR 384 and the cases referred to therein at [165]-[168].

8.4.2 All special cases shall be tested against the public interest.

(Emphasis in original)

24 In *Public Sector Salaries No 2* the Full Bench, as presently constituted, considered (at [47]-[51]) an argument that as a result of the combined operation of s 146C of the Act and cl 6 of the Regulation it is no longer open to the Commission to apply its Wage Fixing Principles in the determination of applications for the making or variation of awards. The Full Bench concluded (at [51]) that the applications in that case "must be brought within the Wage Fixing Principles".

25 The PANSW "reserve[d] its position in relation to the correctness or appropriateness of the Full Bench's conclusion" but did "not seek to agitate that question further in these proceedings".[5] The PANSW put forward the basis on which it said the PANSW Application attracted the special case, work value and productivity and efficiency sub-principles, "to the extent the Full Bench considers that the Wage Fixing Principles continue to have utility".[6]

26 Neither the APA nor the HSU contended that the Wage Fixing Principles ought not to be applied in determining the APA Application. To the contrary, the APA's case was premised on it seeking to establish its claim under the special case principle. The APA submitted:[7]

> "19. ... Nor did the APA submit that the Wage Fixing Principles ought not to apply. APA's application, evidence and submissions have fully accepted the onus on it to demonstrate in accordance with the relevant Principle that the wage increase sought is necessary to ensure that the Award remains fair and reasonable."

27 We do not consider that there is before us any controversy that in determining the Applications the Commission should have regard to the Wage Fixing Principles, however equivocal the PANSW's submissions may have been. However, to the extent that there is any question in the present proceedings as to the application of the Wage Fixing Principles, we see no reason to depart from the position taken by the Full Bench in *Public Sector Salaries No 2*.

---

[5] PANSW Final Submissions at par 24 fn 32
[6] ibid. at par 26
[7] APA Written Outline of Closing Submissions

28 Having said that, we note the following submissions of the PANSW:[8]

> "4. As a general observation, the respondent's submissions (particularly that a case 'must be brought within the Wage Fixing Principles') seek to elevate the Wage Fixing Principles from a body of principles designed to guide the exercise of a broad discretion to vary an award where it is considered not contrary to the public interest (s 17(3)(d) of the IR Act), or create an award setting fair and reasonable conditions of employment (s 10 of the IR Act), to a fixed body of decision making rules not found in the statute. They are not."
>
> (Footnote omitted)

29 The Wage Fixing Principles are in the nature of guidelines. They do not have the force of statute, and cannot add to and do not detract from the Commission's jurisdiction under the Act.

30 At the same time, the Wage Fixing Principles derive their utility from their consistent and logical application to award proceedings brought before the Commission. We note and adopt the following observations of the Full Bench in *State Wage Case 2010* (2010) 201 IR 155; [2010] NSWIRComm 183:

> "87. We agree with the submission of the DPE that the Wage Fixing Principles have served the Commission and the parties well over long periods of time. The rationale underpinning the Principles has not fundamentally changed. The Principles provide a coherent set of rules that ensures consistency of approach by the wage fixing tribunal and certainty and predictability in respect of the fixation of wages and the setting of employment conditions. They also ensure that employment conditions are regulated in a way that is economically sustainable."

31 The statement by the Full Bench in *Public Sector Salaries No 2* that the applications in that case "must be brought within the Wage Fixing Principles" should not be taken as elevating the Wage Fixing Principles beyond their proper status. The Full Bench was there confirming that it saw no reason why the Commission ought to depart from its usual practice of having regard to the Wage Fixing Principles in determining the Applications in accordance with the Act. We are similarly of that opinion in these proceedings.

[8] PANSW Final Reply Submissions

Approach to the making or varying of awards

32 The approach that the Commission should adopt in making or varying awards has been considered by the Full Bench in numerous decisions. The principles which arise from those cases to which we have had particular regard are as follows:

(1) Whether the conditions of employment in the award are fair and reasonable is a primary test for evaluating whether an award should be altered: *Re Operational Ambulance Officers (State) Award* (2001) 113 IR 384; [2001] NSWIRComm 331 at [164].

(2) Awards of the Commission are presumed to set fair and reasonable terms and conditions of employment: *City of Sydney Wages/Salary Award 2014* (2014) 247 IR 386; [2014] NSWIRComm 49 at [12].

(3) The terms "fair" and "reasonable" in s 10 of the Act import a requirement that the conditions of employment set represent a proper and proportionate balance between the entitlements afforded employees and the interests of those employing them: *City of Sydney Wages/Salary Award 2014* at [19].

(4) In a contested case, the onus falls on the applicant to make out a case for an alteration to an award: *Re Pastoral Industry (State) Award* (2000) 104 IR 168; [2000] NSWIRComm 27at [77].

(5) In a special case the applicant bears the onus of persuading the Commission that the application satisfies a dual test: that the terms of the award sought constitute fair and reasonable conditions of employment and that the matter in question has "special attributes" or is "out of the ordinary" so as to take the matter outside the restrictions which otherwise apply under the Wage Fixing Principles: *Re Operational Ambulance Officers (State) Award* at [166] and [168]; *City of Sydney Wages/Salary Award* at [16].

(6) The applicant must meet the ordinary onus to make out its case. In a special case the applicant does not bear a higher onus or standard of proof: *Re Pastoral Industry (State) Award* at [73]; *Re Operational Ambulance Officers (State) Award* at [165] and [168].

(7) The onus borne by a party was described by Kite AJ in *Transport Industry – General Carriers Contract Determination* (2016) 257 IR 294; [2016] NSWIRComm 3 in these terms:

> "34. It has long been recognized that Industrial Tribunals are in a different position to the general courts. The duty of the Commission is to make an award or determination which prescribes fair and reasonable rates and conditions. In doing so the Commission is not bound by the rules of evidence or to act in a formal manner but *'is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.'* See s 163 (1)(c) of the Act.
>
> 35. The various authorities referring to the 'onus' born[e] by a party are to be understood in that context. There must be information before the Commission which allows it to be satisfied that the determination or award, if made, will provide just and reasonable rates and conditions. The assessment of the adequacy of that material will vary according to the nature of the case, including the degree of consent, before the Commission: see *In re Butchers, Wholesale (Cumberland) Award* 1971 AR 425 especially at 437- 440."
>
> (Emphasis in original)

(8) The Commission should have regard to all factors relevant to the determination of the general claim including economic considerations and then make a global assessment of what is a fair and reasonable wage to be determined in the circumstances. In this context, the state of the economy, including fiscal considerations, will be taken into account in the overall assessment but will not be determinative of the Commission's decision: *Crown Employees (Police Officers – 2009) Award (No 2)* [2012] NSWIRComm 104 ("*Police No 2*") at [72], citing *Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* (2004) 133 IR 254; [2004] NSWIRComm 114 at [432], in which the Full Bench observed:

> "...The economic and financial position of the State and the effects of our decision on the New South Wales economy have played a significant role in our decision, but not a determinative one. It is our statutory duty to fix fair and reasonable rates of pay and conditions. In a matter, such as this one, where a compelling basis for increases in rates of pay has been demonstrated, then the Commission must give recognition to that conclusion even though it may temper the final result in recognition of economic considerations. The terms of s146 of the Act require no more than this, particularly in the light of the paramount requirements of s10 of the Act. ..."

(9) The Commission must attempt to fix rates which will be just and reasonable rates at the time when the award commences to operate and which, unless unforeseeable happenings occur, will continue to be just and reasonable during the term of the award: *Re Crown Employees (Teachers) Award* [1964] AR 463 at 482-483, cited with approval in *Police No 2* at [78].

(10) In this regard, it is appropriate for the Commission to have regard to economic considerations, including the changing value of money over time, when deciding the amount of any increase which should be awarded. Matters which may be considered in that regard are the date on which the last wage increases for employees in question took effect, and changes in money values which have occurred since that time or are forecast during the term of the award to be made: *Re Crown Employees (Administrative and Clerical Officers State) Award and other Awards (No 2)* (1993) 52 IR 243, cited with approval in *Re Operational Ambulance Officers (State) Award* at [167]. See also *Police No 2* at [121].

Factual context

33 The PANSW Application and APA Application arise from largely the same factual context as that which the Full Bench, as presently constituted, considered in *Application for Crown Employees (Public Sector – Salaries 2020) Award and Other Matters* [2020] NSWIRComm 1044 ("*Public Sector Salaries No 1*") and in *Public Sector Salaries No 2*. In the second decision the Full Bench observed:

"63. To provide context, we reproduce the following passages from our Earlier Decision:

> '35. The PSA, the NMA and the HSU led evidence which was said to provide historical context to the 2014 Regulation. In their Outline of Submissions in Reply those unions described that evidence, and its significance, as follows:
>
> > "18. The context of the enactment of s 146C and the making of the initial Regulation in 2011 is critical in understanding the nature of the 'policy' to which the Commission is required to give effect. The NSW Government first introduced a wages policy in 2007 which was contained in Premier's Memorandum M2007-12. The 2007 Premier's Memorandum recorded as follows:
> >
> > > *... It is intended to maintain real wages by allowing for increases of 2.5 per cent per annum. Additional increases are available where employee-related cost savings are achieved.*
> > >
> > > *Since wage agreements are set in a forward looking manner, forecasts for inflation need to be utilised to maintain the real value of wages. The Reserve Bank of Australia (RBA) has an agreement with the Federal Government to maintain CPI increases within a range of 2-3 per cent. That is, on average, the CPI will increase by 2.5 per cent. While increases in the CPI may exceed, or be less than 2.5 per cent in the short-term, the RBA actively pursues monetary policy to achieve the target range. Therefore, in multi-year wage agreements, a 2.5 per cent Sydney CPI inflation rate is the best available forecast. This is also NSW Treasury's medium-term inflation parameter as published in the Budget papers.*
> >
> > 19. In 2011, the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* was enacted amending the Act by inserting s 146C. At the same time the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* ('the 2011 Regulation') was made. At or around the same time the NSW Government issued the 2011 Wages Policy ('the Wages Policy'). The 2011 Regulation was designed to ensure that the Commission applied the fundamental tenets of the Wages Policy and to continue key aspects of the 2007 Wages Policy, but to require the Commission to comply with the policy.
> >
> > 20. As set out in the earlier submissions filed on behalf of the PSA, NSWNMA and the HSU, in parliamentary debates associated with the introduction of s 146C and the making of the 2011 Regulation, the relevant Minister asserted repeatedly and unequivocally that the Regulation would 'ensure that wage increases of 2.5 per cent are available each year to our hard-working public sector employees'. Furthermore, the Wages

Policy expressly indicated that the policy was designed to maintain the real value of public sector wages in line with the mid-point of the Reserve Bank's target range for inflation. Those aspects of the statutory history and the underlying policy are ignored by the Industrial Relations Secretary.

21. There are additional statements made in Parliament which make clear the object and purpose of the Regulation. On 2 June 2011, for example, Mr Greg Smith in a speech to the Legislative Assembly stated (*New South Wales Parliamentary Debates (Hansard)*, Legislative Assembly, 2 June 2011, p 2145):

> We will provide 2.5 percent wage rises across the public service, and rises above that level will have to be offset by productivity gains...

22. On 3 August 2011, the responsible Minister, the Hon. Greg Pearce stated, in a speech to the Legislative Council in relation to the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (*New South Wales Parliamentary Debates (Hansard)*, Legislative Council, 3 August 2011, p 3483):

> *Despite the scaremongering from the Opposition, our policy is more transparent than Labour'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.*

23. It could not have been more clearly stated that the government's policy was that a wage increase of 2.5% would be guaranteed for public sector employees under the Regulation: *Re Crown Employees Wages Staff (Rates of Pay) Award 2011 (No 3)* (2013) 240 IR 24 at [84]. That guarantee is consistent with the underlying policy of the Regulation, namely, that real wages and fiscal responsibility would be maintained by providing for increases in remuneration each year by reference to the mid-point of the Reserve Bank's target range for inflation.

24. The 2011 Regulation was repealed by Schedule 5 to the *State Revenue and Other Legislation Amendment (Budget Measures) Act* 2014 and replaced by the text contained in sub-schedule 5.2 of the Budget Measure Act which is referred to as the *Industrial Relations (Public Sector Conditions of Employment) Regulation* 2014. The Regulation continues the purpose and structure of the 2011 Regulation other than to address, in clause 6(1)(a), the relevance of changes in

superannuation entitlements to the constraint on the Commission's jurisdiction.

..."

(Emphasis in original)

...

66. It is apparent that the 2.5% cap was imposed by the Government as a wage restraint mechanism which has, with few exceptions, eliminated wage increases by way of work value and/or productivity and efficiency claims which had been a regular feature of public sector employment prior to the imposition of the cap. The rates of pay and work-related allowances in the awards the subject of the Joined Applications have, since 1 July 2011, been increased by 2.5% annually, almost invariably with the consent of the parties to those awards (apart from 2013 and 2014 when the increases were 2.27% due to the increase in the superannuation guarantee).

67. On 27 May 2020 the Honourable Gladys Berejiklian, the Premier of New South Wales, and the Honourable Dominic Perrottet, the Treasurer of New South Wales, issued a media release which contained the following statements:

> 'The NSW Government will pause pay rises for the next 12 months to protect public service jobs as unemployment spikes across NSW.
>
> ...
>
> The new wages policy will be implemented by regulation and will apply prospectively. For workers with agreements already struck, the pay rise pause will apply for the first 12 months of their next agreement.'

68. On 29 May 2020 the Government made the Industrial Relations (Public Sector Conditions of Employment) Amendment (Temporary Wages Policy) Regulation 2020 (NSW). That regulation purported to amend the 2014 Regulation so as to give effect to the 'new wages policy' referred to in the media release of 27 May 2020.

...

70. On 2 June 2020, the Legislative Council disallowed the Industrial Relations (Public Sector Conditions of Employment) Amendment (Temporary Wages Policy) Regulation 2020. ..."

(Emphasis in original)

34 The reference to the "Earlier Decision" in this passage (and others from *Public Sector Salaries No 2* to which we will refer) is a reference to *Public Sector Salaries No 1*.

35 Further to the extract of the media release of 27 May 2020 reproduced in part at [67] of *Public Sector Salaries No 2*, the media release went on to state:[9]

> "This pause will save NSW taxpayers around $3 billion.
>
> Pausing pay rises will enable the government to focus on preserving existing public sector jobs while also stimulating job-creation as NSW confronts the prospect of the deep recession and contraction of the economy."

36 A further media release issued by the NSW Government on 31 May 2020 stated:[10]

> "The NSW Government has announced a new $3 billion acceleration fund to go towards job creating projects, increasing the government's infrastructure pipeline to a guaranteed $100 billion.
>
> The new $3 billion Infrastructure and Job Acceleration Fund will be used for smaller, shovel-ready projects touching every corner of the state, injecting up to an extra 20 thousand jobs back into the NSW workforce."

37 Specifically in connection with the PANSW Application, Ms Membreno deposed that police officers had been awarded increases to their salaries and salary-related allowances of 3.5%, 3.2% and 3.2% from 1 July 2011, 1 July 2012 and 1 July 2013 respectively. (We observe parenthetically that these increases were the result of decisions of the Full Bench in *Crown Employees (Police Officers - 2009) Award* [2012] NSWIRComm 23 ("*Police No 1*") and in *Police No 2*.) In each year from 1 July 2014 to 1 July 2019 police officers were awarded increases of 2.5%.

38 In her statement Ms Membreno further deposed:

> "62. The negotiations for the 2020 Award began as early as 9 August 2019 whereby the PANSW wrote to the Minister of Police the Honourable David Elliot MP seeking a meeting to discuss the upcoming Award negotiations.
>
> 63. On 27 August 2019 Ms Rebecca Alexander, Manager Workforce Relations and Strategy NSW Police Force wrote to the PANSW seeking what she described as 'the COP is seeking an indication from the PANSW of what is likely to be sought as part of the 2020 Award bargaining process. All that is requested is a summary list of items and a short description'.

---

[9] Affidavit, San Midha, 26 August 2020, Tab C(1)
[10] Exhibit Crown 5, Tab C(12) at p 132

64. On the 10 September 2019 the PANSW provided a response to Ms Alexander outlining a summary of our 'Award 2020 items' and canvassed this with a formal log of claims would be promptly provided to the Commissioner of Police in the coming months *[sic]*. ...

65. On 25 September 2019 a meeting was held with the Minister of Police the Honourable David Elliot MP that I attended, to discuss the 2020 Award from the PANSW perspective along similar lines to what was expressed in the response to NSWPF on 10 September 2019.

66. On 6 December 2019 the PANSW provided the Commissioner of Police a formal log of claims on behalf of its membership for the 2020 Award. ...This was followed up with the Commissioner of Police on the 8 January 2020. ...

67. On 16 January 2020 the Commissioner of Police wrote to the President, Tony King advising he had received the log of claims but at present was unable to negotiate and expected to have bargaining parameters by the end of January 2020. ...

68. On 10 March 2020 NSW Police Force Assistant Commissioner HR Command Leanne McCusker chaired the one and only 'informal negotiation' meeting held between the parties concerning Award 2020. I attended. NSWPF advised they had submitted the 'paperwork' to NSW Treasury prior to Christmas. NSWPF advised during that meeting that based on advice from NSW Treasury they did not yet have permission to bargain, but to prevent delays were seeking to have this meeting initially. Ms Alexander who did most of the talking for the NSWPF, in describing what the NSWPF position to treasury was, said words to the effect of 'We are seeking a 3 year award. Whilst we don't have approved bargaining parameters, the current wages policy is 2.5%. We are seeking 2.5% in year 1, 2.04% in years 2 and 3'. I understood the reduced wages for years 2 and 3 was because of changes in the superannuation guarantee.

69. On 11 March 2020, I (and others from the PANSW) attended a meeting with the Commissioner and his Deputies, in relation to a number of agenda items including the Award 2020. The position expressed to us was that the NSWPF was seeking increases consistent with the 2.5% wages policy, and an optional disengagement proposal.

70. On 17 March 2020 the PANSW provided an offer to the Commissioner of Police, seeking a 12 month Award with an increase of 2.5%, in light of the COVID-19 circumstances that were then evolving, and noting in particular the crucial role the Commissioner of Police was about to play in taking control of the States *[sic]* response to COVID-19. We understood he was about to take up that role and as such there may be difficulties in securing access for further negotiations. ...

71. On 20 March 2020 President Tony King met with the Minister of Police the Honourable David Elliot MP to further discussions regarding the 12 month 2.5% proposal made to the Commissioner of Police.

72. Other than this correspondence the PANSW met with the Commissioner of Police (and his Executive Team) in relation to the Award (amongst other pressing matters) on a number of occasions. We were

> informed on multiple occasions that the Commissioner did not have bargaining parameters approved by Treasury, but the NSWPF position was 2.5% consistent with the published wages policy.
>
> 73. On 21 May 2020 the PANSW lodges *[sic]* an application in the IRC to vary the current Crown Employees (Police Officers 2017) Award to provide for a 2.5% increase in salary and salary related allowances."

39 In his statement, Mr Knappick, who was called to give evidence by the Crown, gave the following description of the meeting of 10 March 2020 to which Ms Membreno referred:

> "17. I am informed that during the meeting the NSWPF indicated that it had requested bargaining parameters to negotiate a three year award, including salary and salary related allowance increases of *up to* 2.5% in the first year, and *up to* 2.04% in the second and third years, noting the proposed increases to the federal superannuation guarantee."
>
> (Emphasis in original)

40 Under cross-examination Mr Knappick deposed that the information on which his evidence was based had been provided to him by Rebecca Alexander, the Manager Workforce Relations Strategy for the NSW Police Force. Ms Alexander was not called to give evidence. Mr Knappick was not present at the meeting.

41 In submissions made by the Commissioner of Police to the NSW Government Wages Policy Taskforce on 19 December 2019 and 23 March 2020[11] approval was sought to offer "up to" the relevant percentage increases. However, on the evidence and in relation specifically to representations that might have been made during the meeting of 10 March 2020, we prefer the evidence of Ms Membreno.

42 In relation to the APA Application, in his statement of 1 July 2020 Mr Kiat deposed:

> "3. On or around 10 April 2020, I read an article published by the Sydney Morning Herald entitled 'Plans to stop pay rise for NSW public servants but not health workers'. ...

[11] Exhibits PA41 and PA42

4. The article's lede *[sic]* states, 'NSW Treasurer Dominic Perrottet will recommend to cabinet that the state's public servants go without pay rises for 12 months but will insist frontline health workers are exempt.' It goes on to specifically refer to paramedics when discussing other measures taken by the Government to support its healthcare staff.

5. As the source of the information in the article appeared to be Mr Perrottet himself, I took it as representing the Government's position in relation to this year's Award negotiations. Accordingly I concluded that as in previous years, and consistent with the general wages policy of the Government, the Minisry *[sic]* would propose or agree to an unconditional increase to wages under the Award of 2.5%.

6. In order to confirm my belief, on 1 May 2020 I sent a letter to Ms Elizabeth Allen, the Director of Industrial Relations for the Ministry. ...The letter sought, 'confirmation that the Ministry will be passing on a 2.5% wage increase under a new Award commencing 1 July 2020.' I also requested that, 'In order to avoid undue concern amongst our membership we ask that you respond as soon as possible.'

7. Part of the reason that I sent this letter, including the request for a prompt reply, was that some APA (NSW) members had expressed concern to me regarding the security of the 2.5% wage increase, despite the publicly reported position of the Government's Treasurer.

8. After sending the 1 May 2020 letter to Ms Allen, I asked Mr Gary Wilson, the Secretary of APA (NSW), to call Ms Allen to follow up. On 12 April 2020, Mr Wilson informed me that he had spoken to Ms Allen the previous day and that she had told him that the she did not have 'bargaining parameters' yet. I took this to mean that Ms Allen had not received formal instructions as to how to respond to our letter seeking confirmation of the Ministry's position on the 2.5% wage increase.

9. On 18 May 2020, I emailed Ms Allen to ask whether there was any further information in relation to this issue. She advised me that she did not have any update, other than to say that there had been an application filed by the Nurses and Midwives Association for a new Award with a 2.5% pay increase, and that she also had no instructions from the Government to consent to or oppose this application.

10. On 27 May 2020, the Government publicly announced its position that it would be freezing the pay of all public sector workers. Mr Wilson advised me that he had received confirmation from Ms Allen that this pay freeze would apply to our Award.

11. As the position of the Ministry had been confirmed, I took immediate steps to take instructions on the filing of an application to seek a pay increase of 2.5%. This was filed on 29 May 2020, just under two months after I had first written to the Ministry seeking their advice on their position."

43 Evidence adduced by the PANSW suggests that in or about late May 2020 the Government offered a "one-off payment in lieu of a salary increase for

nurses, police, paramedics, teachers and train crews".[12] The amount of the payment was $1,000. That the Applications proceeded to arbitration is evidence that the offer was not accepted by the PANSW or the APA on behalf of their members.

44 Against this factual background we will turn to the matters requiring determination in these proceedings.

Public Sector Salaries No 2

45 In *Public Sector Salaries No 2* the Full Bench considered and determined applications relating to 41 awards of the Commission. It suffices to say that the applications broadly sought increases of 2.5% to the salaries and salary-related allowances provided by the relevant awards. The Full Bench awarded increases of only 0.3% from the first full pay period on or after 1 July 2020.

46 In its Closing Submissions in these proceedings the Crown identified a further 18 awards in respect of which the employer and union parties had agreed to adopt the outcome in *Public Sector Salaries No 2*. The Crown contended:

> "11. In those circumstances the only substantial issue is whether the Applicants in these proceedings can identify factors which sufficiently differentiate their applications from the applications in the 2020 Salaries Case (and indeed those other parts of the public sector workforce who have agreed to an increase of 0.3%) in a manner that justifies a different increase. To do so the Applicants must show, by reference to relevant Wage Fixing Principles, that the Commission is *required* to provide a differentiated outcome in order to maintain fair and reasonable conditions of employment.
>
> ...
>
> 18. In light of those matters, in practical terms the only issue to be determined in these proceedings is whether either Applicant has made out a case that the relevant award would not be fair and reasonable without an increase greater than 0.3% due to factors which differentiate their case from that run by the Applicants in the 2020 Salaries Case.
>
> 19. While the Commission has taken further economic evidence, it is evidence largely to the same effect as the evidence that underpinned the conclusions of the Commission in the 2020 Salaries Case Decision. That evidence is summarised below. The evidence presented in these proceedings

[12] Exhibit PA43, Tab1 at p 2

would not cause the Commission to depart from any of the key findings as to the economic evidence.

20. That is not to say that these proceedings fall to be determined on any basis other than the evidence led in these proceedings. Further, the Applicants have the onus to persuade the Commission that it should amend or vary the awards at all. However, since the economic evidence is substantially to the same effect, and these proceedings concern two further public sector groups of employees, the Commission can be expected to come to the same overall conclusion.

21. The only reason the Commission would not come to the same overall conclusion (and award a higher increase) would be if the Full Bench were satisfied that one or other application had differentiated itself by leading evidence that established a higher increase under the wage fixing principles. ..."

(Emphasis in original)

47 In its Closing Submissions in Reply the APA contended in response:

"3. The Crown at RS [11] submits that all issues in dispute can be subsumed into the single consideration of whether the APA can identify factors that sufficiently differentiate their applications *[sic]* from the Public Sector Salaries case, by reference to the relevant Wage Fixing Principles, such that the Commission is required to provide a different outcome. This submission misstates the test. The Commission must exercise its discretion to the application before it with reference to the statutory conditions and wage fixing principles. While these are usefully set out in the Public Sector Salaries case, this application must be considered on their own merits *[sic]*. From a purely practical perspective, it is impossible for the APA to make its own case with reference to applications, evidence and submissions to which it does not have access and which are not filed in these proceedings."

48 In light of par 20 of the Crown's Closing Submissions, it may be that there is no relevant contest between the parties as to the effect of *Public Sector Salaries No 2*. To the extent that the Full Bench in that case made findings regarding the principles to apply in determining the matters arising from the Applications, we will adopt them and apply the same approach.

49 However, in determining what is fair and reasonable, the Full Bench does not simply presume that the outcome in *Public Sector Salaries No 2* will or should be applied to the Police Award and the Paramedics Award. That is, the Full Bench is not necessarily constrained by the outcome in *Public Sector Salaries No 2*. That matter was determined on the evidence presented to the Full Bench in those proceedings. The PANSW Application and the APA

Application will similarly be determined on the evidence adduced in these proceedings.

50 That said, the outcome in *Public Sector Salaries No 2* is a relevant factor to which the Full Bench has had regard. This is significant in the context of the approach taken by both the PANSW and the APA regarding the fiscal implications of the Applications or, to put it more directly, the "affordability" of their claims. From [222] below we address the economic considerations arising from the Applications, but it is convenient to deal with this aspect of the matter at this point.

51 On the question of whether the increases sought in the Applications were "affordable", each of the PANSW and the APA directed attention to their particular claims. The PANSW adduced evidence to the effect that its claim would come at a first year cost of approximately $72 million, a figure derived from an attachment to a submission made by the Commissioner of Police to the NSW Government Wages Policy Taskforce.[13] We digress to observe that based on the figure given in that document for annual wages and salaries (approximately $1.8 billion) and the number of full-time equivalent employees it stated were covered by the Police Award (17,200), the average annual salary of a police officer, not including superannuation or allowances, is approximately $105,000. In any event, the PANSW described the amount of $72 million as "clearly affordable".[14]

52 The APA estimated that the first year cost of its claim would be in the order of $11 million. This figure was premised on an assertion made by counsel for the APA during the hearing that the "average wage of a paramedic" is $118,000 per annum, which was accepted by Mr Midha as "sounding right".[15] Similarly

---

[13] Exhibit PA42
[14] PANSW Final Submissions at par 101
[15] Tcpt, 13 November 2020, p 321(28-38). We observe that one of the documents in evidence was a report prepared by Dr Denniss and David Richardson of The Australia Institute dated July 2020, which was premised on an assumption that the median base annual income for the workforce covered by the Paramedics Award was $75,726.56 and that the median paramedic will receive an additional 15% on top of base income for penalties and overtime (a total of $87,085.54). In light of the findings we have made, it is not necessary to explore whether there is a meaningful difference between "average" and "median" incomes under the Paramedics Award.

to the PANSW, the APA submitted that there was "no real contest on the evidence that the NSW Government has the capacity to fund $11m of infrastructure stimulus spending from borrowing if it is unable to save that amount through a wage freeze".[16]

53 Viewed in isolation, there is no question that the NSW Government could fund the increases sought in the Applications without prejudicing its planned investment in infrastructure through the Infrastructure and Job Acceleration Fund. The Crown conceded that there was no contest in this regard. However, the Crown submitted that the Commission would be "mindful of the appropriateness to not treat one sector of the public sector more favourably (all other things being equal) simply because it made a later application, or represents a smaller subset of the workforce".[17]

54 We have already observed that these proceedings arise out of the same broad factual context as that considered by the Full Bench in *Public Sector Salaries No 2*. The evidence presented in those proceedings, including the economic and fiscal implications of granting the salary increases that had been sought, led to the award of 0.3% only. Determining the PANSW Application and the APA Application in a purely standalone manner, without regard to the broader factual and economic context giving rise to the Applications, would be entirely artificial. It would also permit the PANSW and the APA to derive a potentially unfair forensic advantage for their members through nothing more than having their Applications determined second in time to those considered in *Public Sector Salaries No 2*.

55 Section 146(2) of the Act provides that the Commission "must take into account the public interest in the exercise of its functions". The Commission's obligation contained in s 146(2)(b) to have regard to the state of the economy of NSW, and the likely effect of the Commission's decisions on that economy, forms part of, but not necessarily a determinative part of, the overarching obligation to take into account the public interest.

---

[16] APA Written Outline of Closing Submissions at par 51
[17] Crown's Closing Submissions at par 153

56 Having regard to the authorities referred to at [19]-[20] above, we do not consider that it would be in the public interest to permit members of the PANSW and the APA to obtain a forensic advantage by having their respective Applications considered in isolation to the totality of the applications determined in *Public Sector Salaries No 2*. Such an approach would fail to give effect to the object contained in s 3(a) of the Act, namely the provision of a framework for the conduct of industrial relations that is fair and just.

57 Further in this context, we accept the following submissions of the Crown:

> "153. These circumstances are unchanged. This being the case, the Commission should place no weight on arguments that the cost/saving of an increase of 2.5% awarded to PCCOs alone, or to police alone, would have a 'marginal effect' upon the budget and financial position of the State and so should be awarded. The Commission will be mindful of the appropriateness to not treat one sector of the public sector more favourably (all other things being equal) simply because it made a later application, or represents a smaller subset of the workforce. If one takes any small subset of public sector workers one could contend that the cost of an increase to that subgroup is not large compared to total Government expenditure and so can be afforded without a significant increase to Government debt. Yet taken to its logical conclusion that would justify a $3b impost to the budget. The Commission has appropriately considered the effect of the cost of an increase on a public sector wide basis, and the impact that would have on the budget. To depart from that for one subgroup of employees would inevitably lead to other groups seeking the same outcome for the same reason. *If PCCOs are to get a different increase it should not be on the basis that their relatively small number means the cost of the increase is not significant enough to prevent it. To the extent the PANSW put forward the same proposition, the same submission is made.*"
>
> (Emphasis added)

A presumptive increase?

58 In *Public Sector Salaries No 2* the Full Bench observed:

> "32. In the light of this authority, it is necessary to consider the approach urged on the Commission by the PSA, the NMA and the HSU. The premise underpinning the case advanced by those unions was stated as follows: [6]
>
> > '10. Any assessment of what constitutes fair and reasonable conditions of employment in a particular year must commence with the presumption that public sector employees receive a 2.5% increase each year. ...'

33. This presumption was said to arise for a number of reasons, including:

(1) the policy underlying the 2014 Regulation was constructed on the basis that an appropriate balance is struck between the fiscal requirements of government and the maintenance of fair working conditions for employees by providing a 2.5% increase in remuneration or other conditions of employment each year;

(2) the Commission will in future years be constrained from increasing remuneration or conditions of employment beyond 2.5%, at least without cost offsets. Consequently, an increase below 2.5% in any year will constitute a permanent cut to the remuneration of public sector employees which cannot be corrected or made good in future years regardless of the economic or merit considerations which may then arise;

(3) the Commission is entitled, and required, to take into account as a public interest consideration the repeated statements by Government that public sector employees would be guaranteed a 2.5% increase each year: per Boland J in *Re Crown Employees Wages Staff (Rates of Pay) Award 2011 (No 3)* (2013) 240 IR 24; [2013] NSWIRComm 109 at [99] to [102] and [170];

(4) cl 9 of the 2014 Regulation dictates that employee-related cost savings must be 'additional to whole of Government savings measures (such as efficiency dividends)'. The necessary consequence is that the payment of an increase of 2.5% per annum is intended to compensate employees not only with respect to the changing value of money over time, but also for contributions to 'whole of Government savings measures' such as efficiency dividends; and

(5) the public interest considerations relevant to the applications go beyond economic considerations. These include a consideration of the objects of the Act.

34. The PSA, the NMA and the HSU submitted:

'20. It is to be presumed these public interest considerations, going to fairness, justice, the promotion of efficiency and productivity, appropriate regulation of employment, cooperative workplace reform are all contemplated in the 2.5% wage increase provided for in the policy. These factors point to a strong presumption that whilst the *Policy* is in place public sector employees should receive a 2.5% per annum increase. The Commission should be reluctant to depart from that presumption."

(Emphasis in original)

35. In our Earlier Decision we observed:

'76. The Commission cannot award more than 2.5% (subject to cl 6(1)(b) of the 2014 Regulation), but it is open to it to award increases in remuneration of 2.5% or less. Within that "narrow scope", as it was described by Boland P in *Re Crown Employees*, the Commission is bound to apply the provisions of both ss 10 and 146(2)

> of the *Industrial Relations Act*. There is nothing in s 146C or the 2014 Regulation that would make it inconsistent for the Commission to apply those provisions.
>
> 77. In answer to the question: Does the Government policy declared in clause 6(1)(a) of the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014 require the Commission to ensure that public sector employees be awarded increases in remuneration or other conditions of employment of 2.5% per annum?
>
> The answer is "No".'
>
> 36. A contention that a particular increase is to be presumed (or assumed, as it was otherwise submitted) runs very close to an argument that employees have a *de facto* entitlement to what had previously been claimed, essentially, as a *de jure* entitlement. The effect of our Earlier Decision was to make it clear that the employees do not come into these proceedings with an entitlement to a particular wage increase. As a result, we do not approach this decision from a position that there is a presumptive outcome."

59 The PANSW's Final Submissions in these proceedings contains a submission, at par 35, in precisely the terms reproduced at [32] of *Public Sector Salaries No 2*. They also contain contentions to the same effect as those summarised at [33(1)-(3)] in the passage quoted above. This is despite the PANSW recognising, at par 32 of its Final Submissions, that the Full Bench in *Public Sector Salaries No 2* rejected the very contention it pressed at par 35.

60 The APA submitted that "at no stage has the APA adopted the primary and/or secondary positions taken by the unions and rejected by the Full Bench, i.e. that the increase sought was mandatory or presumptive".[18]

61 This issue was not addressed in the HSU's written submissions. However, in her closing oral submissions, Ms Forsyth-Sells, who appeared for the HSU, stated that the HSU did "not believe that there is a presumption for 2.5%".[19]

62 We have been provided with no reason to depart from the reasoning adopted by the Full Bench in *Public Sector Salaries No 1* and *Public Sector Salaries No 2*, and see no reason to do so in any event. We do not approach these proceedings from a position that there is a presumptive outcome.

---

[18] APA Written Outline of Closing Submissions at par 19
[19] Tcpt, 18 December 2020, p 419 (23-24)

63 At the same time, we accept the submission of the PANSW that the existence of the Regulation, and the constraints it imposes on the Commission's jurisdiction, are of relevance to the exercise of our discretion to set wages.

Wage Fixing Principles – PANSW Application

A cumulative approach

64 The PANSW contended that its case satisfied the special case, work value and productivity and efficiency sub-principles. In its Final Submissions the PANSW submitted:

> "32. The Association's claim is brought pursuant to s 17 of the Act and, to the extent necessary, Principle 8, Arbitrated Case, of the Wage Fixing Principles. In particular, sub-principles 8.2 Work Value, 8.3 Productivity and Efficiency Considerations and 8.4 Special Case Consideration, are relied upon. Sub-principle 8.5.2 within the Wage Fixing Principles significantly provides that an Arbitrated Case may be made out on the basis of *'a cumulation of the factors referred to in this Principle'.* This means that an aggregate salaries outcome under the Arbitrated Case principle may be obtained through a multi-factor case in which particular factors satisfy particular sub-principles, but it is not necessary for the whole of a case to satisfy any particular sub-principle."
>
> (Emphasis in original)

65 In a footnote to this passage the PANSW cited *Police No 1*, in which the Full Bench observed:

> "36. Even though the Association relied, in an overall sense, on the Arbitrated Case Principle, which is permissive of claims based both on work value and productivity and efficiency considerations, and, there is no doubt an overlap between factors relied upon in the work value and productivity elements of the Association's claims, we do not consider that approach to be particularly helpful. This is primarily because the respective elements of the Arbitrated Case Principle 'work value' and 'productivity and efficiency', must ultimately be determined as quite discreet *[sic]* matters. The satisfaction of the respective elements concern quite different factors, even though they may overlap to some degree. Nothing in Principle 8.5.2 alters this conclusion. The reference to 'a cumulation' in that sub-principle concerns, in our view, circumstances where more than one head of the considerations or criteria referred to in the Principle may be brought to account in determining an application in arbitrated proceedings. This cumulative approach may only properly occur, however, where the criteria for each such consideration (sought to be added to the overall arbitrated case) has been satisfied.
>
> ...

> 77. The Arbitrated Case Principle provides that, in determining an application pursuant to the principle, the Commission is to have regard to particular criteria, namely: work value considerations (sub-principle 8.2), productivity and efficiency considerations (sub-principle 8.3) and special case considerations (sub-principle 8.4). Sub-principle 8.5.2 provides that there shall be no double counting, although an arbitrated case claim may rely upon an accumulation of such factors or criteria. We agree with the submission of the Association that 'this means that an aggregate salaries outcome under the Arbitrated Principle may be obtained through a multi-factor case in which particular factors satisfy particular sub-principles. It is not necessary for the whole of a case to satisfy any particular sub-principle'. (We would reiterate, however, that this does not remove an obligation to address each sub-principle as a discreet *[sic]* matter, so as to assess whether or not the claim may be sustained under that criteria *[sic].*)"

66 These passages were relied on by the PANSW as support for what appeared to be the proposition that the sub-principles might operate in a manner analogous to costs savings, where the combined savings from a range of initiatives, which may not have affected all employees, might still be "pooled" into a fund to be used for salary increases from which they can all benefit. That is, that work value changes that affect some but not all employees, or productivity and efficiency improvements to which some but not all employees have contributed, and any special case considerations might in some manner be aggregated, with the total value being apportioned across the entire workforce. To the extent that this is the approach urged by the PANSW in the present case, we do not consider that it reflects a proper application of the Arbitrated Case Principles.

67 In *Police No 1* the Full Bench was considering evidence as to what had been agreed "would be taken as a representative sample of the NSW Police Force as a whole": at [57]. This is reflected in the following passage from the decision:

> "742. By reliance upon an agreed representative sample of LACs and specialist Commands, the Association has, with respect to the general claim, satisfied the requirements of the Arbitrated Case Principle and, in particular, the work value and productivity and efficiency sub-principles."

68 An approach allowing for the aggregation of factors under the Arbitrated Case sub-principles must be seen in that context. While the PANSW submitted that the evidence it had adduced in the present proceedings was similarly

representative, a matter to which we will return, there is no agreement in that regard.

69 It is also noteworthy that the Full Bench in *Police No 1* separately considered "specialist claims" in respect of police prosecutors and experts within the Forensic Services Group. The Full Bench determined (at [744]) that "the Association [had] satisfied the requirements of the Arbitrated Case Principle and, in particular, the special case and work value sub-principles with respect to the specialist claims made for police prosecutors and experts within the FSG".

70 Further, the construction of *Police No 1* advanced by the PANSW is difficult to reconcile with the Full Bench in *Police No 2* citing with approval (at [90]) the following passage from *Re Public Hospital Nurses (State) Award (No 4)* (2003) 131 IR 17; [2003] NSWIRComm 442:

> "22. We consider that the important point to be drawn from *The TAFE Case* is that if an applicant seeks wage increases for all classifications under an award **the applicant carries the onus of demonstrating work value change in respect of each classification**. It is not sufficient to contend, for example, that there have been changes in technology over the relevant period that have impacted on the work value of employees generally. **It must be demonstrated how that impact has led to a significant net addition to the work requirements of each award classification in respect of which the increase is sought**."
>
> (Bold emphasis added)

71 The Full Bench in *Police No 1* is better to be understood as confirming that any wage increases that might flow from an applicant's case meeting one or more of the sub-principles can be accumulated. That is, in the present case the PANSW need not show that a 2.5% increase is warranted under the special case sub-principle *or* the work value sub-principle *or* the productivity and efficiency sub-principle. If the Commission is satisfied that the evidence justifies an increase under more than one sub-principle, the quantum of each such increase can be combined to form a total which can be awarded to the employees. To get to that point, however, it is necessary to "assess whether

or not the claim may be sustained" under each sub-principle on which the PANSW relied.

72 In this regard, the Crown contended in its Closing Submissions:

> "30. Whilst the Full Bench in *Crown Employees (Police Officers - 2009) Award (No 2)* (2012) 220 IR 192; [2012] NSWIRComm 104 at [77] ('**Police No.1**') found that an arbitrated case may rely upon an accumulation of factors, the Commission must be diligent in stringently testing each element of the claim. The PANSW's claim is unsatisfactorily imprecise in this regard. At best PANSW has provided evidence of some changes to some subsections of the police force in the hope that the Full Bench can identify for itself an understanding of whether the workforce as a whole has made work value gains, productivity/efficiency gains or some unspecified combination of both."
>
> (Emphasis in original)

73 In our view, to adopt the "cumulative" approach urged by the PANSW it is necessary that the sections of the workforce that have seen an increase in their work value, or who have made a significant contribution to productivity and efficiency improvements, are sufficiently representative of the relevant workforce as a whole that the increases that flow from those elements might properly result in across-the-board salary increases.

74 On this basis we turn to consider the claims advanced by the PANSW under each of the Arbitrated Case sub-principles.

Special Case sub-principle

75 In making out its case under the special case sub-principle, the PANSW relied on the following passages from *Public Sector Salaries No 2*:

> "73. Given the regularity and consistency of public sector wage increases over the past nine years, it is reasonable to conclude that employees covered by the Relevant Awards held a legitimate expectation that their rates of pay would be increased by 2.5% from 1 July 2020. This is an expectation they could reasonably have held until late May 2020.
>
> ...
>
> 75. While we have found – and reiterate – that any *expectation* held by the employees does not translate into an *entitlement* (however described), it is properly a matter to which we should have regard in considering the public

interest. In the particular circumstances described above, we are satisfied that the Joined Applications fall within the special case principle."

76 The PANSW further relied on the following factors:

(1) salaries for police officers have increased at the rate of 2.5% or more since 2011, as set out at [37] above;

(2) evidence that people will tend to adjust their spending habits based on their actual and anticipated level of earnings; and

(3) the representations made by the Commissioner of Police, through his delegates, to the PANSW in March 2020 regarding a 2.5% increase from 1 July 2020, as referred to at pars 68 and 69 of Ms Membreno's statement, reproduced at [38] above.

77 The Crown conceded that "the factors that gave rise to the application of the Special Case Principle in the particular manner identified in the 2020 Salaries Decision exist in the same way in these proceedings".[20]

78 We do not place particular weight on the representations said to have been made by the Commissioner of Police (through his delegates) to the PANSW as described by Ms Membreno. It is clear that while the Commissioner of Police may have sought approval from the Wages Policy Taskforce to offer particular increases, that approval had not at that stage been received. Further, there is no evidence of the representations having been made other than to officers of the PANSW.

79 We find that the PANSW has discharged its onus of demonstrating that the PANSW Application attracts the special case sub-principle. This is on the same basis as was found to apply in *Public Sector Salaries No 2*.

[20] Crown's Closing Submissions

Work Value sub-principle

Approach to apply

80 In its Closing Submissions the Crown provided the following useful summary of authorities that have considered the work value sub-principle:

> "32. The following Work Value principles can be derived from the authorities:
>
> a. wage fixing principles require a stringent examination of whether there has been work value changes such as to justify the grant of wage increases (per *Re Crown Employees (Public Sector - Salaries 2011) Award (No 3)* [2011] NSWIRComm 104; (2011) 210 IR 458 at [35]);
>
> b. changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed (per *Police No 1* at [79]);
>
> c. changes in work by themselves may not lead to a change in wage rates (per *Police No 1* at [79]);
>
> d. some changes in work merely reflect the evolving nature of the particular occupation where skills or responsibilities are lost and new ones gained without producing a net addition to work requirements. In many occupations, particularly professional occupations, change, and the requirement to cope with it by coming to terms with new methods and new technology, is an inherent and accepted characteristic of the employment and rarely will this evolutionary process attract extraordinary wage increases under the work value principle (per *Re Public Hospitals Nurses (State) Award (No 4)* (2003) 131 IR 17 at [18]);
>
> e. changes that justify an alteration in rates must be 'significant', meaning 'to a meaningful degree, not insignificant, not immaterial, not trivial' though not necessarily 'major' (per Police No 1 at [79]) ;
>
> f. changes in qualification requirements and qualifications form an important part of the assessment of changes in the nature of work and level of skill and responsibility required of the persons performing the work (per *NSW Health Service Allied Health Assistants (State) Award* [2015] NSWIRComm 30 at [17]);
>
> g. the Commission must carefully sift through the material that has been placed before it and separate out those changes which have occurred to the nature of the work, skill and responsibility of employees or to the environment in which the employees work and which have not previously been the subject of compensation (per *Re Public Hospitals Nurses (State) Award (No 4)* (2003) 131 IR 17 at [20]);

h. increases to the volume of work, or to the frequency of specific tasks, do not meet the strict requirements of the work value principle (per *Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* (2004) 133 IR 254 at 289; [2004] NSWIRComm 114 at [89]);

i. if an applicant seeks wage increases for all classifications under an award the applicant carries the onus of demonstrating work value change in respect of each classification (per *Re Public Hospitals Nurses (State) Award (No 4)* (2003) 131 IR 17 at [22]); and

j. given the need to prove work value change in respect of each classification, generally the work value sub-principle has not resulted in across-the-board wage increases with limited exceptions."

(Footnotes omitted)

81 In the last point in this passage, the Crown cited *Police No 2* in support of its contention. By way of amplification we note the following passages from that decision:

"89. The task of determining the appropriate quantification of a wage increase under the work value sub-principle is, as submitted by the Association, that described by the Full Bench in *Public Hospital Nurses (No 4)* at [20]:

> ... An assessment is then to be made as to how that change should be measured in money terms. Such assessment will normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work.

90. Whilst we agree with the Commissioner that, generally speaking, the work value sub-principle, and predecessor principles, have not resulted in across-the-board wage increases (due to the nature of the requirements of the sub-principle), that approach is not without significant exceptions. Thus, in *Public Hospital Nurses (No 4)*, the Full Bench explained that the decision of the Full Bench in *Crown Employees (Teachers and Related Employees - Technical and Further Education Teaching Service) Salaries and Conditions Award* (unreported, Fisher P, Bauer and Hungerford JJ, 1619 of 1989, 7 August 1991 at 44) was not intended to exclude entirely generalised, across-the-board wage increases under the work value principle. The Full Bench, in *Public Hospital Nurses (No 4),* made the following observation, with which we agree:

> We consider that the important point to be drawn from The TAFE Case is that if an applicant seeks wage increases for all classifications under an award the applicant carries the onus of demonstrating work value change in respect of each classification. It is not sufficient to contend, for example, that there have been changes in technology over the relevant period that have impacted on the work value of employees generally. It must be demonstrated how that impact has

led to a significant net addition to the work requirements of each award classification in respect of which the increase is sought.

91. The application of those principles, in our view, would not preclude the satisfaction of the work value sub-principle in this matter resulting in a generalised, across-the-board wage increase. The changes to police proactivity found by the Full Bench in *Police Award (No 1)* do relate to all General Duties police officers as a classification group. There is a small exception which is based almost entirely upon a geographic distinction. It is true that some specialist Commands in the representative sample did not experience proactive policing (only one Command experienced none) but, again, numerically this would represent a relatively small component of the NSW Police Force. We consider that the approach most consistent with the application of the work value sub-principle, and the findings that we have made in this matter in that respect, is to apply the principle of averaging so as to reduce, commensurate with the extent of the gaps or limitations in the reach of police proactivity change after 2006, the overall remedy that might otherwise be available as the result of the satisfaction of the sub-principle."

Datum point

82 Clause 8.2(f) of the work value sub-principle provides:

"(f) The time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the *State Wage Case 1989* (1989) 30 IR 107 or the last work value inquiry or the date of a consent award where the parties have agreed pursuant to a consent award the wage increases reflect increases in work value, whichever is the later."

83 Ms Membreno deposed that the last arbitrated adjustment to the salaries and salary-related allowances of police officers took effect on 1 July 2011 (as determined in *Police No 2*). The award made on that occasion provided for further increases from 1 July 2012 and 1 July 2013. All subsequent increases have been by consent. There is no evidence to suggest that those increases were related in any way to increases in work value.

84 The PANSW submitted that the datum point for the purposes of the work value sub-principle should, as a consequence, be 1 July 2011. The Crown did not appear to take issue with that contention. We accept 1 July 2011 as the relevant datum point.

Work value changes

85 The PANSW submitted that there were two grounds on which increases to salaries are justified on work value grounds: firstly, restructuring that has occurred in the NSW Police Force, and, secondly, the introduction of "Active Armed Offender" protocols in 2015. We will consider each in turn.

Re-engineering

86 The PANSW led evidence of a significant number of structural changes or reforms to the NSW Police Force since 2011. In so far as the work value sub-principle is concerned, however, the PANSW relied on changes that were introduced from 2017 under what was known within the NSW Police Force as "Re-engineering".[21]

87 In the November 2017 edition of the Police Monthly, Re-engineering was described in these terms:[22]

> "More police officers out on the street and having the flexibility to move those officers around are the cornerstones to a modern NSW Police Force being created by Commissioner Mick Fuller under re-engineering.
>
> Major changes are underway across the organisation and will lead to extra police officers working in frontline positions throughout NSW to actively prevent, disrupt and target crime.
>
> The local area command structure is being retired after 20 years, to be replaced with new frontline structures for metropolitan Sydney and regional NSW.
>
> In metropolitan Sydney, the 42 current local area commands are being condensed and consolidated down to 32 police area commands, each consisting of between 230 and 300 police officers and reporting through to the three metropolitan region commanders.
>
> The consultation process for regional NSW continues, but there will be a different structure to the city's police area commands in recognition of the different needs of police and the community in country NSW.
>
> ...

[21] The other restructuring projects or changes about which evidence was led were relied on by the PANSW in support of its claim under the productivity and efficiency sub principle, to which we will return.
[22] Exhibit PA33 Part 2, Tab 7 at pp 9-13

> Re-engineering will increase the numbers of police working in frontline positions, in part by reducing more than 800 over-strength positions across the state, and also by increasing class numbers at the Police Academy from March next year.
>
> ...
>
> Re-engineering will see changes to only a small percentage of all police officer positions across the organisation, as well as a number of administration staff.
>
> Placement strategies have now been finalised in close consultation with the Police Association of NSW and the Public Service Association and engagement with affected staff has commenced.
>
> The changes to the current LAC structure will result in a reduction in commissioned officer numbers, particularly at the newly created commands, but there will be no changes to overall police numbers. Excess commissioned officers will be placed into meaningful temporary duties to ensure their skills and expertise are utilised until permanent positions can be found.
>
> Some senior officers have already flagged that they'll retire soon so it's expected that natural attrition will reduce those excess numbers over time, allowing the recruitment of more constables.
>
> Consolidations will also see a reduction in some administration positions at affected commands. Where possible, options for redeploying affected staff elsewhere within the organisation will be considered before looking at other options."

88 The December 2017 edition of the Police Monthly reported as follows:[23]

> "Commissioner Mick Fuller and Deputy Commissioner Regional NSW Field Operations Gary Worboys travelled to Mudgee last month to announce a new policing model for regional NSW under re-engineering.
>
> The current 34 LACs in regional NSW will be replaced by 26 police districts (PD). This includes 12 new districts which will be created through the consolidation and geographical realignment of 20 current LACs.
>
> ...
>
> 'We'll see a return to the officer in charge (OIC) model throughout regional police stations in which that OIC would run the day-to-day operations, overseen by a commander at the district office,' Deputy Commissioner Worboys said."

89 The evidence led by the PANSW on the Re-engineering project was usefully summarised in its Final Submissions. It is convenient to reproduce that summary, as follows:

[23] Exhibit PA33 Part 2, Tab 9 at p 16

"164. Re-engineering had the effect of reducing the overall number of Duty Officers in many PACs/Districts and created the role of Officer In Charge (OIC) in regional Police Districts. To use the Hunter Valley PD as an illustration, Chief Inspector Guiana describes how the scope of duties now expected of an OIC were different to the previous deployment model: his duties as an OIC were 'previously shared by five duty officers, are now effectively the responsibility of one OIC for each sector'.

165. A number of officers have described the impact of Re-engineering in their area, including:

(a) Chief Inspector Budd, now an OIC, Ex PA3 at [15]-[17]:

> *'From my perspective, the most obvious change was re-engineering. Up until January 2017 the position of Officer in Charge did not exist. Components of the role existed but many were the bally wick responsibility of Superintendents. The Officer in Charge model has seen the divestment of responsibility in terms of Strategic Management, Community Engagement, and Stakeholder Consultation from Superintendent to Inspector. There has been an intensification in work and decision making capacity to the Officer in Charge in all areas of the role.*
>
> *In 2011, I was the Senior Inspector within Oxley Local Area Command. The area of responsibility and accountability that I had then was greatly different to today. As the Officer in charge of Tamworth I have 7 Stations, 86 Staff that report directly to me and through their Supervisors. Prior to re-engineering, between 2011 and 2017, that same demographic was shared between 3 Inspectors. 3 Inspectors shared the responsibility and accountability of what my role now requires me to do. The Stations and Supervisors were evenly distributed to each Inspector along with all of the associated HR administration, system auditing and reporting, career development, performance management, resource management and overall leadership. My responsibility and accountability is in effect 3 fold that of the period between 2011 and 2017. What this has caused is an increase in expectation and requirement for my Supervisors to become more strategically focused and involved in the day to day decision making processes.'*

Its practical effect on Chief Inspector Budd can be seen in his description of his role (Ex PA3 at [7]):

> *'As the Officer In Charge of Tamworth Police Station, I oversee 7 Police Stations and 86 staff. This is in fact bigger in terms of geographical size and resources than some Superintendent resourced PAC's in Metropolitan Sydney. My job has changed to be essentially that of a Commander. All Operational, Strategic, HR, Professional Standard's combined with all things that are Community Engagement are my responsibility.'*

(b) Chief Inspector Gorman, District Inspector - Professional Standards (Ex PA4 at [20] - [28]):

> *'One aspect of the Re-engineering project was the 2017 introduction of the Officer in Charge role to Police Districts in regional NSW. This role puts an Inspector in charge of a station or group of stations in order to be the single point of contact for members of the community, emergency management and external government agencies. Prior to this, each Inspector within a District (then a Local Area Command) was responsible for a certain portfolio which covered a group under that portfolio (for example, the Operations Portfolio, the Human Resources Portfolio, the Professional Standards Portfolio etc). The OIC now has some local responsibility for all of those portfolio issues and is responsible to the Commander as well as the substantive holder of the portfolio.*
>
> *The OIC is now a jack of all trades, responsible on a daily basis for operational response on a day to day basis, achieving the proactivity targets of police attached to that station or group of stations, mental health interagency meetings,...customer service issues (police response times, victim follow up compliance), emergency management, correspondence through the chain of command and meeting business plan targets.*
>
> *In addition to this, the OIC is required to meet community engagement requirements, where the OIC is required to meet regularly with Local Members of Parliament, Council, Chambers of Commerce and other community groups to identify community concerns, and respond to these concerns with concrete plans to address them on behalf of the police district.*
>
> *These responsibilities of the OIC are on top of rostered shifts and operational response.*

(c) See also Chief Inspector Guiana, now OIC of the Hunter Valley Police District, Ex PA2 at [11] - [15], and Det Sgt Malligan Ex PA24 at [23]-[24]

166. The amalgamation of PACS and Police Districts also impacted on investigative functions. For example, Det Sgt Malligan observes of his amalgamated District (Ex PA24 at [23]):

> *'As a Detective Acting Inspector managing the crime within an Operational Command, I have worked in this role both during the Local Area Command model and now the Police District model. I have managed a local Detectives Office within Wagga Wagga and now due to the Re-Engineering, Wagga Wagga and Cootamundra Local Area Commands combined to create the Riverina Police District. This re-engineering of the Commands has caused detective numbers to increase due to the larger geographical area of the new Police District. The new Police District has created better monitoring of crime in neighbouring towns, ultimately impacting on cross Police District*

criminal behavior. Merging of the Wagga Wagga and Cootamundra Local Area Command's into the Riverina Police District has also allowed for quicker response of additional Detectives to these communities, when more serious investigations are undertaken. Through the re-engineering of Cootamundra and Wagga Wagga Local Area Commands into the Riverina Police District, senior positions were lost by two Detective Inspector positions becoming one. Also the Crime Management Unit within both Local Area Commands, become one Unit. No additional detectives were allocated to the Riverina Police District, from the amalgamation of the two Local Area Commands.'

167. Similar impacts were experienced by the specialist investigative squads at the State Crime Command, merging together a number of squads reducing the total number of squads from 12 to 8, achieving 'operational efficiencies' brought about by 'cost savings in relation to senior and middle management as teams were larger in numbers and the ratio of supervisors and managers' was altered, so that 'Senior officers now had responsibility and accountability for greater numbers of staff and operational outcomes'.

168. Whilst the immediate impact of Re-Engineering, and in particular the creation of the OIC, was on senior management within a PAC or District, it also had an impact on the Sergeants who provide the day to day supervision as Team Leaders. For example, Chief Inspect Budd observed: *'What this has caused is an increase in expectation and requirement for my Supervisors to become more strategically focused and involved in the day to day decision making processes'.* Chief Inspector Gorman observed (Ex PA4 at [28]) in describing the impact of this model observed *'The OIC relies heavily on the Sergeants within his area of responsibility to monitor and motivate the staff to achieve corporate and District targets'.*

169. Officers in lower ranks describe that same impact on them:

(a) Senior Constable Ozols observes at [52]):

'With the lack of supervision from Inspectors, the onus was placed on the Sergeants. Given the often lack of Sergeants in remote areas, as a Senior Constable, I was required to perform roles that are traditionally roles of the Sergeant and Inspector to ensure they were completed. Processed including the allocation of warrants, summons and apprehended violence orders, station checks within the Command Management Framework became the responsibility of the most senior officer on shift, which was often me.'

(b) Sgt Campton at [24], referring to the restructure of his area (Murray River Police District):

'This change has increased the workload of the Sergeants though greater responsibility in the field and extra administration tasks at the station. Previously an Inspector was available most days of the week and afternoons to attend the scene of significant incidents and take control. Now this responsibility falls back to the Sergeants as the most senior officer at the scene. Sergeants have also been tasked to

attend community meetings such as the mental health working group, a task previously performed by the Inspectors.'

(c) Sgt Allwood observed (Ex PA27 at [18]):

'In 2018 Port Stephens Command underwent a restructure called Re-Engineering which merged Central Hunter and Port Stephens Command. This resulted in 234 staff, a reduction of 2 Inspectors and 1 Superintendent. In my opinion Sergeants have now had to fill the void left by the lessoning the number of operational Inspectors in the re-engineering of Police Districts, increasing their level of decision making and responsibility. We have larger communities to cover with less Senior Officers. I am now more often the Senior Police officer on the shift, making decisions that were prior to re-engineering were made by Inspectors. Examples of this include recalls of staff, monitoring of pursuits, complaint resolution and emergency management roles. Each of these decisions would usually be made by an Inspector on shift, due to the reduced number, as Sergeants we are now required to make these decisions which has increased our level of accountability and decision making along with the breadth of other responsibilities we have as supervisors which I have outlined. Port Stephens has been re-engineered twice in since 2011, I have had 8 different Police Commanders in this period. Reengineering has had one very tangible benefit and that has been the pooling of the Police Officers to help with rostering. There are less cancelled rest days due to roster shortages and overall more police on each shift available for duty.

170. Sgt Allwood gives a particular illustration of how that increased reliance on Sergeants has manifested itself (Ex PA27 at [12]): *'In the absence of an Operational Inspector during the nights I am also required to monitor the appropriateness of any pursuits in my area. Police pursuits are a high risk activity, there are real risks to the police, community and the accused. A complex and balanced operational decision is required on the spot, in real time. A high speed pursuit accident usually results in the serious injury or death of someone. I am acutely aware that I am accountable for the monitoring and possible termination of a police pursuit. ...'*. The restructure also significantly impacts on the work of non-Commissioned officers when they act up in various more senior positions: see for example, Detective Acting Inspector Malligan Ex PA24 at [23]- [24]."

(Reproduced verbatim, emphasis in original, footnotes omitted)

90 In his statement Mr Knappick gave the following evidence in relation to the Re-engineering program:

"35. As a result of the rationalisation of some Specialist Commands and the amalgamation of Police Commands into Police Area Commands in metropolitan areas and Police Districts in regional areas, there was a reduction in the number of Superintendent and Inspector positions. For every deleted position, the affected officer was placed in a vacant role at rank when

one arose (this was generally immediately after the position was deleted, or officers were provided suitable alternate duties at rank until a permanent position arose) and the position was 'offset' by a Constable position, such that no police officer was made redundant. Although the ratio of ranks changed, the overall number of police officers remained the same.

...

37. The 'Re-engineering program' did not result in changes to police officer rostering arrangements (other than localised 'business as usual' changes) nor result in increases to working hours or role accountabilities. The localised 'business as usual' changes mentioned were made when Commanders sought to change rostering patterns or first response agreements locally within existing policies – such changes were not the intent of the 'Re-engineering program'.

38. As part of the formation of Police Districts in regional areas, a new role titled 'Officer in Charge' was created. Officers in this role are responsible for strategic management, stakeholder engagement and overall performance of the geographic area to which they are assigned. The role reports to a Superintendent and was intended to address the geographical factors of regional policing. The intention of the Deputy Commissioner, Regional Field Operations was to be the equivalent of a District Inspector in a specified area. District Inspectors hold portfolios, such as Operations, Human Resources and Professional Standards. It was not intended that an Officer in Charge role operate as a District Commander (at the rank of Superintendent)."

91 The PANSW submitted:[24]

"171. The restructuring of the NSW Police Force over the period 2011 to now, and in particular via the Re-Engineering process, has had a material impact on the scope of duties of Commissioned and Non-Commissioned officers across the police force and the environments in which they work, expanding the size of the policing areas/districts they worked within, making senior supervisors (Commanders and Inspectors) responsible for greater numbers of officers and larger portions of the community (noting Superintendents and Inspectors are by cl 6(2) of the Police Regulation 2015 'responsible for the peace and good order of the area'), and requiring team leaders to absorb greater levels of responsibility for staff supervision, *such that there is a general increase in the work value of police officers*."

(Emphasis added)

92 The submission that there has been a "general increase in the work value of police officers" is difficult to reconcile with the submission also made by the PANSW that the Re-engineering process "impacted particularly on

[24] PANSW Final Submissions

Superintendents, Duty Officers and team leader Sergeants".[25] Further, the PANSW submitted:

> "134. That reduction in the number of Commissioned officers had a knock on consequence: it increased the supervisory role and responsibility for Sergeants, because of the reduced availability of Commissioned Officers. **But the Association does not contend that *of itself* the Re-engineering process justified an across the board wage increase for all classifications.** The Association's case is a multifactorial case, consistent with cl 8.5.2 of the Wage Fixing Principles, and by reference to *Police No.1* at [77]...
>
> 135. **It is not suggested that the various restructuring and reorganisations relied upon, looked at in isolation, ought sound in a general adjustment of wages on Work Value grounds.** But an increase in work value for those officers (who are not insignificant in number), can be and is relied upon as one element in the Association's multifactorial case under the Arbitrated Case principle. Indeed, far from being primarily relied upon as justifying a general increase on work value grounds, the restructures and reorganisations themselves are repeatedly identified as in the Association's submissions as contributing to productivity and efficiency gains."
>
> (Bold emphasis added)

93 Noting these submissions we reiterate that in the extract from the November 2017 edition of the Police Monthly, reproduced at [87] above, it was reported that:

> "Re-engineering will see changes to only a small percentage of all police officer positions across the organisation, as well as a number of administration staff."

Active Armed Offender

94 In his statement Mr Knappick described the Active Armed Offender program in these terms:

> "49. In response to emerging crime trends and in consideration of world best practice, a training program called 'Active Armed Offender' ('AAO') was included in the mandatory training program from 2015 to 2017. All police officers and some civilian officers, for example Special Constables, were required to participate in this training program.
>
> 50. The AAO training program was designed to train police officers to respond to an armed offender who was actively engaged in killing or attempting to kill people and who a member of the police force reasonably

[25] ibid. at par 162

suspects will continue to do so while having access to additional potential victims."

95 Sergeant Watt is an Operational Safety Instructor in Weapons and Tactics, Policy and Review, part of the Operational Safety and Skills Command. In his statement he deposed as follows:

"12. I will comment first on the most significant cause of change in the nature of my work as both an OSI and an operational police officer - the introduction of Active Armed Offender training commencing in 2015. This is without doubt the most significant change in operational safety training and operational tactics in my entire career. Prior to 2015, the wider NSWPF did not have any training in relation to the response to an active armed offender, also known as an active shooter or active attacker, depending on the location.
...

13. I was tasked with conducting research intended to identify what response strategies and specific tactics existed both in Australia and internationally. As a result of that research, it appeared the response package provided by the Advanced Law Enforcement Rapid Response Training (ALERRT) Center, based in San Marcos, Texas, was the most suitable available system. It had been adopted by the Federal Bureau of Investigation as the national standard for response in the United States, and ALERRT had trained a significant number of law enforcement agencies throughout the US and internationally.

...

ACTIVE ARMED OFFENDER - TRAINING THE TRAINERS

17. The training included how to respond to the use of improvised explosive devices, deal with being ambushed whilst in a vehicle, movement techniques for open environments whilst under fire, how to link up with other teams in a high stress, high threat environment without shooting each other, alternate low light techniques, provided protocols for post engagements priorities of work, and introduced both the concept and skills to triage significantly injured persons and apply life saving interventions based primarily around haemorrhage control. It also introduced the concept of moving past uncleared areas when there is a direct indication of the location of an offender with the view to limiting the number of injuries or deaths. As importantly, these techniques were specifically designed to be utilised effectively with less training time than is typically afforded to a specialist tactical police officer.

18. The tactics are designed to provide a significantly enhanced immediate intervention capability to prevent death and injury without having to train and equip all police to the standards expected of a tactical team. It also provides an instantly available response capability - when looking at an incident that typically lasts for 10-15 minutes, rapidity of response is a critical requirement. The benefit to the State of New South Wales is clear - all police are now capable of responding to an AAO incident in a fashion designed to

limit death and injury caused by the offender, and enhances the chances of survival of any of those injured during the incident.

...

IMPACT OF AAO ON GENERAL POLICE

30. AAO training significantly increased the expectations placed on first response police across the state. The principle *[sic]* operational strategy of the NSWPF when responding to high-risk incidents was (and still is) one of containment and negotiation. This strategy hinges on effectively isolating the subject from any person he or she can harm and attempting to resolve the situation by negotiation. The deliberate resolution of such incidents by force was historically the exclusive domain of the TOU and TORS. Prior to AAO training, this was effectively the only strategy that first response police were trained to execute, contain and negotiate and to call for assistance. While first response police were trained that in exigent circumstances, they could resolve a high-risk incident by force, they were provided with no specific techniques or methods to do so. They were expected to improvise, but only in the direst of circumstances.

31. The training package for police consisted of four days - three of which were spent addressing tactics, medical skills, policy changes and conducting Simunition scenarios. The final day was spent conducting live fire training. Police were expected to pass the scenario-based assessment conducted on day three, and both a NSWPF designed scored sequence (which focused on close range defensive type sequences), and a modified version of the standard FBI qualification shoot on the range day. The modified FBI shoot focused on precision and distance.

...

34. Essentially, over a period of four months (April to August 2015), the world shifted for police in NSW. In March, 2015, officers understood that they were expected to contain an *[sic]* high risk situation and wait for specialist police to resolve it. By September, police were expected [to] identify if a containment and negotiation strategy was appropriate, and if it was not, to aggressively enter a location, locate an armed offender and engage them in a potentially crowded environment. The most apt description I have yet heard for an AAO response is 'you are expecting the least trained and equipped police to respond to and resolve an incident that would challenge a well trained and equipped tactical team'. The expectation of most police prior to 2015 was if they were required to discharge their firearm, it would likely be at close range and in the defence of their own life. After 2015, they were expected to aggressively approach a potentially (and probably likely) better armed offender whose sole intention is to kill as many people as possible. Not only might that offender be better armed, they may be employing improvised explosive devices, and while rare, may be operating in concert with other offenders. Officers were instructed that once they had dealt with the offender, they must then attempt to save as many of the injured as possible without the immediate assistance of NSW Ambulance.

...

38. As I have set out, the inception and refinement of Active Armed Offender training was a fundamental shift for the trainers who would be required to impart knowledge, assess and certify competency. At the trainers' level Active Armed Offender required a new and different mindset and approach to training. For officers undergoing the training it has meant a significantly increased level of responsibility, and has effectively reversed the policy of always containing a high risk incident and waiting for specialist resources - they are now expected to make critical decisions and intervene immediately when required, without recourse to contacting or waiting for higher ranking officers. NSWPF has benefited by having dramatically expanded the capacity and available pool of personnel to address the threat of an active armed offender, which may occur at any time and location within the state. Individual police benefit because they are now trained in methods of response, rather than being expected to improvise in the dangerous, fast changing environment that is an AAO incident. Police now have the means to respond if faced with the threat of an active armed offender - this alone is likely to result in increased confidence and performance. The Commissioner of Police, government and people of the state of NSW benefit from increased community safety and reduction of the fear of violent crime."

96 In his statement Senior Constable Piffarelli deposed:

"15. One of the biggest changes that I have seen comes after the wake of the Lindt Café siege. Officers are now completing Active Armed Offender training; training that would normally have been reserved for specialist squads. As a weapons instructor, I am responsible for delivering this training [to] officers. To be able to teach staff, I underwent three weeks of training to learn the concepts and principals *[sic]* to a standard that would allow me to effectively instruct others.

16. Officers only have 3 days to completely understand a myriad of concepts and principals *[sic]* and retain that information for up to three years before they complete this training again. There are no refreshers for officers during this time. Specialist units like the Tactical Operations Unit and their regional counterpart, TORS, conduct this training regularly. The regional unit TORS completes this training every three months. Police are expected to retain this complex information and be called upon to use it should an unimaginable situation occur.

17. This training has upskilled officers so that they are able to respond to these high-risk incidents without having to wait for specialist police that would have previously been responsible for active armed defender situations. Whilst the Police have a 'Contain and Negotiate' policy, the pressing nature of an active armed defender situation trumps this, and thrusts officers into the unknown. Before AAO training, officers did not have the skills to work in tactical groups and effectively search buildings in a way that afforded them the most protection and offered a tactical advantage. The benefit of having frontline officers respond, is that it eliminates the time delay between victims getting treatment and the situation getting resolved.

18. Whilst frontline officers have not had to respond to such a situation, the risk and accountability that they face is beyond measure...."

97 A number of the witnesses called by the PANSW deposed as to their views as to the impact that the introduction of the Active Armed Offender program has had on their work environment. It is not necessary to traverse every statement; a selection will suffice. Chief Inspector Gorman stated:

> "29(i) ...In certain circumstances it requires non-specialist police to seek out an offender using newly taught tactical skills and resolve the incident, possibly through lethal force. This is a fairly dramatic shift in the tactical options model, and contrary to the long standing contain and negotiate policy. ..."

98 Sergeant Ludkin stated:

> "8. ...I feel that when dealing with an Active Armed Offender incident there is now an obligation for police to enter premises, search for and eliminate that threat without giving any consideration to their own safety or personal/family circumstances put themselves in harms way to deal with such threats." (Sic)

99 Sergeant Allwood stated:

> "21. The introduction of Active Armed Offender (AAO) as a tactical option has changed my work practice. Prior to this our model was based on 'contain and negotiate', now I am expected to form an entry team – 'stop the killing' is one of the foundation blocks. This is a major change requiring me to put myself and the police officers under my control at potential risk of harm, possibly serious injury or death. Prior to this change, specialist police, highly trained together, would be called to do an initial entry, I am expected to enter a lethal environment with a team that I have not trained with. ..."

100 The evidence demonstrates that all police officers are required to undertake Active Armed Offender training. Leaving aside the statements of the witnesses referred to above, this is reflected in the various editions of the Police Monthly issued by the NSW Police Force, including in October 2015, November 2015, August 2016, December 2016 and January 2018.

101 The PANSW placed the Active Armed Offender program into the context of what it described as the "increasingly dangerous policing environment".[26] In an alert to staff contained in the January 2015 edition of the Police Monthly, all staff were informed that the "national terrorism alert level remains at 'high'

[26] ibid. at par 192

for the foreseeable future".[27] In the September 2018 edition of the Police Monthly the Commissioner of Police wrote:[28]

> "Australia's national terrorism threat level remains probable, with credible intelligence indicating that some people have the intent and capability to conduct a terrorist attack in this country. And so we will continue to respond to high risk situations."

102 In this context the PANSW led evidence regarding the deployment of high powered semi-automatic M4 military assault rifles to police outside of the Tactical Operations Unit. The January 2018 edition of the Police Monthly reported:[29]

> "The rollout of long-arm firearms has been supported by rigorous training that all Public Order & Riot Squad (PORS) officers will have completed by June.
>
> Forty-seven PORS officers have already been accredited to use the Colt M4 semi-automatic rifles, which Commissioner Mick Fuller said will help police protect the community and respond to an ever-changing crime environment.
>
> 'This is an additional capability that will provide greater support for officers responding to high-risk incidents and ensure increased community safety,' he said. 'Officers have undergone rigorous training in order to be armed with these rifles on the streets of Sydney.'
>
> ...
>
> Deputy Commissioner Investigations & Counter Terrorism David Hudson said the rifles provide officers with greater strategic scope when responding to high-risk incidents.
>
> 'The rifles provide greater accuracy over distance and when combined with the evolving situations, they provide an additional layer of support for our officers,' Deputy Commissioner Hudson said.
>
> 'This rollout is part of the NSW Police Force's plan to strengthen its response to terrorist violence by arming police outside of the Tactical Operations Unit (TOU) with military assault rifles.
>
> 'The deployment of these rifles complements the active armed offender training undertaken by all operational officers.'"

103 Senior Constable Smart deposed:

---

[27] Exhibit PA33 Part 2, Tab 25 at p 55
[28] Exhibit PA33 Part 2, Tab 33 at p 77
[29] Exhibit PA33 Part 2, Tab 31 at p 70

"14. The Public Order & Riot Squad now also has a longarm capability in response to the increased threat of 'active shooter' or terrorism incidents and a need for a more rapid response to these.

15. The initial training in the operation of these firearms is intensive and time consuming and fortnightly ongoing training and development is required to not only maintain a high level of proficiency but to increase proficiency in the use of long arms and the standard Glock firearm used by all officers."

104 In its Final Submissions the PANSW contended:

"193. Of itself, the elevated National threat level is a material change in the working environment of police, and one that ought be reflected in an increase in the Full Bench's assessment of the work value of police officers. In addition, the adoption of the AAO tactical option is a material change in the tactical options model for police, requiring significant knowledge and skill enhancement, resulting in a dramatically different working environment, and a dramatically different set of expectations for the vast majority of the police force when responding in that high risk setting, such that the Full Bench would be well satisfied of an increase in work value."

105 Mr Knappick sought to diminish the significance of the Active Armed Offender training by likening it to other training programs provided to police officers, such as "mandatory training relating to COVID-19 and police powers".[30] Consistent with this evidence the Crown submitted:

"41. Each year the NSWPF develops a mandatory training program which ensures that police officers are equipped with specialist knowledge, relevant skills and the ability to critically think about and understand the operating environment. This mandatory training is part of NSWPF's 'career long learning' approach.

42. The Active Armed Offender ('AAO') training program provided specialised training for in *[sic]* a particular high-risk situation. Police officers were trained in a new and different to *[sic]* respond to an armed offender who is actively engaged in killing or attempting to kill people. The initial AAO training that commenced in 2015 and continued until 2018 replaced the delivery of the usual mandatory training directive and focused solely on AAO.

43. AAO training involved the acquisition of new skills and knowledge through 4 days of mandatory ongoing training, more recently reduced to 3 days.

44. The program does not constitute a significant change 'in the nature of the work, skill and responsibility' for officers *generally.* Certainly the PANSW has not led evidence as to it being a change that has affected every classification.

[30] Statement, Craig Knappick, 30 July 2020 at par 51

> 45. Hopefully, this training is never or rarely used by officers. The Commission cannot objectively find that this updated approach to a very specific and rare situation, and which is the subject of a three day training course, constitutes a significant change to the nature of work of police officers generally."
>
> (Emphasis in original, footnotes omitted)

106 In reply, the PANSW described the Crown's case as demonstrating a "casually dismissive attitude to the [Active Armed Offender] reforms",[31] a submission which has some force. The PANSW further submitted in its Final Reply Submissions:

> "11. The Association identified that changed working environment (that is, the heightened threat level and increased frequency of high risk events) of itself as a significant change in the work value of police. The respondent calls no evidence and makes no submission that would permit the Full Bench to doubt that proposition. Of its very nature, that heightened risk environment applies to all police. The Full Bench would reject the attempts by the respondent to minimise the dramatic change to the working environment of police disclosed in the evidence, and the significant AAO reforms deployed to address it and can be satisfied that the change in the working environment of police officers, and the AAO reforms developed to address the reality of this elevated risk environment, do reflect a material increase to the work value of police. It is appropriate to take that change into account in reassessing the remuneration paid to police covered by the Award."

Conclusions – work value sub-principle

107 Having regard to the matters addressed at [91]-[93] above, on its own case the PANSW has not established how the Re-engineering process "has led to a significant net addition to the work requirements of each award classification in respect of which the increase is sought", as referred to in *Re Public Hospital Nurses (State) Award (No 4)* (see [70] and [81] above). To the extent that the PANSW relies on a "multifactorial case" we repeat the observations at [64]-[73] above.

108 We are not persuaded that changes introduced as a consequence of the Re-engineering process justify an across-the-board wage increase under the work value sub-principle. We will return to consider those changes, and

[31] PANSW Final Reply Submissions at par 9

evidence of other structural and organisational changes that have occurred since 2011, in the context of the productivity and efficiency sub-principle.

109 We agree with the PANSW that the Crown's submissions understate the significance of the Active Armed Offender reforms. We also do not consider that they properly reflect the environment in which, and in response to which, they were introduced.

110 We are persuaded that the Active Armed Offender reforms attract the work value sub-principle.

Productivity and efficiency sub-principle

Approach to the sub-principle

111 In relation to the productivity and efficiency sub-principle, in *Police No 1* the Full Bench observed:

> "513. The Association provided what is described as a summary of the requirements of the sub-principle. This was uncontentious and, in our view, broadly encapsulates the operating conditions for the sub-principle. That submission was as follows:
>
> > (a) The case must be based upon 'productivity and efficiency measures'. 'Measure' in that context presumably has its relevant ordinary meaning, namely 'an action or procedure intended as a means to an end'.
> >
> > (b) The relevant measures must have either delivered substantial cost[s] savings and/or productivity or efficiency improvements or made a substantial contribution towards the attainment of the objectives of the employer (including departments and agencies of the Crown) in seeking to become more competitive and/or efficient. The latter alternative appears to recognise that Government departments and agencies providing services to the public may have their productivity and efficiency measured by reference to their service objectives, rather than just by reference to notions of cost and profit which would apply to a private sector business.
> >
> > (c) Employees must have made a significant contribution to the requisite productivity and efficiency measures. The required nature of this contribution, which is not elaborated upon further, is likely to reflect the approach taken in Re Crown Employees (Administrative and Clerical Officers) Award (No 2) at 378-380 and the cases which followed it."

112 In *Re: Application for a New Award for Patient Transport Officers* [2017] NSWIRComm 1024 Newall C observed:

> "27. The respondent submitted that the instant application could not be considered under Principle 8.3 because the quantum of the proposed allowance has not been calculated by reference to identified cost savings, but rather was set by reference to another award of the Commission. I do not see that the Principle requires that there be established a precise relationship between the benefit of an efficiency which will be or has been achieved and the level of an allowance. Indeed, it would be impossible to quantify in dollar terms 'the attainment of the objectives of the employer', which is, as I observe above, a discrete and separate kind of productivity and efficiency measure. Not all efficiencies are quantifiable in dollar terms. The Principle cannot and does not require a dollar-for-dollar balance of an efficiency or a contribution toward competitiveness and/or efficiency in order for an increase to be determined.
>
> 27. It must be remembered too that the employees are required to make a 'significant' or 'substantial' contribution to the attainment of the objectives of the employer. Taking 'significant' and 'substantial' to have their ordinary natural meaning, they each mean something less than the whole. Employees are not required to make the whole of any contribution to efficiency or to the achievement of the objectives of the employer that might give rise to a wage increase. That is another reason why a strict dollar-for-dollar assessment of any increase sought is not appropriate.
>
> ...
>
> 29. The employer also advanced that a number of employees – between a third and a half – have not changed their practices, and put that that was fatal to any increase being contemplated. ...But more, the Principle does not require that, in a group of employees on whose behalf an increase or improvement in conditions may be sought, each single one of the employees must have made a contribution to efficiency or achieving the employer's objectives. The test is, rather, whether the group of employees on whose behalf the benefit is sought have made that contribution."

113 We observe that although Newall C's decision was overturned on appeal in *Secretary, NSW Ministry of Health v Health Services Union NSW* [2018] NSWIRComm 1007, the Full Bench did not, in that case or in the subsequent related decision, *Application for a New Award for Patient Transport Officers (No.2)* [2019] NSWIRComm 1066, call into question the correctness of the Commissioner's observations in the passages reproduced above.

114 In *In re Mineral Sands (State) Award* [1980] AR 107, in the context of an application for a variation to an award on work value grounds, Liddy J observed (at 114):

"'Significant' does not necessarily mean 'major' but 'to a meaningful degree, not insignificant, not immaterial, not trivial'. To be significant a factor does not need to be dramatic, sudden or eye-catching. A change, as in this case, may occur subtly, gradually, even covertly but on examination prove to be significant."

115 Without suggesting in any way a limitation of the principles outlined in these authorities, we note the following matters in particular:

(1) It must be possible to identify the "measures" on which a claim under the productivity and efficiency sub-principle is based.

(2) The attainment by the employer of its objectives is not sufficient. The measures must be shown to have delivered substantial costs savings and/or productivity or efficiency *improvements*, or have made a substantial contribution towards the attainment of the objectives of the employer in seeking to become *more* competitive and/or efficient.

(3) It must be shown that employees have made a significant contribution to the requisite productivity and efficiency measures. That is, whether the group of employees on whose behalf the benefit is sought have made that contribution.

Objectives of the NSW Police Force

116 The PANSW submitted:[32]

"202. The fundamental objective of the NSW Police Force is clearly stated in s 6(1) of the *Police Act* 1990: *'The mission of the NSW Police Force is to work with the community to reduce violence, crime and fear'*. In this connection, the Full Bench in *Re Crown Employees (Police Officers - 2009) Award* identified the objective of the Respondent for the purpose of subparagraph (b) of the above summary of principle as follows (at [515] - [516], emphasis added):

'515 By reference to sub-paragraph (b) of the extract from the Association's submissions above, the relevant objective of the NSW Police Force for the purposes of the productivity and efficiency sub-principle *is the prevention or driving down of crime. In other words, the objective to be taken into account for the purposes of the sub-principle is the reduction of crime*. The NSW Police Force is a service-orientated agency and its productivity and efficiency, as we have

[32] PANSW Final Submissions

earlier discussed, must, at least, be measured by reference to the service it provides to the public in respect of the detection and apprehension of criminals, the prevention of crime and the reduction in the incidence of crime. *This is clear from the statutory provisions governing the NSW Police Force and how it measures its own performance.*

516 In this case, the relevant objective could not be clearer for the subject period (from the datum point to the current date). The State Plan imposed upon the NSW Police Force crime reduction targets, which targets, in and of themselves, thereby became an objective for the purposes of the sub-principle.'

203. The fundamental statutory object articulated in s 6 of the Police Act has not changed since that decision. In the period since 2011, the Respondent has continued to use crime rates (and other clearly identifiable performance measures), as centrally indicative of its performance.

...

206. The NSW Police Force is a service-orientated agency and its productivity and efficiency must be measured by reference to the service it provides to the public in respect of the detection and apprehension of criminals, the prevention of crime and the reduction in the incidence of crime. The objective to be taken into account for the purpose of the sub-principle is today, as it was in 2011, the reduction of crime."

(Emphasis in original)

117 These submissions were not challenged by the Crown.

Measures on which reliance was placed by the PANSW

118 The measures on which the PANSW placed reliance for the purposes of attracting the productivity and efficiency sub-principle may be grouped into four categories: structural or organisational changes; policy and legislative reform; domestic violence reform; and, technological advancements. We will address each in turn.

Structural and organisational changes

119 Ms Membreno deposed to a number of changes to the organisational structure of the NSW Police Force which had occurred since the datum point of 1 July 2011. These included:

(1) the creation of the Police Transport Command in 2012. Previously referred to as the Commuter Crime Unit, the number of officers working in the new Command doubled in three years. The Command works with other commands to provide an increased police presence on all commuter networks and deploys police in significant numbers to target crime hotspots; and

(2) the establishment of the Traffic and Highway Patrol Command in 2011/2012, which saw all Highway Patrol resources throughout the State realigned under a single Command structure. The new Command was focused on road safety and traffic policing through intelligence-based and better coordinated police activities, aimed at reducing road trauma. The officers assigned to the Command largely remained physically located in their existing commands.

120 Ms Membreno further stated that in 2013 the NSW Police Force began a process of amalgamating Local Area Commands. The first "tranche" of this process occurred in 2014, which saw eight Sydney metropolitan commands integrated into four new commands. The second "tranche" of the process became known as "Re-engineering", which we have already considered.

121 In the February 2013 edition of the Police Monthly there was an article titled "LAC Amalgamations – What you need to know". That article stated in part:[33]

> "The NSW Government has announced a raft of changes that will provide additional capacity for the NSW Police Force in the coming years.
>
> ...
>
> These operational initiatives, put forward by the NSW Police Force as part of the Ministerial Audit process, will see additional officers on the front line, boosting pro-active policing and our community response.
>
> No Local Area Command will lose authorised strength, service levels will be enhanced and no police stations will be closed as a result of the changes.
>
> ...
>
> **Stage One**

[33] Exhibit PA33 Part 2, Tab 2 at p 2

> The first stage will see eight Sydney metropolitan commands integrated into four new commands by the end of 2013 with the integration process subject to a thorough evaluation.
>
> ...
>
> The first and second stages are anticipated to return over 100 officer positions currently in management and support positions. Through the attendant reduction in the number of superintendent and inspector positions, a greater number of operational sergeant, constable and other positions will be created."

122 In addition to its submission that the changes introduced by the Re-engineering process attracted the work value sub-principle, the PANSW relied on a number of particular reforms that it said resulted from that process as also attracting the productivity and efficiency sub-principle. These included the following:

(1) the creation of a number of units to permit greater targeting on particular areas of concern, including High Risk Domestic Violence Offender teams in each Region, and rural crime prevention teams. Ms Membreno stated that "each Police Area Command and Police District was allocated a position to monitor offenders on the Child Protection Register, and a position focused on elder abuse prevention, which were both designed to be specialised positions tailored specifically to crime types relating to children and the elderly".[34] The rural crime prevention teams were described in the April 2018 edition of the Police Monthly as comprising "more investigators and senior detectives providing more effective coordination, intelligence sharing and deployment";

(2) the creation of proactive investigative units known as Region Enforcement Squads. These were described in the December 2017 edition of the Police Monthly in these terms:[35]

> "Each of these squads will be run by a sergeant and staffed by constables. They will be deployed as needed across the Northern,

[34] Statement, Kirsty Anne Membreno, 1 July 2020 at par 34
[35] Exhibit PA33 Part 2, Tab 9 at p 19

> Southern and Western regions to target mid-level crime, including drug crime, firearms offences and property crime throughout major towns and smaller villages."

(3) the amalgamation of a number of investigative squads, "requiring Command level officers to now be responsible for a greater field of responsibility and have oversight of a greater number of operational officers".[36] This included the restructuring of the Forensic Services Branch into the Forensic Evidence & Technical Services Command, "recognising the synergies between forensic and technical evidence";[37]

(4) the creation of the State Intelligence Command in 2018, which was established "to harmonise and enhance intelligence flows, coordinate information sharing and enable a more organised response to the changing crime and security environment".[38] In what was described by Assistant Commissioner Mark Jenkins as a "game changer" for the NSW Police Force, all intelligence functions within the NSW Police Force were centralised under the State Intelligence Command.[39] The work of the Command was enhanced by the development of "Chimera", which was described as "a state-of-the-art intelligence system that will deliver tasking and deployment functions and eventually, artificial intelligence and cognitive responses";[40] and

(5) further restructuring in 2019 which included the creation of the Police Prosecutions & Licensing Enforcement Command. The July 2019 edition of the Police Monthly reported:[41]

> "The creation of the Police Prosecutions & Licensing Enforcement Command sees Police Prosecutions sit alongside the Firearms Licensing & Enforcement Directorate and the Security Licensing & Enforcement Directorate.
>
> The alignment of these directorates to operational areas of Investigations & counter Terrorism is designed to enhance the

[36] PANSW Final Submissions at par 157
[37] Exhibit PA33 Part 2, Tab 7 at p 12
[38] Statement, Kirsty Anne Membreno, 1 July 2020 at par 37
[39] Exhibit PA33 Part 2, Tab 15 at p 28
[40] ibid.
[41] Exhibit PA33 Part 2, Tab 20 at p 43

organisational response to licensing and enforcement issues relating to firearms and the security industry."

123 In addition to these reforms, the evidence disclosed a number of other structural or organisational changes. In May 2017 the Fixated Persons Unit was created to detect and prevent violent acts by fixated or obsessed persons. This Unit was created as a result of recommendations made by the NSW Coroner following an inquest into the Lindt Café siege.

124 The Traffic and Highway Patrol Command was created as a stand-alone command. In his statement Senior Sergeant Foran deposed:

> "12. ...
>
> a. ...In 2012 the Traffic and Highway Patrol Command was established as a statewide command with base being in Huntingwood. The command took over all areas associated with traffic and road policing such as Highway Patrol, Traffic Technology, Radar Engineering Unit, Random Drug Testing Unit, Impaired Driving Unit, Operations Planning Unit, Traffic Taskforce, Traffic Service Group, Traffic Policy unit, Drug and Alcohol Sampling Unit, Crash Investigation Unit and Breath Analysis and Research Unit. This major organisational change had a direct impact on all staff with changes in chain of command and reporting requirements, changes in expectation of management, monitoring of tasking and deployment of staff, and the implementation of National Root operations monitored by the Transport Management Centre. It also saw the creation of the Traffic Taskforce, Regional Highway Patrol, Metropolitan Highway Patrol, Traffic Intelligence Unit, Police Liaison Officers within the Transport Management Centre (TMC) and the Motorcycle Response Group/Team.
>
> b. Broadly described, the restructure to create the THP Command significantly refocused the NSWPF response to road safety and traffic management. Prior to the creation of the THP Command, the Highway Patrol and other elements of the THP Command structure, were organizationally connected to either a Region office or a Police Area Command and were managed to achieve that organisational unit's priorities. In other words, whilst there were certainly targets for road safety and traffic related activity, our work was primarily focussed on the crime response of the relevant Command. The focus of those Commands is first response policing. So, for example, if the PAC needed staff to feel a 'gap' in their first response, they would draw from the highway patrol, or they would pull the highway patrol off the road safety related work to form part of a targeted operation. With the creation of the THP Command, our tasking and deployment is primarily directed at achieving the NSWPF objectives with respect to road safety and traffic management, which

assists the work of the Command to achieve the NSWPF goals in road safety and traffic management."

125 Senior Constable Tazzyman described the creation of the Traffic and Highway Patrol Command as allowing "the use of [Highway Patrol] Operatives more freely across the state, meaning they could respond quicker to major incidents and operations than when attached to Local Area Commands".[42]

126 In terms of the impact on staff of the creation of the Traffic and Highway Patrol Command, Senior Sergeant Foran stated:

> "10. ...For example, upon the creation of the THP Command as a stand alone command (discussed below), the management of the Command had to take on responsibility for many of the staff management functions previously done by staff within a PAC..."

127 In his statement, Sergeant Giffney deposed:

> "13. ... I fully support the implementation of Traffic and Highway Command and the wider benefits this has brought, however it has increased the workload above the previous normal work associated with general duties Policing, as on each operation or weekly count there is an expectation for each car crew to engage proactively in random breath testing and motor related offences. This brings benefits to the Community, as it ensures a Police presence and the ability to intervene and detect offences and take the appropriate action to deter road related crashes."

128 A further reform was the creation in May 2012 of the Police Transport Command. The PANSW submitted:[43]

> "177. In May 2012 the new Police Transport Command (PTC) took over policing the entire public transport system. The objective was to increase public safety on and around trains, buses and ferries, based around three primary transport hubs at central Sydney, Parramatta, and south western Sydney (supported by seven satellite hubs on the Central Coast, Hunter and Illawarra areas) to address emerging crime trends. The PTC works with LACs to provide an increased police presence on all commuter networks and deploys police in significant numbers to target crime hot spots."

129 In his statement Leading Senior Constable Kassab described the work of the Police Transport Command in these terms:

---

[42] Statement, David Tazzyman, 2 July 2020 at par 18(viii)
[43] PANSW Final Submissions

> "5. On a day to day basis, this will involve high visibility patrols of trains, buses, ferries and the respective locations where commuters board and alight these services. These patrols are conducted in a variety of ways from on foot to vehicle patrols. Patrols in vehicles also include ensuring that infrastructure is safe and secure. Officers will also respond to broadcasted incidents within and surrounding the public transport network and assist local Police Area Commands with their workload. Police Transport Command Officers with the appropriate training can also complete their duties on Police issued mountain bicycles which involved conducting patrols around the network, Business districts and shopping complex in close vicinity." (Sic)

130 Evidence was also led as to a process of multi-skilling and cross training that has occurred within the Forensic Services Group since 2011, known as the Forensic Investigator Model. In his statement Sergeant Clarke described the changes in these terms:

> "21. Since 2011 staff have become more cross trained in forensic investigation. Whereby previously there were clear divisions of work between different skillsets (fingerprinting premises and exhibits – Scene of Crime Officers and Fingerprint technicians and Crime Scene – physical evidence examination). Those roles have now largely combined. Cross training has enabled forensic investigators to undertake all routine examinations of scenes of Crime. For example at the scene of an aggravated break and enter where blood, shoe prints and fingerprint evidence are located. Prior to the implementation of the Forensic Investigator model this offence would necessitate the attendance of a Crime Scene examiner (to examine the blood and shoeprint) and a fingerprint examiner to detect and record the fingerprints." (Sic)

131 According to Sergeant Clarke, these changes have allowed for the identification of suspects more quickly, in hours as opposed to days. Sergeant Clarke further deposed that the Forensic Investigator Model involved the completion of forensic investigator training encompassing six weeks of residential study, and field laboratory workplace training as part of a 12 month induction package.

Policy and legislative reform

132 The PANSW drew the Commission's attention to three particular developments under the heading of "Policy/Legislative Reform". One was the adoption in 2013 by the Police Prosecutions Command of a new "Practice Management Model". In his statement Senior Constable Lee described that reform in these terms:

"13. ... In 2013, the PPC introduced the Practice Management Model (PMM). The PPM *[sic]* revolutionised the way in which Police Prosecutors operated. Rather than a prosecutor receiving the brief of evidence the morning of the hearing, the prosecutor was now required to actively interact with a designated command and assume the role of a brief handler. The prosecutor became a resource to be utilised by the command for on the spot general advice, or where appropriate, more considered legal advice. A conduit between legal representatives and the command concerning representations and, an advocate for the reduction in the number of police attending court...

14. The purpose of introducing the PPM *[sic]* was an increase in service delivery to the field by assigning a police prosecutor to a specific command and then implementing the PMM to quality assure briefs, build relationships with officers at that command and follow defended matters to finality.

15. In terms of efficiency and effectiveness, the prosecutors *[sic]* involvement with the matter from inception to finalisation, colloquially referred to as a 'cradle to grave' prosecution, increased the quality assurance checking and compliance of the brief. Efficiencies were and continue to be achieved by the now existing ability of the prosecutor to commence discussions with legal representatives earlier in the process. This lead *[sic]* to the avoidance of matters inappropriately running to hearing and delays on the day of hearing occurring due to negotiations. Prosecutors were able to get timely instruction from Crime Managers and Officers in Charge regarding backup charges. Rostering was positively affected due to the negotiated finalisation of matters and/or withdrawal of matters without the need for a hearing date. With matters being resolved early where possible, the court diary saw a positive reduction in its backlog and operational Police were able to remain on the beat protecting and serving the community rather than being rostered on a court shift.

16. In terms of changes to day to day work practices, this was the most profound change to the way prosecutors operated that the command had experienced. ...

17. From a staffing perspective, 64 brief handler positions were absorbed into Police Prosecutions Command as prosecutors took on the brief handler role. This meant an expansion of the role of the prosecutor and the development of the 'cradle to grave' concept. Existing brief handlers whose role was absorbed by the command were offered the opportunity to train as prosecutors thus enabling an expansion of the training unit, an update of the prosecutor education program, the introduction of differing training platforms being both online and face to face and an increased trainee supervisory role for senior prosecutors in the field."

133 These reforms were said to have been enhanced by a new software application, the Court Matter File Management System, which was introduced in April 2019. In the July 2019 edition of the Police Monthly,[44] this was described as "a new computer system built for NSW police prosecutors to

[44] Exhibit PA33 Part 2, Tab 106 at p 215

automate and help in the tracking, management and service of court matters and briefs of evidence". The report further stated that:

> "it has improved existing court management practices by using the one system to automatically link several other systems...creating a more efficient communication pathway between prosecutors and police."

134 In the NSW Police Force 2016-17 Annual Report Deputy Commissioner Catherine Burn is quoted as saying:[45]

> "A range of legislative and procedural reforms are contributing to swifter, fairer and more efficient court outcomes. Prosecution services have moved to a practice management model, working with local area commands to achieve specific crime reduction objectives. Improved screening of briefs of evidence and the use of audio visual links to adduce evidence in court have seen thousands of police shifts returned to the front line and many civilian witnesses spared attending court, without compromising the rate of convictions."

135 The PANSW submitted that the Practice Management Model reform "no doubt has had significant benefits on the quality of brief prepared and prosecuted by police officers, and will inevitably have contributed to the achievement of the organisational goals".[46]

136 The PANSW further submitted that "[d]oing away with the position of Brief Handling Manager, whilst permitting the expansion of the number of police prosecutors, in at least some locations had the collateral impact of expanding the responsibility of the Sergeant Team Leaders to review briefs of evidence prior to submission to prosecutors".[47] In his statement Sergeant Minns deposed:

> "22. ... Another added role the general duty sergeant/supervisors has is the checking of Briefs of Evidence. It is true to say that supervisors always checked briefs, but they have a far greater role now. The Sergeant Supervisor now reviews the brief as there is no Brief handling manager at police stations. They request any necessary changes and electronically confirms that the brief is suitable and meets the proofs of the charge and sends the brief on to the Police Prosecutors for the next review process. This has brought another layer of checking brief of evidence which is designed to improve the quality

[45] Exhibit PA33 Part 1, Tab 18 at p 185
[46] PANSW Final Submissions at par 246
[47] ibid. at par 244

and standard of the brief in the initial stages. This is designed to save time during the court process and again bring out better outcomes for court." (Sic)

137 The second reform on which the PANSW placed particular reliance was the devolving of work of the District Court to the Local Court. To describe the nature of the nature of the change it is sufficient to reproduce the following passage from the PANSW's Final Submissions:

> "242. Between 2016 and 2018, a number of previously strictly indictable offences were added to Table 1 of the Criminal Procedure Act 1986, enabling them to be dealt with in the Local Court in certain circumstances. The rationale for these reforms, as understood by Senior Constable Ben Lee, was to reduce the backlog and consequent delay of criminal trials in the District Court, and reduce the remand prisoner population. The practical effect on police prosecutors was a *'significant and substantial increase in the day to day work of police prosecutors', 'an increased workload comprised of matters of greater complexity',* resulting in *'an increase in full day and multi day fixtures'.* It also drove efficiency in the operation of the NSW Police Force itself:
>
> > *'There were a number of efficiencies driven through these developments. A Local Court hearing is about a quarter of the time required for a District Court trial and is approximately one third of the total cost. From commencement to finalisation, a Local Court matter is on average 108 days compared to an average 474 days in the District Court. There is a saving of operational police shifts due to these matters now being set for hearing as distinct from trial.'"*
>
> (Italics in original, footnotes omitted)

138 The third matter on which the PANSW relied was Early Appropriate Plea of Guilty reforms introduced in May 2018. These reforms were summarised in the June 2017 edition of the Police Monthly in the following terms:[48]

> "As part of a NSW Government package of smart and tough criminal justice reforms designed to deliver safer communities, early guilty pleas (EGP) reforms are scheduled to come into effect in March 2018. They are designed to address a growing backlog of cases in the district court *[sic]* while improving outcomes for victims and delivering swift and certain justice.
>
> Currently, 73% of serious criminal matters are resolved by a guilty plea. However, 23% of those guilty pleas are not entered until the day of the trial. In these cases police officers, victims, witnesses, prosecutors and defence lawyers are forced to prepare for a hearing that doesn't go ahead.
>
> This is partly caused by the fact senior prosecutors and defenders are often not briefed until late in proceedings, so charges are often withdrawn or

[48] Exhibit PA33 Part 2, Tab 57 at p 123

> amended the day the trial is due to start. Even when the charge is amended at this stage, the accused person could be entitled to the maximum sentence discount.
>
> The EGP reforms fundamentally change the process by engaging senior prosecutors and defence lawyers at the start of criminal proceedings. The brief of evidence served by police will be in a simplified form, facilitating earlier disclosure of evidence.
>
> ...
>
> Not all evidence will be required to be inadmissible form. However, the brief will still have to contain all material that forms the basis of the prosecution case, all material relevant for the accused, and all material affecting the strength of the prosecution case.
>
> Senior prosecutors will review the brief of evidence as soon as it's received and certify the charges that will proceed. This will ensure the defendant is charged with the most appropriate offence as early as possible which, along with tighter sentencing discounts, removes the incentive for a defendant to wait to plead."

139 The May 2018 edition of the Police Monthly reported that the Early Appropriate Guilty Plea reforms were introduced on 30 April 2018.[49] The report stated that the reforms contain five elements, two of which are relevant for present purposes. Firstly, police would be required to provide a brief of evidence in simplified form (not necessarily in admissible form) to the prosecution within eight weeks of charges being laid, the purpose of which was said to "document sufficient evidence for the [Office of the Director of Public Prosecutions] to certify the charge, and to make the defendant aware of the key evidence against them" being "designed to help the defendant make an informed decision at an early stage about how they should plead". Secondly, police prosecutors would be "involved in matters for longer", appearing in committal matters "until a brief of evidence is served on the defence and the ODPP, and the case is adjourned for charge certification."

140 In its Final Submissions the PANSW submitted:

> "250. The impact of the EAGP Reforms on police included, on the evidence, the intensification of the investigative work of police, whilst providing productivity and efficiency gains by facilitating early guilty pleas, avoiding the need for officers to be rostered for Court attendance, and ultimately facilitating more police in the field providing policing services to the community:

[49] ibid. at p 124

(a) Chief Inspector Gorman: Having described the reforms described their impact in this way *'This is additional brief preparation time which is required to fit into the hourly time of police officers. In practical terms, the reforms require more intensive work by police earlier in the prosecution process, so that a partial brief may be served on the ODPP and the defendant much more quickly (within 8 weeks of charge). The EAGP reforms were all about driving efficiencies, in particular by ensuring that significant police man hours were not wasted by having police prepare for hearings, and rostering officers for attendance at hearings, that are abandoned on the first day of the trial'*.

(b) Det Sgt Watson (Ex PAIS at [10.4] - [10.5]): *'This process will inevitably shorten matters through the court system, but is* [sic] *also has increased the initial workload of police who have strict timelines to meet with EAGP briefs and the required documents and or summaries needed. The information/evidence now has to be presented as per the reforms. This can add enormous workload and pressure particularly to matters that are not protracted, are spontaneous or new investigations and are serious. ...10.5. I have observed that the changes to the EAGP have resulted in less time for police officers appearing as witnesses being spent at the court; as EAGP reforms have meant that they are no longer required to attend if the EAGP is utilized, saving police shifts and enabling focus on other pending matters'*.

(c) Det Sgt Harmer Ex PA32 at [24]: *'These developments have... resulted in an intensification of work and an increased workload, with a requirement of investigators to have a large amount of evidence prepared for service on the ODPP and defendant within eight weeks of charges being issued, which outlines the evidence of the prosecution. EAGP briefs are required to be reviewed by the Detective Sergeant and signed off as meeting the requirements of the EAGP Reform. The change has resulted in tighter time frames, placing additional responsibility on Investigators and Team Leaders. The introduction of the EAGP has resulted in an increase to the workload but also has resulted in a reduction of matters going to trial due to the evidence of police being reviewed and a better quality brief being produced. The last figure stated to me from the ODPP was that 27% of matters [were] committed to trial whereas the previous year the figure was 32%. The reduction is due to an increase in pleas by the accused.'*"

(Italics in original, footnote removed)

141 We observe that while it was not a matter on which the PANSW placed reliance in its written submissions, a number of the police witnesses called by the PANSW made reference to changes to bail and custody management processes occasioned by amendments to the *Bail Act 2013* (NSW), which were introduced in January 2015. There was, however, some conflict in the evidence as to whether these changes had delivered productivity and

efficiency improvements. For example, Sergeant Henderson-Smith was of the view that the changes "streamlined the process which makes it more efficient and reduces the time taken to review bail or guard people in custody".[50]

142 In contrast, while Leading Senior Constable Behrens deposed that the "new process adds to the productivity of police", he also stated that the review of the *Bail Act* "saw a relatively simple bail determination process evolve into a considerably more detailed and lengthy series of justifications which have had a greater transparency in relation to how the bail decision was derived, however has added significantly to the time taken to complete each bail determination by the custody manager".[51] Similarly, Sergeant Gorrie was of the view that the changes have resulted in "a lengthy process that now adds time to the bail determination process that has not been as lengthy prior to the introduction of the current Act".[52]

143 In light of this evidence we have not placed any particular weight on any changes introduced as a consequence of the amendment of the *Bail Act*.

Domestic violence reform

144 The evidence led by the PANSW suggested that domestic violence "is the number-one volume crime type that NSW police deal with".[53] Sergeant Henderson-Smith estimated that it accounts for up to 40% of the work performed by frontline general duties police officers.

145 The PANSW identified two primary reforms relating to the policing of domestic violence which it said attracted the productivity and efficiency sub-principle. The first was described as "Domestic Violence Evidence in Chief" ("DVEC"), which followed the enactment of the *Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014* (NSW), which received assent on 28 November 2014. That Act inserted a new s 76A into the *Criminal Procedure Act 1986* (NSW), which allowed for evidence for the prosecution to

[50] Statement, Brett John Henderson-Smith, 26 June 2020 at par 56
[51] Statement, Oliver Behrens, 24 June 2020 at par 17
[52] Statement, Jacqueline Gorrie, 30 June 2020 at par 35
[53] Exhibit PA 33 Part 2, Tab 37 at p 82

be given in the form of a recorded statement instead of a written statement, if the offence is a domestic violence offence, subject to certain conditions being met.

146 Combined with new technology, known as MobiPol, which is discussed in greater detail below, DVEC enabled police officers to obtain in the field electronic (audio-visual) statements in respect of domestic violence incidents. A large number of the police witnesses called by the PANSW described DVEC and their experiences with it. As the evidence was broadly consistent, it is necessary only to refer to a sample of that evidence.

147 In her statement Sergeant Gorrie deposed:

> "24. Another recent development in the DV space is the introduction of the Domestic Violence Evidence in Chief reforms. These reforms facilitate the audio and visual recording of the statement of a DV victim at the scene. With the introduction of DVEC in recent years, this has assisted Police to capture evidence not previously able to be captured. There are some associated administrative tasks that can take some time (for example, uploading the video to the View IMS system, and copying to cd *[sic]* for service on the accused person, is time consuming and extends the time to process the charges). Police are then required to provide a synopsis to prosecutors to be included in the brief of evidence in order to provide the evidence in the DVEC, adding to the time taken to complete briefs of evidence.
>
> 25. The benefit, however, in taking a DVEC statement is that it takes considerably less time to obtain as opposed to a handwritten statement in a notebook and then a typewritten statement, which is traditionally how we have obtained the evidence. A DVEC statement generally takes ten to fifteen minutes on average, where a typewritten can take up to an hour or more. This saves time in the evidence gathering stage of the process for the investigation, allowing the investigating officer to continue the investigation and resultant arrest of the offender in a timely manner. This means that, should the outcome result in charges, victim protection is in place quicker. The time benefits are also apparent within the Court setting, with the statement being presented in Court rather than the victim rehashing their evidence on the stand. The DVEC statement stands as their evidence in chief. Not only is that a benefit for the victim, who may find it distressing to relive the events in question, it also provides the Court the ability to see the real reactions of the victim immediately after the incident, without the passage of time to dull the impact of the violence presented at the time of the offence. It gives the Court incredible insight into how the offence has affected the person subjected to it, a clear indication of the injuries and the pain experienced in their untreated form on a real person rather than in a photograph."

148 In his statement Leading Senior Constable Behrens deposed:

"11. ...

iii. ... DVEC, introduced around 2015, is the video recorded evidence of a victim of Domestic Violence. This is primarily achieved by utilising the MobiPol camera. DVEC has had a significant impact on frontline general duties policing. Domestic violence related matters take up massive amounts of police time. In some PACs Domestic Violence related jobs represent the core component of their daily business. Thus, any enhancements or productivity gains in this field impact significantly on the day to day work of front-line policing. DVEC evidence contributes to the objectives of detecting and prosecuting crime, by more accurately reflecting the victims *[sic]* physical state and state of mind at the time of the incident. It can visually represent any injuries incurred or the environment in which the incident took place. It is also a benefit to the victim as it is much quicker and more accurate that *[sic]* attempting to capture everything faithfully in a lengthy written statement. Police underwent training in relation to the use of DVEC, when to use it, how to record, how to upload it into police systems once recorded, and how to download and burn it to disk for court, etc."

149 Reflecting the reference to the training undertaken by police officers, Senior Constable Ozols stated that "with the introduction of DVEC came further face to face training that required completion prior to police being in a position to capture the evidence in this manner".[54] Sergeant Allwood referred to DVEC requiring "a new skill set from police".[55] In his statement Leading Senior Constable Crosby deposed:

"47. DVEC means that each officer is now required to understand how to make a short video to capture effective evidence and a worthwhile statement in video form. For me and other field teaching officers, it increased the scope and variety of teaching to a high degree – now having to instruct on video-making, sound-scapes, lighting, and video interviewing techniques."

150 Another reform in connection with domestic violence to which the PANSW drew our attention was the introduction of legislation empowering a "senior police officer" to issue a provisional apprehended domestic violence order ("ADVO"). The nature of the change, and the effect of some of the evidence on which it relied, was conveniently summarised by the PANSW in its Final Submissions as follows:

[54] Statement, Fiona Anne Ozols, 29 June 2020 at par 25
[55] Statement, Ian Stanley Allwood, 2 July 2020 at par 13

"256. A 'key instrument' in combatting the 'insidious' problem of domestic violence, are apprehended domestic violence orders taken out in favour of persons in need of protection.

257. Prior to 2014, applications of that kind, including applications for interim orders, had to be made to a Magistrate (usually the on-call Magistrate). Having attended a 'job' in the field, the officer would return to the station and enter it into the computer, and make application (via the computer) for an interim Order. An internal police publication from March 2014, stated that in 2013 alone 'the NSWPF applied for 37,304 orders of which 30,384 were for provisional ADVOs'.

258. In 2013, the Crimes (Domestic and Personal Violence) Amendment Act 2013 was passed, enacting s 28A of Crimes (Domestic and Personal Violence) Act 2007, commencing 23 May 2014. That provision empowered a 'senior police officer', defined as an officer of or above the rank of sergeant, to issue a provisional apprehended domestic violence Order.

259. The NSW Police Force described the operation of this legislation and identified the 'benefits' of it in internal police communications. In essence it:

(a) expanded police powers to direct and detain defendants before and during the application process for provisional ADVOs; and

(b) authorised sergeants and above to determine applications for provisional ADVOs and to impose appropriate conditions.

260. From the individual Sergeant's perspective, they are now called upon to exercise the judgments previously required of a Magistrate when issuing a provisional Order.

'A senior police officer must determine whether there are reasonable grounds for making a provisional ADVO based on the material contained within the application. Quite simply, it is the role of the senior officer to determine whether the applicant officer's suspicion or belief that an immediate order is necessary to ensure the safety of the person or to prevent substantial damage to property, is reasonable'.

260. As Assistant Commissioner Murdoch observed at the time of the introduction of these reforms *'Police are expected to make considered decisions in the use of these new powers,' he said. 'This will involve weighing up options and their effect on the protected person and defendant. ...However, it's expected that the fundamental premise behind every such decision should be that the safety and protection of all persons, including children, who experience or witness domestic violence is paramount'.*"

(Italics in original, footnotes omitted)

151 Once again, a number of the PANSW's witnesses deposed as to the benefits of these reforms. For example, Sergeant Henderson-Smith stated:

"58. Police Issue Apprehended Domestic Violence Orders cut through the red tape of making an application for an Apprehended Domestic Violence

Order (ADVO), with the attendant outcome being an increase in the immediate care, protection and support police can afford victims. By giving a senior police officer the ability to independently authorise an interim ADVO upon application by another police officer; *[sic]* without any reference to the Central Justice Panel, does just that.

59. PIADVO's afforded those affected by domestic violence more immediate care, protection and support, but the savings in not only police time, but court time, are considerable."

152 Leading Senior Constable Crosby deposed:

"71. In approximately 2014, Police issued Apprehended Violence orders were introduced. Previously, to apply for an AVO *[sic]*, an application was made to a court or authorised officer by fax, telephone, or email. In most cases ADVOs could be expected to return from the court within about 40 minutes, either approved or rejected. At night, and particularly early morning, ADVOs could sometimes take hours to return.

72. In the case a provisional ADVO application was rejected, it was either altered and sent to court as a formal Application for an ADVO, to be heard in court, or, in some cases, altered and sent back to court for reapproval.

73. In all, each domestic could have taken up to 6 hours to complete, and, where an interpreter was required, it was not unusual (though infrequent) to be occupied with a single domestic incident for an entire 12 hour shift.

74. When Police issued ADVOs were introduced, the amount of time the procedure and paperwork took was reduced (at its most speedy), about 40 minutes. It was not unheard of to complete three or four domestic incidents, including charges and an ADVO application within a twelve hour shift. This returned Police officers to the street for re-tasking to the next job or incident far more quickly than previously. This single change was responsible for hundreds of man-hours saved during a week." (Sic)

153 As reflected in the PANSW's submissions, these changes saw an increase in responsibility for senior police officers. Sergeant Allwood described those changes as follows:

"16. As a substantive Sergeant/operational Supervisor I am now required to assess and approve the applications for Apprehended Domestic Violence Orders (ADVO). This process has placed a responsibility upon me that was once that of an on-call Justice, often a Magistrate. I am acutely aware that Orders are designed to protect people from violence and harm. The decision to approve, resubmit or not approve this application rests with me alone. I am accountable for this decision. The change was designed to expedite the application process, it has done this at the expense of placing an onerous responsibility upon my assessment and decision. I am acutely aware that any order that I have approved will as a matter of course become enforceable. Often the orders that I approve will exclude a person from their own home, decisions like these require careful analysis and thought to balance the

protected persons safety and the basic needs of the defendant/accused." (Sic)

Technological advancements

154 The PANSW adduced evidence demonstrating that the work of police officers is constantly evolving to respond to or take advantage of the ever-increasing prevalence of technology such as smartphones and similar devices, and social media. The evidence suggested that while the use of new technology had enabled the NSW Police Force to achieve better outcomes and productivity and efficiency improvements, it had also increased the workload and responsibilities of police officers.

155 An example of this can be seen in the statement of Sergeant Watson, who deposed:

> "11.3 ...This increase in technology in the community, and the potential for important evidence to be contained on those devices, has meant the requirement of Police to be diligent and seize and examine those devices has, over time, resulted in a dramatic increase in the work demands of police when investigating almost any offence.
>
> 11.4 The advancement and proliferation of smart devices in homes and within the community, and the increased information stored about people operating in their daily lives, has increased direct evidence towards offences, and the tracking and monitoring of individuals most certainly has had an impact on disrupting criminals and how they go about their business, achieving better outcomes in criminal investigations."

156 Sergeant Webb stated:

> "16. Mobile phones from 2011 would typically hold 2-8GB of data, which predominantly could be obtained in a relatively straight forward process that will take around 1-2 hours. Modern smartphones can typically store 64-256GB of data and are purposefully built with encryption and strong security to protect this data. The methods to obtain this data are esoteric and non-trivial in difficulty as they are derived from exploits or vulnerabilities discovered. The practicality of this situation is that an examiner is required to manipulate the phone to boot in a special way. The precise way to do so varies, and forms part of the specialised knowledge garnered by the examiner.
>
> 17. As each phone manufacturer has developed their own Operating System, as well as their own methods of security, the tools needed to extract data have become technologically mature and complex. Operators of the tools needed to access this information have had to expand their capability

and knowledge of how to deal with a wide variety of phones and techniques. ...This acquired and nuanced knowledge was not necessary in the Mobile Forensics field in 2011. This has required staff within the [Digital Forensic Unit] to pursue tertiary studies and professional accreditation to maintain currency in this emerging discipline.

...

26. Given that modern smartphones are capable of holding data measured in multiple terabytes, this process can be very time consuming, and require the investigator to possess a moderate understanding of technology to interpret the data. Investigators are now required to understand the concepts of GPS locations, Bluetooth connections, Location Services tracking, timeframes for recovering deleted data, current social media applications, and importantly how these concepts fit into the electronic evidence concerning the criminal investigation." (Sic)

157 Outside of these general observations, the PANSW drew the Commission's attention to a significant number of developments in the nature of new or enhanced technology introduced since 2011, which it contended attracted the productivity and efficiency sub-principle.

158 The first of these was "Cellbrite", which was described by Leading Senior Constable Crosby in these terms:

"58. The Cellebrite *[sic]* system is a device and program that allows the comprehensive forensic download of the contents of mobile phones. Where once an officer was dependent on being able to scroll through photographs or through the various menus of a phone's device, or referring the device out to be examined by a specialist area, now the PAC based system allows the download of all levels of the phone's physical memory (down to the metadata), including GPS, timestamps, deleted files and folders, call records, messaging data, and a plethora of other information. This system, gradually becoming mainstream and widely available, has meant that investigations often evolve, or spawn sub-investigations as new evidence is discovered and seized using this system.

...

60. New types of information is *[sic]* now accessible, such as the metadata on photographs or messages, location details, geotracking, contact lists, deleted photos as well as those remaining on the device. Previously, this type of extreme detail was available only to specialist units such as SEEB, the State Electronic Evidence Branch, and is now available for most relevant investigations, at a general duties level. Where previously, requests for assistance from SEEB would be received and acted on in only a few very serious cases, now this evidence is in easy reach."

159 The evidence suggests that Cellbrite had been utilised by the NSW Police Force prior to 2011, but has been made more widely available to police officers since then. In passages of her statement which the PANSW said related to Cellbrite (although this is not clear on the face of the statement itself), Sergeant Webb deposed:

> "18. After limited efforts to address these issues in prior years, in 2019 a large scale project to train 600 officers and equip 150 locations with the tools necessary to examine mobile devices within the field was undertaken.
>
> 19. I was tasked with supervising the team of DFU officers that would deliver the training to those officers. Those officers received training in the proper handling of the devices to ensure integrity and continuity, training on WHS and legislative issues, practical knowledge on how the tool extracts data, as well as how to properly present this data.
>
> 20. The officer would then be able to perform these extractions in the field and supply these data sets via reports to the investigator to review and determine what is relevant. Since the completion of the bulk of the training, those officers have completed over 20,000 extractions.
>
> 21. Many court matters are now able to meet the requirements of the Early Appropriate Guilty Plea scheme, as the approximately 20 operational DFU examiners could not adequately process thousands of requests in a timely manner.
>
> 22. Instead of waiting 6-12 months for a DFU examination, investigators are now able to put this digital evidence before a court much sooner or use it to lead the direction of their investigation to locate further evidence. This improvement has enable *[sic]* DFU to become more focused on the next tier of examinations that are either more in depth or technically difficult in nature. This would not have been possible without operatives in the field being able to perform these technical tasks."

160 Another technological development was the introduction of MobiPol, which Sergeant Giffney described as being "one [of] the most important, effective and welcomed new tools that have been introduced to support us over the past 9 years" and that "the list is endless as to it's *[sic]* benefits".[56] A significant number of the witnesses called to give evidence by the PANSW described MobiPol and its impact on their work. It is not necessary to traverse all of that evidence.

[56] Statement, Steven Joseph Giffney, 30 June 2020 at par 8

161 In broad terms, MobiPol is a police-issued smart phone providing officers in the field with access to NSW Police Force databases. Its features were described as including the enabling checks of individuals and vehicles, and the identification of suspects, to be conducted in the field; the issuing of infringement notices electronically; the obtaining of audio-visual evidence, including DVEC statements, through its camera, video camera and voice recorder; and, permitting officers to speak to colleagues in other commands whilst in the field.

162 The evidence led by the PANSW was generally, but not exclusively, positive as to the benefits of MobiPol. As an example, leading Senior Constable Behrens stated:

> "11. ...
>
> ii. **MobiPol** – MobiPol's were introduced in 2017. A MobiPol is a police issued mobile smart phone with access to the iCOPS Police Database and other police systems to facilitate improved operational capability in the field. The MobiPol allows officers in the field to verify the identities and details of suspects and to determine if individuals are wanted in relation to warrants or ongoing investigations, etc. This represents a huge productivity gain. Previously checks were primarily carried out verbally over a police radio. This was slow, tied up resources and staff at Police Radio and was at times difficult to validate. The MobiPol provides police at the scene with complete and real-time information which can often be visually validated by comparing the subject to a previous charge photo. The MobiPol also facilitates infringements (Traffic/Parking/etc) to be issued in the field and processed electronically. Completing them this way saves time writing them out by hand in carbon copy ticket books and then when back at the station reentering all the information into the COPS database. The MobiPol is also utilized for DVEC and Field ID purposes... The MobiPol can be utilized to commence the recording of certain routine reports (events) in the field that can then be completed later in the station leading to productivity improvements. One example is the use and the recording of ADVO compliance Checks. Previously these checks were recorded on paper and then later at the station re-entered into the computer. Now they can be electronically entered in the field, cutting out the duplication and saving data entry time back at the station." (Sic)

163 Leading Senior Constable Kassab stated that with all the positives provided by the MobiPol devices, there has been an increase in the work required of supervisors to ensure compliance with the standard operating procedures that

apply in respect of the devices. He also observed that the devices have "added another item required to be carried by officers in the field".[57] Sergeant Ireland stated that as MobiPol enabled officers to spend more time in the field, minimising their time in the station, he is required as a supervisor to be "more intrusive when monitoring the workload of the individual officers".[58]

164 A further development related to MobiPol is the upgrading of the Field ID unit, with technology titled "Neoscan" making Field ID a "companion device to the MobiPol".[59] The Field ID unit is a handheld device which allows police officers to positively identify offenders in the field by way of fingerprint comparisons when issuing Criminal Infringement Notices or Field Court Attendance Notices. Leading Senior Constable Behrens identified what he described as the public benefit in ensuring that the correct person is identified and prosecuted.

165 Another development which was the subject of evidence by many of the PANSW's witnesses was the introduction of Body Worn Video ("BWV") in approximately 2015. In its Final Submissions the PANSW provided the following summary of the evidence regarding the introduction of BWV:

> "286. The official launch of Body Worn Video (BWV) was on 17 September 2015. As its name suggests, BWV is a high quality video and audio recording device worn by police as part of their arms and appointments... It is a technology utilised by police to capture audio and visual footage of their interactions with the public in real time, which may capture evidence that assists police in their investigations and is designed to supplement the usual investigative and note taking methodologies employed by police.
>
> 287. A trial of the technology was conducted in 2013. ...
>
> 288. In late 2014, Parliament enacted the Surveillance Devices Amendment (Police Body-Worn Video) Act 2014, to expressly permit police officers, in certain circumstances, to use what would otherwise be a prohibited surveillance device (see s 50A). The images and audio captured are securely stored, archived and disposed of in accordance with the State Records Act 1998. The Surveillance Devices Regulation 2014 was amended effective 16 December 2016 to ensure greater practical use of BWV product by police."

[57] Statement, Anthony Kassab, 29 June 2020 at par 11
[58] Statement, Paul Ireland, 1 June 2020 at par 8
[59] Statement, Oliver Behrens, 24 June 2020 at par 11(iv)

(Footnotes omitted)

166 A large number of the PANSW's witnesses described their experiences with BWV and the benefits which they considered had resulted from its introduction. Once again, we do not propose to traverse all of the evidence. It suffices to say, drawing in large part from the PANSW's Final Submissions, that the benefits were said to include:

(1) the enhancement of the evidence available at court, including by demonstrating a witness' or offender's conduct at the time of police attendance;

(2) assisting officers to prepare their own statements, by having access to recordings to refresh their memory when preparing their statement;

(3) encouraging early guilty pleas based on the evidence captured by the BWV, reducing the number of matters proceeding to trial;

(4) prompting individuals to modify their behaviour when interacting with police officers, which not only enhances officer safety but also reduces the instances of an officer's time being spent in managing a hostile, argumentative and potentially violent person;

(5) encouraging police officers to conduct themselves professionally in the field, promoting the use of correct procedures when exercising police powers in the community; and

(6) reducing the number of frivolous or vexatious complaints against police officers, and permitting the more efficient triaging and resolution of complaints against police officers.

167 A number of officers stated that the introduction of BWV had increased the workload and responsibilities of supervisors. For example, Sergeant Minns referred to BWV as having "brought on another level of checking and

responsibility for the Sergeant Supervisor".[60] Sergeant Ludkin stated that "there is now a requirement to conduct audits of the video files to ensure the cameras *[sic]* use and the actions of officers comply with the Body Worn Video Standard Operating Procedures".[61]

168 Another development on which the PANSW relied was the introduction of Audio Visual Links ("AVL") technology, both through the installation of AVL suites in 137 police stations and the deployment of iPads that enabled video conferencing. Witnesses described the benefits of AVL as including the following:

(1) the reduction in the handling and movement of prisoners between a police station and a court;

(2) the ability of police officers to give evidence from their stations, rather than needing to appear in court;

(3) a consequent reduction in the number of police required to attend court (and the resultant decrease in the number of police vehicles being parked at court and not "on the road");

(4) an increase in the reliability of appearances by victims and witnesses, with matters such as distance to the court or lack of time due to work commitments no longer being an impediment;

(5) a safer environment in which victims and witnesses may give their evidence;

(6) the facilitation of remote witness preparation; and

(7) greater efficiency in holding internal meetings.

[60] Statement, Robert Minns, 1 July 2020 at par 17
[61] Statement, Jeffrey John Ludkin, 29 June 2020 at par 14

169 We observe that in the passage from the 2016-17 Annual Report reproduced in part at [134] above, Deputy Commissioner Burn is quoted as describing the benefits that had been derived through the use of AVL technology.

170 There were a number of other technological changes or developments on which the PANSW relied. We will not deal with them in detail, although we have given consideration to them all. It suffices to list those particular additional measures to which the PANSW referred us:

(1) the introduction of random drug testing;

(2) the use of drone technology;

(3) the creation of the Community Portal, enabling two-way communication between the NSW Police Force and citizens in relation to the reporting and actioning of local level crime;

(4) the sub-sampling of exhibits, and legislative reform permitting properly qualified Forensic Services Group staff to undertake some of the work previously done by lab technicians;

(5) enhancements to the central Computer Aided Dispatch system, known as MobileCAD; and

(6) "non-operational measures" such as:

(a) the development of online and e-learning training; and

(b) developments in the performance management system of the NSW Police Force.

Achievement of objectives

171 The PANSW adduced a significant amount of evidence which it submitted "overwhelmingly establishes the NSW Police Force has substantially achieved

its objectives over the period since 2011".[62] While there was some demur in the Crown's Closing Submissions, it was not a submission strenuously advanced. On the evidence, we accept the PANSW's submissions in this regard.

172 However, the Crown correctly submitted that meeting objectives does not necessarily equate to an increase in productivity and efficiency. Some credit for the attainment by the NSW Police Force of its objectives may be attributable to the increase in police numbers from 15,806 as at 30 June 2011 to 17,295 as at 30 June 2020, to which Mr Knappick deposed in his statement.

173 At the same time, the Crown led little evidence challenging the evidence summarised above as to the productivity and efficiency enhancements delivered through structural, policy/legislative, domestic violence and technological reforms or changes. At its highest, the Crown's case in this regard is limited to Mr Knappick's evidence. He deposed that some of the reforms undertaken by the NSW Police Force, which are not identified, "have resulted in increased costs".[63] He further stated, in a passage which was admitted into evidence over the objection of the PANSW but subject to the weight to be attributed to it:

> "66. The introduction of new technology and work practices are inherent in all professional workplaces and particularly in respect of the NSWPF. There are various technological advancements cited in PANSW's evidence, such as, the introduction of MobiPol, Body Worn Video and Random Drug Testing. The introduction of these procedures and equipment in addition to other technological advances are designed to assist officers in meeting the objectives of the NSWPF by improving officers' access to information, reducing the number of incidents and escalation of violence, reducing officer injuries and improving community safety."

174 Even taken at its highest, this passage is not inconsistent with the productivity and efficiency enhancements which the PANSW and its witnesses say arose from the various measures identified in their evidence, as summarised above.

---

[62] PANSW Final Submissions at par 227
[63] Statement, Craig Knappick, 30 July 2020 at par 44

175 It is difficult on the evidence to conclude definitively whether and to what extent any particular measure delivered productivity or efficiency improvements in the NSW Police Force. Cumulatively, though, the evidence supports the proposition that the various measures relied on by the PANSW have to varying degrees enhanced the productivity and efficiency of the police force as a whole.

176 To adopt the language of the sub-principle, we are satisfied on the evidence that the measures identified have either delivered productivity or efficiency improvements, or have made a substantial contribution towards the attainment of the objectives of the NSW Police Force to become more efficient.

Employee contribution

177 While the demonstration of productivity or efficiency improvements, or the enhancement of the employer's efficiency, is necessary to attract the sub-principle, it is not of itself enough to warrant an increase under the sub-principle. It must be shown that the measures on which reliance is placed are those "to which employees have made a significant contribution".

178 The sub-principle does not require a party to demonstrate that every employee has made a contribution to every measure which is relied on. At the same time, when the claim before the Commission is for an across-the-board increase to the salaries and salary-related allowances paid under the Police Award, it must at least be shown that employees have made a substantial contribution to each measure.

179 Relying on *Police No 1*, the PANSW submitted that a significant contribution may be found by an intensification of work that had previously been done. It further submitted:[64]

> "225. In the result, the various restructures, technological advancements and policy reforms (some supported by legislative reform) from 2011

[64] PANSW Final Submissions

> onwards, described in the Applicant's Tender Bundle and otherwise described by the police who give evidence in the Association's case, have materially impacted on the day to day work of police officers, (by them adopting, amongst other things, a range of new equipment, information systems and other technologies), and have contributed to better police performance, productivity and efficiency.
>
> ...
>
> 315. The Full Bench would be well satisfied that each of the structural, policy/legislative, and technology/equipment reforms identified in the Associations *[sic]* case have to varying degrees enhanced the productivity and efficiency of the police force as a whole. For the reasons outlined above, by their work in adopting those measures in their day to day work the members of the NSW Police Force have substantially contributed to the NSW Police Force's success in the period since 2011, such that an increase in salary and salary related allowances is warranted under sub-principle 8.3 of the Wage Setting Principles (to the extent they have any ongoing relevance in the face of the Conditions of Employment Regulation."

180 At the outset, we observe that a "significant contribution" is not to be found through employees simply "adopting" changes that might be introduced in the workplace. Something more is required.

181 In summarising above the evidence as to the various productivity and efficiency measures on which the PANSW relied, we have also attempted to reflect the evidence which might go to demonstrating how it could be said that police officers have made a contribution to those measures. The PANSW submitted, correctly in our view, that many of the technological changes on which reliance was placed "are properly characterised as an enhancement of existing technology".[65]

182 We further consider that the following observation by the Full Bench in *Police No 1* is apposite to the current proceedings:

> "446. We would further observe that, whilst police officers are not strictly 'professionals' in an occupational sense, many of the factors relied upon represent changes which police officers might be expected to adapt to as part of their ordinary duties."

183 The PANSW placed significant reliance on the "intensification" of work of police officers brought about by the productivity and efficiency measures. In

[65] ibid. at par 312

this respect, the impression left by the evidence is that while some features of the changes introduced since 2011 have resulted in more or new particular tasks, the changes on which the PANSW relied have made some aspects of the work of police officers easier.

184 We emphasise that we are not in any way suggesting that the work of police officers is "easy". The evidence overwhelmingly demonstrates that they face challenges in their day-to-day work unlikely to be encountered in many other occupations. Societal and technological changes continue to throw up challenges, which police officers invariably rise to meet.

185 There can be no question that some significant changes have been felt at the level of sergeant or supervisor. Measures such as the Re-engineering process, the new Practice Management Model, police-issued ADVOs and the need to monitor officers' use of technology such as BWV have seen an increase in the workload of sergeants or supervisors.

186 Added to this, developments such as the Early Appropriate Guilty Plea reforms, DVEC and BWV have required officers to either perform more work, or to develop new skills and expertise. Some of the restructuring of the NSW Police Force, such as the creation of the Traffic and Highway Command, has had implications for the workload of police officers beyond the supervisory level.

187 The PANSW submitted:[66]

> "127. The scope and breadth of the evidential sample relied upon by the Applicant should leave the Full Bench in no doubt that it has a proper evidentiary foundation from which to make adjustments to salary and salary relate allowances on account of work value and/or productivity and efficiency findings that apply to the police force as a whole. That is particularly so as the matters relied upon include restructuring of the NSW Police Force, changes to the tactical options model to deal with Active Armed Offenders that apply to all police, and a range of policy/legislative reforms and information technology/equipment changes that apply to all police (albeit it is accepted their significance to different parts of the police force will be different, depending on their utility in the particular operational setting)."

[66] ibid.

188 The Crown did not challenge the proposition that the police witnesses called by the PANSW formed what might be described as a "representative sample" of the workforce to which the Police Award applies.

189 Equally though, care must be taken when considering the PANSW's submissions in the passage cited against the requirements of the productivity and efficiency sub-principle. In much the same way as we are not satisfied that a "significant contribution" is to be found in employees simply adopting changes in the workplace, we do not think that the fact that a change might "apply to" a police officer necessarily attracts the sub-principle. It is not the application of change to employees, but their contribution to that change, which is relevant.

Conclusion – productivity and efficiency sub-principle

190 As already stated, we are persuaded that the measures identified by the PANSW have either delivered productivity or efficiency improvements to the NSW Police Force, or have made a substantial contribution towards the attainment of the objectives of the NSW Police Force to become more efficient. While the evidence falls short of establishing a "significant contribution" by employees to every measure on which reliance was placed, for the reasons set out above at [171]-[176] and [185]-[186] above we find that a sufficient case has been made out to attract the productivity and efficiency sub-principle.

COVID-19

191 It is convenient at this point to address the case presented by the PANSW as to the regard we should have to the impact of COVID-19 on the work of police officers, and the extent to which it should influence our determination in these proceedings. A number of the PANSW's witnesses gave evidence in this regard.

192 For example, Senior Constable Piffarelli stated:

> "19. During my 10 years in the Police force, I have seen an increase in responsibilities and requirements for frontline Police. Police are called the universal problem solvers because of their ability to make a bad situation or system work. When the Covid 19 pandemic hit our state, Police were at the literal front line ensuring that the public were kept safe and those that were flaunting the rules were held accountable. Our officers also lacked appropriate PPE at the beginning of the pandemic and had to make do with reusing masks and other equipment. Police in Orange also had to check on covid positive individuals and even at one point, put themselves into harms way to track down a member of the public who was believed to be covid positive and not self-isolating. The danger that front line police faced wasn't just for them, but for their family as well. Officers were not sure if they would be transmitting the disease to their family when they arrived home from work. Despite this, officers still turned up for work and went about their duty. If it wasn't for the Police response, the infection rate and the death toll would have been a lot higher. The officers on the frontline were forced to learn new laws and powers and enforce them with minimal training and minimal time. ..." (Sic)

193 Sergeant Allwood stated:

> "22. The COVID-19 Pandemic has made me learn new skills and take risks that I couldn't control. I have learnt how to check a person's temperature at work. I actively monitored infected COVID-19 people who were in home ordered quarantine. I door knocked and spoke with them and monitored their health and if they had stayed home. The questions asked were different from normal policing duty, mainly asking health and travel related questions. I would estimate that our first response workload increased 30% at least during the peak of the Health Ministers directions to the public. During this period I was highly concerned that I would bring the virus home to my family, because I was exposed at work." (Sic)

194 In its Final Submissions the PANSW submitted:

> "317. Once again by their day to day work, placing themselves potentially in harms *[sic]* way in the pursuit of a safer community for all, the police officers of the State materially contributed to New South Wale's *[sic]* success to date in navigating the social and economic dislocation arising from the Covid pandemic. It is another matter that warrants consideration when considering whether the claim of a 2.5% increase in salary and salary-related allowances...is justified."

195 We recognise the contribution made by members of the NSW Police Force during the COVID-19 pandemic and have taken it into account in our determination. However, it is a consideration which needs to be tempered to a degree. In *Public Sector Salaries No 2* the Full Bench acknowledged (at [162]) "the exceptional circumstances of the pandemic". Whether those

circumstances warrant an *ongoing* increase to salary and salary-related allowances is a matter which the Crown questioned.

196 Further, we note the following observations of the Full Bench in *Public Sector Salaries No 2*, which have some bearing on our consideration in the present proceedings:

> "160. At the same time, it must be observed that the Government sector in New South Wales has been shielded from some of the significant employment-related consequences of the COVID-19 pandemic that have been experienced in other parts of the workforce. There is no evidence that the pandemic has resulted in forced redundancies or other job losses in the Government sector in New South Wales. Employees continue to be paid their salaries at rates which are currently fair and reasonable. In a comment that is apposite to the present case, in *Annual Wage Review 2019-2020* [2020] FWCFB 3500 the Full Bench of the Fair Work Commission observed:
>
> > '[289] The impact of the COVID-19 pandemic has been felt across the economy; but the extent of its impact has not been consistent across all sectors of the economy. While some industries have been substantially affected, other sectors have been affected to a much lesser extent.'"

Wage Fixing Principles – APA Application

197 The APA "primarily sought to establish its case under the special case principle".[67] On the application of the Wage Fixing Principles it described the question for determination by the Commission as follows:[68]

> "Has the applicant discharged its onus to establish facts demonstrating special circumstances that render the conditions of employment in the current award no longer fair and reasonable such that the conditions should be varied?"

198 To establish a special case, the APA relied principally on the impact on paramedics and control centre officers ("PCCOs") of the widespread bushfires in NSW in 2019 and 2020, and the COVID-19 pandemic.

---

[67] APA Written Outline of Closing Submissions at par 20
[68] ibid. at par 30(i)

Bushfires

199 The APA's evidence included affidavits from a number of PCCOs who described their experiences during and in responding to the bushfire crisis. Without in any way wishing to detract from the obvious effort that has gone into preparing those affidavits, we find it convenient to adopt the summary of that evidence contained in the APA's Written Outline of Closing Submissions, as follows:

> "32. In relation to the Bushfires, the Applicant's evidence establishes that:
>
> a. All Paramedics across NSW were required to familiarise themselves with a state-wide disaster response plan and local bushfire plans.
>
> b. All Paramedics with the rank of Station Officer and above were given extra powers and responsibilities under the Emergency Services Act.
>
> c. There was a large increase in respiratory cases and Paramedics improved their skills in this area in response.
>
> d. Paramedics underwent a long period of sustained readiness to respond to the bushfires, taking a significant toll on their mental health and fatigue levels.
>
> e. Control Centre Officers worked under increased workloads and increased stress.
>
> f. Control Centre Officers made significant improvements in their capacity to coordinate with other emergency response agencies and to use advanced communication and geolocation techniques to respond to difficult cases.
>
> g. Control Centre Officers took on increased responsibility in providing logistical support to stranded communities and hospitals.
>
> h. Due to the scale of the disaster, Paramedics increasingly performed duties that were high-risk and/or normally performed by Special Operation Team (SOT) Paramedics, and thereby increased their experience and capabilities in responding to bushfires and other emergencies.
>
> i. SOT and other specialist Paramedics had significantly increased deployments to dangerous bushfire emergencies and as a result have increased their capacity respond to future emergencies, including COVID.

j. Paramedics, particularly in lower level management, increased their interoperability capacity with other emergency response agencies."

(Footnotes omitted)

200 In his statement, Mr Ipsen described his experiences during the bushfires in these terms:

"6. This summer has put me repeatedly in the most dangerous, difficult situations I have been in during my entire career. I was working as a Special Operations Paramedic and on occasion as a Special Operations Team Leader. I was deployed all across the state and have seen SOT and non-SOT Paramedics do incredible things to protect their communities.

...

20. We are trained to deal with high-risk environments, but to go into these completely uncontrolled encironment *[sic]* when your life is at risk is extremely psychologically impactful. The psychological strain was intensified over the protracted bushfire season. I believe it is even worse for non-SOT paramedics, who are compelled to go into increasingly dangerous environments to save lives without training. It can be incredibly traumatic to reflect on the risks that were faced in a situation even if they did not eventuate.

21. You can train as much as you like, but without operational experience you cannot put it into context. We now have an unprecedented level of operational context. Many real-world safety and retrieval lessons were learned. As an organisation we are more equipped for the future. There have been significant Incident Management Team improvements, especially regarding interoperability with other agencies. Many of the frontline managers, myself included, received a huge amount of invaluable experience working with IMTs, rapidly delivering information between NSWA executive and their own staff. These hard fought lessons definietley *[sic]* had a positive impact on the entire organisation's capacity to respond to the next state-wide crisis, COVID-19."

201 The APA's evidence regarding the 2019-20 bushfires was not the subject of particular challenge in the Crown's evidence. Indeed, Assistant Commissioner Elliott, who was called to give evidence by the Crown, deposed in his statement:

"12. The 2019-20 bushfire season was a period of exceptionally intense bushfires throughout New South Wales and other parts of Australia. The extraordinary scale and duration of the bushfire season meant that a large amount of our workforce was exposed to the direct and indirect impacts of the bushfires.

...

17. The scale of the bushfires and at times, the restricted access or inaccessibility of certain areas increased the demand for services and added to the complexity of issues faced by NSW Ambulance operations and staff (and no doubt other frontline, health and emergency services workers). Paramedics provided considerable assistance in responding to patients during periods of increased demand."

202 In documents tendered into evidence by the APA, the Honourable Gladys Berejiklian, the Premier of New South Wales, is quoted as describing the bushfires as "unprecedented".[69] NSW Ambulance Commissioner Dominic Morgan is quoted as saying that the bushfire season had resulted in "the busiest season on record" for the organisation.[70]

COVID-19

203 The evidence led by the APA as to the impact of the COVID-19 pandemic on PCCOs is again conveniently and well summarised in the APA's Closing Submissions, as follows:

"38. In relation to COVID, the Applicant's evidence establishes that:

a. Paramedics have faced unique risks of COVID infection, even amongst the health workforce, due to their role as first responders to triple-zero calls in uncontrolled environments (as opposed to e.g. the hospital environment). The low number of Paramedic transmissions in NSW illustrates the rapidity and effectiveness with which new skills and protocols were incorporated into everyday practice.

b. Every Paramedic in NSW has operated under a completely new 'Pandemic Protocol' in relation to every single triple-zero call they respond to. The Pandemic Protocol has required Paramedics to learn and implement new or adapted skills and procedures with respect to every single patient they treat and transport. The Pandemic Protocol requires significant changes to the performance of the following clinical skills with respect to *all patients*:

i. Intranasal Administration

ii. Nebulised Medication Administration

iii. Endotracheal Administration

iv. Oral/Sublingual Administration

[69] Affidavit, Tom Kiat, 11 August 2020 at par 2, annexure A
[70] ibid. at par 2, annexure B

v. Oxygen Administration

vi. Inhaled Medications

vii. Intravenous Administration

viii. Inspiratory Assistance

ix. Bag-Valve-Mask ventilation

x. Airway Adjuncts

xi. Suction

xii. Airway Management

xiii. Compressions

xiv. Defibrillation

xv. Asthma and Salbutamol Metered Dose Inhalers

xvi. Verification of Death.

The Pandemic Protocol requires significant changes to the following clinical skills with respect to patients with suspected or confirmed positive for COVID:

xvii. 2nd and 3rd Stage Labour

xviii. Management of Deceased Bodies

c. The clinical procedures that have required change due to the Pandemic Protocol include some of the most clinically advanced and complicated emergency procedures that Paramedics perform. In particular, the clinical procedures associated with resuscitation and securing a patient's airway, have been further adapted and complicated due to the risks associated with aerosolization.

d. Specialist Paramedics and Control Centre Officers have taken on additional and unique responsibilities and skills, including an entirely new, intensive 5 day training course to equip Intensive Care Paramedics with a new set of clinical skills to address COVID.

e. Paramedics have been very effective in adapting to new PPE protocols, despite many changes to protocol during the course of the pandemic, challenges in PPE supply, and the constant discomfort and difficulty of working with PPE donned.

f. PCCOs have been required to keep up with a constant stream of new highly important safety and clinical information in relation to every aspect of work including commencement of shift, completion of shift, cleaning of vehicles and equipment, decontamination practices, communication and logistical protocols with hospitals and other health agencies, monitoring of own symptoms, reporting of potential exposure incidents.

g. Frontline PCCOs have contributed innovative solutions to the challenges posed by the pandemic that have been adopted across the organisation.

h. Significant changes to practice, including the 'Four at the Door' questionnaire required for every triple-zero response the requirement to don PPE, and new transport protocols, have created difficulties in communicating with patients and building positive rapport, who are generally already more anxious than pre-pandemic.

i. In addition to the existing high risk of injury, PCCOs now carry the risk of possible infection to their home and their social lives, causing significant stress and changes in out-of-work behaviour.

j. There are new requirements to follow uniform and other personal item decontamination protocols, including showering at work.

k. There is a significant mental strain on Paramedics associated with the constant need to maintain a high level of suspicion in relation to every patient, maintain new and onerous standards and procedures, constantly expose oneself to risk, constantly worry about the risk of infecting colleagues, family and friends, and the increased level of anxiety amongst patients. Scientific research indicates that the mental health impact of the pandemic on health workers will be significant, with up to half likely to experience significant levels of psychological distress during the pandemic, with a substantial minority going on to develop chronic health problems as a result."

(Emphasis in original, footnotes omitted)

204 To place this summary of the evidence into some context, it is illustrative to reproduce some of the evidence of the PCCOs called to give evidence by the by the APA. Mr Allen deposed:

"16. Being the very first health care workers a patient encounters means that paramedics are walking into homes of potentially infected people with little to no reliable information on the risk of infection. For example, I was tasked to attend an elderly lady who had fallen over in her home. On its face, it is a routine, low risk, low stress and simple job that I have done many hundreds of times before. But when we started our clinical assessment of the patient, it became apparent that she fell because she had been feeling unwell, had a fever, cough and runny nose. Unfortunately, I had already had a significant exposure to her before this was realised. I was then able to 'gown up' (i.e. don the appropriate personal protective equipment or PPE) and pre-warm the hospital. Notification to the receiving hospital is necessary in order to allow hospital staff to implement their COVID protocol for handover of this patient. As a result the hospital staff had massively reduced risk. But for me, I had already potentially been exposed. While it turned out this patient did not have COVID, the risk was significant and the time waiting for test results was nerve-racking."

205 Mr Kastelan stated:

"15. The pandemic has had a very significant impact on the ability of Paramedics to socialise and debrief the working day with our loved ones at the end of your shift. Many have taken the decision to self-isolate out of duty and obligation to the community, solely because of the work we under take *[sic]* as paramedic professionals. This was a very draining time, and still is, to be a paramedic, and having to take additional social restrictions on top of what is imposed on the general community makes it that much more difficult.

16. Whilst we are aware that the community is supportive of the care we're providing, there is a new and common experience amongst Paramedics of a level of distaste and disdain for the presence of our uniform and us as individuals in the community, whether it was after our work and we were returning home to fill the car up with petrol, dropping by the shops to pick up our dinner, or even just grabbing a coffee during the course of the day. The looks of disgust that some people gave towards me personally (and other Paramedics I spoke to) that we were potentially carrying the virus straight into the small area that they were occupying will live with me for a long time."

206 Mr Jenison stated:

"13. Paramedics have given their all in fire emergency, flood emergency and now Covid 19. We are the people who walk through a patients *[sic]* front door, crawl into an upside down car or do CPR in the middle of Woolworths with no knowledge of what or who at the situation may infect them. We do not have the luxury of the [patients] being screened and triaged before we see them. We are the triage. ..."

207 The impacts of the pandemic are not confined to on-road paramedics. Mr O'Riordan referred to a heightened level of risk of COVID-19 infection for Aeromedical Control Centre Officers as a result of their "inevitable contact with the on-road Paramedic workforce".[71]

208 Assistant Commissioner Elliott appeared to downplay the significance of the pandemic on the work of PCCOs. He stated:

"23. While COVID-19 is an unprecedented public health crisis, meaning the volume of procedural and guideline updates has been significantly higher than usual, the nature of work performed by paramedics at NSW Ambulance means it is ordinarily subject to continual updates regarding work practices. That is, it is a normal function of their role as paramedics that work is undertaken within clinical guidelines, which can be subject to regular updates.

24. Paramedics are individually registered health professionals. It is an obligation of registration that paramedics stay up to date with clinical developments. They also have an obligation to their employer to stay abreast of changes and developments in the provision of health services. During

[71] Affidavit, Padraig Alan O'Riordan, 26 June 2020 at par 28

COVID-19, as at all times, clinicians in health professions across the board have been required to keep up to date with regular changes to practices and procedures."

The parties' submissions

209 Reflective of Assistant Commissioner Elliott's evidence, the Crown submitted:

"62. In light of the findings in the 2020 Salaries Case Decision under the Special Case principle, the APA's claim must necessarily be that circumstances for PCCOs are a different kind of special to other public sector workers whose work has been disrupted by COVID-19.

...

68. In reality the basis of the APA's claim for a 2.5% increase is indistinguishable from the cases advanced by the applicant unions in the 2020 Salaries Decision, particularly the cases advanced by the HSU [and] the Australian Salaried Medical Officers Federation ('**ASMOF**').

69. There is no dispute that COVID-19 and other emergencies have caused changes to how PCCOs perform their work, particularly concerning infection control measures. However, the fundamental work of PCCOs has not changed even though some protocols and procedures have been altered. PCCOs prior to COVID-19 approached patients on the basis that they may be infectious, and various policies and procedures existed which required infection controls and the use of PPE.

70. Particular risks have always arisen in attending uncontrolled premises, although it is acknowledged that during COVID-19 those risks are heightened. The evidence is that:

a. protocols for attending different premises have been revised in light of COVID, such as the 'four at the door' clinical questionnaire, PPE and the like; and

b. some paramedics are more anxious about COVID-related risks and the introduction of COVID-related protocols.

71. However, the fundamental work of attending 'uncontrolled' environments is not new, nor is not particularly unique to PCCOs compared to other emergency service workers.

72. The evidence itself is put in broad anecdote-like terms and when properly viewed is evidence of *'learning and applying new procedures, use of new technologies and implementation of additional infection control protocols'* (per the HSU's claim in the 2020 Salaries Decision Case summarised by the Full Bench at [56](y)]).

73. The APA's Closing Submissions list a range of procedures that have altered because of COVID-19. These procedures necessarily recognise the possibility that a patient, or deceased person, is infectious - the most obvious procedures being resuscitation, securing airways, verification of death and the like. The APA's evidence does not properly establish how these altered

procedures, with their altered infection controls, are so materially different to what they had to do before (noting that the need to deal with the risk that patients may be infectious is not new), nor so materially different to the circumstances of other health workers and other emergency services workers, that they constitute a special case.

74. Further, the APA case appears to rest in large part on an extraordinary year, namely work that, other than COVID-19, in the past to seek to justify an ongoing increase. There is nothing contradictory in submitting that the work done by PCCOs in respect of drought, bushfires and COVID-19 deserves to be publicly applauded, and the conclusion that it does not justify an *ongoing* increase in rates of pay which will continue well beyond the current year."

(Emphasis in original, footnote omitted)

210 In respect of the Crown's submissions as to the significance of the outcome in *Public Sector Salaries No 2*, we refer to [45]-[50] above.

211 On the question of whether PCCOs are a "different kind of special" – the phrase appearing in par 62 of the Crown's submissions – in its Written Outline of Closing Submissions the APA contended:

"43. ...The special challenges posed by COVID to PCCOs, both in terms of personal risk and the fundamental changes required to work practices, is incomparable to workers not delivering frontline health services. Even with respect to other health workers, Paramedics are in the uniquely challenging position of being required to treat and transport patients who invariably have not already been reviewed by another health worker. Paramedics treat and transport patients in an uncontrolled environment, rather than within a hospital or medical facility, with minimal information or protection, often in emergency situations. The systems of control, quarantine and seclusion, division of labour, and segmentation of the workforce that have been applied in hospitals are not available to Paramedics."

212 In its Written Outline of Closing Submissions the APA submitted:

"22. The fact that PCCOs are directed to respond to triple-zero calls gives rise to particular risks and challenges with respect to the pandemic, even when compared to other health workers. The closest comparable group would be health workers who work entirely in emergency departments – however even these workers have the benefit of being able to control the environment e.g. to exclude family, friends and bystanders, to have adequate equipment and ventilation, to have access to higher-level clinical specialist, etc."

213 Paragraphs 69-74 of the Crown's submissions as reproduced above suggest that the 2019-20 bushfires and COVID-19 are not to be regarded as so out of

the ordinary for PCCOs as to entitle them to an increase to their salaries or salary-related allowances having regard to the special case sub-principle. Responding to this contention, in its Outline of Closing Submissions in Reply the APA contended:

> "18. That submission [in par 69 of the Crown's submissions] does not rise above assertion. It is contrary to the evidence. It is presumably hyperbole. ...
>
> 19. Several veteran Paramedics deposed that the scale of the changes to work associated with the pandemic represented the most significant change to work in such a short period in their entire career. The Crown did not lead any evidence to dispute this nor were the witnesses cross-examined. ...
>
> ...
>
> 21. COVID has transformed PCCO work for even the simplest type of triple-zero response. This is because Paramedics are generally the first point of contact between the public and the health system. Further, their work environment is uncontrolled. This is because every single patient is a new patient, in an emergency situation, generally surrounded by other people who are not subject to infection control measures. While these features are not new, they are crucial to understanding why the pandemic has impacted the entire PCCO workforce in a particularly challenging way."
>
> (Footnote omitted)

214 The HSU's submissions did not traverse to any significant degree the application of the special case sub-principle in the context of the APA Application. The only submission of the HSU that we wish to address in relation to the special case sub-principle is one which flows from the evidence Mr Grayson who, in his statement, made reference to the contribution made by paramedics during the bushfires in NSW in 2019 and 2020 and the COVID-19 pandemic. He deposed:

> "3. The current proceedings to justify freezing the historical public sector annual 2.5% pay rise are a disgrace.
>
> ...
>
> 12. In response to this unprecedented year where Paramedics faced not one, but two life changing catastrophes, the Government stands and claims that we do not deserve 2.5% and that they should keep it to better spend it elsewhere.
>
> 13. As Paramedics we feel abandoned by this Wage Case and the wage fixing principals *[sic]* that have been used to stifle wage growth in an industry that continually undergoes significant change and saves the government

> millions. When the State was in an economic boom the Government hides *[sic]* behind a restrictive wage regulation that limits Paramedics to 2.5% each year all the while they give themselves increases far above that, year after year.
>
> 14. So, this year the Government after again paying well above 2.5% to senior public servants, turns to the actual workforce and says it has nothing for the hard-working front-line workers.
>
> 15. It is unfair, grossly unfair. ..."

215 In its Submissions the HSU contended:

> "17. Contained within Mr Grayson's statement is his feelings *[sic]* of frustration and anger at the offensive proposition that his and his colleague's *[sic]* wages should be frozen to assist in economically recovering from the crises of 2020.
>
> 18. The ADHSU believes the Commission must turn its mind to this anger and these frustrations when setting what it determines to be fair and reasonable working conditions when making awards."

216 There are several points to make about these submissions. Firstly, to the extent that any alleged "anger and frustration" stems from employees having had a legitimate expectation of a wage increase on 1 July 2020, it is addressed in our findings in relation to the application of the special case sub-principle.

217 Secondly, the submissions convey a sense of entitlement to a 2.5% increase, which is inconsistent with the determinations of the Full Bench in *Public Sector Salaries No 1* and *Public Sector Salaries No 2* referred to at [58]-[62] above.

218 Thirdly, and flowing from this apparent sense of entitlement, the submissions are tone-deaf. The HSU premises its submissions on anger and frustration felt by PCCOs that their efforts during the bushfires and the pandemic have not properly been recognised (in the form of a 2.5% salary increase). We emphasise that the Full Bench does not in any way seek to diminish the contribution and sacrifices made by PCCOs and others during those crises. However, it is impossible to have regard to the efforts of PCCOs without recognising that the events to which they were responding cost lives and

livelihoods, and caused unprecedented damage to the economy. The failure of the HSU to have such regard demonstrates something of a "tin ear".

219 In this regard we note again the observations of the Full Bench in *Public Sector Salaries No 2* reproduced at [196] above.

Conclusions regarding special case sub-principle – APA Application

220 We do not accept the Crown's submissions to the effect that COVID-19 did not result in, or has not resulted in, a material change to the work practices and risks – both physical and psychological – for PCCOs. These submissions are inconsistent with the largely uncontroverted evidence of the PCCOs from whom the APA led evidence.

221 We are satisfied that the evidence supports the submissions of the APA reproduced at [211]-[212] above, having regard in particular to the extracts from the evidence reproduced at [204] and [206] above. We are persuaded that the APA has made out a case attracting the special case sub-principle. Moreover, the evidence discloses considerations beyond those which were found to exist in *Public Sector Salaries No 2*.

Economic considerations

222 As noted above, s 146(2)(b) of the Act requires that when exercising its functions the Commission must have regard to "the state of the economy of New South Wales and the likely effect of its decisions on that economy". A significant proportion of the evidence adduced by the parties, and the greater part of the hearing, was directed towards the economic implications of the Commission awarding, or not awarding, the increases sought in the Applications.

223 At [32] above we set out the principles distilled from previous decisions of the Commission which will guide the exercise of our discretion in these proceedings. These include the approach to be taken to economic considerations as required by s 146(2)(b).

Preliminary observations

224 Before turning to address the economic evidence led by the parties and the submissions derived from it, we make the following preliminary observations.

225 First, the evidence and submissions reflected the largely binary options that the Commission was invited to consider. That is, on the part of the PANSW and the APA, the benefits of awarding a 2.5% increase to the relevant employees which was said to outweigh the costs of doing so, and on the part of the Crown, the benefits to be gained from awarding no increase at all, with the funds "saved" being otherwise applied in measures that would have a greater benefit in repairing the damage to the State's economy caused by the COVID-19 pandemic.

226 We will turn to consider the detail of the parties' cases below. In the meantime, we observe that the result of any cost/benefit analysis (using that term in its broadest sense) that is required will depend upon the nature and quantum of any award that the Commission considers is necessary to set fair and reasonable conditions of employment, that will remain so for the term of the award. This in turn will depend on the evidence that has been provided for the Commission's consideration.

227 Second, the requirement in s 146(2)(b) has generally been regarded by the Commission as a curb on its award-making powers. In *Police No 2* the Full Bench observed:

> "70. When taking into account the public interest, the Commission must also, for that purpose, have regard to 'the state of the economy of New South Wales and the likely effect of its decisions on that economy'. Whilst that requirement (which is found under s 146(2)(b) of the Act) might not always operate in favour of restraint, the long history of jurisprudence in this Commission and its predecessors would indicate that the provision more often operates as the limitation or restraint in the award making function (particularly in relation to wage fixing) and, in that respect, may, to some extent, be seen as a juxtaposition of the provisions of s 10 of the Act.
>
> 71. There is a long line of cases in this Commission considering the reconciliation of those provisions. We consider that the observations of the Full Bench in *Re Public Hospital Nurses (State) Award (No 4)* [2003]

NSWIRComm 442; (2003) 131 IR 17 at [233] ('*Public Hospital Nurses (No 4*') amply set out the relevant principles:

> As the HAC contended, the Commission is required, pursuant to s 146(2) of the Act, to take into account the public interest in the exercise of its functions and, for that purpose, must have regard, inter alia, to the state of the economy of New South Wales and the likely effects of its decisions on that economy. Hence, even though wage increases may be justifiable under the work value principle, if to grant them were to have an adverse impact on the economy, a case may exist for restraint. The onus of demonstrating the need for restraint would fall on those opposing the increase because unless it can be convincingly demonstrated that real harm will be done to the economy by the granting of any increase, the employees concerned are entitled to receive remuneration commensurate with the value of their work.
>
> 72. It follows from this authority that the submission of the Commissioner to the effect that the Commission should have regard to all factors relevant to the determination of the general claim including economic and, more specifically, fiscal considerations and then make a global assessment of what is a fair and reasonable wage to be determined in the circumstances, should be accepted. In this context, the state of the economy, including fiscal considerations (see *Crown Employees* (2004) at [471]) will be taken into account in the overall assessment but will not be determinative of the Commission's decision: *Crown Employees* (2004) at [432].
>
> 73. The quantification of any salary or wage adjustment warranted, in accordance with the aforementioned statutory requirements and applicable principle, should not be undertaken by means of a 'mathematical exercise' and will include a 'value judgment' in order to determine appropriate increases in all the circumstances: *Crown Employees* (1993) at 340 and *Crown Employees (Teachers & Ors)* [1991] NSWIRComm 14 at 69. The assessment of an appropriate wage adjustment involves, in those circumstances, a matter of 'broad judgment based on a range of relevant circumstances': *Transport Workers' Union of Australia v Qantas Airways Limited* [2012] FWAFB6612 at [94]."

228 Third, the PANSW relied on the passage from *Re Public Hospital Nurses (State) Award (No 4)* reproduced at [71] of *Police No 2* to submit:[72]

> "To the extent that a party suggest that the Commission should exercise restraint based on economic consideration *[sic]*, the party is required to demonstrate that real harm will be done to the economy by granting an increase to employers."

229 The same submission was considered by the Full Bench in *Public Sector Salaries No 2* (at [40]). The Full Bench observed:

[72] PANSW Final Submissions at par 62

"42. With respect, the reliance by the Applicants on *Re Public Hospital Nurses (State) Award* is not entirely sound. The passage reproduced above makes it clear that the Full Bench in that case was dealing with an application under the work value principle. There is nothing remarkable in the proposition that the Commission would be loath to permit employees to be paid at a rate less than the value of their work, and that cogent reasons would be needed to justify why it was in the public interest that such an outcome should result.

43. However, the effect of the submissions made by the Applicants is that it is possible to extrapolate from the passage in *Re Public Hospital Nurses (State) Award* a two-stage approach. The first is that the applicant must establish that it is fair and reasonable that there be a particular wage increase. The second, which appears to require a reversal of the onus, involves those opposing the increase having to make out the case for restraint, in the sense that the increase would cause 'real harm' to the economy.

43. We have difficulty reconciling such an approach with the authorities referred to at [31(4)], [31(5)] and [31(8)] above. The onus to make out the case in respect of each of the Joined Applications rests with the Applicants.

44. The question of what is fair and reasonable cannot be determined in a vacuum. The making of awards under s 10 of the Act is one of the functions to which s 146 refers. Section 146(2) makes it clear that it is when exercising the relevant function that the Commission must take into account the public interest, which will include (but, we emphasise, not be limited to) having regard to the objects of the Act, and the state of the economy of New South Wales and the likely effect of the Commission's decisions on that economy. It is inconsistent with these provisions to require, in effect, that a finding first be made under s 10 which would then be subject to 'calls for restraint' under s 146. But this is the effect of the position advanced by the Applicants."

230 We adopt the same view in respect of the PANSW's submissions reproduced at [228] above.

231 Fourth, in its Final Submissions the PANSW made the following contentions:

"45. The Commission will have regard to the need to maintain the purchasing power of wages for police officers in assessing the appropriate quantum of an increase which would provide for fair and reasonable conditions of employment. As was observed in *Re Crown Employees (Administrative and Clerical Officers) (State) Award (No 2)* (1993) 52 IR 243 at 377, it is entirely appropriate that the Commission have regard to economic considerations, including the changing value of money over time, when deciding the amount of increase which should be awarded.

46. However, the Commission would be in error to mechanically apply any particular CPI forecasts or measures to determine the quantum of the increase. Rather, the Commission ought have regard to cost of living considerations as part of the overall assessment of all of the circumstances of the case. The reasons this is the appropriate approach include the following:

(a) ***Firstly***, to mechanically apply a particular forecast or measure of inflation is inconsistent with the approach historically adopted by the Commission of having regard to all factors relevant to the determination and making a 'global assessment of what is a fair and reasonable wage to be determined in the circumstances.' In *Re Crown Employees (Police Officers - 2009) Award (No 2)* (2012) 220 IR 192, the Full Bench accepted (at [76]) the submissions then advanced by the Commissioner of Police that to isolate cost of living considerations and apply that consideration as a 'mathematical exercise' would be inconsistent with the broad approach contemplated by the combinations of ss 10 and 146(2) of the Act.

(b) ***Secondly***, to simply apply particular forecasts of CPI change over the period to be covered by the wage increase, or some other period, would fail to give any weight or consideration to the legitimate expectation that police officers had to receive an increase of 2.5% in salaries and related allowances from 1 July 2020. If, as the Commission accepted in *Application for Crown Employees (Public Sector - Salaries 2020) Award and Other Matters (No 2)* [2020] NSWIRComm 1066, employees are likely to have adjusted their spending habits and financial commitments in expectation of receiving a 2.5% increase, the effect of that expectation being defeated should itself be given some weight in assessing the quantum of the appropriate increase.

(c) ***Thirdly***, the task of the Commission is to set rates of pay that are fair and reasonable at the time when the relevant award commences to operate and which will continue to be fair and reasonable during the term of its operation to the extent possible. That task ordinarily takes account of the general community expectation of not merely maintenance of the value of wages, but of rising living standards which is appropriate to be considered in setting wages. In *Re Crown Employees (Teachers) Award* [1964] AR (NSW) 463, for example, the Full Bench noted that awards are to apply for a period of time and continued (at 482-483):

> *This means that the award-making tribunal must attempt to fix rates which will be just and reasonable rates at the time when the award commences to operate and which, unless unforeseeable happenings occur, will continue to be just and reasonable during the set term of operation. The Australian economy is a growing one and year by year for many years the standard of living has been rising. Wage levels have constantly risen and there is no reason to believe that they will cease to do so. If the Commission is making an award for a term of three years is it not right for it to bear in mind that the employees whose wages or salaries are being fixed are members of a community in which, according to the evidence of history, living standards are rising? It is our view that, unless there is some material before it to show that the course of history is likely to be changed during the succeeding three years, it should bear that fact in mind. The influence which consideration of such a factor would have on the level of rates to be awarded is quite imponderable. Every fixation involves the exercise of judgment in the light of all relevant factors. All*

that can be said is that it would have some influence. It has in fact had some influence in our thinking in the present case.

(d) ***Fourthly,*** inflation forecasts both vary between different forecasting agencies and Government bodies and are inherently uncertain. Insofar as the Reserve Bank, NSW Treasury, Commonwealth Treasury or other bodies produce forecasts of various economic measures periodically and will, understandably, alter the forecasts as circumstances change. The Commission should have regard to appropriate inflation measures and forecasts as part of an overall assessment rather than mechanically applying particular inflation measures to determine wage outcomes. Caution is particularly appropriate when adopting particular inflation measures in the current circumstances given the atypical and dramatic movements in some cost items in recent times.

47. The Commission should have regard to changes in projected changes in the cost of living over the period to be covered by the wage increase but, with respect, should not link the outcome directly with one or other forecast of inflation. Consideration should be given to what is fair and reasonable including the effect of the Respondent defeating the legitimate expectations of police officers of receiving a wage increase on 1 July 2020 and to community expectations of rising living standards."

(Emphasis in original, footnotes omitted)

232 The contentions in pars 45 and 46 of the PANSW's submissions are largely unexceptional. They are in broad terms consistent with the authorities referred to at [32(8)] above. We note also the following observations of the Full Bench in *Police No 1*:

"543. Before turning to the issue at hand, it is necessary to introduce a note of caution. Economic factors of this kind are merely one element in the determination of appropriate remedies, that is, if the Association satisfies the requisite Wage Fixing Principles. The resolution of the appropriate method of determining how real wages might be maintained cannot be determinative of any wage outcomes if the applicant has otherwise made out a case under the requisite principles."

233 We suggest, however, that a caveat ought to be added to the PANSW's reliance on *Re Crown Employees (Teachers) Award* [1964] AR (NSW) 463. The PANSW submitted that in determining the quantum of the increase to be granted in respect of the PANSW Application, the Commission would have regard to all of the circumstances including "Community expectations of generally rising living standards".[73] However, while the Full Bench in *Crown*

[73] ibid. at par 318(d)

Employees (Teachers) Award recognised (in 1964) that living standards were generally rising, in the passage reproduced in the PANSW's submissions it allowed for the possibility of evidence being led to "to show that the course of history is likely to be changed" over the life of the award. The evidence as to the impact of the COVID-19 pandemic, to which we will return, has resonance in this regard.

234 As to par 47 of the PANSW's submissions, it is wrong to suggest that inflation ought never be the determinant of a particular wage outcome. Whether or not it is appropriate in setting fair and reasonable conditions to "link the outcome directly with one or other forecast of inflation" will be determined by the circumstances, including the case which is brought before the Commission. For example, if the Commission determines that a party has failed to make out its case for a particular increase, it might still have regard to inflation in determining that an increase ought to be awarded to maintain the real value of wages.

235 Fifth, the PANSW submitted that economic or fiscal considerations are not the only matters relevant to the public interest and that "there is an undoubted public interest in public sector employees who are performing work providing important government functions and services receiving fair and reasonable salaries".[74] Again, these submissions are unexceptional and seem to us to arise necessarily from the language of ss 10 and 146 of the Act. The touchstone remains, however, what is "fair and reasonable" having regard to all of the circumstances of the case.

236 Finally, and significantly, the PANSW submitted that s 146(2)(b) does not put the Commission "in the position of being the general economic manager of the State".[75] We agree with these submissions.

237 In *Public Sector Salaries No 2* the Full Bench observed:

---

[74] ibid. at par 67
[75] ibid. at par 66

> "120. Before addressing the positions of the parties in this regard, we observe that we accept the submissions made by the PSA, the NMA and the HSU that it is not for the Commission to determine Government policy. The Commission can make awards requiring the Employers to provide fair and reasonable terms and conditions to their employees. The requirement under s 146 of the Act that the Commission have regard to the state of the economy of New South Wales and the likely effect of its decisions on that economy in making such awards does not confer on the Commission the discretion, much less authority, to dictate to the Government how it *manages* the State's economy."
>
> (Emphasis in original)

238 In *Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* the Full Bench observed:

> "432. ...The economic and financial position of the State and the effects of our decision on the New South Wales economy have played a significant role in our decision, but not a determinative one. It is our statutory duty to fix fair and reasonable rates of pay and conditions. In a matter, such as this one, where a compelling basis for increases in rates of pay has been demonstrated, then the Commission must give recognition to that conclusion even though it may temper the final result in recognition of economic considerations. The terms of s 146 of the Act require no more than this, particularly in the light of the paramount requirements of s 10 of the Act. It is those duties that we will discharge in this matter. We shall exercise those duties without fear or favour and in order to do justice between the parties in the light of the evidence and submissions in the proceedings."

239 The purpose and effect of s 146(2) is made clear in this passage and in the other authorities to which we have referred. In having regard to the state of the economy of New South Wales and the impact of its decisions on that economy, the Commission is not necessarily constrained by the budgetary preferences of the government of the day. Other than to the extent set out in the Act and Regulation it is not bound by any policy preference of the government, whether directed at the management of the economy broadly or aimed specifically at curbing increases in public sector salaries. Equally, however, it is not for the Commission under the guise of setting fair and reasonable conditions of employment to purport to dictate to the Government how it should go about managing the State's economy.

Overview of the economic evidence

240 There was a large volume of economic evidence led by the parties. We have already itemised the statements and affidavits that were read by the parties, but for ease of reference we observe:

(1) the PANSW read two statements of Dr Andrew Charlton, a director of AlphaBeta Advisors Pty Ltd, dated 1 July 2020 and 3 September 2020. These statements attached, respectively, two reports prepared by Dr Charlton and Angela Jackson of Equity Economics dated June 2020 and September 2020;

(2) the APA read four affidavits of Dr Richard Denniss, the Chief Economist for The Australia Institute, affirmed on 3 July 2020, 12 August 2020, 4 September 2020 and 24 September 2020. These affidavits attached, respectively, reports prepared by Dr Denniss and David Richardson of The Australia Institute dated July 2020, August 2020, and two dated September 2020;

(3) the Crown read:

(a) two affidavits by San Midha, Deputy Secretary for the Policy & Budget Group of New South Wales Treasury, affirmed 26 August 2020 and 17 September 2020. Annexed to Mr Midha's first affidavit was a report he had prepared for the proceedings;

(b) three affidavits by Stephen Walters, Chief Economist for the New South Wales Treasury, affirmed 29 July 2020, 30 July 2020 and 17 September 2020. Annexed to Mr Walters' first affidavit was a report he had prepared for the proceedings; and

(c) three affidavits by Greg Houston, a founding partner at HoustonKemp. Two affidavits were affirmed on 29 July 2020. They were prepared in connection with, respectively, the PANSW Application and APA Application. They each attached a

report that had been prepared by Mr Houston in respect of, separately, the PANSW Application and the APA Application. The third affidavit was affirmed on 17 September 2020.

241 The statements and affidavits to which we have referred annexed a large volume of documents in addition to the reports that we have identified. These documents included, but were not limited to, reference material used in the preparation of the reports. Separate to the statements and affidavits, each party also tendered a significant number of documents containing additional information regarding the state of the economy (both national and NSW) and the potential impact on that economy of a determination by the Commission to award either no increase or a 2.5% increase. We do not propose to itemise all of this evidence.

242 The oral evidence of Dr Charlton, Dr Dennis, Mr Walters and Mr Houston was heard concurrently. Mr Midha gave oral evidence in the same "conclave", although he had also previously been cross-examined in the more conventional sense.

243 The PANSW submitted that as each of Mr Walters and Mr Midha hold senior positions in the NSW Treasury, the Commission could not regard the reports they prepared as independent nor could the witnesses themselves be regarded as impartial. Rather, "their evidence must be regarded as partisan".[76]

244 On our observation, each of Mr Walters and Mr Midha seemed genuinely to be attempting to assist the Commission to understand the economic considerations to which these proceedings gave rise. Mr Walters in particular readily made concessions during the course of his oral evidence that might be regarded as adverse to the Crown's case. Indeed, in some ways he appeared more willing to do this than the independent expert witnesses who had been called to give evidence.

[76] PANSW Final Reply Submissions at par 28

245 We accept that as senior officers in the NSW Treasury, Mr Walters and Mr Midha are not properly to be regarded as "independent". But that is not to say that their evidence is devoid of any persuasive force. We have taken into account their positions with the NSW Treasury in considering the weight to be attached to their evidence.

The state of the economy

246 There was little controversy between the parties that COVID-19 has caused significant harm to the NSW and national economies, although there may have been room to debate the precise economic consequences of the pandemic. It is not necessary to traverse those nuances.

247 The Crown tendered into evidence a document which was said to have been created in the process of preparing the Federal Budget for 2020-21. The document is titled "Statement 2: Economic Outlook" ("Economic Outlook"),[77] and is stated on its first page to "present the economic forecasts that underlie the Budget estimates". Under the heading "Overview", in passages with which Dr Charlton largely agreed, the Economic Outlook states:[78]

> "The COVID-19 pandemic represents the greatest challenge for the global economy since the Great Depression. …
>
> The economic effects of the COVID-19 pandemic have already been severe. The spread of the virus and the restrictions implemented to contain it led to historic falls in economic activity and employment globally over the first half of 2020. Economic activity has contracted in almost every economy around the world. …
>
> …
>
> In line with international experience, the Australian economy is currently in recession as a result of the COVID-19 pandemic; its first in almost 30 years. Real GDP contracted by 7.0 per cent in the June quarter 2020, the largest quarterly fall on record, after a modest fall of 0.3 per cent in the March quarter 2020. There were sharp falls in most components of economic activity over the first half of 2020, as uncertainty about the health and economic outlook increased precautionary behaviour, and travel restrictions and other containment measures affected the ability of consumers and businesses to undertake their usual activities. The effects on the labour market were severe, with around 10 per cent of the labour force losing their job or being stood

[77] Exhibit Crown 14
[78] ibid. at pp 2-3 – 2-6

down on zero hours during the peak of the restrictions in April. As a result, the effective unemployment rate peaked at around 15 per cent in that initial phase of the crisis...

...

The first tranches of the Government's economic support were effective in mitigating the most severe economic effects of the COVID-19 pandemic. The JobKeeper Payment kept a large share of those workers stood down connected to their employer, while the significant support to incomes continues to support household and business balance sheets.

Australia's economic and health outcomes compare favourably with those of most other countries. ...

There were positive signs in the second half of the June quarter 2020 that a rebound in activity was underway, consistent with the staged easing of containment measures in most parts of the country. Measures of business and consumer confidence had picked up from record lows and measures of consumer spending were recovering. There had also been a noticeable improvement in the labour market, with the effective unemployment rate in July around 5 percentage points lower than its peak in April, accompanied by a significant recovery in average hours worked.

...

The challenges for the Australian economy from the virus remain significant. Further outbreaks of the virus are likely until a vaccine is developed and widely available. There is also substantial uncertainty surrounding the global and domestic outlook. This stems largely from uncertainty around the spread of the virus and the success of health interventions. Any substantial outbreaks that affect the confidence of households to spend and businesses to invest and employ people remain a key risk to the recovery. There is also significant uncertainty around the timing and efficacy of vaccines and other medical treatments. An earlier-than-expected vaccine poses the most significant upside risk to the outlook.

Further, the extent of any longer-lasting economic effects from the COVID-19 pandemic, both domestically and globally, are difficult to predict. There is a risk that the substantial dislocation that has occurred in the labour market could result in persistently higher unemployment than forecast. ..."

248 The Economic Outlook also noted that the "challenges facing the Australian economy remain significant and there is substantial uncertainty around the domestic outlook".[79] In the Economic Outlook the Commonwealth Government predicted that:

(1) real Gross Domestic Product ("GDP") will fall by 1.5% by the end of the 2020-21 financial year;

[79] ibid. at p 2-13

(2) the consumer price index ("CPI") for that year will be 1.75%; and

(3) unemployment will be 7.5% by the end of that year.

249 In its Statement of Monetary Policy ("SOMP") issued in November 2020 the Reserve Bank of Australia ("RBA") stated:[80]

> "Economic developments continue to be driven by the COVID-19 pandemic and the responses to it. The initial outbreaks prompted significant restrictions on activity and resulted in very large contractions in output. Most economies have been recovering from these initial contractions. But in most cases, economies still remain well below pre-pandemic levels, and in Europe fresh outbreaks are threatening even this progress.
>
> In Australia, economic activity contracted substantially in the early months of the pandemic and has since recovered some of that decline. The 7 per cent contraction in GDP in the June quarter was the largest peacetime contraction since at least the 1930s, and certainly one of the most sudden. It was nonetheless not as big a fall as had been feared, and was less than that experienced in many other countries. The less negative outcome stemmed largely from Australia's early success in bringing new infection rates down, which allowed restrictions on activity to be eased sooner than earlier thought.
>
> The deterioration in labour market conditions has also been significant. After contracting by 7 per cent between February and May, employment has recovered about half of this decline. The number of people working reduced or zero hours for economic reasons has also reversed about half of the initial increase. Even so, the unemployment rate remains well above where it had been prior to the outbreak of the pandemic, at 6.9 per cent in September.
>
> The unemployment rate is likely to increase in the near term, partly because some workers who withdrew from the labour force in the early months of the pandemic are expected to return, in response to improving job prospects in some areas and tightening eligibility requirements for JobSeeker. The unemployment rate is expected to peak a little below 8 per cent around the end of the year. This peak represents a very high level of spare capacity in the labour market. The unemployment rate is expected to decline only gradually, to just above 6 per cent by the end of 2022. With significant spare capacity remaining in the labour market over this period, wages growth and inflation are both likely to remain low. Both headline and trimmed mean inflation are forecast to bottom out below 1 per cent in 2021, and reach 1½ per cent by end 2022.
>
> ...
>
> As in the previous couple of *Statements*, the significant uncertainty around the outlook has been represented using downside and upside scenarios around the baseline scenario. The main driver of the different scenarios is again the course of the pandemic. In the baseline scenario, it is assumed that

[80] Exhibit Crown 17, Tab 3 at p 1-4

no further large outbreaks occur in Australia, and that restrictions on activity do not need to be tightened materially at any point. However, international borders are assumed to remain largely closed until the end of next year, reducing services exports and imports.

In the downside scenario, Australia does see some major outbreaks and tighter activity restrictions. International borders are also assumed to remain closed for longer. Unemployment would increase more and stay high under this scenario. After peaking at around 9 per cent, the unemployment rate would still be around 8½ percent by the end of 2022.

An upside scenario can also be envisaged, especially if there is additional progress in the control and treatment of the virus in the near term. Better health outcomes and ongoing control over the virus would boost confidence and help sustain a swifter recovery in household consumption and business investment. This would see the unemployment rate decline faster, reaching around 5½ per cent by the end of next year.

Both in Australia and overseas, the outlook for growth involves considerable uncertainty related to the course of the pandemic. Fresh outbreaks are prompting new lockdown measures and could therefore slow the recovery in many advanced economies. Trade and geopolitical tensions also pose downside risks to the recovery. Spare capacity is likely to persist for some time and global inflation is accordingly likely to remain subdued.

...

At its November meeting, the Board discussed the updated forecasts. It concluded that, despite the somewhat better recent outcomes in Australia, the recovery was expected to be extended and bumpy. ..."

250 The RBA predicted that:

(1) for the year ended June 2021:

(a) GDP would grow by 6%;

(b) CPI would be 2.25%; and

(c) the trimmed mean inflation would be 1.25%; and

(2) unemployment by the year ended June 2021 would be 7.5%.

251 We digress to observe that the significance of trimmed mean inflation was explored in *Public Sector Salaries No 2* as follows:

"*Reference rate for inflation*

92. A distinction must be drawn between 'headline' and 'underlying' inflation. Headline inflation is derived from movements in the value of all of the goods and services included in the calculation of the Consumer Price Index ('CPI'). Underlying inflation is calculated after removing the more volatile items in that parcel of good and services.

93. The RBA uses a measure of underlying inflation referred to as the 'trimmed mean'. Dr Charlton described it in these terms:

> "The one that the RBA uses is called the trimmed mean inflation. It's a measure of underlying – underlying inflation, which is – which is – all they do is they take the total inflation basket and they take off the most volatile 15% at each end of the spectrum, and that gives what they call the trimmed mean. And the value in doing that is that it takes out some of the things that you were referring to earlier, like things that are very volatile – like fuel, for example, is often excluded from the trimmed mean."

94. It was common ground that COVID-related developments had distorted inflation. For instance, the June 2020 CPI issued by the Australian Bureau of Statistics noted significant price falls in the June quarter for childcare (-95%), automotive fuel (-19.3%), preschool and primary education (-16.2%) and rents (-1.3%). These were attributable to government subsidies on childcare and preschool costs, international oil pricing, and low demand on the relevant goods and services brought about by COVID-19 restrictions.

95. In the Treasury Report Mr Walters expressed the opinion that due to this volatility the underlying measure of inflation would be a better indicator of the general increase in prices. …

96. Dr Charlton agreed with Mr Walters that 'the underlying measure is a better measure'. He explained that the underlying measure of inflation takes out some of the volatility in inflation figures and would give a better measure of 'what will trend over time'.

…

98. Consistent with the evidence of both Mr Walters and Dr Charlton, we accept that in the present circumstances underlying inflation, and in particular, trimmed mean inflation is the better measure by which to assess any movements in the value of employees' salaries."

(Footnotes omitted)

252 As set out at [231] above, the PANSW argued against the Commission "mechanically apply[ing] any particular CPI forecasts or measures" to determine the quantum of any increases to be awarded to employees. As already stated, we have no intention of doing so. At the same time, we have not been provided with any basis on which we would depart from the

approach taken in *Public Sector Salaries No 2*, namely that trimmed mean inflation is the better measure by which to assess any movements in the value of employees' salaries. Indeed, the APA submitted that "the trimmed mean is an appropriate measure of inflation".[81]

Matters agreed

253 In addition to a broad consensus on the impact which the COVID-19 pandemic has had on the NSW economy, there was no significant controversy about the following matters:

(1) the salaries and salary-related allowances in both the Police Award and the Paramedics Award were increased by 2.5% with effect from 1 July 2019. If regard is had to that increase, and assuming that there is no further increase from 1 July 2020, there will be no reduction in the real wages of the employees over the period 1 July 2019 to 30 June 2021;

(2) an increase in public sector wages would have a stimulatory effect on the economy, as would spending money on infrastructure;

(3) interest rates are low and are likely to remain so for an extended period; and

(4) it would be possible for the NSW Government to fund both its planned infrastructure spending and the increases to salaries and salary-related allowances sought in the Applications by taking on higher debt.

Stimulating the economy

254 As we observed in the summary of the factual context to these proceedings, the Government proposed a one year "pause" in increases to the salaries of public sector employees. This pause was expected to provide estimated net savings in the General Government sector of $3 billion across the four year

[81] APA Outline of Closing Submissions in Reply at par 1(ii)

period starting from 2020-21. Those funds would be applied towards the Infrastructure and Job Acceleration Fund, which would provide stimulus spending in the form of investment in "smaller, shovel-ready projects touching every corner of the state".

255 The Crown submitted:[82]

> "151. The Respondents in the 2020 Salaries Case submitted and the Respondents in these proceedings submit, that through pausing wage increases across the whole of public sector (for the 2020-21 financial year, or for those who are entitled under a current instrument to a wage increase in that year and possibly later years, in the 12 months following the last increase,) savings of approximately $3 billion will be realised over the next four years; these savings will offset expenditure from a new Infrastructure and Job Acceleration Fund which will provide a greater stimulatory effect on the New South Wales economy than a pay increase to public sector employees and critically, will ensure that the Government's ongoing cost-base is not increased at time when Government revenue has been slashed due to the impact of the pandemic.
>
> ...
>
> 156. The NSW Government's focus for stimulus includes direct job creation through labour-intensive construction projects, leveraging the private sector and non-government sectors to create jobs, and other programs which seek to directly support employment across all sectors.
>
> 157. The Government's decision, as announced on 31 May 2020, is to fund *shovel-ready capital initiatives with high economic stimulus potential.* The aim is to reduce the extent of job losses commencing late 2020, minimise the structural impact of the COVID-19 on the state's economy and support a return to a sustainable growth trajectory."
>
> (Emphasis in original, footnotes omitted)

256 As the PANSW submitted:[83]

> "71. ...The gist of the criticism [of Dr Charlton's reports] was that the Government's proposed infrastructure spending represents a better way to stimulate an economy weakened by the pandemic than allocating funds to annual wage increases..."

257 There was significant debate in the proceedings as to the relative stimulatory benefits of a wage increase as opposed to an investment in infrastructure. The question as to which measure would provide the greater stimulus to the

[82] Crown's Closing Submissions
[83] PANSW Final Submissions

economy in the current climate, and indeed, whether a choice between the two options needed to be made, occupied a large part of the economic evidence.

258 In this regard, the evidence and submissions explored the following issues:

(1) the steps the NSW Government should take to address the impact of the COVID-19 pandemic on the economy of NSW, including the measures that ought to be taken to stimulate the economy;

(2) the need for certainty when assessing infrastructure projects and their stimulatory impact, including the period over which the infrastructure spending may occur;

(3) the ability to properly assess the economic stimulus impact of a set of infrastructure projects in the absence of information about those projects, and the attendant risk of substantial error in attempting to do so;

(4) the relative stimulus benefits of investment in infrastructure projects as opposed to funding wage increases. That is, whether infrastructure spending should be preferred to a wage increase, or, indeed, whether this "represents a false dichotomy",[84] in the sense of whether the funding of infrastructure projects is properly to be regarded as an alternative to the funding of wage increases;

(5) the reliability and utility of applying fiscal multipliers to inform that debate; and

(6) whether a wage "freeze" makes more political sense than economic sense.

[84] ibid. at par 76

259 In *Public Sector Salaries No 2* the Full Bench accepted (at [124]-[128]) the employers' submissions in those proceedings that an investment in infrastructure would have a greater stimulatory effect on the New South Wales economy than the same sum spent on increasing public sector wages. However, that determination was made on the evidence adduced in those proceedings. Despite the submissions by the Crown to the contrary, the evidence led and submissions made in these proceedings allow for the possibility of a different determination.

260 The Commission had the benefit of evidence from witnesses whose knowledge of economics and economic theory was apparent and impressive. Their qualifications and experience enabled them to assist the Commission in not only understanding the theoretical underpinnings of their respective opinions, but also the practical implications of the issues in dispute drawn from their past experiences. Even so, there remained an intractable difference of opinion between Dr Charlton and Dr Dennis on the one hand and Mr Houston and Mr Walters on the other as to the approach that the NSW Government should take to stimulate the economy in the current crisis.

261 We have considered this evidence in light of the cases presented by each of the parties. We do not consider that it is necessary for the Commission to determine at an abstract or theoretical level whether one stimulus measure is to be preferred over the other. Section 146(2)(b) does not require such a determination. The relative benefits of alternative stimulus measures (to the extent that they are truly to be considered as alternatives) need only be considered in the context of the impact that the decision we make in these proceedings will have on the economy of New South Wales.

262 This comes down to the question of whether a decision to withhold salary increases on the basis that the funds will be invested in infrastructure spending would have a detrimental effect on the economy. In this regard, the PANSW submitted as follows:[85]

[85] ibid.

> "78. A key question which is posed by the Respondent's *[sic]* case is whether the evidence demonstrates that real harm will be done to the NSW economy by the granting of an increase in salaries or allowances for employees covered by the award subject of the proceedings. The evidence demonstrates the opposite is the case, namely, denial of salary increases will have a materially negative impact on the NSW economy."

263 We note the submissions of the PANSW and the APA to the effect that the Crown has not made out a case sufficient to persuade the Commission that the funds that would otherwise finance salary increases will in fact be spent on infrastructure projects or, further, whether those projects will have a relevantly positive effect on the economy.

264 The PANSW submitted:[86]

> "96. ...[T]he failure of the Respondents to provide any detailed explanation of the projects contemplated means the Commission is simply in no position to find, as submitted by the Respondent *[sic]*, that infrastructure spending will actually occur let alone, will occur in a timely manner or provide a more beneficial fiscal stimulus when compared to the wage increases sought."

265 We accept that the evidence regarding the "shovel-ready projects" in which the Crown intends to invest is relatively sparse and not altogether convincing. However, Mr Midha deposed as to a number of projects which, although they may already have received approval, had received additional or accelerated funding.

266 There was no controversy that each of infrastructure spending and increasing wages is a stimulus measure which would benefit the economy. Indeed, it was accepted that it would be preferable if both measures could be deployed, a matter to which we will return. For immediate purposes, we are not persuaded that the evidence supports the PANSW's submissions that choosing infrastructure spending over wage increases will have a *materially negative* impact on the NSW economy.

267 It follows that there is no basis on which the Commission, in discharging its obligations under s 146(2)(b) of the Act, ought necessarily to interfere with the

---

[86] ibid.

Government's decisions regarding the economic management of the State, and in particular the decision to prefer infrastructure spending over public sector wage increases.

268 Further, were the Commission to consider the competing merits of differing stimulus measures and purport to determine which is to be preferred at an abstract or theoretical level, it would run the very real risk placing itself in the position that the PANSW submitted it should not adopt, namely that of being the "general economic manager of the State".

Fiscal considerations

269 In its Closing Submissions, under the heading "Fiscal Responsibility", the Crown submitted:

> "174. As observed above, the impact of the coronavirus has caused significant revenues and expenditure pressures and will result in a weakening of the NSW's *[sic]* financial metrics, including the outlook for the State's operating position and debt levels.
>
> 175. Through the *Fiscal Responsibility Act 2012,* the State has a legislated objective to maintain its triple-A credit rating, and to maintain expense growth lower than long-term revenue growth. Rating agencies view a combination of strong operating position, sustainable levels of debt, and commitment to fiscal discipline to be in line with a triple-A rating.
>
> 176. The potential consequences of the State having to borrow money to pay for its current expenditure, in an environment where revenues are lower are outlined in paragraph 101 above. Two significant consequences are a downgrade in credit rating, resulting in higher borrowing costs through higher interest rates; and a breach of the *Fiscal Responsibility Act.* Both consequences have now come to pass.
>
> 177. While the Applicant Unions will no doubt continue to argue that the worst is over, that New South Wales has plenty of money available and that the State can readily afford to pay the increases they seek, the very reason the State is in a relatively healthy position (compared to other States and the rest of the world) is due to its commitment to fiscal discipline. This includes, limiting growth in the State's ongoing operating expenses.
>
> 178. Adherence to fiscal discipline means that the Government cannot spend on infrastructure to repair the labour market and stimulate the economy as well as give the public sector a wage increase (particularly in circumstances where there is no need to do so to maintain the real value of wages), no matter how much it may like to do so and no matter how much it may wish to acknowledge the efforts of police officers and PCCOs over the period of last summer's bushfires and the COVID-19 pandemic. In the

> circumstances the Respondents submit that it would be contrary to the public interest for the Commission to award any adjustments to the salaries and salary related allowances provided by the subject awards beyond that awarded in the 2020 Salaries Case Decision."
>
> (Footnotes omitted)

270 To the extent that the PANSW and the APA urged the Commission to consider the fiscal implications of the Applications having regard only to their anticipated first year cost, outside of the public sector-wide context in which the Applications were made, we repeat the observations at [45]-[57] above. We do not consider that such an approach would be just or appropriate.

271 However, even allowing for the Applications to be considered within the broader context in which they arise, the PANSW and the APA contended that the Government could afford to fund both wage increases of 2.5% across the public sector as well as invest $3 billion in infrastructure stimulus through the Infrastructure and Job Acceleration Fund.

272 Once again, there was little controversy on this point. Each of the expert witnesses, together with Mr Walters and Mr Midha, expressed the opinion, either in their reports or during oral testimony, that the NSW Government had the capacity to borrow the funds necessary to finance each measure. The point of difference was whether it should do so.

273 In the report attached to his affidavit of 26 August 2020, Mr Midha made reference to the *Fiscal Responsibility Act 2012* (NSW), the object of which "is to maintain the AAA credit rating of the State of New South Wales": s 3. He referred also to recent publications by the rating agencies Moody's and S&P Global Ratings, which set out those agencies' review of the economic situation in Australia. In that report Mr Midha stated:

> "16. Reduced revenue and additional expenditure on stimulus to support the economy has led to higher borrowings (and therefore debt) to maintain planned levels of service delivery. Final audited accounts for 2019-20 will not be ready until late 2020, however, it is likely the Government operated in a 'cash operating deficit' in 2019-20. Furthermore, it is likely the Government will continue to operate in a 'cash operating deficit' in 2020-21. This means the State is borrowing to cover the State's day to day running costs – or in

other terms, future generations paying for the costs of services enjoyed by current citizens.

...

25. The Government's fiscal strategy in response to COVID-19 is therefore a balance between additional borrowings to make up the shortfall in revenue and to fund economic stimulus in the short-term, while also laying the foundations for a sustainable fiscal position over the medium term.

26. This strategy is supported by reinvestment of savings from a pause in wages growth into temporary, targeted stimulus measures; while also reducing expense growth over the medium-term. This balance also ensures that the Government retains flexibility to respond to future shocks should they materialise.

27. This strategy gives some flexibility to respond to unforeseen shocks, including to provide stimulus in response to COVID-19. However, operating in a permanent (or structural) deficit is inconsistent with sustainable financial management, as it would lead to ever increasing levels of debt (in the absence of offsetting action). Without repair over the medium term, lower revenues relative to higher debt levels will reduce the state's credit-worthiness.

28. A downgrade in the credit rating can result in higher borrowing costs through higher interest rates and reduces the Government's ability to raise funds at the most competitive rates. While market yields are currently at relatively low levels and higher levels of debt may be affordable (in part due to the State's strong credit rating), higher indebtedness leaves the Government more vulnerable to changes in market conditions for Government borrowings. In addition, market anticipation of increased bond supply can result in a wider (more costly) yield spread when compared to federal government bonds."

274 During his oral testimony, Mr Houston stated:[87]

"I'm going to focus my observations on some of those pressures in the direction. The first is that the more debt that one takes on, the higher will be the future borrowing cost. There is always a risk that the great amount of debt, eventually credit ratings reduce, as credit ratings reduce the cost of debt goes up, and so you get negative reinforcing feedback.

Secondly, the more that the government has income generating assets on its balance sheet, perhaps as a result of that borrowing, as opposed to recurrent expenditure or operating expenditure, which is also as a result of that borrowing – the more that that borrowing is directed to income generating assets the better will be the position to service that future debt and so the more capacity there is to borrow. So in simple terms, it's easier to increase borrowing to generate assets and income generating assets than it is to borrow to support annual operating expenditure. ...

Thirdly, the higher is the future volume of economic activity in New South Wales, the greater will be the capacity of – or the prospect of future tax

[87] Tcpt, 13 November 2020, p 288(28)-289(34)

revenue to support that borrowing. In a sense, if the borrowing is to fund something that's going to generate greater economic activity that means that borrowing is more able to be undertaken.

Fourthly, the greater is the converse, the greater is the increase in borrowing to fund recurrent expenditure, then the level of economic activity stimulated is likely to be lower and the worse will be the position of the state to finance that future debt. Fifthly, the borrowing, as we've heard in our previous sessions, to fund an investment infrastructure is less likely to compromise the ability to pay down future debt because that infrastructure is permanent, it's more likely to support future ongoing economic activity. Wage rises don't have that same degree of support to future economic activity because they don't leave you with a permanent asset that will generate itself economic activity.

Finally, in terms of the debt constraints. I don't propose to opine on the Fiscal Responsibility Act because it's not really my area, but I think it's helpful to understand – and this is the message I think that one should take from the Fiscal Responsibility Act and it's like is that a sort of debt constraint, if you like, is something that is a phenomenon that no government should really want to discover. It's important, I think, in all borrowing decisions to take account of the wisdom of prudence. So for example, at the moment we're managing a major economic shock in the form of a pandemic and it's always tempting to assume that that's the only economic problem that we face and to say how far can we push the borrowing in the context of this particular problem here and now. But it's always important to bear in mind that it's important to have something in reserve. Who's to say there isn't the risk of another different kind of economic shock that could transpire in the next – in the near term. It would be of a different nature that also itself give rise to the need to – for debt to be raised to deal with the economic consequence of that."

275 In contrast, Dr Charlton deposed:[88]

"So that leads us to the second question, which was actually the substance of most of the discussion. Should the New South Wales government spend on both infrastructure and salaries, and question 3(b) is the structure to the answer to that question, which is to think about the consequences of doing so over three horizons, the consequences over the short term, the consequences over the medium term and the consequences over the long term.

Again, here I thought there was quite a lot of commonality. Over the short term, the answer is unquestionably positive. We're in a crisis. You spend more, you support the economy more, you stop the economy from going down. That is a better outcome for the economy itself, as well as for Government revenue. So in the short-term I thought there was a lot of agreement, and I associate myself with that. It is better to do both than just infrastructure.

In the medium-term I think it's also clear that it's a positive result. You get the economy improving more quickly, you come out of the recession faster as a

[88] Tcpt, 13 November 2020, pp 292(45)-293(48)

result of doing both. Really the key difference was the long-term consequences. Again, I think all parties agree that we can fund this. The question is, should we? What are the consequences over the long-term? This is where Mr Midha focused his comments. He talked about the consequence of doing both being slightly more borrowing, slightly more interest. I agree that both of those consequences are accurate.

But that means that the question here is really quite straightforward. It's, over the long-term, if you do both, there is more money to pay back. Crises are expensive things and so the question before us, really, that I think is the point of disagreement is, who should pick up the tab for this crisis? If you give a wage increase to these workers, then that interest that Mr Midha referred to - that borrowing that Mr Midha referred to gets paid back in the way that all Government expenditure gets paid back. So through the tax system, evenly distributed across everybody who pays tax in this State.

If you decide not to give a wage increase to public sector workers, then it's those workers who are effectively picking up the tab that Mr Midha referred to. Lower interest costs; lower borrowing. So I think the question of 'can' we all agree; on the question of 'should we' in the short-term we agree; in the long-term the questions is, 'Who should be paying for this crisis?' Should it be the way that we pay for most things through the tax system, as fairly we can distribute it? That's how the tax system is built; to provide fairness in the payment of Government liabilities. Or should it fall disproportionately on this particular set of workers?

The final point I'd like to make is that things have been moving. Things have been moving in the last few weeks since we met, and they've been moving through the course of this year. For the most part they've only been moving in one direction. Every day that goes by the economic outlook has been improving. The argument that this is unaffordable is weakening with every day that goes by. The GDP outlook is being revised up by the Commonwealth Government; by the IMF; by others. The employment outlook is improving, according to the ABS; according to the RBA. The cost of debt is falling, and inflation is strengthening, as the documents submitted to you show. Every day that goes by this argument is weakening around the long-term affordability of these measures."

276 Dr Denniss expressed views similar to Dr Charlton. For example, in the July 2020 report prepared by The Australia Institute, Dr Denniss and Mr Richardson opined that "it would be sound macroeconomic policy to respond to the current economic downturn with both the public sector wage increase and additional stimulus spending, funded by Government borrowing if necessary".

277 In a statement made to the House of Representatives Standing Committee on Economics on 14 August 2020, Mr Philip Lowe, the Governor of the Reserve Bank of Australia, said:[89]

> "I'd like to close now with some general comments about the economic policy response to the pandemic. While monetary policy has played an important role, it's been fiscal policy that has provided much of the support to the Australian economy. This is quite a change from how things have worked over recent decades, and it's been accompanied by a significant increase in public borrowing as governments work to limit the hit to people's incomes. This shift in fiscal policy is quite a shock for a country that's got used to low budget deficits and low levels of public debt. In that context, it's worth making a few points. The first is that, by borrowing today to support the economy we are avoiding an even bigger loss of output and jobs that would damage our economy and our society for years to come, and this would also put ongoing strain on the budget. Second, Australia's public finances are in strong shape, and public debt here is much lower than in most other countries. Third, the overall national balance sheet is also in a strong position after decades of good economic performance. And, fourth, government's financing costs have never been lower, with interest rates being the lowest since Federation.
>
> This all means that the expected increase in public debt is entirely manageable and it's affordable. It's the right thing to do to borrow today to help people, to keep them in jobs and to boost public investment at a time when private investment is very weak. Of course, there will always be debates about the precise nature of the programs and about how much support should be provided, but the general direction, the general strategy, that we have right now is the right one."

278 Later, in response to a question from the Chair of the Standing Committee, Mr Lowe said:[90]

> "To date, I think many of the state governments have been concerned about having extra measures because they want to preserve the low levels of debt and their credit ratings. I understand why they do that, but I think preserving the credit ratings is not particularly important; what's important is that we use the public balance sheet in a time of crisis to create jobs for people. From my perspective, creating jobs for people is much more important than preserving credit ratings. I have no concerns at all about the state governments being able to borrow more money at low interest rates. The Reserve Bank is making sure that's the case. The priority for us is to create jobs, and the state governments have an important role there, and I think, over time, they can do more. But the federal government may be able to do more as well. We may need all shoulders to the wheel."

---

[89] Affidavit, Richard Denniss, 4 September 2020, Annexure A at p 26
[90] ibid. at p 27

279 In an article in the *Sydney Morning Herald* on 14 November 2020 it was reported:[91]

> "[Dominic] Perrottet and his predecessors have delivered a string of healthy budget surpluses. The capital raised by an ambitious privatisation program meant the NSW government carried no net-debt between mid-2017 and 2020.
>
> But the coronavirus pandemic has disrupted the conventions of budget politics in Australia. On Tuesday, Perrottet will radically recast the role of debt in the state's finances.
>
> Borrowing will now play a much bigger role in funding the government's priorities – debt and deficit is no longer a pathway to disaster but a new opportunity.
>
> 'We are prioritising the economy over the budget and that's prioritising people over numbers in a spreadsheet,' Perrottet says. 'We see the opportunity to borrow to build the future of the state and stimulate the economy.'
>
> ...
>
> 'Our strong financial management and discipline has put our budget in a strong position heading into this pandemic and that allows us to take the opportunities that are in front of us – that is to lock in debt at record low interest rates to navigate our economy through this crisis,' he says. 'It's not about being ideologically wedded to one way or another.'"

280 On 7 December 2020 S&P Global Ratings downgraded New South Wales' credit rating from "AAA" to "AA+". The ratings agency stated that the downgrade was a result of the "COVID-19 shock" and that "the rating action primarily reflects [the State's] rising debt burden".[92] The outlook for the State was described as stable.

281 On the same day, Moody's confirmed that New South Wales had maintained a long term rating of "AAA". That rating agency expected "the state's debt burden to stabilise once economic growth resumes, supported by its proven history of fiscal resolve".[93]

282 In its Outline of Closing Submissions in Reply the APA submitted:

---

[91] Exhibit Crown 19, Tab 4
[92] Exhibit Crown 19, Tab 12 at p 82
[93] Exhibit Crown 19, Tab 13 at p 93

> "29. At RS [108]-[111] the Crown sets out its case as to why funding both measures would not be in the public interest. The submission can be summarised as a concern for the Government's medium term policy considerations relating to cost control. No evidence or argument is put in relation to what specific considerations arise as a result of this particular application, or why that would bear upon the public interest.
>
> 30. In any case, the submission takes the Commission into the realm of assessing government policy…
>
> 31. It is one thing for the Crown to urge restraint on the Commission on the basis that savings are necessary in order for the State to take urgent corrective action in the context of a major economic shock. It is quite another to ask the Commission to deny a wage increase on the basis of 'keeping the Governments' *[sic]* cost base low' to lay 'the foundations for a sustainable fiscal position over the medium term.' That is a policy proposal for determination by the voters of NSW. It is not a proposal that should be accorded significant weight before the Industrial Relations Commission."

283 We accept that there are elements of the Crown's position that might be considered to be "policy preferences", in relation to which we note our observations at [236]-[239]. However, we do not accept that the Crown's submissions in relation to "fiscal responsibility" are wholly to be characterised in this way. The evidence suggests that there have been changes to the fiscal considerations, and possibly to the Government's position in relation to those considerations, since Mr Midha prepared his report. That is not to say, however, that the concerns expressed by Mr Midha are no longer of any consequence.

Maintenance of wages

284 In *Public Sector Salaries No 2*, the Full Bench determined to award an increase of 0.3% in order to maintain the real value of employees' earnings (at [157]-[158]). In doing so:

(1) the Full Bench accepted the evidence of witnesses in those proceedings that trimmed mean inflation was the better measure by which to assess any movements in the value of employees' salaries (at [98]);

(2) determined (at [107]) that:

> "...it is appropriate to have regard to the developments since the Relevant Awards were last made or varied. The consideration of the changing value of money over time includes changes which have occurred since the employees last received a salary increase and those which are forecast during the term of the award to be made or varied. This entails the Commission taking into account the wage increases awarded to employees with effect from 1 July 2019 in determining whether the Applicants have discharged the onus they bear to justify any change to the current salaries and salary-related allowances."

(3) had regard to movements in trimmed mean inflation since the salaries and salary-related allowances in the relevant awards had been increased (in each case, 1 July 2019), and took into account the quantum of that increase (at [108]-[111]).

285 Having noted in its Final Submissions the approach taken in *Public Sector Salaries No 2*, the PANSW contended:

> "51. ... Whilst it is accepted changes in the value of money since the last wage increase was awarded may be relevant, it is submitted that caution should be exercised in mechanically applying inflation measures over that period in the present case. ..."

286 The PANSW relied on the decision of Boland J in *Re Crown Employees Wages Staff (Rates of Pay) Award 2011 (No 3)* (2013) 240 IR 24; [2013] NSWIRComm 109 in support of the submission that the Commission should not take into account the increases to the salaries and salary-related allowances in the Police Award, which were awarded on 1 July 2019, and that the changing value of money should be considered prospectively over the term of the award (1 July 2020 to 30 June 2021). The PANSW drew our attention to the following passages from the decision:

> "153. The approach taken by the Full Bench in *Police Officers (No 2)* when deciding the amount of increase that should be awarded was to have regard, prospectively, to the changing value of money over time. In that respect, the Full Bench stated at [121]:
>
> > [121] Given the conclusion that we shall reach later in this decision that the ultimate award made in this matter will operate for a period of three years, and, further, given that any additional salary adjustments (over the interim award) arising from the general claim will operate from 1 July 2011, then, having regard to the approach adopted in *Police Award (No 1)* at [545], the Commission will have regard to,

> for the first year of the award, the inflation rates operating in the period 1 July 2010 to 1 July 2012 and, for the balance of the period of operation of the award, to inflation forecasts corresponding to each successive actual year of the operation of the award; namely, in the second year, the financial year 2012-2013 and for the third year, the financial year 2013-2014.
>
> 154. In *Police Officers (No 2)* the rates of inflation to which the Full Bench had regard in fixing the increases in wages for the three years 2011, 2012 and 2013 were 3.1 per cent (having regard to the whole of the period from the last salary adjustment in 1 July 2010 through to the end of the financial year to 2011), 2.5 per cent and 2.5 per cent respectively."

287 We observe that in *Police No 2* the Full Bench varied the award with effect from 1 July 2011. In considering rates of inflation it had regard to the whole of the period from the last salary adjustment on 1 July 2010. This is reflected in the following observations of the Full Bench in *Police No 1*:

> "545. ...It is appropriate, when considering appropriate remedies in a general application such as the present, to have regard to the maintenance of the purchasing power of wages by assessing, *for the first year of the operation of any award made*, relevant economic considerations for the period *since the last salary adjustment* (in this case 1 July 2010), provided there is an avoidance of double counting."
>
> (Emphasis added)

288 We note further in this regard the authorities referred to at [32(10)] above.

289 To the extent that the PANSW submits that the Commission should have regard to the likely changes in the value of money over the life of the award, we agree. That is clearly consistent with the authorities. However, the authorities do not support the proposition that the Commission ought not to have regard to movements in inflation since the last increase to salaries and salary-related allowances in the relevant award.

290 Apart from urging the Commission to "exercise caution", the PANSW does not precisely articulate why the approach taken in *Public Sector Salaries No 2* was in error and ought not to be followed. We are not persuaded that we should approach these proceedings on any alternative basis.

291 The APA approached the question of the maintenance of wages from a different perspective. In its Outline of Closing Submissions it submitted:

> "72. There was no evidence in these proceedings to disturb the Full Bench's finding at [98] of the Public Sector Salaries case that the appropriate measure of inflation for assessing real wages is the trimmed mean.
>
> 73. Having regard to the trimmed mean inflation from the time since the current PCCO Award was made, to the end of the proposed Award period, a wage freeze would result in a 0% change to real wages. Accordingly the wage increase sought of 2.5% on 1 July 2020 would lead to a 2.5% real wage increase over the 2 year period.
>
> 74. Having regard to the year ending 30 June 2021 only, the RBA forecast trimmed mean inflation remains 1.25%. Therefore in that period, a nominal wage increase of 2.5% would yield a real wage increase of 1.25%.
>
> 75. It cannot be assumed that the increase of 2.5% on 1 July 2019, reached through a consent position, was given to maintain real wages only. The most that can be said is that a 2.5% increase from 1 July 2020 will give a 2.5% real wage increase over the two year period, and a 1.25% real wage increase over the one year period.
>
> 76. The size of this increase is fair and reasonable in the context of the very significant transformations to work established in the Applicant's special case. A number of the Applicants *[sic]* witnesses expressly observed that the changes were the most significant in their career over such a short period.
>
> 77. Taking into account broader economic considerations, the wage increase of 2.5% would be consistent with the RBA's target inflation rate of 2-3%, and slightly lower than the RBA aspiration for wages to grow at greater than 3% per year."
>
> (Footnotes omitted)

292 We have had regard to these submissions, and in particular those at par 76, in our determination of the APA Application.

HSU Submissions

293 It is necessary to address the submissions of the HSU. In its Closing Submissions the HSU contended:

> "3. ...The Full Bench [*in Public Sector Salaries No 2*] determined that 0.3% would be the most appropriate pay rise to ensure the effective class of employees didn't see a real loss in the value of their wages to the 2021 financial year that would have occurred if the Commission awarded 0%.

4. Applying this same calculation to the current proceedings, the updated figures would result in the correct wage rises for paramedics and police officers to be, in fact, 0% as the predicted value of real wages in 2021 has been increased and there is no longer a need to offset for the previously forecasted *[sic]* reduction.

5. This necessarily means the decision before the Full Bench is one of the following:

a. The Full Bench applies out of date economic forecasts to ensure paramedics and police officers have access to the same 0.3% award as the remainder of the public sector.

b. The Full Bench would be consistent in their reasoning, applying the updated forecast, and award paramedics and police officers with 0%.

c. The Full Bench finds that this class of public sectors *[sic]* workers has a special set of circumstances and applies a wholly unique decision, separate from the Salaries Case.

...

13. It is to be assumed that the economic evidence will weigh heavily on the decision before the Commission in these proceedings as they did in the Salaries Case.

14. It will likely be concluded by the Commission that the use of the funds that the NSW Treasury seeks to recover from the freezing of public sector wages is best used in other projects which will have a more stimulatory and/or multiplying effect.

...

26. The Commission's decision in the Salaries Case will likely apply in this matter as well, and the only remaining questions is *[sic]* whether the Commission will apply the updated fiscal forecasts and award 0%, or find some form of judicial logic to award these proceedings with the same 0.3% as the Salaries Case. In any event, either conclusion is unfair and unreasonable in the best of times and is certainly cruel after the events of 2020."

(Footnotes omitted)

294 With respect, the submissions misapprehend the task of the Commission in these proceedings. As we have already stated at [45]-[49], while we have endeavoured to apply our discretion in this manner consistent with the principles enunciated, and approach taken, in *Public Sector Salaries No 2*, we are not bound to blindly apply the outcome in that case to either of the Applications. They fall to be determined on the cases presented by the parties.

295 Consistent with those observations, these proceedings fall within the category described at par 5c. of the HSU's submissions.

Economic considerations – conclusions

296 Consistent with the finding of the Full Bench in *Public Sector Salaries No 2* at [15] we are satisfied that the evidence demonstrates a need for restraint in the particular circumstances of the 2020-21 financial year. That restraint does not, however, preclude *any* increase being awarded.

297 To the extent that the Commission is persuaded that a case has been made out for an increase in rates of pay or another award, we have had regard to the following considerations in particular:

(1) the consensus between the parties that the Crown could fund both its planned investment in infrastructure through the Infrastructure and Job Acceleration Fund and the increases sought in the Applications through additional funding;

(2) without detracting from our observations at [45]-[57] above, the absence of any relevant contest that, if considered in isolation, increases in the amount sought in the Applications would have only a marginal impact on the State's economic position; and

(3) an increase in the salaries and salary-related allowances in the Police Award and the Paramedics Award would have a stimulatory effect on the economy (even if, in turn, it might only be considered to be marginal and there may be other stimulus measures which have greater effect).

Determination

298 To succeed on the Applications, the onus is on the PANSW and the APA to demonstrate that the terms of the Police Award and the Paramedics Award respectively are not fair and reasonable, and that they will not be so for the

duration of the award (until 30 June 2021) unless salaries and salary-related allowances are increased by 2.5% with effect from 1 July 2020. The PANSW and the APA have each only partly discharged their onus.

PANSW Application

299 The PANSW has established that the nature and extent of changes in the work of police officers since the datum point, reflected in our findings as to the application of the work value and productivity and efficiency sub-principles, justifies an increase to the salaries and salary-related allowances contained in the Police Award. To that extent, the Police Award does not currently set fair and reasonable conditions of employment in that it does not reflect changes to the work value of police officers, or their contribution to productivity and efficiency improvements, since 1 July 2011.

300 While the evidence calls for restraint in the particular circumstances of the 2020-21 financial year, this should not preclude the Police Award being varied to ensure that its terms are, and remain during its term, fair and reasonable. As observed by the Full Bench in *Public Sector Salaries No 2* at [42]:

> "There is nothing remarkable in the proposition that the Commission would be loath to permit employees to be paid at a rate less than the value of their work, and that cogent reasons would be needed to justify why it was in the public interest that such an outcome should result."

301 We do not accept that an increase of 2.5% is justified on the evidence or that it would, in all of the circumstances, be in the public interest. We have decided to award an increase of 1.75%.

302 In making this determination we have taken into account the Crown's submissions that it would be open to the Commission to find that an increase of 0.3%, as awarded in *Public Sector Salaries No 2*, would be appropriate to create equality across the public sector (see [7] above).

APA Application

303 The APA submitted:

"83. ...

i. The Applicant has discharged its onus to establish special circumstances that render the existing conditions of the Award no longer fair and reasonable, on the basis of the transformations to PCCO work as a result of the bushfires and particularly COVID. These changed circumstances and changes to work, justify the wage increases sought."

304 We accept that the combined effect of the bushfires and the COVID-19 pandemic attract the special case sub-principle. We are not persuaded that the evidence justifies an increase of 2.5% to the salaries and salary-related allowances in the Paramedics Award, but an award to PCCOs is warranted. In determining the quantum of any award we have again had regard to the need to exercise restraint in the particular circumstances of the 2020-21 financial year.

305 We recognise that the world has not seen the end of the pandemic, and that PCCOs will continue to confront the changes and challenges posed by COVID-19, to which we have referred, for an indefinite period. Assistant Commissioner Elliott deposed under cross-examination:[94]

"Q. Just in relation to COVID, I think we would all agree, wouldn't we, with Dr Morgan that COVID doesn't seem to be going anywhere fast, would you agree with that?

A. It's not going away anywhere fast, no.

Q. The fact that it is still here and is continuing to be here, means that the sorts of efforts that you talk about, ambulance officers having taken, will continue to need to be taken, is that correct?

A. That's correct.

Q. I think too you fairly state at paragraph 20 that there has been ongoing stress felt by New South Wales Ambulance staff from the COVID crisis?

A. I did.

Q. You also pointed out at paragraph 21 that ambulance has introduced significant practice changes since onset of the pandemic. When you talk about significant practice changes, what does that mean within the ambulance service?

[94] Tcpt, 13 August 2020, pp 27(43)-28(27)

A. There's, there's a heightened requirement for such thing as personal protective equipment and in particular, about observing a heightened level to ensure their safety and reduce or minimise the other chance of exposure.

Q. Would it be fair to say in broad that it's been an extraordinary conjunction of events but the ambulance service and its staff has risen to the occasion, would that be a fair summation of your evidence?

A. Yes, it is.

Q. It would also be a fair summation of your evidence too, wouldn't it, that significant lessons have been learnt by the ambulance service in how to deal with these sorts of events?

A. Yes it is ongoing learning, that's correct.

Q. When you talk about ongoing learning, you're also talking about how that experience will carry forward into the future, aren't you?

A. Yes."

306 Even having regard to this evidence, there is some force to the Crown's submissions that the circumstances do not warrant "an *ongoing* increase in rates of pay which will continue well beyond the current year" (at par 74, reproduced at [209] above). However, as noted at [7] above, the Crown accepted that it would be "open to the Commission to find that an increase of 0.3% would be appropriate to create equality across the public sector". In the exercise of our discretion we do not consider that it would "create equality across the public sector", or otherwise be fair and reasonable, to deny PCCOs an increase to their salaries and salary-related allowances in the same percentage awarded in *Public Sector Salaries No 2*. We have decided to award that increase.

307 But the award should not be confined to that amount. Accepting at least in part the Crown's submissions that the circumstances do not warrant a greater increase to salaries and salary-related allowances which will not only become an ongoing entitlement of PCCOs, but which will have consequential impacts on the value of their employment-related accruals, we find that the special circumstances of the case warrant the award of an additional one-off payment to PCCOs.

308 Such a conclusion finds support in the offer made by the Government in May 2020 of a one-off payment to paramedics, amongst other categories of employees. This "suggests not only that the Government recognised the need to recognise the employees to some degree, but also that such a payment was considered to be affordable": *Public Sector Salaries No 2* at [156].

309 We have determined that in addition to an increase of 0.3% to the salaries and salary-related allowance in the Paramedics Award, PCCOs should receive an amount equal to the difference between 0.3% of their annual base salary (as prescribed in the Paramedics Award, immediately prior to the 0.3% increase) and $1,000.

310 In making this determination, we are mindful that the effect of *Public Sector Salaries No 2*, and the orders subsequently made in *Application for Crown Employees (Public Sector – Salaries 2020) Award and Other Matters (No 3)* [2020] NSWIRComm 1077, was that many healthcare workers, including nurses, received an increase of only 0.3% to their salaries and salary-related allowances. Our decision in these proceedings is not intended to suggest, and should not be regarded as suggesting, that the work of PCCOs is inherently of more worth than that of other healthcare workers. Our decision reflects the evidence placed before us in these proceedings. It would be inconsistent with the evidence, and our obligations under the Act, to confine ourselves to the award made in other proceedings so as to avoid the risk of disaffection or reproach.

Effective date of increases

311 Clause 6.1(e) of the Regulation provides as follows:

> (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).

312 However, this clause does not apply "if the relevant parties otherwise agree or there are exceptional circumstances": cl 6.2.

313 In *Maan v Minister for Immigration and Citizenship* (2009) 179 FCR 581, Branson J observed:

> "51. Although the expression 'exceptional circumstances' is not defined in the Regulations it has been the subject of consideration in numerous cases. Assistance in interpreting the expression can be found in comments of Lord Bingham of Cornhill CJ in *R v Kelly (Edward)* [2000] 1 QB 198 at 208 as follows:
>
> > We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered. ..."

314 This passage from *Maan* was cited with approval by the Full Bench in *Re Crown Employees (Public Sector - Salaries 2011) Award (No 3)* at [48].

315 In *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290 Campbell JA, with whom Handley AJA and Tobias JA agreed, observed:

> "66 Another question of construction concerned *'exceptional circumstances'* in rule 31.18(4). In *San v Rumble (No 2)* (2007) NSWCA 259 at [59]-[69], I gave consideration to the expression *'exceptional circumstances'* in a different statutory context to the present. Without repeating that discussion in full, I shall state such of the conclusions as seem to me applicable in the construction of rule 31.18(4).
>
> > (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered: *R v Kelly (Edward)* [2000] 1 QB 198 (at 208).
> >
> > (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] 1 WLR 1262; [2000] 1 All ER 907 (at 1268; 912-913).
> >
> > (c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (at [26]).
> >
> > (d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the

rationale of that particular statutory provision: *R v Buckland* (at 1268; 912-913).

(e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *Awa v Independent News Auckland* [1996] 2 NZLR 184 (at 186)."

316 The PANSW and APA sought an order that any variation operate with effect from the first full pay period on or after 1 July 2020.

317 In its Closing Submissions the Crown submitted:

"179. While the Respondents continue to oppose a finding that any increase should be backdated to 1 July 2020, the Respondents do not suggest that the facts that gave rise to the conclusion that there are exceptional circumstances are relevantly different in respect of these proceedings.

180. In the 2020 Salaries Decision the Full Bench said:

[146] In our view, it is the 'fundamental changes' and 'significant disruptions' to which the Employers referred that go a significant way towards establishing exceptional circumstances in this case. The unprecedented scale and ever-changing impacts of the COVID-19 pandemic saw the Commission presented with cases from the Applicants and the Employers that were constantly evolving, even if their fundamental claims remained unchanged. This not only prolonged the hearing, but has required some considerable time for the Commission to evaluate the evidence and publish this decision.

[147] We also accept that there is force to the submissions of the PSA, the NMA and the HSU reproduced at [144] above. In particular, the hearing took place over a protracted period. This was to a large degree a consequence of the Government's position not being notified to the Applicants or the Commission until late May 2020, and thus hearing dates for three members of the Commission needing to be obtained at short notice. Further, and to a lesser degree, a result of the use of the audio visual court technology causing a loss of hearing time.

181. The Respondent accepts that the prolonged hearing in the 2020 Salaries matter impacted upon the hearing of this present matter."

318 In the circumstances of this case, having regard to the authorities and in particular the position taken by the Crown, we find that there are exceptional circumstances within the meaning of cl 6.2 of the Regulation.

Orders

319 The Commission orders that:

(1) there be a 1.75% increase to the salaries and salary-related allowances in the Crown Employees (Police Officers – 2017) Award, with such increase to take effect from the first full pay period on or after 1 July 2020;

(2) there be a 0.3% increase to the salaries and salary-related allowances in the Paramedics and Control Centre Officers (State) Award, with such increase to take effect from the first full pay period on or after 1 July 2020; and

(3) employees covered by the Paramedics and Control Centre Officers (State) Award receive a payment equal to the difference between $1,000 and 0.3% of their annual base salary under that Award at the rate immediately prior to the increase required by Order (2), such payment to be made within 28 days.

320 The Commission directs that:

(1) the PANSW prepare short minutes of order in matter 2020/151448 to give effect to the Commission's Order at [319(1)] above;

(2) the PANSW confer with the Commissioner of Police as to the content of the proposed short minutes of order;

(3) the APA prepare short minutes of order in matter 2020/160506 to give effect to the Commission's Order at [319(2)] above;

(4) the APA confer with the Health Secretary and the HSU as to the content of the proposed short minutes of order; and

(5) no later than 4.00pm on Friday, 28 May 2021 the PANSW and the APA each file with the Registry of the Commission the short minutes of order they propose, together with a document identifying:

(a) those proposed short minutes of order which are agreed by the relevant parties; and

(b) those proposed short minutes of order which are not agreed by the relevant parties, and stating the basis of the disagreement between the relevant parties.

****