



No. 3 of 2020

REPORT OF THE REMUNERATION TRIBUNAL
2020 APPLICATION FOR ADDITIONAL SALARY – DEPUTY PRESIDENT MAGISTRATE
STUART COLE OF THE SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL

INTRODUCTION AND BACKGROUND

1. Section 13 of the Remuneration Act (“the Act”) provides that the Remuneration Tribunal (“the Tribunal”) has jurisdiction to determine the remuneration of members of the judiciary and other offices listed in that section of the Act.
2. Section 14 of the Act provides that the Tribunal has jurisdiction to determine the remuneration, or a specified part of the remuneration, payable in respect of certain offices, if such jurisdiction is conferred upon the Tribunal by any other Act or by the Governor by proclamation.
3. On 23 January 2020, the Tribunal received an application for a Determination of additional salary from Deputy President Magistrate Cole of the South Australian Employment Tribunal (“SAET”).

PROCEDURAL HISTORY

4. 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.
5. Section 10(4) of the Act provides that the Honourable Premier of South Australia (“the Premier”), as 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.
6. The Tribunal, by letters dated 29 January 2020, sent notifications to Deputy President Magistrate Cole, the Judicial Remuneration Coordinating Committee (“JRCC”) and the Magistrates Association of South Australia (“MASA”) notifying of the Tribunal’s intention to consider the application made by Deputy President Magistrate Cole.
7. The Tribunal, by letter dated 29 January 2020, sent notifications to the Premier, as the Minister responsible for the Act, inviting submissions in the public interest.
8. On 15 April 2020, the Tribunal wrote to Deputy President Cole inviting him to provide further information in support of his application, which was provided to the Tribunal on 19 May 2020. The same invitation to was also extended to President Dolphin and Deputy President Lieschke of the SAET.

SUBMISSIONS

9. Deputy President Magistrate Cole

- 9.1. Deputy President Cole requested that the Tribunal determine a specified amount of additional salary as a Magistrate on account of holding office as a Deputy President of the SAET.
- 9.2. The determination of additional salary is sought under the provisions of section 13(10) of the SAET Act.
- 9.3. The level of additional salary sought is an amount which takes the annual salary of a Deputy President Magistrate to that of a District Court Judge.
- 9.4. Magistrates appointed as Deputy Presidents of the SAET perform substantially similar work to District Court Judges appointed as Deputy Presidents of the SAET, save and except for certain statutory limitations as specified by the SAET Act.
- 9.5. Other Magistrates appointed as Deputy Presidents of the SAET are remunerated with a salary equivalent to that of a District Court Judge.
- 9.6. Historically, all persons previously appointed Deputy Presidents of the SAET or its predecessor have been paid a judicial salary.
- 9.7. The equal pay for equal work principle ought to apply in relation to the salaries of all Magistrates appointed as Deputy Presidents of the SAET.
- 9.8. Written statements of Deputy President Lieschke (SAET) and former President McCusker (SAET) were submitted as evidence.
- 9.9. That the operative date for the determination of additional salary ought to be backdated to 3 April 2019, to align with the date of appointment as Deputy President of the SAET.

10. Summary of Statement Made by Deputy President Lieschke (submitted by Deputy President Magistrate Cole)

- 10.1. My salary and other terms and conditions have always been the same as my Deputy President colleagues, other than the judicial pension.
- 10.2. I understand that my former colleague DP McCouaig, who held no other judicial appointment and who only worked in the workers compensation jurisdiction, also received the same salary and leave conditions as all other Deputy Presidents.
- 10.3. The same also held true for Acting DP Thompson, and for Acting DP Gilchrist when he was first appointed over 20 years ago.
- 10.4. I am aware that steps were taken by President Hannon of the SA Industrial Relations Commission, and by Senior Judge Jennings of the Workers Compensation Tribunal to correct an error in the terms and conditions of DP McCouaig. He was not initially afforded the same travel allowances as other Presidential members, but that was corrected to the level of a Judge after the intervention of our leadership.
- 10.5. When the Workers Compensation Tribunal was abolished in 2015 in favour of the new SAET, two new Deputy Presidents were appointed, being DP Calligeros and DP Dolphin. Both received the same terms and conditions as the other Deputy Presidents even though they only worked in the workers compensation jurisdiction and held no other judicial appointment.
- 10.6. I was appointed to the SAET by proclamation of 4 February 2016. I was appointed to the office of Deputy President of SAET from 5 March 2016. The office of Deputy President was designated by proclamation as my primary judicial office pursuant to section 6 of the *Judicial Administration (Auxiliary Appointments and Powers) Act 1988*. DP Ardlie was appointed on same basis at the same time.
- 10.7. Prior to his appointment to SAET in 2016, DP Ardlie's initial appointment in 2002 was as a Magistrate, and he was assigned to the SA Industrial Relations Court.

He was later temporarily appointed as an Acting Deputy President of the Workers Compensation Tribunal, having been initially appointed on 7 November 2013 for six months. I recall that was to assist with an increase in the workers compensation case load. When appointed as an Acting DP, his primary judicial office was designated as an Industrial Magistrate. His Acting appointment was later extended, and his primary office was still designated as an Industrial Magistrate. DP Ardlie also held the position of President of the Health Practitioners Tribunal, and was the only member of the Workers Compensation Tribunal, Industrial Relations Commission or SAET of that Tribunal. DP Ardlie retired from the SAET in August 2019.

- 10.8. Both DP Ardlie and I received the same terms and conditions as our DP colleagues who also held appointments as Judges. My remuneration was and still is consistent with s 6(3) of the *Judicial Administration (Auxiliary Appointments and Powers) Act 1988*, which provides that:

“the remuneration and conditions of service of a judicial officer who holds two or more concurrent appointments will be the same office as for a judicial officer who holds a single appointment to the primary office”

- 10.9. No one has been appointed as just a Magistrate of the SAET.
- 10.10. The title of my office is simply Deputy President. An incorrect title of Deputy President Magistrate has been used internally by some staff without my agreement and contrary to my wishes.
- 10.11. As Deputy Presidents of the SAET, DP Cole and I work in all jurisdictions other than in dust diseases. We sit on appeals including against decisions of all Presidential member colleagues. We are however limited in our sentencing powers to fines not exceeding \$300,000. There is no dollar limit to the type of claims we can hear, as is the case in the Magistrates Court, or to the amount of any pecuniary penalty we might impose under the Commonwealth *Fair Work Act 2009*. We hear and determine claims involving amounts from millions of dollars to small claims.
- 10.12. The *Fair Work Act 2009* jurisdiction is shared with judges of the Federal Court and the Federal Circuit Court. Appeals from our judgements in that jurisdiction are generally heard by a Full Bench of the Federal Court. That work is not any less demanding and complex as the workers compensation jurisdiction, which constitutes the bulk of SAET's cases.
- 10.13. There is no difference in our jurisdiction under the SA *Fair Work Act 1994* to that which can be exercised by DP's who hold appointment as judges.
- 10.14. While there is some minor difference to the powers and jurisdictions of Presidential members, there is no difference in the application of high level legal experience, skill and knowledge to whatever cases we a hearing at first instance or on appeal. The minor differences to powers and jurisdictions are more than compensated for by the judicial pension entitlement of some members.
- 10.15. To the extent that the SAET Act could be read to support this anomaly in the absence of a proclamation that his primary office is Deputy President, I urge the Tribunal to apply section 13(10) to eliminate any salary difference. It appears that section 13(10) is designed to specifically cater for this situation.
- 10.16. On 20 May 2020, Deputy President Lieschke submitted to the Tribunal that he agrees with the additional information provided to the Tribunal by Deputy President Magistrate Cole on 19 May 2020. DP Lieschke added that the circumstances of his salary level, including his primary office being that of a Deputy President in accordance with section 6 of the *Judicial Appointments (Auxiliary Appointments and Powers) Act 1988*, are included in his previous submission.

11. Summary of statement of former President McCusker of the SAET (submitted by Deputy President Magistrate Cole of the SAET).
 - 11.1. That the Tribunal have regard to the principle of comparative wage justice. That is sometimes described as “same work, same wage”. In my understanding, that is the essential principle at stake in this application.
 - 11.2. I have read the statement and submission of his Honour Deputy President Lieschke and I agree with it.
 - 11.3. During all the time I have held the office as a judicial member of the Industrial Court and the SAET, the terms and conditions of Deputy Presidents have been the same as the judicial members save for the judicial pension. That is because they are overwhelmingly engaged in the same work.
 - 11.4. While all Deputy Presidents sit on appeals, in my view, not all Deputy Presidents make an equivalent contribution. Indeed, the fact that certain members made inadequate contribution on appeals was a source of tension in the SAET while I was president.
 - 11.5. I refer to paragraph 18 of his Honour Deputy President Lieschke’s statement and submissions. I agree with that submission. I have never regarded Section 13(8) of the SAET Act as governing the remuneration and conditions of a Deputy President who is also a Magistrate. It would be contradiction of the clear intent of the Remuneration Act and the purposes for its enactment. (8) is clearly contextual and governed by and limited to the purpose of (7). The authority of the Full Supreme Court confirms this.
 - 11.6. I strongly support Deputy President Cole’s application to enjoy the same terms and conditions of employment as a judicial member save for appreciating that he will not enjoy the Judicial Pensions Act. He completely satisfies the, “same work, same wage” principle.
12. Judicial Remuneration Coordinating Committee
 - 12.1. That the JRCC supports the application made by Deputy President Magistrate Cole of the SAET for an additional component of salary in accordance with section 13(10) of the SAET Act.
13. No other submissions were received by the Tribunal.

DEPUTY PRESIDENT APPOINTMENT

14. Section 13(1)(b) of the *South Australian Employment Tribunal Act 2014* (“the SAET Act”) provides for the appointment of a Magistrate to be a Deputy President of the SAET. That section is set out as follows:

“13—Appointment of Deputy Presidents

(1) *A Deputy President will be—*

 - (a) *a judge of the District Court appointed by the Governor, by proclamation, to be a Deputy President of the Tribunal; or*
 - (b) *a magistrate appointed by the Governor, by proclamation, to be a Deputy President of the Tribunal.”*
15. Relevantly, a copy of the proclamation made by the Governor on 28 March 2019 appointing Deputy President Magistrate Cole to the SAET is provided below:

South Australia

South Australian Employment Tribunal (Appointment of Deputy President) Proclamation 2019

under section 13 of the *South Australian Employment Tribunal Act 2014*

1—Short title

This proclamation may be cited as the *South Australian Employment Tribunal (Appointment of Deputy President) Proclamation 2019*.

2—Commencement

This proclamation comes into operation on 3 April 2019.

3—Appointment of Deputy President

Stuart Charles Cole, a Magistrate, is appointed to be a Deputy President of the South Australian Employment Tribunal from 3 April 2019.

Made by the Governor's Deputy

after consultation by the Attorney-General with the Chief Justice of the Supreme Court and the Chief Magistrate, and with the advice and consent of the Executive Council
on 28 March 2019

AGO0019-19CS

16. The Tribunal has noted that the above proclamation denotes section 13 of the SAET Act as the authority exercised by the Governor in the making of the appointment. Moreover, Deputy President Magistrate Cole's appointment as a Deputy President is made as a Magistrate. Insofar as the Tribunal is able to discern, the appointment is therefore taken to be made under section 13(1)(b) of the SAET Act.
17. It is convenient to reproduce section 13 of the SAET Act below:

“13—Appointment of Deputy Presidents

- (1) *A Deputy President will be—*
 - (a) *a judge of the District Court appointed by the Governor, by proclamation, to be a Deputy President of the Tribunal; or*
 - (b) *a magistrate appointed by the Governor, by proclamation, to be a Deputy President of the Tribunal.*
- (2) *The appointment of a judge of the District Court as a Deputy President of the Tribunal under subsection (1)(a) does not affect—*
 - (a) *the judge's tenure of office or status as a judge; or*
 - (b) *the payment of the judge's salary or allowances as a judge (subject to the operation of subsection (5)); or*
 - (c) *the ability of the person to do anything in the person's capacity as a judge (including as to the exercise of the jurisdiction of the District Court); or*
 - (d) *any other right or privilege that the judge has as a judge of the District Court.*
- (3) *Service in the office of Deputy President of the Tribunal by a judge of the District Court is taken, for all purposes, to constitute service as a judge of that Court.*
- (4) *Subject to subsections (2) and (3), an appointment under subsection (1)(a) may be subject to conditions determined by the Governor.*
- (5) *Without limiting subsection (4), in the case of an appointment under subsection (1)(a), the Remuneration Tribunal may determine that a Deputy President's salary or allowance as a judge will have an additional component on account of holding office under this Act (and the jurisdiction to make such a determination is conferred on the Remuneration Tribunal by this Act).*

- (6) *Any salary or allowances payable as an additional component of remuneration under subsection (5) cannot be reduced during the person's term of office as a Deputy President of the Tribunal.*
- (7) *The appointment of a magistrate as a Deputy President of the Tribunal under subsection (1)(b) does not affect—*
 - (a) *the magistrate's tenure of office or status as a magistrate; or*
 - (b) *the payment of the magistrate's salary or allowances as a magistrate (subject to the operation of subsection (10)); or*
 - (c) *the ability of the person to do anything in the person's capacity as a magistrate; or*
 - (d) *any other right or privilege that the magistrate has by virtue of the office of magistrate.*
- (8) *Service in the office of Deputy President of the Tribunal by a magistrate is taken, for all purposes, to constitute service as a magistrate.*
- (9) *Subject to subsections (7) and (8), an appointment under subsection (1)(b) may be subject to conditions determined by the Governor.*
- (10) *Without limiting subsection (9), in the case of an appointment under subsection (1)(b), the Remuneration Tribunal may determine that a Deputy President's salary or allowance as a magistrate will have an additional component on account of holding office under this Act (and the jurisdiction to make such a determination is conferred on the Remuneration Tribunal by this Act).*
- (11) *A person ceases to be a Deputy President of the Tribunal if—*
 - (a) *in the case of an appointment under subsection (1)(a)—the person ceases to be a judge of the District Court; or*
 - (b) *in the case of an appointment under subsection (1)(b)—the person ceases to be a magistrate; or*
 - (c) *the person resigns as Deputy President by written notice to the Attorney-General; or*
 - (d) *the person dies.*
- (12) *Nothing in subsection (11)(c) affects a person's tenure or status as a judge (in the case of an appointment under subsection (1)(a)) or as a magistrate (in the case of an appointment under subsection (1)(b)).*
- (13) *Before the Governor makes a proclamation under this section, the Attorney-General must consult with—*
 - (a) *the Chief Justice; and*
 - (b) *in the case of an appointment under subsection (1)(a)—the Chief Judge; and*
 - (c) *in the case of an appointment under subsection (1)(b)—the Chief Magistrate.”*

- 18. The Tribunal has noted that the provisions within section 13 allow the Tribunal to make a Determination of additional salary for a Judge appointed as a Deputy President of the SAET, and also for a Magistrate appointed as a Deputy President of the SAET, on account of holding office as a Deputy President of the SAET. This supports the conclusion that the issue before the Tribunal is not simply a comparative wage justice issue but also an assessment of the additional duties associated with holding office as a Deputy President.
- 19. Since the commencement of section 13(10) of the SAET Act, no Determination of additional salary has been made by the Tribunal for a Magistrate appointed as a Deputy President.
- 20. In addition to the above provision for the making of a Determination of additional salary by the Tribunal, section 13(9) of the SAET Act provides for the Governor to determine conditions of appointment for magistrates appointed as Deputy Presidents of the SAET. At the time of writing, the Tribunal is not aware of any such determinations made by the Governor which confer an entitlement to additional salary for Deputy Presidents of the

SAET. No submissions were made to the Tribunal in relation any conditions determined by the Governor for magistrates appointed as Deputy Presidents under the SAET Act.

21. It was submitted by Deputy President Magistrate Cole that other Magistrates appointed as Deputy Presidents of the SAET have been remunerated with a salary equivalent to that of a District Court Judge, however, the instrument which creates the entitlement to that level of remuneration has not been identified by any of the submissions before the Tribunal. The entitlement to that level of remuneration does not arise from a Determination of the Tribunal. The Tribunal is therefore unaware of the arrangements in place which confer such an entitlement, however, insofar as the Tribunal can discern from the submissions before the Tribunal, that remuneration appears to have been previously set as an informal administrative arrangement.

THE STATUTORY FUNCTIONS OF A DEPUTY PRESIDENT

22. Section 14 of the SAET contains general functions applicable to the office of Deputy President of the SAET. That section is set out as follows:

“14—Deputy President's functions generally

- (1) *A Deputy President of the Tribunal has the functions conferred on the Deputy President under this Act or any other Act.*
- (2) *The functions of a Deputy President include—*
 - (a) *participating as a member of the Tribunal; and*
 - (b) *assisting the President in the management of the business of the Tribunal; and*
 - (c) *assisting the President in managing the members of the Tribunal, including in connection with the training, education and professional development of members of the Tribunal; and*
 - (d) *other functions assigned by the President.*
- (3) *A Deputy President may do all things necessary or convenient to be done in the performance of the Deputy President's functions.*
- (4) *A Deputy President is subject to the direction of the President in performing the Deputy President's functions, other than adjudicating in the Tribunal.”*

23. Relevantly, the application made by Deputy President Cole contains information which relates to the performance of the statutory functions of Deputy President of the SAET.

24. The Tribunal has noted that the submissions made by Deputy President Magistrate Cole were not contested by the Premier, and the Tribunal has accepted those submissions in the absence of any contrary advice from the President of the SAET.

25. The following examples were provided by Deputy President Cole:

- 25.1. Participating as a member of the Tribunal;
- 25.2. Sitting as a member of the South Australian Employment Court;
- 25.3. Sitting on the Full Bench for appeals;
- 25.4. Hearing appeals from decisions at first instance made by members of SAET, most of whom are Deputy President Judges of SAET;
- 25.5. Writing Full Bench judgements;
- 25.6. Manage and hearing money claims under the *Fair Work Act 2009* (Cth);
- 25.7. Prosecutions under the *Work Health and Safety Act 2012* and *Return to Work Act 2014*.

26. The functions of a Deputy President of SAET are further explored in the comparative analysis below.

COMPARATIVE ANALYSIS

27. The Tribunal sought additional information from Deputy President Magistrate Cole in order to understand the material differences in the duties of presidential members of the SAET. The information sought was comprised of a comparative analysis on the basis of work value considerations. Those considerations included the nature, skill, complexity, and the level of the responsibility. That information is set out below in tabular form.
28. The following table illustrates material differences in the duties of a Deputy President of the SAET, depending on whether the Deputy President is appointed as a Judge or a Magistrate.

Jurisdiction	Deputy President Judge	Deputy President Magistrate
Return to work and extended workers compensation claims are the majority of matters in the SAET. Allocated evenly between Presidential Members at the direction of the President via the Registry.	Yes	Yes
Industrial grievances, award applications, employment contract disputes, .etc. Allocated evenly between Presidential Members at the direction of the President via the Registry.	Yes	Yes
Mediations. All presidential members are approved mediators and conduct mediations.	Yes	Yes
Full bench appeals. All presidential members hear and decide appeals. Evenly allocated by the President.	Yes	Yes
Prosecutions are allocated to Deputy President Magistrates, unless the President of SAET directs otherwise. Summary jurisdiction conferred on Deputy President Magistrate by Section 6A (8) of SAET Act. Deputy President Judge to sentence if fine is likely to exceed \$300,000 or imprisonment likely to exceed 5 years.	Few	Most
Money claims, pecuniary penalties .etc. Mostly allocated to Deputy President Magistrate. Historically, Industrial Magistrates heard these matters.	Few	Most
Dust Disease matters. To be heard only by District Court Judge.	Yes	No
Recovery of workers compensation from damages (section 66 of the <i>Return to Work Act 2014</i>). To be heard only by District Court Judge. No judgements to date. Few matters, which tend to settle.	Yes	No

29. The following table illustrates material differences in the duties of a Magistrate appointed as a Deputy President of the SAET, compared with the duties of an ordinary Magistrate.

Jurisdiction	Deputy President Magistrate	Magistrate
Hear civil claims	No monetary limit. Some return to work matters are worth \$1.5/1.6 million. Money claims can be modest sums, or several hundred thousand dollars.	Limited to \$100,000 (Section 8 <i>Magistrates Court Act 1991</i>).
Hear appeals	Sit on the Full Bench. Hear appeals from decisions of other Presidential Members. Write appeal judgements.	No appeal jurisdiction.
Hear criminal prosecutions	Mostly <i>Work Health and Safety Act 2012</i> , some <i>Return to Work Act 2014</i> prosecutions, sentencing limited to \$300,000 fine or 5 years. Imprisonment (section 6A (6) SAET Act).	A wider range of criminal matters. Sentencing limited to a \$150,000 fine or 5 years imprisonment (10 years multiple offences). Section 9 of the <i>Magistrates Court Act 1991</i> .
Mediation	Yes	Yes

CONSIDERATION

30. The amount of additional salary sought by Deputy President Magistrate Cole on account of holding the office of Deputy President of the SAET is \$77,540.
31. The Tribunal has considered the submissions in relation to the work of a Deputy President Magistrate of the SAET relative to a Deputy President Judge of the SAET. The Tribunal considers that whilst there are similarities in the duties performed by both Judges and Magistrates who hold office as Deputy Presidents of the SAET, the evidence before the Tribunal demonstrates that there are material differences in those duties when compared on the basis of nature, skill, complexity, and the level of responsibility. The principle of comparative wage justice is therefore not capable of application in the circumstances, as the duties are not strictly equal in the context of work value.
32. Had there been a clear Determination made in the past that a Deputy President Magistrate ought to be paid at the level of a Judge, that would have cast a different light on the issue currently before the Tribunal. However, in the absence of any definitive basis for the current and past arrangements for setting remuneration for persons appointed as Deputy Presidents of the SAET, the Tribunal does not accept that the past arrangements form an appropriate foundation for the future Determination of additional salary pursuant to section 13(10) of the SAET Act.
33. Further, the SAET Act at section 13 provides a clear bifurcation of the two pathways to appointment as a Deputy President of the SAET. The two pathways are separated according to whether the appointee holds concurrent appointment as a Judge or Magistrate. That section also provides separate remuneration provisions for Judges and Magistrates.
34. Notwithstanding the differences between the duties performed by the two types of officers, which are illustrated by the comparative analysis above, the duties of a Deputy President of the SAET, whether performed by a Judge or Magistrate, both require the application of a high level of legal expertise, skill and knowledge commensurate with the office of Deputy President of the SAET. This supports the notion that some additional component of salary is warranted for a Deputy President Magistrate. This issue is,

however, finely balanced in that ordinary Magistrates are required to address a far broader range of issues involving a wider scope of legislative provisions.

CONCLUSIONS

35. The Tribunal has considered the application made by Deputy President Magistrate Cole for the Tribunal to determine an additional component of salary applicable to the office of Deputy President of the SAET.
36. The Tribunal has concluded that the duties of a Deputy President of the SAET are such that an additional component of remuneration over and above that of a magistrate is warranted.
37. Having regard to the above considerations, a Magistrate appointed as a Deputy President of the SAET shall be entitled to an additional component of salary of \$35,000 per annum, on account of holding the office of Deputy President of the SAET under section 13(1)(b) of the SAET Act.
38. Where such an appointment is made on a part-time basis, that person is entitled to be paid the applicable additional component of salary as a pro rata amount, based on the hours worked as a proportion of the full-time equivalent.
39. The accompanying Determination 3 of 2020 will issue accordingly.
40. The accompanying Determination will be consolidated with the Tribunal's Determination¹ for members of the judiciary, at the next annual review of that Determination.

OPERATIVE DATE

41. The accompanying Determination shall be operative on and from 3 April 2019.



Matthew O'Callaghan
PRESIDENT



Peter Alexander
MEMBER



Pamela Martin
MEMBER

Dated this 11th day of June 2020

¹ Remuneration Tribunal Determination 12 of 2019 – Remuneration of Remuneration of Members of the Judiciary, Presidential Members of the SAET, Presidential Members of the SACAT, The State Coroner, and Commissioners of the Environment, Resources and Development Court.