REMUNERATION TRIBUNAL

REPORT RELATING TO DETERMINATION NO 4 OF 2010

1. INTRODUCTION

1.1 In accordance with the provisions of the *Remuneration Act 1990 (the Act)*, the Remuneration Tribunal ('the Tribunal') reviewed the remuneration of members of the judiciary and statutory office holders whose offices are listed in Section 13 of the Act during the latter part of 2009. By Determination and Report published in the Government Gazette of Thursday 10 December 2009, the Tribunal promulgated its decision in that matter, noting its intention to receive submissions regarding judicial work value changes, as follows:-

> "*...the Tribunal proposes to conduct a further review in the new year and hear further submissions specifically in relation to work value changes. The Tribunal will call for submissions as per the usual process at a date to be determined.*"

1.2 The Tribunal by letters dated 29 January 2010 invited the Judicial Remuneration Co-ordinating Committee ('JRCC') and the Crown Solicitor's Office, as the Minister's Representative, to provide submissions regarding changes in work value within the Judiciary.

2. COMMONWEALTH TRIBUNAL'S REVIEW AND DETERMINATION

2.1 The Tribunal noted the recently issued Commonwealth Tribunal's Determinations 2009/23 and 2010/03 and the accompanying statements of the Commonwealth Tribunal, which provided a 1.5% increase effective 1 November 2009 and a further 1.5% increase effective 1 May 2010.

2.2 The Tribunal also noted that these increases were provided in accordance with the Commonwealth Tribunal's Report on the *Review of Remuneration Relativities among Australia's Federal Courts*, published in October 2009, to which it referred in some detail in the report relating to its Determination 5 of 2009.

2.3 In summary the Commonwealth Tribunal commenced its review in May 2007. Submissions were received during the course of that year and the Tribunal gave consideration to each of the submissions over the period between late 2007 and early 2008. Further submissions were made in 2008 and by November 2008 the Tribunal had come to an indicative decision. In this indicative decision the Commonwealth Tribunal "concluded that there was a work value case to increase the remuneration of the Judges of the Federal Court by 6%. At the same time, the Tribunal noted the Attorney-General's views about the difficult economic circumstances in which Australia, and indeed the world, found itself and decided at the time not to put the increase into effect until at least 1 July 2009."

2.4 The Commonwealth Tribunal subsequently revisited the circumstances of its indicative decision and following the receipt of further information from both the Family Court and the Federal Magistrates Court published its final report in October 2009. In its decision (as outlined within the final report), the

Commonwealth Tribunal concluded that the prevailing economic circumstances preclude the granting of the full increase of 6% and instead decided on an adjustment of 1.5% for judicial offices in the High Court, Federal Court, Family Court and Federal Magistrates Courts operative from 1 November 2009". It also indicated that its present intention was "to determine three further 1.5% adjustments for each of the judicial offices concerned" subject to some further consideration "and while the actual decisions on timing are for the future... the total increase would have occurred by 1 May 2011".

3. SUBMISSIONS

3.1 The Tribunal received written submissions from:

- Justice Bleby, Chair of the Judicial Remuneration Co-ordinating Committee (JRCC), on behalf of the Chief Justices, Judges and Masters of the Supreme Court; the Chief Judge, Judges and Masters of the District Court; the Senior Judge, Judges and Magistrates of the Industrial Relations Court; the President, Deputy Presidents and Commissioners of the Industrial Relations Commission; the Chief Magistrate and the Magistrates of the Magistrates Court; the State Coroner and the Deputy State Coroners; and the Commissioners of the Environment Resources and Development Court; and
- The Crown Solicitor's Office, on behalf of the Minister, intervening in the public interest.

3.2 The Tribunal convened a hearing on Wednesday 17 February 2010 to hear oral submissions. The following representatives attended and made submissions:

- Justice Bleby, with four colleagues, on behalf of the JRCC; and
- Mr Stephen McDonald and Mr Edward Stratton-Smith on behalf of the Minister, in the public interest.

3.3 In summary, the JRCC submitted that the Tribunal should continue to set judicial salaries in a national framework, and in the national interest. It contended that because the increases to the Federal judiciary's salaries as a result of the Commonwealth Tribunal's decision of 13 October 2009 has flowed on to judges in the other States and Territories, with the exception of NSW, either automatically via existing legislative provisions or by Tribunal determinations, the same increases should flow on to the South Australian Judiciary. Other reasons for seeking this increase were:

- The adverse impact on the attraction and retention of judges of the highest calibre for South Australian courts, of a 6% gap in remuneration between South Australia and other jurisdictions;
- A substantial salary disparity is not justifiable on a work value basis, as State courts exercise a much wider and more comprehensive jurisdiction than Federal Courts, including jurisdictions that cannot be exercised by the Federal Courts, for example extensive criminal jurisdiction, substantial testamentary causes jurisdiction and jurisdiction under the *Inheritance (Family Provision) Act 1972* (SA), and planning and development and liquor licensing jurisdictions.

- Most of the jurisdictions of State Supreme and Federal Courts are cross-vested by legislation, allowing a greater number of Federal jurisdiction cases to be heard by State Supreme Court Judges.
- Any increase in work value of the Federal Court and Federal Magistrates Court with regard to workload, factual and legal complexity, increases the breadth of law, including the number of legal and factual issues both across case load and within individual cases have a corresponding effect on State courts because they exercise essentially the same jurisdictions.
- There has been substantial increase in jurisdictions conferred on State courts, in workloads and in the length and complexity of cases without a corresponding effective increase in judicial personnel all of which has required an increase in judicial education and the acquisition of additional knowledge and skills.

3.4 The Minister's representatives submitted that the Commonwealth Tribunal's rationale for granting an increase in the remuneration of Justices of the High Court, the Federal Court, the Family Court and the Federal Magistrates Court based on an increase in 'work value' was flawed in important aspects. In this context they submitted that an increase in 'work value' of Federal Court Judges did not automatically result in a corresponding increase in the 'work value' of the South Australian Judiciary. Other submissions made by the Minister's representatives included the following:

- The Tribunal, with regards to the requirement that an increase not be granted unless an increase in work value is clearly demonstrated, should apply the wage fixation principles established by the Industrial Relations Commission of South Australia, viz. by ensuring the judiciary are treated consistently with other wage earners in South Australia.
- There was insufficient basis for an argument that 'attraction and retention' is of great utility in relation to judicial appointments, and as such is of limited use in the consideration of remuneration.
- Work value is by its very nature difficult to assess and this is particularly so in respect of the work of the judiciary and as such is generally not a predominant concept in the determination of appropriate levels of remuneration for the judiciary.
- The remuneration of South Australian judicial officers should not be further increased at this time, however in doing so noted that should the Tribunal determine that the remuneration of South Australian judicial officers should be increased, that the increase provided be of no more than 6% over 18 months.

4. FAIR WORK ACT 1994

4.1 In relation to comments made by the JRCC and Crown Solicitors Office on behalf of the Minister, the Tribunal will, as required by s101(1) of the *Fair Work Act 1994* (SA), continue to have due regard to State Wage Fixing Principles, and as it deems appropriate apply and give effect to such principles.

5. CONCLUSION

5.1 The Tribunal notes that while there have been changes in the breadth of jurisdiction and workload of the South Australian Judiciary it does not consider

these, in the words of Principle 8 of the SA Wage Fixation Principles, to be such as to "constitute such a significant addition in to work requirements as to warrant the creation of a new classification or upgrading to a higher classification". Nevertheless, and while it accepts the criticism of the approach taken by the Commonwealth and Western Australian Tribunals with regards to work value assessment, and the lack of details of work value changes in their reasoning, the Tribunal reiterates it's past approach, that setting salaries in a "national framework" continues to be the most persuasive and appropriate approach for it to adopt, and in the public interest. In this regard, present indications are that NSW has now appointed a new Tribunal that is presently in the process of seeking submissions with respect to this aspect of judicial remuneration.

5.2 Finally the Tribunal will consider any additional increases provided by the Commonwealth Tribunal, in relation to its *Review of Remuneration Relativities among Australia's Federal Courts*, as they arise, and determine their applicability to the South Australian Judiciary at the appropriate time.

6. DETERMINATION

6.1 Having regard to all the submissions and material before it, including the review and decisions of the Commonwealth Tribunal, the Tribunal determines that the salaries of the judiciary and statutory office holders the subject of this review should be increased as set out in Determination 4 of 2010, to operate from 1 May 2010.

Hedley R. Bachmann AM
PRESIDENT

30 April 2010