Supreme Court
New South Wales
Court of Appeal

Case Title:	Secretary of The Treasury v Public Service Association & Professional Officers' Association Amalgamated Union of NSW
Medium Neutral Citation:	[2014] NSWCA 138
Hearing Date(s):	14 March 2014
Decision Date:	6 May 2014
Jurisdiction:	Court of Appeal
Before:	Bathurst CJ at [1]; Beazley P at [60]; Meagher JA at [61]
Decision:	(1) Order that the order of Boland P in *Re Crown Employees Wages Staff (Rates of Pay) Award 2011& Ors (No 3)* [2013] NSWIRComm 109 be quashed. (2) Remit the matter to a member of the Industrial Relations Commission to be dealt with according to law. *[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*
Catchwords:	STATUTORY INTERPRETATION - principles - legislative intention - giving effect to express words - relationship

between clauses - cl 6(1)(a) Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (NSW)
STATUTORY INTERPRETATION - principles - limited conferral of jurisdiction on a court - cl 6(1)(a) Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (NSW)
ADMINISTRATIVE LAW - jurisdictional error - different considerations for administrative tribunal and inferior court - Industrial Commission - misconceive extent of powers

Legislation Cited:

Industrial Relations Act 1996 (NSW), ss 10, 15, 16, 17, 146C, 179 and 407
Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011 (NSW)
Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (NSW), cll 4-9
Superannuation Guarantee (Administration) Act 1992 (Cth), ss 16, 19 and 23
Superannuation Guarantee (Amendment) Act 2012 (Cth)

Cases Cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) [2009] HCA 41; (2009) 239 CLR 27
Attorney General for the State of New South Wales v Quin [1990] HCA 21; (1990) 170 CLR 1
Certain Lloyd's Underwriters v Cross [2012] HCA 56; (2012) 248 CLR 378
Collector of Customs v Agfa-Gevaert Ltd [1996] HCA 36; (1996) 186 CLR 389
Craig v The State of South Australia [1995] HCA 58; (1995) 184 CLR 163
Director General, NSW Department of Health v Industrial Relations Commission of NSW [2010] NSWCA 47; (2010) 77 NSWLR 159
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; (2012) 87 ALJR 98
King Gee Clothing Company Pty Ltd and Others v The Commonwealth and Another [1945] HCA 23; (1945) 71 CLR 184
Kirk and Another v Industrial Court of NSW and Another [2010] HCA 1; (2010) 239 CLR

	531 Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment [2012] HCA 58; (2012) 87 ALJR 162 Re Crown Employees Wages Staff (Rates of Pay) Award 2011 & Ors [2013] NSWIRComm 53 Re Crown Employees Wages Staff (Rates of Pay) Award 2011 & Ors (No 3) [2013] NSWIRComm 109 Shergold v Tanner [2002] HCA 19; (2002) 209 CLR 126 Speirs v Industrial Relations Commission of NSW and Another [2011] NSWCA 206; (2011) 81 NSWLR 348
Texts Cited:	NA
Category:	Principal Judgment
Parties:	Secretary of the Treasury (First applicant) Director General Ministry of Health (Second applicant) Landcom (Third applicant) Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales (First respondent) Unions NSW (Second respondent) Construction, Forestry, Mining and Energy Union (New South Wales Branch) (Third respondent) Australian Manufacturing Workers' Union (Fourth respondent) Australian Salaried Medical Officers' Federation (New South Wales) (Fifth respondent) Australian Workers Union NSW Branch (Sixth respondent) Electrical Trades Union, NSW Branch (Seventh respondent) Fire Brigade Employees Union (Eighth respondent) Health Services Union NSW (Ninth respondent) NSW Nurses and Midwives Association (Tenth respondent) NSW Teachers Federation (Eleventh respondent) The Association of Professional Engineers,

	Scientists and Managers, Australia (NSW Branch) (Twelfth respondent) Transport Workers' Union of New South Wales (Thirteenth respondent) United Services Union (Fourteenth respondent) United Voice (Fifteenth respondent) Industrial Relations Commission of NSW (Sixteenth respondent)
Representation	
	Counsel: Paul Menzies QC / Stan Benson (Applicants) S Crawshaw SC / M Gibian (Respondents) Solicitors: Crown Solicitor (First applicant) W G McNally Jones Staff Lawyers (First-Fifteenth respondent)
File number(s):	2013 of 385141
Decision Under Appeal	
- Court / Tribunal:	Industrial Relations Commission of New South Wales
- Before:	Boland J President, Walton J Vice President and Tabaa C and Boland J President
- Date of Decision:	25 June 2013 and 17 December 2013
- Citation:	[2013] NSWIRComm 53 and [2013] NSWIRComm 109
- Court File Number(s)	IRC Matters 256-263, 342, 324, 325, 352, 357, 367-387, 398, 401, 403-406, 422-442 of 2013 and IRC Matters 256, 257, 259-263, 342, 324, 325, 352, 357, 367-387, 401, 403-406, 452, 453, 591, 737, 738 of 2013
Publication Restriction:	NA

JUDGMENT

1 **BATHURST CJ:** This application essentially involves the interpretation of cl 6(1)(a) of the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (NSW) (the Regulation). The issue is the manner in which the cap on the Industrial Relation Commission's power to award increases in remuneration or other conditions of employment in cl 6(1)(a) (the clause) is to be calculated.

The relevant legislation

2 It is convenient to set out the relevant provisions of the *Industrial Relations Act 1996* (NSW) (the Act) and the Regulation at the outset of this judgment.

3 Section 146C of the Act provides as follows:

> "146C Commission to give effect to certain aspects of government policy on public sector employment
>
> (1) The Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees:
>
> (a) that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission, and
>
> (b) that applies to the matter to which the award or order relates.
>
> (2) Any such regulation may declare a policy by setting out the policy in the regulation or by adopting a policy set out in a relevant document referred to in the regulation.
>
> (3) An award or order of the Commission does not have effect to the extent that it is inconsistent with the obligation of the Commission under this section.
>
> (4) This section extends to appeals or references to the Full Bench of the Commission.

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

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

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

(8) In this section:

award or order includes:

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

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

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

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

conditions of employment -see Dictionary.

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

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

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

4 So far as is relevant the Regulation is in the following terms:

"4 The matters set out in this Regulation are declared, for the purposes of section 146C of the Act, to be aspects of government policy that are to be given effect to by the Industrial Relations Commission when making or varying awards or orders.

5 The following paramount policies are declared:

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

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

Note. Clause 6 (1) (c) provides that existing conditions of employment in excess of the guaranteed minimum conditions may only be reduced for the purposes of achieving employee-related cost savings with the agreement of the relevant parties.

Clause 9 (1) (e) provides that conditions of employment cannot be reduced below the guaranteed minimum conditions of employment for the purposes of achieving employee-related cost savings

6(1) The following policies are also declared, but are subject to compliance with the declared paramount policies:

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

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

(i) whether relevant savings have been achieved is to be determined by agreement of the relevant parties or, in the absence of agreement, by the Commission, and

(ii) increases may be awarded before the relevant savings have been achieved, but are not payable until they are achieved, and

(iii) the full savings are not required to be awarded as increases in remuneration or other conditions of employment.

(c) For the purposes of achieving employee-related cost savings, existing conditions of employment of the kind but in excess of the guaranteed minimum conditions of employment may only be reduced with the agreement of the relevant parties in the proceedings.

(d) Awards and orders are to resolve all issues the subject of the proceedings (and not reserve leave for a matter to be dealt with at a later time or allow extra claims to be made during the term of the award or order). However, this does not prevent variations made with the agreement of the relevant parties.

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

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

...

7(1) For the purposes of this Regulation, the ***guaranteed minimum conditions of employment*** are as follows:

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

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

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

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

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

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

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

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

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

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

9(1) For the purposes of this Regulation, ***employee-related cost savings*** are savings:

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

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

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

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

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

(2) Savings are ***existing savings*** if they are identified in a relevant industrial instrument made before the commencement of

this Regulation (or in an agreement contemplated by such an industrial instrument) and are relied on by that industrial instrument, whether or not the savings have been achieved and whether or not they were or are achieved during the term of that industrial instrument."

5 In the second reading speech for the Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011 (NSW) in which s 146C was introduced (the Second Reading Speech), the Minister made the following comments:

"...Our policy and legislative response will ensure that wage increases of 2.5 per cent are available each year to our hard-working public sector employees. Increases in excess of 2.5 per cent are available but will be required to be funded through employee-related savings.

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

...

The commission will be left in no doubt about the matters to which it must give effect when it makes or varies awards or orders relevant to public sector employment. For example, where a public sector union has filed a wages claim in the commission and seeks that the commission conciliate and/or arbitrate to achieve an outcome, the commission will be bound to ensure that, in accordance with the declared wages policy, any increase in excess of 2.5 per cent will only be awarded where employee-related savings sufficient to fund such an increase have been both identified and implemented.

Similarly, where a claim has been filed to create an additional condition of employment, such as increased leave entitlements or a new classification structure, this too has to be assessed by the commission in accordance with the terms of the declared government wages policy..."

Background

6 By an application filed on 12 April 2003 the respondents (who, for convenience, I shall describe generally as the PSA) filed an application under s 17 of the Act to vary the Crown Employees (Public Sector Salaries 2008) Award (the Award) by increasing the remuneration paid to various public sector employees. The variation was sought to take effect from the first full pay period commencing on or after 1 July 2013.

7 In addition to the obligations to pay any remuneration awarded by the Industrial Relations Commission (the Commission), the applicants (the employers) are also under an obligation to make superannuation contributions in respect of their employees. This obligation arises under the provisions of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (the *Superannuation Act*). The legislation is complex but imposes on employers what it defines as a superannuation guarantee charge for one or more individual superannuation guarantee shortfalls (s 16, *Superannuation Act*). An individual superannuation guarantee shortfall is calculated quarterly (s 19, *Superannuation Act*) and as at 30 June 2013 was effectively 9% of the quarterly salary of employees. However, this charge percentage is reduced if payments have been made on behalf of an employee to a complying superannuation fund (s 23, *Superannuation Act*).

8 In that fashion an obligation was effectively imposed on employers to pay a 9% superannuation contribution for the year ending 30 June 2013 in respect of their employees (the superannuation guarantee). However, as a consequence of the *Superannuation Guarantee (Amendment) Act 2012* (Cth) (the Amendment Act) the charge percentage was increased to 9.25% for the financial year ending 30 June 2014 (the increased superannuation charge percentage), with further increases in subsequent years. This increase was effective from 1 July 2013.

9 Separate provision is made in the *Superannuation Act* for members of defined benefit schemes. These provisions are not relevant in the present proceedings.

10 In these circumstances, the issue before the Commission was whether in varying the Award and calculating the cap on increases to employee related expenses by no more than 2.5 % per annum, it was obliged to take into account the increased superannuation charge percentage and the fact that as a result of the Amendment Act, employee-related expenses would increase by .25%.

11 The question was referred to a Full Bench of the Commission (the Full Bench). The Full Bench's decision (in *Re Crown Employees Wages Staff (Rates of Pay) Award 2011 & Ors* [2013] NSWIRComm 53) concluded it was not necessary to take the increased superannuation charge percentage into account in determining whether or not an award made by the Commission exceeded the 2.5% threshold in the clause. Its conclusion was summarised in the following terms:

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

12 The only order made by the Full Bench (at [57]) was to refer the proceedings to Boland P for the purpose of disposing of them in accordance with their decision.

The reasoning of the Full Bench

13 The Full Bench adopted the PSA submission. It concluded (at [25(a)]), first, that s 146C of the Act was directed only to the making or varying of

an award or order by the Commission. Its reasoning was summarised in the following terms:

> "[25](c) Clause 6(1)(a) declares as a policy to be given effect to by the Commission that public sector employees "may be *awarded* increases in remuneration or other conditions of employment *that* do not increase employee-related costs by more than 2.5% per annum." It is increases in remuneration or conditions of employment that are *awarded* (that is, by award or order of the Commission) *that* may not increase employee-related costs by more than 2.5% per annum. The clause, on its terms, does not apply more broadly." [Emphasis in original]

14 The Full Bench also agreed (at [25(d)]) that the increased employee-related costs referred to in cl 6.1(b) of the Regulation are increases resulting from awards of the Commission. It suggested (at [25(e)]) that this was made clear by other parts of the Regulation particularly cll 6(1)(d) and (e).

15 The Full Bench concluded that as the increased superannuation charge percentage was not an "awarded increase" it was not to be taken into account in calculating the 2.5% limit. The Full Bench explained (at [36]) that this was because although the increased superannuation charge percentage was an employee-related cost within the meaning of cl 8 of the Regulation, it was not an increase awarded or ordered by the Commission. The Full Bench stated (at [41]), however, that if appropriate it could take the increase into account as part of its residual discretion to set fair and reasonable conditions pursuant to s 10 of the Act.

16 The Commission also concluded that this construction of the clause was consistent with the extrinsic material. It concluded that the purpose of the legislation was to achieve fiscal restraint through the mechanism of limiting the Commission's power to make awards which increased employee-related costs above the 2.5% limit unless the increase was offset by employee-related cost savings.

17 As I indicated above, the matter was remitted to Boland P to determine the appropriate variation to the Award. In *Re Crown Employees Wages Staff (Rates of Pay) Award 2011 & Ors (No 3)* [2013] NSWIRComm 109 Boland P varied the Award to provide for an increase in wages and "relevant allowances" by 2.5% from the beginning of the first pay period to commence on or after 1 July 2013.

The parties' submissions

18 The employers emphasised that the power of the Commission in s 10 of the Act to make awards setting fair and reasonable conditions of employment are subordinated to and constrained by s 146C and any declared policy: *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* [2012] HCA 58; (2012) 87 ALJR 162 (*PSA v Director of Public Employment*) at [17]. Senior counsel for the employers submitted there was a failure by the Commission to take this into account in construing the Regulation.

19 The employers submitted that the clause sets a limit on what may be awarded by the Commission. They submitted the limitation was that increases in remuneration and other conditions of employment were not to increase employee-related costs by more than 2.5% per annum. They submitted that this paid proper regard to the definition of employee-related costs. The employers submitted that the increased superannuation charge percentage was an increase in those costs and thus had to be taken into account.

20 The employers noted that cl 7(1)(c) of the Regulation had the effect of making the payment of superannuation prescribed by the Commonwealth a paramount policy within the meaning of cl 5 of the Regulation. They submitted that if compliance with that policy increased employee-related costs this was a matter which the Commission was required to take into account in setting an award.

21 The employers contended that in calculating such increases the starting point was the commencement of the nominal term of the award. The calculation to take place involved comparing employee-related costs for the 12 months prior to that date with a cost which would be incurred during the subsequent year.

22 Senior counsel for the employers submitted that the starting point on the issue of construction is that compliance with the declared paramount policies is required. He submitted that increases in remuneration or other conditions of employment may result as a direct consequence of the award or as an indirect consequence, by reason of compliance with the declared paramount policy with respect to superannuation. He submitted that the limit of the power of the Commission was to increase the rates of pay and conditions of employment up to a 2.5% increase in employee-related costs and therefore it was necessary to take into account increased costs resulting from the superannuation legislation.

23 The PSA accepted that it was relevant that the effect of s 146C of the Act was to limit the power of the Commission. Notwithstanding this, it contended that the conferral on a court or statutory tribunal of a statutory power to make orders should be construed broadly and not confined by implications unapparent from the words of the legislation, which conferred the power.

24 The PSA submitted the following textual considerations supported the interpretation of the Regulation arrived at by the Commission:

(a) The words in s 146C of the Act "when making or varying any award or order", show that the Regulation is directed only to the making or varying of an award or order by the Commission.

(b) The words in the clause "may be awarded increases in remuneration or other conditions of employment that do not increase employee-related costs by more than 2.5 % per annum", prohibited award increases

from increasing such costs by more than 2.5% per annum. It submitted the clause did not operate more broadly.

(c) The employee-related costs in cl 6(1)(b) of the Regulation are the increased employee-related costs resulting from increases awarded by the Commission.

25 The PSA submitted that its construction did not involve any re-arrangement of the text. By contrast it said that the employer's construction involved reading the clause as if it said "increases in remuneration or other conditions of employment (of whatever source) are not to increase employee-related costs by more than 2.5% per annum". It submitted that this was contrary to the express words of the provision.

26 The PSA said in effect that it was not intended that the clause operate by reference to global changes in employee-related costs. It submitted that if the construction contended for by the employer was correct, then parts of the Regulation dealing with employee-related cost savings would be superfluous as any reduction would have been factored into consideration.

27 The PSA submitted that the significance of the words "per annum" was that they prevented an award or order of the Commission being made in one year without reference to other awards or orders made during the year. It submitted that the Commission was able to assess, with evidence, the impact of the amount awarded on employee-related costs. However, it submitted the Commission would be unable to assess the impact of unrelated costs. At the hearing, senior counsel for the PSA referred to the situation when extraneous increases took place immediately after the award. He submitted that on the employer's interpretation they would take the award made beyond the prescribed threshold.

28 The PSA also submitted that the construction contended for by the employer would be incompatible with the capacity to make a multi-year award. It submitted it would be impossible to assess increased costs in

the second and third years of an award which had a nominal term of three years.

29 In the alternative, the PSA relied on the fact that the guaranteed minimum conditions of employment included superannuation payments prescribed by Commonwealth law. It submitted that even if cll 6(1)(a) and (b) of the Regulation were to be interpreted in the manner suggested by the employers, the limitation in those subclauses is subject to employees' entitlement to superannuation payments prescribed by Commonwealth law. It submitted that the 2.5% per annum increase excluded such payments. Senior counsel for the PSA submitted that otherwise the clause would be incompatible with the paramount policy in cl 7(1)(c) of the Regulation.

30 The PSA contended that even if its submission on the question of construction was incorrect, there was no jurisdictional error and the privative provision in s 179 of the Act applied. It submitted that it had not been established that an increase in salary and allowances of 2.5% in any of the effected awards increased employee-related costs by more than 2.5%. It also submitted that as the increase in the superannuation charge commenced on 1 July 2013, prior to the commencement of the variation to the Award, then the increase had already been factored into employee-related costs.

31 Senior counsel for the PSA relied on what was said in the Second Reading Speech, namely that the policy would ensure wage increases of 2.5% per annum. He said in effect that it was inconsistent with that purpose that the 2.5% be discounted by reference to increased liability for superannuation payments. He pointed to a hypothetical extreme case when there was an immediate 3% increase in the superannuation guarantee. He submitted that on the employer's construction that would deprive the Commission of any power to make an award in the year in question.

Consideration

Construction of the clause

32 The principles relating to the construction of regulations are the same as those applicable to the construction of the enabling legislation: *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389 at 398; *King Gee Clothing Company Pty Ltd and Others v The Commonwealth and Another* [1945] HCA 23; (1945) 71 CLR 184 at 195.

33 The relevant principles have been stated on a number of recent occasions by the High Court. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27 the plurality emphasised, at [47], that construction must begin with the text itself and whilst the language applied is the surest guide to legislative intention, the meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision and in particular the mischief it seeks to remedy. Determination of the purpose of a statute or a particular provision may be based not only on the express statement of purpose in the statute itself but also by inference from its text and structure, and where appropriate, by reference to extrinsic material: see also *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 87 ALJR 98 at [39] and *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [23]-[26].

34 The effect of s 146C(7) of the Act is, relevantly, that the award-making powers of the Commission, contained in s 10, are constrained by s 146C and the policies declared in the Regulation which the Commission is required to give effect to: *PSA v Director of Public Employment* at [17] and [58].

35 One policy to which effect is required to be given is that contained in the clause, namely that awarded increases in remuneration or other conditions of employment do not increase employee-related costs by more than 2.5%

per annum (subject to the provisions of cl 6(1)(b) of the Regulation). The clause looks to the effect of the award.

36 In that context, one possible construction of the clause is that it simply directs attention to whether the increase viewed in isolation results in an increase in employee-related costs of more than 2.5% per annum. That involves reading the clause as saying that public sector employees may be awarded increases in remuneration or other conditions of employment of not more than 2.5% per annum.

37 However, the clause is not expressed in these terms. It prohibits any awarded increase from increasing employee-related costs by more than 2.5% per annum. Employee-related costs are defined in cl 8 of the Regulation. The matters referred to in that definition need not be covered by an award. The superannuation guarantee, the subject of these proceedings, provides an example. Having regard to the width of the words in cl 8, "relating to ... other personal employee benefits paid to or in respect of the employee", there could be others.

38 In these circumstances it seems to me that compliance with the policy contained in the clause involves an inquiry as to whether any increase awarded by the Commission, taken together with any other increases in employee-related costs, has the effect of increasing employee-related costs by more than 2.5% per annum for the award period. In the present case, as it can be established that the superannuation payment to be made for the benefit of employees will increase compared to the period immediately prior to the award, it will be necessary for it to be taken into account in calculating the 2.5% per annum limit.

39 Contrary to the conclusion of the Commission, cl 6(1)(b) of the Regulation supports the construction which I consider preferable. Clause 6(1)(b) permits awards which increase employee-related costs by more than 2.5% per annum if sufficient employee-related cost savings have been achieved to fully offset the increased employee-related costs. Importantly cl

6(1)(b)(ii) contemplates such savings may be achieved after the award was made. Thus, for example, the Commission can take into account cost savings involving direct changes to future work practices in calculating such cost savings (cl 9(1)(b)).

40 These matters suggest that what is to be taken into account is a comparison of employee-related costs on an annual basis both before and after the award.

41 I do not agree that the construction which I have placed on the clause means that cl 6(1)(b) of the Regulation is superfluous. The expression "employee-related cost savings" is defined to cover cost savings which are wider than savings to employee-related costs as defined in cl 8 of the Regulation. In particular, savings resulting from changes in work practices or other conditions of employment, referred to in cl 9(1)(b) of the Regulation, would not fall within the definition of employee-related costs.

42 Nor do I think that the construction to which I have referred is effected by the fact that it may be difficult to estimate such increases. The duty of the Commission is to make a finding on the material available to it, something that it is well equipped to do as a specialist tribunal. It is to be noted the Commission will be required to do a somewhat similar exercise in calculating employee-related cost savings.

43 Further, I do not consider such a construction is incompatible to the capacity to make a multi-year award. An award, taking into account cl 6(1)(b)(i) of the Regulation, would set a particular rate of remuneration by reference to the annual costs expected to be incurred in the year following the award being made, compared to the costs incurred in the previous year. The fact that there may be increases in costs in subsequent years of the award would be irrelevant if no application for variation was made. However any increases in costs will be taken into account in any application for a further increase in rates of pay.

44 It is a well established principle that a law is not to be interpreted as withdrawing or limiting the conferral of jurisdiction on a court unless the implication appears clearly and unmistakeably (see, for example, *Shergold v Tanner* [2002] HCA 19; (2002) 209 CLR 126 at [34]). Assuming that this principle applies to a non-judicial tribunal such as the Commission (*Speirs v Industrial Relations Commission of NSW and Another* [2011] NSWCA 206; (2011) 81 NSWLR 348), the principle has little application in the present case. This is because the power of the Commission to make an award has clearly been limited by s 146C of the Act and the clause. In these circumstances it is necessary to construe the clause to determine the extent of the limitation. In the present case I am satisfied that the construction which I prefer is correct, notwithstanding that it may in certain circumstances limit the power of the Commission to make awards to a somewhat greater extent than the alternative construction.

45 The fact that the entitlement to superannuation payments of the minimum amount prescribed under the relevant law of the Commonwealth is one of the minimum conditions of employment to which the Commission is to have regard as a paramount policy (s 146C(1)(a) of the Act and cll 7(1)(c) and 5(a) of the Regulation) does not alter the position.

46 The relevant effect of cl 5(a) of the Regulation is to guarantee public sector employees the superannuation contribution required by the Commonwealth legislation. Yet this does not mean that such a liability cannot be taken into account in calculating the 2.5% per annum increase in employee-related costs referred to in the clause. However, if payment of the prescribed superannuation amount considered alone would increase employee-related costs beyond the 2.5% limit, there would remain an obligation to pay that amount notwithstanding the clause. This is not the present case.

47 Some reliance was also placed on the fact that the liability to pay the increased superannuation charge percentage commenced on 1 July 2013 whilst the Award was expressed to commence in the first pay period after

that date. The reference to "per annum" in the clause demonstrates that the comparison is between annual costs in the year preceding the award and annual costs in the subsequent period. Thus, whilst any calculation of the effect of the increased superannuation charge percentage must take into account the fact that it was in existence for part of the preceding year, it does not mean that it can be entirely ignored.

48 I have reached this conclusion without reference to any extrinsic material. In the Second Reading Speech it was stated that the policy would mean increases of 2.5% were available each year to employees. A construction which in effect provides that part of the increase could be achieved through an award variation and part through an extraneous increase in superannuation contributions does not undermine that policy.

Jurisdictional error

49 For the above reasons the Full Bench misconstrued the clause. However, the only orders made were to refer the proceedings to Boland P to dispose of them in accordance with their decision. Whatever be that reasoning, there was no error in the making of the order itself. Judicial review is concerned with the validity of the exercise of the power (or in this case the order made) not the reasoning which led to it. However it may be necessary to consider such reasoning to determine the validity of the exercise of the power: *Attorney General for the State of New South Wales v Quin* [1990] HCA 21; (1990) 170 CLR 1 at 26.

50 However, in reaching his decision Boland P proceeded (at [3] and [4]) on the basis that the decision of the Full Bench was correct.

51 The order made by Boland P granting a 2.5% increase in remuneration thus did not take into account the increase in employee-related costs arising as a result of the increased superannuation charge percentage, something which he was required to consider. In this respect Boland P fell

into error. The question is whether the error can be classified as a jurisdictional error.

52 In *Craig v The State of South Australia* [1995] HCA 58; (1995) 184 CLR 163 (*Craig*) the High Court referred to the different considerations arising when examining whether an administrative tribunal or an inferior court have fallen into jurisdictional error. The Court stated at [179] that if an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material or to rely on irrelevant material and a tribunal's exercise of power is thereby affected, it exceeds its authority or powers. The Court stated that such an error constituted jurisdictional error.

53 In the present case the Commission was not sitting as the Industrial Court and the above basis for intervention (with respect to administrative tribunals) may apply. That was a tentative view reached by Spigelman CJ in *Director General, NSW Department of Health v Industrial Relations Commission of NSW* [2010] NSWCA 47; (2010) 77 NSWLR 159 at [23]-[24]. If this basis of intervention was to apply then there was in my view jurisdictional error.

54 However, as was pointed out in *Craig* (at 176-177), the broader basis for intervention in the case of administrative tribunals, as distinct from inferior courts, was justifiable in part, first, on the fact that administrative tribunals are commonly constituted by members without formal legal qualifications or legal training and are not part of the ordinary hierarchical judicial structure. Second the Court noted in *Craig* at 179, that the doctrine of separation of powers may preclude legislative competence to confer judicial power upon administrative tribunals.

55 Having regard to the structure of the Commission, the first of these considerations does not apply to the Commission with the same force as it may do to other administrative tribunals. Further as was pointed out in *Kirk and Another v Industrial Court of NSW and Another* [2010] HCA 1;

(2010) 239 CLR 531 (*Kirk*) at [69], the distinction between a court and an administrative tribunal may not be drawn so easily at a State level where there is not the same constitutional requirements for the separation of powers as there is at a Federal level.

56 However, it is unnecessary to reach a firm conclusion on the matter. This is because, in my opinion, even if the question of whether there was jurisdictional error is to be determined by reference to the standard applicable to inferior courts, that conclusion should be reached. Proceeding upon the assumption that the increased superannuation charge percentage could be ignored, Boland P misconstrued the relevant regulation, thereby misconceiving the extent of his powers to grant the variation of the Award sought. In those circumstances, his Honour fell into jurisdictional error (*Craig* at 177-178; *Kirk* at [72]).

57 In the circumstances, the appropriate order is to quash the orders of Boland P and remit the matter to the Commission to be determined according to law. The parties indicated at the hearing that it had been agreed amongst them that there should be no order as to costs.

58 Since writing the above, I have had the advantage of reading in draft the reasons of Meagher JA. I agree with those reasons.

59 The orders I would make are as follows:

(3) Order that the order of Boland P in *Re Crown Employees Wages Staff (Rates of Pay) Award 2011& Ors (No 3)* [2013] NSWIRComm 109 be quashed.

(4) Remit the matter to a member of the Industrial Relations Commission to be dealt with according to law.

60 **BEAZLEY P:** I have had the advantage of reading in draft the reasons of the Chief Justice and Meagher JA in this matter. I agree with their

Honours' respective judgments and with the orders proposed by the Chief Justice.

61 **MEAGHER JA:** I have had the benefit of reading in draft the reasons of the Chief Justice. I agree with his conclusion as to the proper construction of cl 6 of the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (NSW).

62 By s 10 of the *Industrial Relations Act 1996* (NSW), the Industrial Relations Commission may make an award "setting fair and reasonable conditions of employment for employees". Such an award comes into force on the day, and applies for the period, specified by the Commission. The nominal term of the award may be not less than 12 months nor more than 3 years: ss 15, 16. The Commission may also vary or rescind an award: s 17.

63 The statutory provisions with respect to which this application is concerned, and the circumstances in which the issue as to the construction of cl 6(1) arises, are set out in the judgment of the Chief Justice.

64 Clause 6(1) provides:

> "6(1) The following policies are also declared, but are subject to compliance with the declared paramount policies:
>
> (a) Public sector employees may be awarded increases in remuneration or other conditions of employment that do not increase employee-related costs by more than 2.5% per annum.
>
> (b) Increases in remuneration or other conditions of employment that increase employee-related costs by more than 2.5% per annum can be awarded, but only if sufficient employee-related cost savings have been achieved to fully offset the increased employee-related costs. For this purpose:
>
> (i) whether relevant savings have been achieved is to be determined by agreement of the relevant parties or, in the absence of agreement, by the Commission, and

(ii) increases may be awarded before the relevant savings have been achieved, but are not payable until they are achieved, and

(iii) the full savings are not required to be awarded as increases in remuneration or other conditions of employment."

65 The Regulation was made under s 407 of the *Industrial Relations Act 1996* (NSW). Section 146C(1) of that Act requires that when making or varying any award or order, the Commission "give effect to any policy on conditions of employment of public sector employees: (a) that is declared by the Regulations to be an aspect of government policy that is required to be given effect to by the Commission". The validity of that provision was upheld in *Public Service Association v Director of Public Employment* [2012] HCA 58; 87 ALJR 162.

66 The text of cl 6(1) makes clear that its purpose is to impose a limit on the exercise of the power of the Commission to make or vary an award that increases the remuneration or other conditions of employment of "public sector employees". That limit adopts as its reference point the costs to the employer of employing those employees and those costs are defined as "employee-related costs". They are costs to the employer related to the salary or other remuneration payable to the employee or to benefits, including superannuation, which may be payable to or in respect of the employee.

67 Those costs include costs that are not imposed directly on the employer by an award. The superannuation guarantee shortfall payable to the Commonwealth under s 16 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) is an example. The obligation to pay that charge is imposed by statute and the amount payable is calculated by reference to the salary or wage paid to the employee. It follows, all other matters remaining constant, that an increase in that salary or wage will result in an increase in that cost to the employer.

68 Clause 6(1)(a) permits the Commission to award increases in remuneration or other conditions of employment "that do not increase employee-related costs by more than 2.5% per annum". Clause 6(1)(b) permits it to award increases "that increase employee-related costs by more than 2.5% per annum" but only if sufficient "employee-related costs savings" (also a defined term) have been achieved to "fully offset the increased employee-related costs". To decide whether that limit will be exceeded it is necessary to determine the employee-related costs for the annual period before the commencement of the proposed award and the increases in those costs for the following period.

69 The issue between the parties is whether, in relation to the period following the commencement of the award, increases in employee-related costs that are not directly imposed by the award are to be taken into account in determining whether the award increases those costs by more than 2.5% per annum. The answer to that question must depend upon the construction of the clause and whether the words "that do not increase employee-related costs by more than 2.5% per annum" (cl 6(1)(a)) and "that increase employee-related costs by more than 2.5% per annum" (cl 6(1)(b)) describe the outcome of the proposed award increase considered alone or after taking into account any other increases in employee-related costs that it is established will also apply during the period following the commencement of the award.

70 The respondent unions submit that when applying cl 6(1) to their applications to vary the awards in question, it is only the remuneration increase sought which is to be taken into account in determining whether there will be an increase in employee-related costs in excess of the limit. They argue that any other increases in those costs that will apply during the period of the award, including those that are an indirect consequence of the award but not "awarded" by it, are not to be taken into account for that purpose. That is said to follow, as a matter of construction, from the language of cl 6(1). That clause refers to "awarded increases" that "do not increase" those costs by more than 2.5% per annum and to awarded

increases that increase those costs by more than that percentage. That argument was accepted by the Full Bench of the Commission: *Re Crown Employees Wages Staff (Rates of Pay) Award 2011* [2013] NSWIRComm 53, esp at [25], [54].

71 The respondent unions' application to the Commission was to increase wages and salaries under existing awards by 2.5% for the 12 months from 1 July 2013. On the same date, the superannuation guarantee shortfall payable to the Commonwealth increased from 9% to 9.25% of an employee's wage or salary. That increase was made by the *Superannuation Guarantee (Amendment) Act 2012* (Cth) and arose entirely independently of the respondent's application.

72 The respondent unions' construction of cl 6(1) excludes from consideration any increases in employer-related costs other than those which are "awarded". Here, those other costs include the additional component of the superannuation charge calculated at 9.25% which is referable to the proposed 2.5% increase in remuneration. They also include the additional component referable to the increase in the charge rate from 9% to 9.25% as applied to the existing, as distinct from varied, remuneration. The former would be a direct and necessary consequence of the proposed award. The latter is a consequence of the change in the charge rate from 9% to 9.25% and would occur in any event.

73 The applicant Secretary, who represents the various public sector employers, submits that cl 6 is concerned with the effect of the proposed award or variation and whether after taking into account all other increases in employee-related costs it will result in those costs increasing by more than 2.5% from the previous year. It is not necessary that those other increases in costs be a consequence of the proposed award. They may be due to the terms of an existing award, which provides for annual increases in remuneration or other conditions, or, as in this case, to external factors such as legislative changes.

74 At this point it is necessary to consider the operation of cl 6(1)(b) which permits "awarded" increases that increase costs by more than the prescribed limit where there are sufficient employee-related cost savings "to fully offset the increased employee-related costs".

75 Adopting the construction propounded by the respondent unions', cl 6(1)(b) will be engaged only where the proposed award or variation, considered alone, increases employee-related costs by more than 2.5% per annum. In that event, any increase in excess of 2.5% is permitted to the extent that it is fully offset by employee-related cost savings.

76 Because, on the respondent's construction, increases in employee-related costs that are not "awarded" are not to be taken into account, all relevant cost savings are available to be offset against those "awarded" increases. This has the result that where there are such savings those increases, because they are to be considered alone, are permitted to exceed the 2.5% limit notwithstanding that there are other employee-related cost increases against which those savings could be offset.

77 On the Secretary's construction, cl 6(1)(b) will be engaged if, after taking into account any other cost increases which it is established will also apply, the award results in increases above the 2.5% limit. In that event the only increases above the limit which are permitted are those that are fully offset by employee-related cost savings. The consequence of this construction is that, subject to one qualification, increases in remuneration or other conditions of employment cannot be awarded if they have the consequence, taking into account other cost increases, that employee-related costs for the period in question increase above the 2.5% limit. The qualification is that those increases are permitted if they are fully offset by cost savings.

78 The purpose of the policies declared by cl 6(1) is tolerably clear. It is, where possible, to keep annual increases in employee-related costs at or below 2.5% per annum. They do that by providing that awarded increases

cannot produce increases in excess of the limit unless they are offset by cost savings – the premise being that all increases in employee-related costs will be taken into account in assessing whether the proposed award will result in increases in excess of the limit. The clause addresses the effect of the award increases at the "margin", which is the point at which increases in employee-related costs exceed the limit, and the offset provision ensures that award increases do not result in increases above the 2.5% limit unless there are equivalent cost savings.

79 The construction urged by the Secretary gives effect to that purpose and for that reason is clearly to be preferred. It does not guarantee that employee-related costs may not increase by in excess of 2.5% per annum. That is because those costs may increase for reasons unrelated to the making or variation of an award. It does ensure, however, that there will not be increases in employee-related costs in excess of the 2.5% per annum limit that are the result of the making or variation of an award, except where increases in excess of 2.5% are fully offset by employee-related cost savings.

80 There is one further argument which must be addressed. The respondent unions also submit that if the Commission was otherwise required by the provisions of cl 6(1) and s 146C(1) to take into account other increases in employee-related costs when addressing the effect of a proposed award, the introductory words to cl 6(1) nevertheless require that it not take into account any increases in costs that are incurred in giving effect to guaranteed minimum conditions of employment.

81 Those introductory words provide that the policies declared in cl 6(1) are "subject to compliance with the declared paramount policies". The paramount policies referred to include the employees' entitlement to the guaranteed minimum conditions of employment in cl 7 which in turn include the making of employer payments to employee superannuation schemes or funds.

82 The effect of those introductory words is not that any increases in such payments are not to be taken into account in calculating whether the 2.5% limit in cl 6(1) has been exceeded. Those words are only enlivened if the policies in that clause are inconsistent with compliance with that guaranteed minimum condition of employment. That is not this case. The position would have been different if the proposed award increase was to give effect to a guaranteed minimum condition of employment and resulted in employee-related costs increasing by more than the 2.5% limit. In that event compliance with the guaranteed minimum condition of employment would prevail.

83 The proceedings before this Court are brought in its supervisory jurisdiction. The order sought by the Secretary is that the decision and orders of the Full Bench and of Boland J (*Re Crown Employees Wages Staff (Rates of Pay) Award 2011 (No 3)* [2013] NSWIRComm 109) be quashed.

84 It was not contested that if the Secretary's argument was accepted, there was jurisdictional error because the Full Bench, and Boland J in giving effect to its ruling, misapprehended the Commission's power to make an award in a case where it was otherwise correctly recognised that jurisdiction existed: *Craig v South Australia* [1995] HCA 58; 184 CLR 163 at 177; and *Kirk v Industrial Court (NSW)* [2010] HCA 1; 239 CLR 531 at [72]. It was not argued before this Court that s 179 of the *Industrial Relations Act* precludes the grant of an order in the nature of certiorari for jurisdictional error.

85 I agree with the Chief Justice that in the circumstances the orders made by Boland J on 20 December 2013 should be quashed and the matter remitted to the Industrial Relations Commission to be dealt with according to law. The respondents should pay the Secretary's costs of these proceedings.

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I certify that this and the 31 preceding pages are a true copy of the reasons for judgment herein of the Honourable Chief Justice of New South Wales and of the Court.

Associate

Dated 6.5.14