



## REMUNERATION TRIBUNAL REPORT RELATING TO DETERMINATION NO. 4 OF 2017

### 2017 ANNUAL REVIEW OF REMUNERATION FOR MEMBERS OF THE JUDICIARY, MEMBERS OF THE INDUSTRIAL RELATIONS COURT AND COMMISSION, THE STATE CORONER, AND COMMISSIONERS OF THE ENVIRONMENT, RESOURCES & DEVELOPMENT COURT

#### INTRODUCTION

1. The Remuneration Tribunal has jurisdiction under section 13 of the *Remuneration Act 1990* (“the Act”) to determine the remuneration payable to the judiciary and holders of the public offices listed in that section of the Act.
2. Section 8 of the Act requires the Tribunal to sit at least once in each year for the purpose of reviewing previous determinations of remuneration, made under the Act. Judicial remuneration in South Australia was last reviewed in March 2016. A Determination<sup>1</sup> was made increasing that remuneration by two per cent (2%), with an operative date of 1 January 2016.
3. Section 10(2) of the Act provides that prior to the making of a Determination, the Tribunal must allow an affected person, or persons of an affected class, a reasonable opportunity to make submissions orally or in writing to the Tribunal. Section 10(4) provides that the Minister responsible for the Act may intervene, personally or by counsel or other representative, in proceedings before the Tribunal for the purpose of introducing evidence, or making submissions, on any question relevant to the public interest.
4. By letters dated 1 December 2016, the Tribunal wrote to the Judicial Remuneration Coordinating Committee (“JRCC”), the Magistrates Association of South Australia (“the Magistrates Association”), the Honourable Premier (“the Premier”) as the Minister responsible for the Act, and the Attorney-General, notifying the intention of the Tribunal to conduct a review of the remuneration of the relevant office holders. The Tribunal subsequently received advice that the JRCC represents the office holders affected.
5. In addition, on 2 February 2017, a notification was placed on the Tribunal’s public website, that the Tribunal would undertake a review of remuneration of judicial and other related offices.

#### BACKGROUND

6. In previous reviews of judicial remuneration in South Australia, the Tribunal has had regard to the national framework of salaries paid to judicial officers throughout the Commonwealth.
7. It would be accurate to describe the concept of a national framework of judicial salaries as a guiding principle for the purpose of considering judicial remuneration in South Australia. However, whilst adopting this guiding principle, the Tribunal has ensured that discretion has been preserved for the purpose of making an independent judgement of an appropriate level of judicial remuneration from time to time.

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<sup>1</sup> *Remuneration Tribunal Determination 5 of 2016 – Annual Review of Judicial Remuneration*

8. The Tribunal has avoided any Determination that judicial salaries in South Australia will automatically follow any Determination or legislative regulation of judicial remuneration in another jurisdiction. Nonetheless, it is a significant feature of the history of the Tribunal's Determination of judicial salaries in South Australia that the level of salary of a Puisne Judge of the Supreme Court has fallen within a narrow band when compared with the salary of a Judge of the Federal Court, and with that of a Puisne Judge of Supreme Courts throughout the States and Territories. This narrow band is illustrated at paragraph 12 of this report.
9. In 2012, the Tribunal fixed the salary of a Puisne Judge of the Supreme Court at \$402,880 per annum, which was the same level of salary as a Federal Court Judge at that time. Since 2012, each annual review of judicial remuneration has resulted in the Tribunal aligning the salary of a Puisne Judge of the Supreme Court with that of a Federal Court Judge, which included two annual reviews where no increase in salary was determined, in 2014, and 2015. The consequence of the Tribunal's Determinations in those two years was that the salary of a Puisne Judge of the Supreme Court remained aligned with that of a Federal Court Judge.

#### **THE COMMONWEALTH REMUNERATION TRIBUNAL DETERMINATION 2016/17.**

10. The Commonwealth Remuneration Tribunal ("The Commonwealth Tribunal") determines the salaries payable to judicial officers of the Commonwealth. The Commonwealth Tribunal conducts reviews of judicial remuneration on an annual basis. In 2016, the Commonwealth Tribunal issued two statements which resulted in a Determination<sup>2</sup> to increase the salaries of Commonwealth judicial officers by 4.8 per cent operative from 1 January 2017.

#### **COMPARISON OF FEDERAL, STATE AND TERRITORY JUDICIAL SALARIES**

11. The Tribunal has examined Federal, State and Territory judicial salaries.
12. The relevant judicial salaries as at the time of writing are as follows:

Jurisdiction	Puisne Judge Salary
New South Wales	\$441,940
Western Australia	\$441,057
Northern Territory	\$441,010
Queensland	\$441,010
Victoria	\$441,010
Australian Capital Territory	\$441,010
Tasmania	\$440,940
Commonwealth (federal court judge used)	\$441,010
Median Salary (all states and territories ex SA)	\$441,010
Average Salary (all states and territories ex SA)	\$441,123
SA (prior to this Determination salary)	\$420,810

<sup>2</sup> Commonwealth Remuneration Tribunal Determination 2016/17: Judicial and Related Offices – Remuneration and Allowances

Jurisdiction	District Court Judge Salary
Western Australia	\$396,951
Queensland	\$396,909
New South Wales	\$395,810
Victoria (county court judge used)	\$382,091
Northern Territory	N/A
Australian Capital Territory	N/A
Tasmania	N/A

Commonwealth	N/A
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Median Salary (all states and territories ex SA)	\$396,360
Average Salary (all states and territories ex SA)	\$392,940

South Australia (prior to this Determination)	\$371,610
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Jurisdiction	Magistrate Salary
Queensland	\$347,075
Australian Capital Territory	\$344,084
Northern Territory	\$341,783
Western Australia	\$327,484
New South Wales	\$315,380
Victoria	\$305,575
Tasmania	\$297,630

Commonwealth (federal circuit court judge used)	\$372,180
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Median Salary (all states and territories ex SA)	\$334,633
Average Salary (all states and territories ex SA)	\$331,399

South Australia	\$293,090
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13. It is appropriate at this point to address the means by which the salary of a Puisne Judge of the Supreme Court of Tasmania is determined. Such salary is determined by the provisions of section 7(3) of the *Supreme Court Act 1887* (Tas) as follows:

*“The Auditor-General, as soon as practicable after 31 May in each year and in accordance with this section, must determine the rate that is the average of the rates of salary payable to the Chief Justices in South Australia and Western Australia at the time of the determination, and that rate of salary is to have effect in respect of the financial year commencing on the following 1 July.”*

14. Should the Tribunal determine a salary equivalent to that of a Federal Court Judge as the appropriate salary of a Puisne Judge of the Supreme Court of South Australia, the Tasmanian legislation would cause the Salary of a Puisne Judge of the Supreme Court of Tasmania to be \$451,120, subject only to verification by the Auditor-General of Tasmania for the purposes of the relevant legislation.

### **FAIR WORK ACT 1994 (SA)**

15. The Tribunal is required by Section 101(1) of the *Fair Work Act 1994* (SA) to have due regard to principles, guidelines, conditions practices or procedures adopted by the Industrial Relations Commission of South Australia<sup>3</sup>. That section is set out as follows:

<sup>3</sup> [2005] SAIRComm 29

**101—State industrial authorities to apply principles**

*(1) In arriving at a determination affecting remuneration or working conditions, a State industrial authority must have due regard to and may apply and give effect to principles, guidelines, conditions, practices or procedures adopted by the Full Commission under this Part.*

*(2) However, principles adopted under this Part are not applicable to enterprise agreements.*

*(3) In this section—*

**State industrial authority means—**

*(a) the Commission; or*

*(b) the Remuneration Tribunal; or*

*(c) the Commissioner for Public Sector Employment; or*

*(d) another person or body declared by regulation to be a State industrial authority.*

16. The Tribunal has had due regard accordingly as required by the relevant legislative provisions. Mention is made later in this report to the practices of the Full Commission of the Industrial Relations Commission of South Australia and consequent outcomes of annual reviews of wages and salaries since 2012 by that Tribunal.

**SUBMISSIONS**

17. The JRCC has made submissions on behalf of judicial office holders, which were supported by the Magistrates Association. Those submissions were filed in writing on 3 February 2017. The Crown Solicitor's Office ("CSO") made submissions on behalf of the Premier and replied to those of the JRCC.
18. In addition to the submissions of the JRCC in 2017, the Magistrates Association made discrete submissions in relation to the salaries of Magistrates and the relationship between the salary of a Magistrate and the salary of a Puisne Judge of the Supreme Court.
19. The Tribunal convened a hearing on 21 March 2017 to hear oral submissions. The following persons attended:
- The Honourable Justice Tim Stanley, on behalf of the JRCC;
  - The Honourable Judge Wayne Chivell, on behalf of the JRCC;
  - The Honourable Magistrate David McLeod, on behalf of the Magistrates Association;
  - The Honourable Magistrate Jayanthi McGrath, on behalf of the Magistrates Association;
  - Mr Elbert Brooks, on behalf of the Magistrates Association;
  - Mr Craig Fabbian, on behalf of the Magistrates Association; and
  - Ms Carly Cooper, on behalf of the Honourable Premier of South Australia, as the Minister responsible for the Act.
20. JRCC Submission
- The JRCC submitted that the Tribunal should continue to set judicial salaries in a national framework, and in the national interest.
  - The JRCC submitted that the salary of a Puisne Judge of the Supreme Court of South Australia should be increased by 4.8% to \$441,010 per annum, to maintain parity with the annual salary paid to a judge of the Federal Court.
  - The JRCC submitted that the salaries of other judicial officers including judges of the District Court, Magistrates, the State Coroner and other statutory office holders as listed in Section 13 of the Act, be increased by no less than the percentage salary increase applicable to a Puisne Judge of the Supreme Court.
  - The JRCC submitted that since 1 November 2013, the Tribunal has awarded only one increase of two per cent (2%) to South Australian judicial officers. Over the same period, the consumer price index has increased 6.7 per cent, and labour costs in South

Australia have risen by 8.1 per cent in the private sector and 8.3 per cent in the public sector.

- The JRCC sought an operative date of 1 January 2017 in order to maintain the same salary level as that of a Federal Court Judge and to maintain judicial salaries within a national framework.
- The JRCC made additional submissions on 31 March 2017, where the following was put to the Tribunal:
  - The Commonwealth Tribunal’s decision, as per the Commonwealth Tribunal’s statements on 4 October 2016 and 28 November 2016, was not based on work value grounds, and the salary of a Federal Court Judge was increased in order to maintain a national framework of judicial salaries, noting that the salary of a Supreme Court judge of Western Australia is \$441,057 and the salary of a Supreme Court judge of New South Wales is \$441,940.
  - The JRCC is not seeking a work value enquiry.
  - There is no justification for fixing the salary of a Puisne Judge of the Supreme Court outside of the narrow band in the national framework of judicial salaries.

21. Magistrates Association Submission – “Relativities”

- The Magistrates Association supported the submissions made by the JRCC.
- The Magistrates Association made an additional submission to the Tribunal for a review of remuneration previously determined for the office of Magistrate, specifically, the annual salaries fixed by the Tribunal’s Determination 7 of 2012<sup>4</sup>.
- The Magistrates Association submitted that the Tribunal’s Determination 7 of 2012 resulted in an anomaly and inequity, due to Magistrates and some other judicial offices being awarded a different percentage increase (3%) from the increase for a Puisne Judge of the Supreme Court (3.53%), without appropriate grounds or reasoning. The Magistrates Association sought restoration of what it claims to be salary relativities that existed prior to the making of Determination 7 of 2012.
- The Magistrates Association submitted that there was no reasonable opportunity afforded prior to the making of Determination 7 of 2012 for Magistrates to make submissions contrary to such a Determination, which resulted in a denial of procedural fairness.

22. Submission on behalf of the Premier

- The submission on behalf of the Premier provided a statement by the Director, Economic Strategy, of the Department of the Premier and Cabinet. The submission provided statistical data, including:
  - Wage Price Index for South Australia indicated that the costs of employment in South Australia had increased by 2.3% over the 12 months to 30 June 2016, compared to 2.1% nationally.
  - Consumer Price Index for Adelaide (All Groups) increased by 1.3% over the 12 months to 30 June 2016.
- Ms Carly Cooper, on behalf of the Premier, submitted that whilst the Tribunal has previously made decisions in a “national framework”, the Tribunal should not adopt the recent Determination made by the Commonwealth Tribunal, which determined a salary increase of 4.8% for Commonwealth judicial offices on the grounds that:
- There is no demonstrated increase in work value in the claim warranting an increase in the remuneration of the South Australian judiciary in accordance with the principles

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<sup>4</sup> SA Remuneration Tribunal Determination 7 of 2012 – Annual Review of Judicial Remuneration

established by the Industrial Relations Commission of South Australia in the *State Wage Case 2005*<sup>5</sup>;

- The economic evidence in respect of South Australia does not justify such a significant increase;
- In making decisions within a “national framework” the Tribunal should, and has, guarded against automatically adopting salary outcomes determined by the Commonwealth Tribunal;
- If so minded, any increase to South Australian judicial remuneration should not exceed 1.5% to be consistent with the current Government wages policy;
- In the alternative, the Tribunal should refrain from making a decision at this time and instead conduct a proper work value review of judicial salaries;
- An operative date of any annual salary increase to be no earlier than 1 January 2017;
- The Tribunal should not award a separate and additional increase to the remuneration of the Magistrates to “restore relativities” that existed prior to a Determination of the Tribunal in 2012 as there is no demonstrated increase in work value in the Magistrates’ claim warranting a further increase in remuneration over and above any general salary increase;
- Additional submissions were made on behalf of the Premier on 29 March 2017, whereby the following points were put to the Tribunal:
  - It is not sufficient to merely identify a disparity between members of the South Australian judiciary and the Federal judiciary.
  - A significant increase in remuneration of the amount claimed should only be granted in this instance if an increase to the work value of each judicial position is clearly demonstrated in addition to economic evidence that supports the claimed increase.

## **JUDICIAL REMUNERATION**

23. Our consideration will now focus upon the essential components of the submissions before us and our approach to the determination of judicial remuneration as expressed in previous reviews. We deal with the claim made on behalf of Magistrates later under a separate heading.
24. We identify the relevant considerations in summary form as follows:
  - The Tribunal’s practice of determining judicial salaries in the context of what we have frequently referred to previously as the national framework of such salaries;
  - The wages policy of the Government; and
  - The current circumstances of the economy of South Australia and wage and salary movements in the community.
25. We consider that the nature of the work of judicial officers is highly specialised and bears substantial similarities across the various jurisdictions throughout the Commonwealth. Moreover, to the extent that the determination of relevant salaries includes that of members of Tribunals we think the same circumstances apply. We consider there is merit in ensuring that, as far as possible and appropriate, broad coherence is maintained between the salaries applicable to the judiciary in South Australia and comparative judicial offices throughout the States and the Commonwealth.
26. In our view, this approach is equitable and provides consistency of practice in the interests of the judicial officers concerned and the public interest. In the latter case the reference to the national framework of judicial salaries determination has identifiable objectivity, consistency and transparency. We think this approach serves to provide public confidence in the appropriateness of the level of judicial salaries. More so, in our view, than highly

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<sup>5</sup> [2005] SAIRComm 29

contingent and apparently inconsistent periodic adjustments of the remuneration applicable to judicial offices would afford. However, the national framework of judicial salaries is made up of numerous levels of salary for various judicial functions and court structures with some unevenness. The national framework should therefore be comprehended as a general reference point for the exercise of the Tribunal's discretionary judgement.

## GOVERNMENT WAGES POLICY

27. It is appropriate to make some observations about the nature of Government wages policy.
28. The first is that reference in the submissions of the Premier to this policy is not supported by evidence of its manifestation. As far as we are aware the policy was expressed as a part of the State budget outlook in July 2016. To our understanding, the policy allows for wage increases arising from Enterprise Bargaining in the public sector to be greater than 1.5% where such bargaining commenced prior to the expression of the policy.
29. We take official notice of various Enterprise Bargaining Agreements in the public sector approved by the Industrial Relations Commission of South Australia since the announcement of the policy. Those Enterprise Bargaining Agreements provide for annual wage or salary increases of more than 1.5% for 2017 and beyond. As far as we can discern, annual increases of 2.5% are frequently evident.
30. Looking more broadly we consider that data concerning actual movements in the level of wages and salaries in the community over time is more informative than an expression of policy, which may or may not manifest consistently and coherently in changes to the level of remuneration as intended.
31. It is also relevant, in our view, to take account of the generic nature of the policy which affects over 100,000 employees in the public sector. We find the reference to the policy informative but of limited utility in reaching a conclusion of what the salary of judicial officers should be in all the relevant circumstances.
32. In this respect we have given consideration to data reflecting actual changes in wages and salaries since the 2012 Determination of judicial salaries at which time the salary of a Puisne Judge of the Supreme Court was aligned with that of a Federal Court. We set out the relevant data below.

SA Puisne Judge Salary (actual)			SA Puisne Judge (if increased by SA State Wage Case IRCSA decision in corresponding year since 2012)		
2012	\$402,880		2012	\$402,880	
2013	\$412,550	2.4%	2013	\$413,355	2.6%
2014	\$412,550	0.0%	2014	\$425,756	3.0%
2015	\$412,550	0.0%	2015	\$436,399	2.5%
2016	\$420,880	2.0%	2016	\$446,873	2.4%
<b>TOTAL</b>		<b>4.4%</b>	<b>TOTAL</b>		<b>10.5%</b>

33. We also observe that had the salary of a Puisne Judge of the Supreme Court increased consistently with the relevant Wage Price Index series of the Australian Bureau of Statistics the result would be a salary somewhat higher than is current. The table below sets out that difference.

SA Puisne Judge (actual)			SA Puisne Judge (if increased by ABS Wage Price Index at 1 July in corresponding year since 2012)		
2012	\$402,880		2012	\$402,880	
2013	\$412,550	2.4%	2013	\$413,758	2.7%
2014	\$412,550	0.0%	2014	\$424,515	2.6%
2015	\$412,550	0.0%	2015	\$434,279	2.3%
2016	\$420,880	2.0%	2016	\$445,136	2.5%
<b>TOTAL</b>		<b>4.4%</b>	<b>TOTAL</b>		<b>10.1%</b>

34. It may also be observed that if the salary of a Puisne Judge of the Supreme Court were to be aligned with that of a Federal Court Judge operative from 1 January 2017 the resultant salary would be less than if the salary of the former had increased at the same rate as shown in the ABS series. The table below shows the difference.

SA Puisne Judge (if aligned to Federal Court Judge as at 1 January 2017)		SA Puisne Judge (if increased by ABS Wage Price Index since 2012, as at 1 January 2017)	
2017	\$441,010	2017	\$445,136

35. All of the above illustrates the difficulty of determining an appropriate level of judicial salaries by reference to an expression of government wages policy of a very broad nature which is, in effect, an expression of intention which may or may not become uniformly manifest in the public sector. Moreover, the policy may not bear a significant relationship with the actual experience of changing levels of remuneration for employment in the state generally.
36. More importantly, for our purposes, the policy does not address specific considerations relevant to the nature of judicial functions and the circumstances of judicial remuneration throughout the Commonwealth. Our immediate task is to determine appropriate remuneration for the performance of the responsibilities of judicial offices.

## THE ECONOMY OF SOUTH AUSTRALIA

37. In our view, the determination of judicial salaries should have appropriate regard to the economic context in which such determinations are made and the relevant economic circumstances experienced by the community which the judiciary serves.
38. The evidence before us and our observations concerning the level of unemployment, closure of parts of the manufacturing sector and challenges faced by the government financing the provision of public goods and services are indicative of broader economic constraints which are currently experienced by the community.
39. We will take these matters into account when balancing all of the relevant considerations for the purposes of our discretionary judgement of the appropriate level of judicial salaries.

## CONCLUSION

40. After reflection upon all of the considerations referred to above and seeking to find an appropriate balance we have decided that it is appropriate to determine a staged approach to the adjustment of judicial salaries arising from this review. We have decided to issue a determination with two tables of judicial salaries operative from 1 January 2017 and 1 January 2018 respectively. The consequence is that the judicial salaries determined will maintain a coherent relationship with the national framework of judicial salaries on a staged basis.

## MAGISTRATES – SALARY “RELATIVITIES”

41. The Magistrates Association has made submissions to the Tribunal which seek the restoration of what is referred to as a relativity between the salary of a Magistrate and that of a Puisne Judge of the Supreme Court of South Australia, which the Magistrates Association submit existed in 2011 and was inappropriately varied by Determination 7 of 2012<sup>6</sup>.
42. The Magistrates Association filed relevant written submissions on 6 February 2017, and filed supplementary written submissions on 15 February 2017 and 5 April 2017.

<sup>6</sup> Remuneration Tribunal Determination 7 of 2012: Annual Review of Remuneration for Members of the Judiciary and other related offices.

43. The Crown Solicitor's Office filed relevant submissions on behalf of the Premier, in the public interest. Those submissions were filed on 15 March 2017 and supplementary written submissions were filed on 29 March 2017.
44. The Tribunal convened a hearing on 21 March 2017. Mr Brooks attended and made oral submissions on behalf of the Magistrates Association and was accompanied by the following persons:
  - The Honourable Magistrate David McLeod;
  - The Honourable Magistrate Jayanthi McGrath; and
  - Mr Craig Fabbian, Solicitor.
45. The submissions made on behalf of the Magistrates, rest on two foundations. The first is a question of the Tribunal's procedure in the 2012 review of judicial salaries. The second concerns the substantive outcome and effect of the 2012 Determination of judicial salaries upon the level of salary of a Magistrate. In the former case the Magistrates Association submits that the procedure was legally erroneous and unfair. The Magistrates Association submits that the outcome determined by the Tribunal in 2012 was anomalous and inequitable.
46. The Tribunal has reviewed Determinations of judicial salaries since the commencement of the Act, on 19 April 1990. At the hearing the Tribunal advised the Magistrates Association that it intended to give consideration to the history of the determination of judicial remuneration, as reflected in Reports and Determinations of the Tribunal accordingly.
47. Mr Brooks accepted that the Tribunal could take notice of the subject matter of such Reports and Determinations for the purpose of dealing with the Magistrates' relativity claim.
48. As noted, the immediate focus falls upon the Tribunal's Determination of judicial remuneration made in 2012. In that Determination the Tribunal awarded differential increases to the salaries of judicial officers, specifically an increase of 3.53% to the salary of Judges of the Supreme Court and District Court and an increase of 3% to the salary of a Magistrate. The Magistrates Association submit that this wrongly changed the relative money value of the salaries of Magistrates and those judicial officers whose salaries were increased by 3.53%, in particular, the relationship of the money value of the salary of a Magistrate to that of a Puisne Judge of the Supreme Court.
49. The Magistrates Association submit that, at that time, the Tribunal did not foreshadow the differential outcome, so determined. The Magistrates submit that, in these circumstances, the Tribunal made an error of law, in that, the Tribunal failed to comply with the Act, in particular section 10 thereof, the terms of which are set out below.

***“10—Evidence and submissions***

*(1) The Tribunal is not bound by the rules of evidence but may inform itself in any manner it thinks fit.*

*(2) Before the Tribunal makes a determination affecting the remuneration of a particular person, or persons of a particular class, the Tribunal must allow that person, or the persons of that class, a reasonable opportunity to make submissions orally or in writing to the Tribunal.*

*(3) A person may appear before the Tribunal personally, or by counsel or other representative.*

*(4) The Minister may intervene, personally or by counsel or other representative, in proceedings before the Tribunal for the purpose of introducing evidence, or making submissions, on any question relevant to the public interest.”*

50. The Magistrates Association made other submissions in relation to the way in which the Tribunal proceeded to determine the salaries of Magistrates in 2012, which will be dealt with further below. It is convenient to first deal with the submission that the Tribunal made an error of law, as submitted above.
51. It will be observed that section 10(2) of the Act, concerns the provision of a reasonable opportunity to make submissions in relation to a review and determination affecting remuneration of persons subject to the Tribunal's jurisdiction.

52. The Tribunal has considered the records of the conduct of the review of judicial remuneration in 2012.
53. The Tribunal is satisfied of the following:
- South Australian Judicial Officers were notified of the conduct of the review in a reasonable manner;
  - Written submissions were filed on behalf of judicial officers by the JRCC, dated 24 October 2012. The JRCC advised the Tribunal in writing that the submission was made on behalf of the Magistrates, among others; and
  - A hearing was conducted on 9 November 2012. The Honourable Justices Sulan and Stanley, and the Honourable Judge Chivell attended that hearing on behalf of the JRCC.
54. In the Tribunal's view, all of the above constitutes compliance by the Tribunal with the requirements of subsections 2 and 3 of section 10 of the Act. Accordingly, the Tribunal rejects the submission of the Magistrates Association, that the Tribunal made an error of law in the 2012 review, comprised of non-compliance with section 10 of the Act.
55. The Magistrates Association additionally submits that, even if it be the case that the Tribunal is not convinced that there was an error of law in 2012, as submitted, it was unfair for the Tribunal to make a determination which had the effect of changing the relative value of the respective salaries of Magistrates and Puisne Judges of the Supreme Court. Moreover, it is submitted that it was unfair of the Tribunal to do so in circumstances where the Magistrates were unaware of this being a possible outcome of the 2012 review of judicial salaries. Whilst not characterised by the Magistrates Association as an error of law, comprised of a failure to comply with a statutory injunction affecting the Tribunal's procedure, nevertheless, this submission of unfair procedure raises a question of procedural fairness which may be tantamount to an error of administrative law.
56. For the reasons set out above we do not consider the proceedings of the Tribunal in 2012 were unfair, having regard to the statutory context in which they were conducted. Moreover, we do not consider that all potential outcomes of reviews of remuneration or Determinations need be notified to persons affected before a Determination is made by the Tribunal. Such outcomes are inevitably a result of discretionary judgement by the Tribunal, which is not confined within the boundaries of the submissions made by those affected. In our view, the outcome reflected in the 2012 Determination constituted judgement of appropriate levels of salary remuneration for various judicial offices and not a determination of salary relativities.
57. In light of our conclusions that there was no error of law, as submitted, and no failure to provide procedural fairness in the 2012 review, we turn to the question of the Magistrates' ability to seek a review of the 2012 Determination and its outcome. In this respect, section 18 of the Act is apt.

***“18—Determinations not to be subject to appeal***

*A determination of the Tribunal is not subject to appeal.”*

58. The Magistrates submit that the appropriate relative value of the salary of a Magistrate and that of a Puisne Judge of the Supreme Court can be taken into account within the scope of the present review and should not be characterised as a purported appeal against the Determination made in 2012. Strictly speaking, the Tribunal considers that this submission is sound. Our understanding is that the Premier's submission does not differ. In the Tribunal's view, it may take into consideration the 2012 Determination and the circumstances under which it was made in the course of the 2017 review of judicial salaries. However, the policy of the Act, as expressed by section 18, is also a relevant consideration. The Tribunal considers that a Determination should be considered final when made but may be reviewed in the future, as a matter of discretion.
59. Although it may be trite to make the distinction between the functions of a Tribunal and a Court, there is a clear difference between decisions made by a court subject to the legal

principle of *stare decisis*<sup>7</sup> and a decision of a Tribunal which is not subject to that legal principle. It is open to the Tribunal to review judicial remuneration in 2017 and, amongst other things, take into account Reports and Determinations previously made affecting judicial remuneration. Should it be persuaded to do so, the Tribunal may take a different approach than had been the case previously. Whether or not the Tribunal would do so must depend upon what is before it and judgement of whether or not to leave an effect of a previous Determination undisturbed. Having regard to all of the above, the Magistrates' application will be dealt with as a matter of discretion, as part of the current review of judicial remuneration.

60. The Magistrates Association submits that due to the outcome of the 2012 review the salary of a Magistrate is anomalous and inequitable. The ordinary meaning of the words anomaly and inequity, as entered in the Macquarie Dictionary, are set out below:

*Anomaly: deviation from common rule or analogy.*

*Inequity: (1) lack of equity, unfairness (2) an unfair circumstance or proceeding.*

61. We have already dealt with the fairness of procedure of the Tribunal in the 2012 review of judicial salaries. Otherwise, what would constitute an anomaly and inequity, in every-day language, would seem to connote a question of unfair degree of difference from a norm. On what is before us, we do not consider that the money value of the salary of a Magistrate determined in 2012 was anomalous or inequitable, in substance. Nothing has been submitted, other than the claimed historical "relativities" of the respective salaries of the relevant judicial offices, which forms a substantive consideration and establishes that the salary of a Magistrate determined was anomalous or inequitable.
62. We therefore now consider the concept of salary "relativities" relied upon in the submissions of the Magistrates Association. Having reviewed the Reports and Determinations of judicial remuneration in South Australia made under the Act, the Tribunal considers that a definitive determination of a scale of judicial salary relativities is impossible to discern. However, there have been occasions, on application, where the Tribunal has been requested by judicial officers to address certain questions involving the relative money values of salaries for various judicial offices of South Australia.
63. In the latter respect, there has been reference in various contexts to a concept of judicial salary relativities, by representatives of judicial officers and submissions made on behalf of the Premier, from time to time. Moreover, discursive content of the Tribunal's reports has engaged in various ways with this concept, which we judge to be inconclusive for present purposes.
64. In these circumstances it is useful to consider, whether or not the concept of salary "relativities" is properly characterised as consequential in nature. That is to say, are salary "relativities" properly characterised as an indirect arithmetic consequence of salaries determined and expressed as money amounts for various judicial offices, or, have the money amounts of judicial salaries been determined to give effect to a system of salary relativities which the Tribunal has judged to be appropriate.
65. Having given consideration to the relevant Reports and Determinations referred to, the Tribunal thinks the former is the case. We discern no fixed salary "relativities" of judicial offices having been determined in a systematic manner in the course of the exercise of the Tribunal's function to review judicial remuneration once per year since the commencement of the Act. Rather, we find that, when requested to do so from time to time on application, the Tribunal has discretely resolved controversies over the level of judicial salaries and dealt with submissions which have referred to the concept of salary "relativities", in the course of doing so.
66. Although not determinative for our purposes, we understand from the oral submissions made on behalf of the Magistrates that the Magistrates Association accepts that the

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<sup>7</sup> The principle of binding precedent within a hierarchy of courts in a common law system. *Australian Law Dictionary* (2010) 1<sup>st</sup> Edition, Oxford University Press

Tribunal has not determined a comprehensive system of salary “relativities” for judicial offices subject to its jurisdiction.

67. The Tribunal’s Report and Determination 5 of 2002<sup>8</sup> is referred to by the Magistrates Association in support of their submissions seeking a “relativities” based salary increase. In the Tribunal’s report in relation to that Determination, the Tribunal directly addressed a salary claim submitted by the Magistrates. In the Report, the Tribunal extracted the following from the Magistrates’ submissions at the time:

*“This application is based on significant changes which have occurred since 1992 in the jurisdiction and work value of Magistrates. These warrant a review of, and increase in, the relativity of Magistrates’ remuneration as compared to a Puisne Judge of the Supreme Court.”*

68. The Tribunal dealt with the Magistrates submissions at that time at paragraph 2.3 of its 2002 report, and reached relevant conclusions at paragraph 2.3.5, the text of which is set out below.

*“The Tribunal spent considerable time examining the work changes that have occurred in the Magistrates Court since 1992, both in terms of actual work and the complexity of that work and it has not been an easy task to reach a conclusion.*

*After full consideration of all the material and submissions, and its own inquiries, the Tribunal has reached the conclusion that there have been sufficient material changes to the work value of Magistrates which would warrant an increase in their salary relative to the current salaries of Puisne Judges in this State.”*

69. The Tribunal clearly concluded that, on the basis of changes in work value, an increase in the salaries of Magistrates relative to the salaries of Puisne Judges of the Supreme Court was warranted, at that time. What was not said was that the Tribunal was determining a relativity which would remain the basis for the determination of the salary of the office of Magistrate.
70. The Tribunal considers that the reference, in the 2002 Report, to relative salaries performed a particular function in that context. Namely, to ensure clarity of intention on the part of the Tribunal. The intention being that the increased salary of the office of Magistrate had no implications which would lead to an increase in salary of a Puisne Judge of the Supreme Court. In short the expression of the Tribunal was to ensure that there would be no flow on of the work value based increase in the salary of a Magistrate based on the concept of “relativities”.
71. Applying this view to the conclusion of the Tribunal in 2002, we are of the view that the Tribunal, as it then was, increased the salaries of Magistrates having exclusive regard to work value changes and expressed the consequence of doing so as affecting a change in the salary of a Magistrate relative to the salary of a Puisne Judge of the Supreme Court, at that time. The outcome was not a Determination expressed such that the salary of a Magistrate was to be a prescribed percentage of the salary of a Puisne Judge of the Supreme Court. Rather, a money amount of annual salary payable to a Magistrate was determined.
72. We are fortified in this conclusion, in that, within the Determination made in 2002, there is no table of relativities of judicial officers’ salaries Determined by the Tribunal. Nor is there an expression of an intention to maintain a prescribed salary relativity as between Magistrates and Puisne Judges of the Supreme Court.

## **CONCLUSIONS**

73. For all of the above reasons we conclude as follows:

- In the course of its review of judicial salaries in 2012 the Tribunal made no error of law comprised of, either, non-compliance with the provisions of section 10 of the Act, or, a failure to afford procedural fairness to Magistrates affected by the determination arising from the review.

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<sup>8</sup> Remuneration Tribunal Report and Determination 5 of 2002: Salaries of Stipendiary Magistrates

- There is no merit in disturbing the outcome of the 2012 review based upon the relative money value of the salaries a Magistrate and a Puisne Judge of the Supreme Court.

#### **COMMUNICATIONS ALLOWANCE**

74. The Tribunal has had regard to the relevant statistical measure which comprises the basis of the Communications Allowance applicable to judicial office holders, and has concluded that the Communications Allowance will remain as provided for in Determination 6 of 2013.



John Lewin  
**PRESIDENT**



Peter Alexander  
**MEMBER**



Pamela Martin  
**MEMBER**

Dated this 25<sup>th</sup> day of May 2017