



## DECISION

*Defence Act 1903*

s.58H(2)(a) - Determination of the salaries and relevant allowances to be paid to members.  
s.58KD - Determination giving effect to agreement between the parties

### **WORKPLACE REMUNERATION ARRANGEMENT 2014 - 2017**

(Matter No. 9 of 2014)

THE HON. A. HARRISON, PRESIDENT

THE HON. A. BEVIS, MEMBER

CANBERRA, 3 NOVEMBER 2014

BRIGADIER W. ROLFE, AO (Ret'd), MEMBER

[1] This decision concerns an application under s.58KD of the *Defence Act 1903* (the Act) for a determination to be made to give effect to an agreement of the type to which that section of the Act relates. Section 58KD provides as follows:

*“The Tribunal may, in making a determination, give effect to any agreement reached between the Minister, acting on behalf of the Commonwealth, and the Chief of the Defence Force, acting on behalf of the members of the Australian Defence Force, in relation to a matter to which the determination relates.”*

A document titled ‘2014 Workplace Remuneration Arrangement’ (WRA) gives effect to the terms of an agreement which has been reached in accordance with s.58KD.

[2] A hearing was conducted in Canberra on 15 October 2014; Mr R. Kenzie AM QC, the Defence Force Advocate, appeared on behalf of the Australian Defence Force (ADF) and Mr J. O’Reilly appeared on behalf of the Commonwealth. Section 58K(9) of the Act provides that *“the Defence Force Advocate and a person representing the Commonwealth are entitled to be present, and to make submissions to the Tribunal, during any proceedings before the Tribunal.”*

[3] The Defence Force Welfare Association (DFWA) and the Returned and Services League of Australia Limited (RSL) sought to intervene in the proceedings. Section 58K(10) of the Act deals with the circumstances in which a person or body may be permitted to appear before the Tribunal. That section is in the following terms:

*“Where the Tribunal thinks that a person or body should be heard in relation to a matter that is being, or is to be, considered by the Tribunal, the Tribunal may permit the person or body to be present, and to make submissions to the Tribunal, during proceedings before the Tribunal in relation to that matter.”*

The DFWA and the RSL were granted permission to be heard in this matter. At the hearing Mr G Nelson appeared on behalf of the DFWA and Ms L Geraghty for the RSL. Each tendered written submissions and made additional oral submissions.

### **Background and key provisions of the WRA**

[4] There have been 11 previous arrangements that have been considered by the Tribunal. The most recent is the Workplace Remuneration Arrangement 2011 - 2014 (WRA 2011-2014)<sup>i</sup>. It is proposed that the WRA will wholly replace that arrangement.

[5] A joint submission by the ADF and the Commonwealth was tendered in support of the determination sought. We refer to that submission later in this decision. We will first refer to the key provisions of the WRA.

[6] The WRA applies to all ADF members of the Permanent and Reserve Forces (excluding statutory office holders). It contains provisions dealing with ADF members' contribution to defence capability and productivity, reform initiatives anticipated during the operation of the arrangement, and requirements about consultation and communication with ADF members. We discuss these provisions in more detail later in this decision.

[7] The arrangement is to be in operation for three years commencing on 4 November 2014 and concluding on 1 November 2017. During this time there are to be increases in salary and salary related allowances of 4.5%. The increases are to be paid in three annual instalments each of 1.5%. They are to be effective on 6 November 2014, 5 November 2015 and 3 November 2016.

[8] There is an acknowledgement that the salary and allowances provisions in it do not 'stand alone'<sup>ii</sup>. They complement other service and employment conditions providing monetary and non-monetary benefits to ADF members, including those made under s.58B of the Act.

[9] The WRA focuses on the ADF and has no links to productivity offsets which may be achieved by civilian employees in the Department of Defence in the context of bargaining for an enterprise agreement. Productivity gains identified in the WRA through the reform and rationalisation of s.58B conditions of service are specified. They are as follows:

- The removal of one day of 'stand-down' at the end of the working year;
- The cessation of Commander's discretion to approve Extra Recreation Leave (ERL);

- An increase in the minimum qualifying period for higher duties from five to ten days, and
- An increase to the allowable driving limits that a member may drive in one day with a trailer from 360km to 500km, and without a trailer from 480km to 600km (this increase in travel is in recognition of improvements in the national road infrastructure and the capacity of modern vehicles).

[10] Additionally, the WRA identifies two variations to s.58B conditions as contributing to the funding of the pay offer. These are:

- The removal of food allowance for members with dependants (unaccompanied) to be replaced by a one-off larder allowance; and
- The replacement of the current three rates of motor vehicle allowance with one rate of 63c per km.

[11] The WRA also acknowledges the multitude of tasks which may be required of ADF members from war-fighting and military operations through to humanitarian relief. They have exhibited an ability to respond and deploy military capability in a manner and in a timeframe that has not previously been expected or directed. It is envisaged that they will continue to be called upon to do so. This fact has been taken into account in the productivity analysis of the arrangement.

[12] The WRA expressly notes that the arrangement is not intended to limit the range of responses that might arise because of strategic circumstances or personnel issues which significantly affect military capability. To that end it is acknowledged that the arrangement may be varied or replaced at any time by a further agreement between the parties reached under s.58KD of the Act<sup>iii</sup>.

[13] We note that within Part C of the WRA, titled 'Pay and Related Matters', there are a number of provisions which acknowledge that it does not operate to preclude the ADF, in the circumstances there identified, seeking to review salaries and/or allowances. In this respect we note, for example, the acknowledgement that in relation to an ongoing general review of salary and amounts structures it is not intended that the WRA will preclude the ADF from advancing proposals to review remuneration structures. Similarly, in relation to the salary related allowance review, which is proceeding before us, nothing in the arrangement is to preclude the ADF seeking a review of any such salary related allowance.

[14] In relation to employment category review matters it is not intended that the WRA will preclude any such matter being brought to the Tribunal. Nor does the arrangement preclude the ADF from seeking review by the Minister of any retention and completion allowances and bonuses or from making submissions to the Tribunal regarding the establishment of capability allowances.

[15] Finally, by reference to flexible remuneration packaging schemes, nothing in the arrangement is to preclude changes to improvements to those schemes from being implemented.

[16] Part D of the WRA deals with 'Consultation with ADF Members'. It refers to visits, presentations and briefings that had been undertaken. It is acknowledged that there is a need

for further consultation with members to "*explain the reasons for taking the case forward to the DFRT in advance of DECA outcomes being known, the context of the WRA salary adjustments within a comprehensive Defence Employment Offer (DEO) and the nature of the achievements in ongoing pay reforms*"<sup>iv</sup>. The WRA records that policy development of the next arrangement is to commence not less than six months before it expires, member consultation is to commence not less than three months before its expiration and the proposed offer will be posted on the Pay and Conditions website during the consultation period.

### **The joint submission of the ADF and the Commonwealth**

[17] We will summarise the main points made in the joint submission:

- The parties submitted that the arrangement is consistent with government policy in respect to ADF remuneration, links improvements in pay with ADF productivity and efficiency gains, is affordable, and is economically fair and responsible.
- The arrangement is "*constrained by the budget and fiscal environment*" and that the parties "*have had strong regard to the responsibility to deliver a pay offer that is affordable within this context*"<sup>v</sup>. The parties acknowledge that the pay offer is modest but submit it is reasonable under the circumstances having regard to fiscal pressures.
- The parties submit that the productivity assessment required has taken into account productivity through the provision of combat power and military capacity for the Government. In that respect, they acknowledge that the demands that may be made of the ADF to conduct or undertake operations are "*very difficult to predict or quantify...The ability of the ADF to respond to unknown requirements to support Government direction has to be taken account of in considering the fairness of the remuneration result...*"<sup>vi</sup>.
- The parties acknowledge that as the ADF prepares for and conducts military operations at the direction of the Government, the ability for it to respond to unknown and unpredictable requirements is a key factor relevant to the work force. Examples of the diversity of operations the Government has directed the ADF to perform in recent times were identified in evidence. They reflect requirements for the delivery of capability not necessarily known or envisaged in advance. The likelihood of the Government directing the ADF to respond similarly at very short notice during the life of the arrangement and the requirement of the ADF to respond to any such direction have been factored into the productivity analysis.
- The estimated cost of the increases to pay and allowance over the three years of the WRA is \$617m.
- The joint submission acknowledges that the parties may seek to vary the arrangement at any time should there be reason to do so. It does not preclude changes to other conditions of service salary related allowances or retention initiatives which may impact on ADF members during the life of the arrangement. Pay and pay related matters including salary structures, salary related allowances, employment category reviews, retention capability and completion allowances and bonuses, are all given as examples of matters which may be dealt with under the provisions of s.58B and s.58H

of the Act. The parties agree that the WRA may be varied or replaced by a further agreement reached between them under s.58KD of the Act. In the event the ADF identifies substantial adverse change the parties agree that they will consider whether it is appropriate to vary the WRA<sup>vii</sup>.

- The joint submission acknowledges the need to “*communicate and consult with ADF members’ seeking their contribution to matters relating to remuneration arrangements and providing feedback on that contribution*”<sup>viii</sup>. It identifies the range of actions taken which constituted the consultation with ADF members relating to the WRA. It gives details of focus groups designed to elicit views about the DEO (of which the WRA is a part) and suggestions as to how to shape the communication with the wider ADF. Monthly newsletters, posters with a QR link and a frequently asked questions document were published. Information sessions were undertaken at all major bases and establishments across Australia. A WRA website was established which contained the information presented at the information sessions, a briefing pack to enable units to conduct internal information presentations, and a mailbox for questions and comments. ADF members were advised that they did not have the ability to bargain about any proposal in the way that civilians may be entitled to under the *Fair Work Act 2009* (FW Act), that Government policy required quantifiable productivity initiatives, and that the outcome would be constrained by budgetary and economic factors.
- The joint submission notes that on 29 August 2014 the Chiefs of Service Committee (COSC) agreed that the proposed new arrangement should follow immediately upon the expiry of the WRA 2011-2014. In reaching that decision the fact that the Commonwealth would resist any order for retrospective pay increases was taken into account. COSC also considered the feedback received from members in the briefings and presentations and decided to endorse the offer of 4.5% over the life of the WRA payable in three instalments of 1.5% each. In doing so it took into account the Government's wages policies, the necessity for productivity and efficiency initiatives, and the necessity for affordability of the pay increases.
- The joint submission acknowledges that although it is necessary to maintain a competitive ADF salary, the adjustment of such salaries is one element only in an otherwise comprehensive reward benefit and career package available to ADF members and identifies the components that make up the total employment package available. The WRA is to operate alongside all of these other elements which constitute an ADF member’s total remuneration and employment package. The joint submission indicates that the package, together with the salary increases under the WRA, is intended to enable the ADF to maintain an attractive employment offer to assist in the maintenance of the ADF workforce<sup>ix</sup>.

## **Witness evidence**

[18] Vice Admiral (VADM) R.J Griggs AO CSC, the Vice Chief of the Defence Force<sup>x</sup> was called to give evidence in support of the application. We have taken into account all of the matters addressed in both his written statement and oral evidence. We summarise the key parts of that evidence:

- In the WRA 2011-2014 proceedings the issue of parity between uniformed and non-uniformed personnel had been addressed. The ADF still saw the issue of parity of wage outcomes as highly desirable, but in the case of the WRA the productivity identified in respect of the ADF was assessed separately from any productivity that may underpin the next enterprise agreement covering non-uniformed defence employees (commonly referred to as the DECA)<sup>xi</sup>.
- The new DECA was still being developed and subject to bargaining. Consideration was given to whether the ADF should wait until the outcome of those negotiations was known.
- The ADF view was that it would be unacceptable if the DECA result was superior to the WRA as a result of the ADF proceeding in advance of that outcome being known<sup>xii</sup>. There were mechanisms, for example industrial action, which were available to employees in the Australian Public Service (APS) in negotiating the DECA that were not available to the ADF. If a superior outcome was achieved in the DECA through, for example, protected industrial action or an industrial campaign the ADF would feel it unacceptable given that it did not have that mechanism to achieve outcomes. He acknowledged that a possible outcome was that Defence public service employees may identify a larger number of productivity initiatives and consequently achieve a higher salary increase and that when he referred in his evidence to the issue of parity it was to be understood in that light.
- The salary offer, productivity initiatives and the other measures identified in the WRA were considered and agreed to by COSC on 29 August 2014. COSC concluded that the salary and allowance increases contained in the WRA were as good as they were going to be able to achieve and that a delay in reaching an agreement was unlikely to give rise to an improved offer. It was a priority that ADF members received any increase as soon as possible<sup>xiii</sup>. VADM Griggs confirmed that the CDF considered that the offer made by the Commonwealth was “*as good an outcome as he was able to negotiate in the current climate*”<sup>xiv</sup>. He also emphasised the importance of the WRA acknowledging the circumstances in which the ADF would be able to return to the Tribunal during the life of the arrangement<sup>xv</sup>.
- VADM Griggs addressed the productivity and other measures identified in the WRA. Each had been considered in depth by COSC. In relation to each of those measures he gave an explanation as to why they were proposed by the ADF and practical examples of how they would be implemented and cost savings that would be achieved. He addressed the requirement that any wage increases be consistent with government policies, be supported by productivity offsets to the extent applicable and to be affordable within existing budgets. Although the WRA identifies specific productivity offsets, the parties to it had acknowledged that it was to operate in circumstances in which considerations relating to the delivery of military capability are paramount. The range of circumstances which may arise during the life of the WRA are “*innately unpredictable*”<sup>xvi</sup>.
- VADM Griggs addressed the commitments made in relation to consultation requirements in the WRA 2011-2014 in respect of a successor arrangement. Those commitments had to be undertaken in the context of an amended process which had

been introduced concerning the requirements for any agreement which may be reached between the CDF and the Minister acting on behalf of the Commonwealth. That amended process meant the CDF was not able to release the WRA offer until agreement with the Minister had been reached; as a consequence, the CDF was not able to release a message to ADF members advising the terms of the arrangement until 10 October 2014.

- Evidence was given in relation to measures taken in respect to consultation and communication with ADF members. VADM Griggs addressed in detail the conduct of focus groups which discussed the overall DEO (as opposed to the WRA offer) the establishment of an information website and the information presentations which were made to ADF members at all major bases in establishments across Australia. He addressed the manner in which the Service Chiefs had engaged their workforces in discussions about budgetary considerations, the Government's approach to public sector wages, and the need for genuine and measurable productivity. The briefings and presentations had also made clear that ADF members had no ability to bargain or to vote on any wages offer from the Commonwealth or the WRA which may be agreed to by the CDF and the Minister.
- Evidence was given pertaining to the manner in which the ADF has, and will continue to enhance efficiency and effectiveness in the delivery of military capability during the life of the WRA. VADM Griggs identified numerous events and occurrences in the previous 12 months which necessitated the ADF responding and deploying military capability in a manner or in a timeframe not previously expected or directed. The achievement of those tasks was indicative of likely future requirements which would require an increase in ADF productivity. He emphasised the need for ADF elements to be placed on restrictions with time frames ranging from numbers of hours to several months dependant on tasking. Operational examples were given of situations where he considered it "*quite difficult to quantify the unpredictability and the volatility of what we do*"<sup>xvii</sup>.
- Additionally, VADM Griggs addressed matters contained within a classified document addressing aspects of ADF capability. This evidence outlined ADF requirements in managing critical categories and a balanced workforce in order to deliver capability. He addressed this in the context of the introduction of new sea, ground based and air platforms which will provide the opportunity to review workforce structures and respond more effectively to operational commitments.
- VADM Griggs acknowledged a survey which had been undertaken by the DFWA. He accepted that the salary and allowance increases in the WRA were more modest than the outcomes that had been achieved in past years. He stated that he knew it was always going to be a difficult process and it was likely that members were not going to be "*universally happy about the outcome*"<sup>xviii</sup>. However he expressed concern about the criticism of the consultation process that had been undertaken. He relied on his written and oral evidence and the joint submission which detailed the actions which had been taken to keep members informed of the process leading up to the WRA being agreed. He gave evidence that members were not forced to attend consultations or presentations nor could they be made to consider the numerous publications addressing the process. It was unfortunate in these circumstances that the survey had

identified members who said that the first they knew about the WRA was 10 October 2014.

### Interveners' submissions

[19] Both the DFWA<sup>xix</sup> and RSL<sup>xx</sup> filed written submissions and also appeared at the hearing. We refer to the submissions of the DFWA first:

- The DFWA submitted that it strongly objected to the “*extremely short time frame*”<sup>xxi</sup> which had been given to assess the WRA before it was put before us for consideration. Despite this, the DFWA had been able to establish an on-line survey to which responses were only able to be made from around midday on Friday 10 October 2014, the time when the terms of the arrangement were released in a signal from the CDF to ADF members. Regardless of the short period of time there had been a very large number of responses from ADF members. The DFWA submitted it had received “*significant input*”<sup>xxii</sup> from members of the ADF who had indicated in “*very strong terms that they do not support the arrangement nor the ‘productivity initiatives’ to fund it*”<sup>xxiii</sup>.
- The DFWA annexed to its written submission an extract of the responses it had received to two questions<sup>xxiv</sup> asked in the survey. Those questions were:
  - Question 4: Why are you dissatisfied with the proposed WRA?; and
  - Question 7: Have you any comments to make regarding how you were kept informed of the progress of the WRA or how you were able to express your views? Have you any other comments you wish to make?

It submitted that, as at the date of the hearing, over 90% of responses expressed displeasure with respect to the arrangement and over 80% with the process by which it was reached. An update of the responses to the two questions was tendered to us in the hearing.

- Although the responses reflected a wide range of concerns the DFWA submitted the nature of the concerns addressed the following matters:
  - That the WRA was likely to deliver increases over its life below the CPI which effectively represented a pay cut to member’s salaries.
  - That the productivity initiatives identified in the arrangement were inappropriate and amounted to a further reduction in existing entitlements.
  - That there were particular concerns expressed by reference to the removal of ERL and the one day stand down provision.
- The DFWA submitted that the survey also reflects dissatisfaction with the process used to develop the WRA and communicate its terms to ADF members which culminated in the details of the arrangement being released on 10 October 2014 - a matter of only a few days before the Tribunal hearing. It was acknowledged that ADF members knew they had no ability to bargain in the manner that civilian employees

are able, but it did not accept that it could properly be said that there had been consultation about the arrangement.

- The DFWA submitted that the joint submission of the ADF and the Commonwealth failed to comprehensively articulate the productivity and efficiency gains that had been made in recent years. It stated it would not be unreasonable for some of the savings to have funded a more equitable salary increase.
- The DFWA accepted the evidence that the outcome reflected in the WRA was the best that the CDF was able to negotiate and indicated that it raised no challenge to the evidence led by the ADF, including that of VADM Griggs, about this fact. Mr Nelson summarised the DFWA's concern as "*not with the bona fides of the way in which this arrangement had been negotiated; it's with the way in which it's perceived to have been negotiated*"<sup>xxv</sup>.
- The DFWA submitted that there is a high probability that the 1.5% pay increase over each of the three years of the WRA will be less than the CPI. Additionally, the pay rise will be quickly consumed by increases in costs borne by members for other entitlements such as defence housing and rental assistance. Consistent with the survey responses the DFWA also challenged the appropriateness of the productivity initiatives included in the WRA.
- The DFWA could not support the terms of the WRA. Mr Nelson submitted that we should not make a determination as sought and, if we were inclined to do so, we should issue a direction for the CDF and Minister to reconsider their agreement. He suggested they should be asked to "*go back and consider their position*"<sup>xxvi</sup>. In making these submissions, Mr Nelson accepted, properly so in our opinion, that there was some doubt as to whether we would have power to make any such direction and, if we were to do so, the practical utility of it in light of the nature of the application that was before us.

[20] The RSL submitted that they "*cannot support any outcome from the current WRA round that does not protect the value of ADF Remuneration*" and expressed "*disappointment to the proposal which involves the trading-off of leave (and other conditions) for pay rises which are less than CPI*"<sup>xxvii</sup>.

[21] The RSL acknowledged that the WRA reflects an agreed position between the CDF and the Commonwealth and submitted that "*in these circumstances we do not oppose the proposal before the DFRT, but seek to register our concern that the financial position of ADF personnel is not being maintained at a time when Australia is asking significantly more of our servicemen and women*"<sup>xxviii</sup>. It noted and supported the fact that the CDF had identified that, should circumstances require, the WRA would be revisited and could be returned to the Tribunal during its period of operation.

## Consideration

[22] We have placed significant weight on the content of the joint submission. Similarly, we have placed significant weight on the written and oral evidence of VADM Griggs. No challenge was made to his evidence that the WRA was the best outcome which could be

achieved in the circumstances in which this new arrangement was being considered. The circumstances included budget restraints, Government policy in respect to ADF remuneration and the APS, the requirements for the identification of genuine productivity initiatives, the costing of those initiatives and the need for the wage increases to be affordable within the defence budget.

[23] We note that the WRA is the 12th such arrangement brought before the Tribunal. Each has been made pursuant to s.58KD of the Act. That has some consequences for the matters that we can properly take into account, the extent to which we have any discretionary powers, and whether we may undertake an exercise similar to an arbitral role in reaching our decision.

[24] We have earlier set out the terms of s.58KD of the Act. It provides that we may make a determination giving effect to the terms of the agreement the CDF and Minister have reached. To that extent we have a discretion that is limited, in our opinion, to either making such a determination or declining to do so. We have a discretion in respect to making rulings about procedural matters however, if we decide to make a determination it must reflect the agreed terms, that is, a determination adjusting the salary and salary related allowances by the amounts identified in the WRA. We do not have a discretion to modify or vary the amounts or accept them in part and require further consideration be given to them. It was not suggested by any person or body appearing before us that any other construction of the section was available. The section does not envisage an exercise akin to arbitration as to what might properly be contained within the determination giving effect to the terms of the WRA.

[25] We considered whether we should adjourn the proceedings until a further time to allow an opportunity for there to be further discussion between the CDF and the Minister. The evidence and the joint submission of the ADF and the Commonwealth persuaded us that such a course was unlikely to result in any improvement of the terms of the WRA or the presentation of a revised WRA to us. The disadvantage that might have arisen, had there been an adjournment, was that any wage increase would not operate retrospectively. We make this observation noting that there was only a short period of time between the hearing and the first wage increase envisaged by the WRA.

[26] We note and accept the submissions of Mr Kenzie that previous arrangements have contained productivity and efficiency gains. In that respect there was nothing new in the requirements for this WRA to contain similar provisions.

[27] We considered the quantum of the pay increase which was accepted to be modest and, not surprisingly, has given rise to significant concerns. The increases in the WRA are significantly less than those contained in recent predecessor arrangements.

[28] We gave consideration to both the published CPI statistics as at the date of the hearing and also to those forecast in Budget Papers and by the Reserve Bank of Australia. An increase of 1.5% is less than the forecasts for each of the years during which the WRA is to be in operation. It is a percentage increase well below the current trends in the outcomes of enterprise bargaining for persons covered by the provisions of the FW Act. The relevance of these observations, in the context of this application made, as it is under s.58KD goes only to whether we should exercise our discretion to decline to make a determination in the terms sought. We weighed these considerations with the evidence given that COSC and the CDF took these statistical factors into account in the assessment made by them that the WRA offer

was as good as could be negotiated. In this context, they also gave consideration to the option of having the WRA operate for a period of less than three years and decided against that option.

[29] In considering whether to make the determination sought, we have taken into account the ability to review salary and allowances during the life of the WRA in the circumstances expressly identified in that arrangement. We note that the joint submission of the ADF and Commonwealth places weight on this factor. In this respect we also note the evidence of VADM Griggs as to the significance of this factor in persuading the CDF to reach agreement with the Minister and to the terms of the WRA. Relevant to these considerations we also note the terms of s.58H(6) of the Act that reads as follows:

*“Where a determination of the Tribunal in respect of the salaries and relevant allowances to be paid to members is in force, the Tribunal shall inquire into and make a further determination in respect of those salaries and allowances:*

- (a) within 2 years of the first-mentioned determination taking effect;*
- or*
- (b) if the Minister, by notice in writing given to the President, requests the Tribunal to make a further determination in respect of those salaries and allowances within a shorter period of the first-mentioned determination taking effect—within that shorter period.”*

[30] The issue of consultation with ADF members was addressed in detail in the hearing. There is a clear requirement for consultation in the WRA 2011-2014 in respect of this WRA. We considered the actions the ADF had undertaken throughout 2014. We have referred in the summary of evidence and submissions to those actions in some detail; we do not repeat it again here. We considered whether the ADF had complied with the consultation requirements and are persuaded that it did. In reaching this finding we have not disregarded the concerns about the process which was undertaken as expressed in the submissions of both the DFWA and RSL.

[31] The very limited opportunity that was given to ADF members to consider the terms of the WRA after they had been agreed is unfortunate. However, we accept that was a consequence of the parameters within which the parties were obliged to negotiate this WRA and the inability to publish any of its terms until agreement was finally reached. In this regard we note that it was originally assumed that advice about a proposal would be likely to be given to ADF members in August of this year. The fact that expectation was not realised no doubt gave rise to the criticisms of the process reflected in the DFWA survey. They are understandable but cannot fairly be made of the CDF or COSC. The detail of the salary component of the WRA could not be published until 10 October 2014. That in turn meant that earlier dates which had been allocated for a hearing before us were vacated. The result was there were only a few days between 10 October 2014 and the hearing on 15 October 2014.

[32] We have earlier referred to the provisions in the WRA which deal with what has been agreed about the consultation that is to occur with ADF members in the lead up to the next arrangement. We note that the proposals in the WRA are in the same terms as were contained in paragraph 37 of the WRA 2011-2014. In complying with those obligations the parties would be informed by the legitimate concerns ADF members have had in relation to the late

advice of the terms of the WRA. We ask the parties generally, and the ADF in particular, to use their best endeavours to minimise similar concerns about consultation being raised again in the context of any replacement for the WRA. Additionally, we would expect that any hearing before the Tribunal would be undertaken at a time well prior to the expiry date of the WRA. We foreshadow that, at an appropriate time, we will require submissions from the parties in relation to the manner in which the consultation requirements of the WRA are to be implemented.

[33] We next refer to matters raised in a supplementary submission made by the Commonwealth<sup>xxix</sup>. It concerns the relevance of s.58K(7) of the Act to the application we are here considering. That section is contained within s.58K which deals with the procedure of the Tribunal. Section 58K(7) is in the following terms:

*“The Tribunal shall, in making a determination, have regard to:  
(a) any decision of, or principles established by, the FWC that is or are relevant to the making of the determination; or  
(b) if the FWC has not yet made any such decision or established any such principles, any decision of, or principles established by, the AIRC that is or are relevant to the making of the determination.”*

The reference to “FWC” means the Fair Work Commission, a Tribunal established under the FW Act. The first observation we make is that this section is to be considered in the making of any determination by the Tribunal. However, there is some difficulty in applying it to an application made pursuant to s.58KD. As we have earlier indicated, we are empowered to either make a determination giving effect to the agreed terms of the WRA or decline to do so. The determination which is sought relates to salaries and salary related allowances being matters within our jurisdiction. In that exercise it is not apparent that there are any decisions or principles of the FWC (or the AIRC) that would be relevant. The wage fixation principles that had been made by the predecessors to the FWC have long ceased to exist. It was not suggested any were relevant to the determination we are here asked to make.

[34] The FW Act contains a regime in respect of the negotiation and approval of enterprise agreements. The various sections of that Act which regulate that regime do not constitute either a decision or principles; they are statutory provisions. Even if they could be said to constitute a principle they are not relevant to the manner in which the salary and salary related allowances of ADF members are set and the determinations made to reflect them.

[35] To the extent that there are Annual Wage Review decisions of the FWC (more properly described as decisions of the Expert Panel) those decisions do not establish wage fixation principles. Nor do they establish principles for the setting of wages and allowances. They do however apply provisions of the FW Act in deciding on any National Minimum Wage Order or modern award wage adjustments that should be made. In doing so, the Expert Panel is obliged by the FW Act to take into account s.134 which sets out the modern awards objectives and s.284 which sets out the minimum wages objective. For the reasons given by the Commonwealth we accept that the considerations contained with those two objectives are not relevant to the making of the determination we are here asked to consider.

[36] The ADF agreed with the Commonwealth that there were no longer wage fixation principles comparable to those which had been made in the past by predecessors to the FWC.

There were Annual Wage Reviews informed by the modern awards and minimum wages objectives. Those reviews were mandated by the FW Act and guided by the various considerations contained within the objectives. It submitted that those objectives are ones dealing with a “*different world from the ADF world*”<sup>xxx</sup> and concepts which had been developed in the federal industrial relations regime were not mirrored within the ADF. The complex statutory regime regulating bargaining also had no counterpart within the defence force. It was the ADF submission that there were no decisions or principles relevant to the application before us.

## **Conclusion**

[37] This is the 12th arrangement brought before the Tribunal under s.58KD. The parties to the arrangement seek a determination to give effect to the agreement they have reached concerning increases to the salaries and salary related allowances of ADF members. For the reasons we have given our decision under s.58KD is to make the determination sought or decline to do so. We have no discretion to vary the quantum or timing of the agreed increases.

[38] The joint submission of the ADF and the Commonwealth is that the WRA represents the best outcome that could be achieved. The WRA was negotiated in circumstances which required the Government's wages policy to be observed and for genuine productivity and efficiency gains to be identified and properly costed. It was a requirement that any increases were to be affordable from within the existing budget and that there would be no retrospective operation of any salary or salary related increases.

[39] We earlier noted that both the CDF and COSC gave consideration to delaying negotiations until the outcome of negotiations in respect of the DECA for non-military personnel was known. A shorter period of operation for the WRA was also considered, as was the CPI forecast for the years in which the WRA was to operate. VADM Griggs evidence was that having taken all of these matters into account the opinion of the CDF and COSC was that the WRA was the best outcome that could be negotiated. He also said that it was important that the salary and salary related increases operated immediately upon the expiry of the WRA 2011-2014.

[40] The DFWA and RSL submissions, and the DFWA survey, reflect the disappointment of the interveners and a significant number of ADF personnel with the outcome of the negotiations. Both interveners could not support a proposed quantum increase that fell below the anticipated CPI or trade-offs impacting leave provisions. The DFWA was particularly concerned about the adequacy of the consultation process. However, it accepted the evidence that the outcome was the best that the ADF was able to negotiate. It proposed that we should direct the CDF and Minister to reconsider the WRA although recognising, appropriately, that there was doubt as to whether we had power to make that direction in the context of a s.58KD application. The RSL did not oppose the application but expressed its concern that the financial position of members of the ADF was not being maintained.

[41] The WRA acknowledges the right of the CDF and the ADF to pursue various salary and salary related claims before the Tribunal during the life of the arrangement. No part of the WRA purports to constrain any of the powers of the Tribunal being exercised during that same period.

[42] We have decided to make the determination sought. The first increase in salary and salary related allowances will take effect from 6 November 2014. A determination will be issued at the same time this decision is published.

THE HON. A. HARRISON, PRESIDENT  
THE HON. A. BEVIS, MEMBER  
BRIGADIER W. ROLFE, AO (Ret'd), MEMBER

*Appearances:*

*Mr R. Kenzie AM QC with Ms S. Robertson for the ADF*

*Mr J. O'Reilly with Ms H. Bull for the Commonwealth*

*Mr G. Nelson for the DFWA*

*Ms L. Geraghty for the RSL*

*Witness:*

*Vice Admiral R. Griggs, AO CSC, RAN Vice Chief of the Defence Force*

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<sup>i</sup> Matter 9 of 2011 - Workplace Remuneration Arrangement (WRA) 2011-2014.

<sup>ii</sup> Matter 9 of 2014 – 2014 Workplace Remuneration Arrangement paragraph 11

<sup>iii</sup> Ibid paragraph 14.

<sup>iv</sup> Ibid paragraph 38.

<sup>v</sup> ADF/Commonwealth 1 - Joint Submission, paragraph 31.

<sup>vi</sup> Ibid paragraphs 36 and 37.

<sup>vii</sup> Ibid paragraphs 10, 12, 26, 28, 29, 47, 48, 50 and 62.

<sup>viii</sup> Ibid paragraph 53.

<sup>ix</sup> Ibid paragraphs 67-69.

<sup>x</sup> At the time of giving his evidence before us he was Acting Chief of the Defence Force.

<sup>xi</sup> ADF 1 Statement of Vice Admiral R.J Griggs AO CSC RAN dated October 2014, paragraph 9.

<sup>xii</sup> Ibid paragraph 11.

<sup>xiii</sup> Transcript pages 36 and 37.

<sup>xiv</sup> ADF 1 paragraph 11.

<sup>xv</sup> Ibid paragraphs 12 – 15.

<sup>xvi</sup> Ibid paragraph 16.

<sup>xvii</sup> Transcript page 32 lines 17 – 39.

<sup>xviii</sup> Ibid page 39 lines 37 and 38.

<sup>xix</sup> DFWA 1 – Defence Force Welfare Association Submission to the Defence Force Remuneration Tribunal dealing with the Joint Submission provided by the Commonwealth and the ADF dated 13 October 2014.

<sup>xx</sup> RSL 1 –Letter from the Returned and Services League of Australia Limited dated 13 October 2014.

<sup>xxi</sup> DFWA 1 page 2 paragraph d.

<sup>xxii</sup> Ibid page 2 paragraph a.

<sup>xxiii</sup> Ibid page 2 paragraph b.

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<sup>xxiv</sup> Ibid Annex A.

<sup>xxv</sup> Transcript page 25 lines 18 and 19.

<sup>xxvi</sup> Ibid page 26 line 20.

<sup>xxvii</sup> RSL 1 paragraphs 2 and 3.

<sup>xxviii</sup> Ibid paragraph 4.

<sup>xxix</sup> CWLTH 2 - Relevance of principles of the Fair Work Commission dated 10 October 2014.

<sup>xxx</sup> Transcript page 57 line 26.