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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

2020 WAIRC 00738

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 15 OF 2018 GIVEN ON 17 OCTOBER 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	APPELLANT
	-v-
	THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
	RESPONDENT
CORAM	BUSS J, MURPHY J, LE MIERE J
DATE	WEDNESDAY, 5 AUGUST 2020
FILE NO/S	IAC 2 OF 2019
CITATION NO.	2020 WAIRC 00738

Result	Order Issued
Representation	
Appellant	Mr RJ Andretich and Mr J Carroll (of counsel)
Respondent	Ms P Giles (of counsel)

Order

1. Decision Reserved.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.

FULL BENCH—Appeals against decision of Commission—

2020 WAIRC 00757

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 145/2019 GIVEN ON 16 APRIL 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2020 WAIRC 00757
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL
HEARD BY WRITTEN SUBMISSION	**:**	FRIDAY, 22 MAY 2020, TUESDAY, 16 JUNE 2020
DELIVERED	**:**	WEDNESDAY, 2 SEPTEMBER 2020
FILE NO.	**:**	FBA 3 OF 2020
BETWEEN	**:**	DEPARTMENT OF EDUCATION WESTERN AUSTRALIA Appellant AND SPYKER LEGAL PTY LTD First Respondent SARAH COLOMB Second Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram	**:**	**COMMISSIONER D J MATTHEWS**
Citation	**:**	**2020 WAIRC 00218**
File No	**:**	**U 145/2019**

CatchWords	**:**	Industrial law (WA) – Appeal against decision of the Commission – Unfair dismissal application – Whether resignation of employment as part of workers' compensation claim was voluntary – Summons to produce documents objected to – Order made at first instance for production of some documents not subject to legal professional privilege – Whether Commissioner erred in law in finding that applicant did not waive privilege over documents — Whether applicant in possession of documents – A finding under s 49(2a) of Industrial Relations Act 1979 (WA) – Appeal regarding finding is in public interest – Issues influencing applicant's state of mind when signing settlement offer which required resignation – Applicant impliedly waived legal professional privilege – Documents to be produced as part of summons – Appeal upheld – Decision at first instance to be varied
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Appeal upheld
Representation:		
Counsel:		
Appellant	**:**	Mr J Carroll (of counsel)
First Respondent	**:**	Mr W Spyker (of counsel)
Second Respondent	**:**	Ms S Colomb

Case(s) referred to in reasons:

Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd and others [1996] HCA 15; (1996) 137 ALR 28

Australian Crime Commission v Marrapodi [2012] WASCA 103; (2012) 42 WAR 351

Australian Reliance Group Pty Ltd v Coverforce Insurance Brokers Pty Ltd [No 3] [2017] WASC 60

Bennett v Chief Executive Officer of the Australian Customs Service [2004] FCAFC 237; (2004) 140 FCR 101

BrisConnections Finance Pty Ltd (Receivers and Managers appointed) v Arup Pty Ltd [2016] FCA 438

Civil Service Association of Western Australia v Dr Ruth Shean, Chief Executive Officer, Disability Services Commission [2005] WAIRC 02043; (2005) 85 WAIG 2993

Commissioner of Taxation v Rio Tinto Ltd [2006] FCAFC 86; (2006) 151 FCR 341

Commonwealth of Australia v Albany Port Authority [2006] WASCA 185

Council of the New South Wales Bar Association v Archer [2008] NSWCA 164

Durham v Western Australian Government Railways Commission trading as Westrail (1995) 75 WAIG 3163

Federated Ship Painters and Dockers Union v. Adelaide Steamship Co 94 CAR 579

Goldberg v Ng [1995] HCA 39; (1995) 185 CLR 83

Gough & Gilmour Holdings Pty Ltd v Caterpillar of Australia Limited (No 1) (2001) 106 IR 239

Mann v Carnell [1999] HCA 66; (1999) 201 CLR 1

Northern Territory v Maurice and others (1986) 161 CLR 475

Perpetual Trustees (WA) Ltd v Equuscorp Pty Ltd [1999] FCA 925

Re Australian Insurance Employees' Union; ex parte Academy Insurance Pty Ltd [1988] 62 ALJR 426; 78 ALR 466

Re Gas Industry Award 104 CAR 376

Re Journalists Metropolitan Daily Newspapers Agreement (1960) 94 CAR 760

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others [1989] WAIRC 11873; (1989) 69 WAIG 1873

Telstra Corporation Ltd v BT Australasia Pty Ltd (1998) 85 FCR 152

Reasons for Decision

SCOTT CC and KENNER SC:

Introduction

1 This appeal is against the decision of the Commission at first instance ordering that 'Spyker Legal Pty Ltd produce to the Registry of the Western Australian Industrial Relations Commission notes taken by anyone acting for Sarah Colomb at the conciliation conference in the WorkCover WA Workers' Compensation Conciliation Service on 19 August 2019, where those notes are of events at which those representing the Director General, Department of Education were also present'.

2 The summons which brought about the order was issued by the Department of Education Western Australia (the Department) and sought '[a]ny document touching upon or evidencing:

1. any agreement for Spyker Legal Pty Ltd (Spyker Legal) to provide services to Ms Sarah Colomb in relation to her workers' compensation claim made against the Department of Education in 2019 (Claim),
2. any correspondence from Slater and Gordon to Ms Colomb or Spyker Legal relating to fees owed by Ms Colomb to Slater and Gordon in relation to the Claim, and in what circumstances any such fees would fall due,
3. what occurred during the conciliation conference held on 19 August 2019, including any file note from the conciliation conference that led to settlement of the Claim on 19 August 2019, and
4. any advice given by Spyker Legal, or any of its employees, to Ms Colomb in relation to any offer made by the Department of Education to settle the Claim, including any advice as to the reasonableness of any such offer and any advice as to whether Ms Colomb would owe Spyker Legal fees for its services if the offer was rejected.

Background

3 Ms Sarah Colomb claims that she was harshly, oppressively or unfairly dismissed from her employment as a teacher by the Department. Ms Colomb had resigned her employment as part of the settlement of a workers' compensation claim. The question of whether she had been dismissed for the purposes of her claim of unfair dismissal arises in the matter currently before the Commission at first instance.

4 The unfair dismissal claim was the subject of a hearing on 16 January 2020 relating to the Commission's jurisdiction. The Department submitted that the claim ought to be dismissed pursuant to s 27(1)(a)(ii) of the *Industrial Relations Act 1979* (WA) (the Act), that further proceedings were not necessary or desirable in the public interest because Ms Colomb had not been dismissed, and that the Commission did not have jurisdiction under s 23A of the Act to deal with a claim of harsh, oppressive or unfair dismissal because there had been no dismissal.

5 Ms Colomb's case was that her resignation as part of the settlement of the workers' compensation claim was not voluntary, that the Department's actions had denied her free will, and that it was necessary for the Commission to go behind the letter of resignation and the agreement to settle the workers' compensation matter.

6 The Department said that Ms Colomb was represented by a legal practitioner in the workers' compensation negotiations, she had time to unwind the settlement before it came into effect and had a real, if not a 'great', choice as to whether to settle and resign and she made that choice.

The jurisdiction hearing

Ms Colomb's evidence

7 Ms Colomb represented herself in the hearing at first instance. We think it is necessary to note that her evidence was less than clear and was not entirely consistent between examination-in-chief and cross-examination. The Commissioner at first instance led her through evidence-in-chief and made significant efforts to give her evidence some direction and clarity. Taking into account and looking at the totality of Ms Colomb's evidence, we have identified the following sequence of events. Ms Colomb had been employed by the Department from August 2012. She was absent from work and made a workers' compensation claim. Ms Colomb's workers' compensation claim was subject to conciliation by WorkCover WA. There was a conciliation conference on 29 October 2018, however, no agreement was reached. The stumbling block to resolving the matter was that the Department sought that, as part of the settlement, Ms Colomb resign. She did not want to resign.

8 Ms Colomb intended to represent herself at conciliation and, if it became necessary, arbitration, in the resolution of her workers' compensation claim. While the timeframes are not entirely clear, it was not in dispute that she engaged law firm Slater and Gordon. She understood that she engaged them on a no-win, no-fee basis, which she understood to include that a settlement of the claim would be regarded as a win and therefore, she was liable to pay the fees if the claim was settled. At some point, Ms Colomb came to understand that if she refused a reasonable offer of settlement then she would be liable for the fees. However, she did not wish to settle if it involved her resigning.

9 Ms Colomb ceased engaging Slater and Gordon. Slater and Gordon provided her with an invoice but indicated that she would only have to pay the legal fees if she settled the claim and as there was no settlement, they waived the fees. She later re-engaged them, at which point Slater and Gordon informed her that the fees were now payable. Ultimately, she engaged Spyker Legal. The contractual arrangements appear to have been similar, if not the same, for Spyker Legal and Slater and Gordon.

10 Ms Colomb says that the fee for Slater and Gordon would have been around $10,000 and for Spyker Legal was around $10,000 reduced to $5,500. However, during her evidence, Ms Colomb also referred to a total figure of around $13,200.

11 Settlement was not achieved during the formal WorkCover conciliation process and the dispute was to be arbitrated. Ms Colomb intended to represent herself in the arbitration.

12 In around June 2019, the Department informed Ms Colomb that it was prepared to negotiate a settlement without requiring her to resign. At the beginning of the arbitration process, the Department informed her that while she may be able to represent herself at the arbitration, the Department would not further negotiate with her for a settlement unless she was represented by a lawyer.

13 There was a pre-arbitration conference at WorkCover WA on 19 August 2019. Ms Colomb agreed that prior to that conference, her union, on her behalf, had approached the Department, informing them that Ms Colomb would consider resigning from her employment as part of a settlement. However, Ms Colomb submitted that this was separate to the workers' compensation matter but she also recognised that they were in some way connected or contingent.

14 At the pre-arbitration conference, Ms Colomb was represented by Mr Spyker of Spyker Legal. As Ms Colomb and Mr Spyker attended for the conference, the Department's lawyer informed them that his instructions had changed, and her resignation was now an essential term of any settlement.

15 The conciliation proceeded with the parties in separate rooms and the conciliator moving between them. According to Ms Colomb, the parties remained separated. Ms Colomb says that she was 'rattled' by the Department's sudden change of instructions, requiring her resignation as part of the settlement. She said she did not have a conversation with Mr Spyker about not wanting to continue settlement negotiations in the circumstances, and Mr Spyker then proceeded with the to-ing and fro-ing of the settlement negotiations.

16 According to Ms Colomb, during her discussion with Mr Spyker, he presented to her a copy of Slater and Gordon's invoice and Spyker Legal's invoice. Ms Colomb understood that if she did not settle her claim, she would be liable for the costs of both law firms. She also understood from her discussion with Mr Spyker that if she refused an offer of more than $10,000, it would be considered as refusing a reasonable offer.

17 Ms Colomb said that as she had no money to pay those fees, she had no option but to settle the claim on the terms offered which included her resignation. She did not want to resign but believed she had no choice. She could have gone to arbitration but would have represented herself, still had to pay the legal fees and had no sure outcome. She said that she was under the impression that even if she got up and walked out of the negotiations, she would still have to pay all of the fees. Ms Colomb said she did not think Mr Spyker played a part in putting pressure on her to accept the settlement.

18 The Department put a Memorandum of agreement to her to settle her claim. It included her resignation. She said to Mr Spyker that she did not wish to resign, that the Department was forcing her to, and that she had no choice. He changed the wording provided in the Memorandum to say that instead of her 'wish(ing) to resign' to say that she 'hereby resigned'. She signed the agreement and provided a letter of resignation which said that her resignation would take effect from the date upon which WorkCover WA's Director of Conciliation Services confirmed that she did not intend to disapprove the settlement of the workers' compensation claim. The Director did so on 10 September 2019.

19 The settlement sum agreed between them was $72,000 and was due to be paid to Ms Colomb by 24 September 2019. It had not been received by 17 October 2019. Spyker Legal wrote to the Department on 17 October 2019 noting the breach of the agreement; reserving Ms Colomb's rights in respect of the breach; foreshadowing suing for breach, seeking damages, interest and legal costs. The settlement sum was received by Spyker Legal the next day, 18 October 2019.

20 Ms Colomb said that she wished to call Mr Spyker to give evidence about what had occurred but had not understood that it was necessary for the purposes of the jurisdiction hearing.

The parties' arguments

21 Ms Colomb said that she was required by the Department to engage a lawyer, that this involved her incurring significant costs which she could not afford to pay unless she reached a satisfactory conclusion, that the Department's change of instructions requiring her resignation rattled her, and that she was tricked into going into negotiations and then into resigning against her will.

22 Ms Colomb says that she did not try to get out of the deal and get her job back because she did not know that she could do so and that even if she did, she had no way of paying the legal fees that she had incurred.

23 Ms Colomb filed the unfair dismissal claim on 21 October 2019. If her resignation took effect on 10 September 2019, it was out of time by a number of weeks. She said that in respect of the timing of filing the application, that she did not know at the time of settlement of the concept of constructive dismissal. She said 'I just signed because my lawyer said I had to. And I didn't want to incur that $13,200'. While Ms Colomb was asked whether she concluded the settlement negotiations with the benefit of advice, she said she would not call it "advice per se".

24 Ms Colomb waited until she received payment of the settlement sum before filing her unfair dismissal claim. She said she wanted to have the money to pay her lawyers' fees and her medical expenses before she took steps to challenge her resignation.

25 The Department said that Ms Colomb's union's suggestion to the Department that she may be prepared to settle and resign, subject to the amount of settlement, occurred very soon before the Department's representative advised that it intended to change its position and require a resignation in finalising any settlement for the workers' compensation matter. Ms Colomb was not tricked in that regard.

26 The Department argued that the Commission ought not to entertain further proceedings on the basis that there was no dismissal. The agreement and the letter of resignation were said to make the question of whether there was a dismissal separate from any question of unfairness.

27 The Commissioner at first instance engaged with counsel for the Department on the issue of whether Ms Colomb's evidence was that she received advice, and whose responsibility it was to bring evidence of whether or not she did. The Department's counsel said that it would not be for the Department to call Mr Spyker because Ms Colomb would need to waive legal privilege to enable him to give evidence about that advice.

28 The Department pointed out that Ms Colomb acknowledged that negotiations by her union involving her possible resignation were separate from the workers' compensation claim in settlement negotiations, although they were connected. Counsel submitted that if Ms Colomb says her lawyers let her down, that has nothing to do with the Department's conduct, which is the only basis upon which she could challenge that her resignation constituted a constructive dismissal.

29 The Department said that the following factors were relevant to the Commissioner's consideration:

1. Ms Colomb was represented by a lawyer during the negotiations and she had time to unwind the settlement in that she signed the resignation letter quite a while before it came into effect;
2. The Department was in breach of the agreement, but she wanted the settlement money; and
3. Ms Colomb had a real choice 'neither of which was great for her, but she had a real choice' (ts 43). It was to resign with a sum of money or to keep her job, press on with arbitration and take her chances.

30 The Commissioner reserved his decision regarding jurisdiction at the conclusion of proceedings on 16 January 2020. However, on 7 February 2020, the Department issued a summons to Spyker Legal to produce any documents that touched upon or evidenced the four matters set out in paragraph [2] above.

The Summons hearing

31 Spyker Legal sought to have the summons set aside on the grounds that the requested documents were subject to legal professional privilege and Ms Colomb said that she did not waive privilege.

32 The Department says that Ms Colomb waived privilege by an implied waiver.

33 During the course of the hearing, Ms Colomb said that she had documents covered by requested documents 1 and 2 but she did not have them with her at the jurisdiction hearing. She agreed to provide them to the Department prior to the substantive hearing. On this basis, the Commissioner found that those two items fell away.

34 As to the other items in the summons, the learned Commissioner acknowledged that he had in effect created the circumstances leading to the summons being issued because he took issue with the phrase used by counsel for the Department about Ms Colomb having the benefit of legal advice, when in fact the issue was not significant, except that what mattered, in his mind, was that Ms Colomb had competent counsel available to her, not whether she received competent or appropriate advice or whether she accepted or acted on that advice.

35 The Commissioner then went on to express the view that 'what is really important is not whether Ms Colomb benefitted from any particular advice, but that she had it available to her – that is, that she had competent counsel representing her …' (ts 60). He said 'the quality in her mind of that advice is to my mind neither here nor there'. Rather, he said, in a case of constructive dismissal, what was important was what the respondent did, and 'that insofar as Ms Colomb said she had a state of mind, it's insofar as the respondent created that state of mind that is important'.

36 The learned Commissioner went on to say that what he was interested in was that Ms Colomb said that she was induced to enter settlement negotiations on the basis that resignation was completely off the table and when she got to the conference, it was back on the table.

Reasons for decision

37 The Commissioner issued his Reasons for Decision ex tempore immediately at the conclusion of the hearing on 16 April 2020 and issued more expansive Reasons in writing the following day. He found that items 1 and 2 of the summons fell away.

38 The Commissioner found that:

(a) what happened in the conciliation conference before WorkCover WA may be relevant to determination of the matter;

(b) insofar as what happened was recorded by Ms Colomb's legal representatives, those documents are relevant and amenable to production under the summons;

(c) any note from the conference that is subject to legal professional privilege was not required to be provided;

(d) legal professional privilege had not been waived in respect of the documents in points (3) and (4) of the summons (paragraphs [11] and [18]).

39 The Commissioner said that Ms Colomb's state of mind at the conference is relevant to her unfair dismissal claim as she said her actions at the conference were unfairly induced by the Department and she did not freely bring her employment to an end. He said that if a person's state of mind includes that they relevantly believed "A" based on legal advice then it followed that the person had opened themselves up to a powerful argument that they may not resist production of the advice on the basis that it is privileged. Ms Colomb gave evidence that while she had a lawyer at the conference she was not provided by him the "advice per se" about whether or not "to accept the offer put by the Department", and he referred to p 36 of the transcript of 16 January 2020. He said that saying that "one has not received 'advice per se' cannot amount to waiver of privilege in relation to something, either expressly or impliedly". [19]

40 The Commissioner found, though, that in his view "Ms Colomb's state of mind, as that state of mind was affected by advice or a lack of advice from her lawyer, is not that which is relevant here. In my view, while it is relevant that Ms Colomb had access to competent counsel, what that person did or did not tell her is not particularly relevant." [20] What was relevant was Ms Colomb's state of mind insofar as it "was created or influenced by the respondent, not her state of mind insofar as it was created or influenced by her own advisers." [21]

41 The Commissioner found that "[w]hat is important is whether anything Ms Colomb has said is inconsistent with a claim of privilege." [24] He went on to say "in a situation where Ms Colomb clearly had competent representation, the question of whether she got any, or any good, advice is not material to the matter of whether her resignation was a constructive dismissal. Accordingly, it cannot be said it would be unfair to the respondent for Ms Colomb to further her claim of constructive dismissal without us knowing more about the exchanges between her and her representative." [25]

42 The Commissioner issued the order set out in paragraph [1] above.

Grounds of appeal

43 The first ground of appeal is that the learned Commissioner erred in law in finding at [11] and [18], that Ms Colomb had not impliedly waived privilege over documents within items 3 and 4 of the summons. This is said to relate in particular to Ms Colomb's state of mind as to why she accepted the offer to settle. Was it because her will was overborne because of the Department's conduct, or did the advice of her lawyer and the issue of the legal fees affect her state of mind?

44 The second ground of appeal is that in finding at [10] that item 2 of the summons fell away, the Commissioner made an error of fact by implicitly finding that Ms Colomb has in her possession all of those documents. The Department says her evidence was that she did not have a copy of Slater and Gordon's bill provided by them to Spyker Legal [t 14], that while Mr Spyker showed her copies, he retained them himself. The Department says that although Ms Colomb said at the summons hearing that she would provide them, her evidence under oath was that she did not have them. Therefore they are appropriate to be produced under the summons.

45 Spyker Legal did not wish to be heard and submits to any orders the Full Bench may make.

46 Ms Colomb's submissions dealt with a number of issues. Firstly, she said that the summons is not valid because it was directed to a company and not a person. Her other submissions relate to the merits of her claim.

Consideration and conclusions

A finding

47 Section 49(2a) of the Act provides that:

> An appeal does not lie under this section from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie.

48 A finding is a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate (s 7(1) of the Act).

49 In our view, the proceedings to which this decision relates is Ms Colomb's claim that she was unfairly dismissed. The decision deals with an interlocutory matter as part of those proceedings in that it relates to whether a summons for the production of documents directly dealing with evidence in the unfair dismissal proceedings ought to have been set aside.

50 Such matters are interlocutory as such do not finally determine or dispose of the substantive proceedings (See *Commonwealth of Australia v Albany Port Authority* [2006] WASCA 185 [15] per Steytler P and *Australian Crime Commission v Marrapodi* [2012] WAIRC 103; (2012) 42 WAR 351 [11] per McLure P). Therefore the appeal is against a finding.

Public interest

51 The question is then whether, in accordance with s 49(2a), the matter is of such importance that in the public interest an appeal should lie.

52 The Full Bench in *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others* [1989] WAIRC 11873; (1989) 69 WAIG 1873 at 1879 set out the principles to be applied in determining what constitutes the public interest in this regard. They are that:

(a) The "public interest" should not be narrowed to mean "special or extraordinary circumstances".

(b) An application may involve circumstances which, because of their very generality are of great importance in the public interest (see *Re Australian Insurance Employees' Union; ex parte Academy Insurance Pty Ltd* [1988] 62 ALJR 426; 78 ALR 466).

(c) "The question of sufficient importance cannot be decided on the basis of case law. Each case will be a question of impression and judgment whether the appeal has the required degree of importance" (*Re Gas Industry Award* 104 CAR 376, per Wright and Moore JJ. and Gough C).

(d) "An appeal will not lie unless the Commission has formed a positive opinion on the public interest of the matter. Doubts or misgivings are not sufficient" (see *Re Journalists Metropolitan Daily Newspapers Agreement* (1960) 94 CAR 760 at 768).

(e) Important questions with likely repercussions in other industries and substantial matters of law affecting jurisdiction can give rise to matters of sufficient importance in the public interest to justify an appeal.

(f) There is no "general standard or degree of importance which will satisfy the test of such importance. Every case must be viewed on its merits according to its individual circumstances." (see *Federated Ship Painters and Dockers Union v. Adelaide Steamship Co* 94 CAR 579).

53 The Full Bench in *Civil Service Association of Western Australia v Dr Ruth Shean, Chief Executive Officer, Disability Services Commission* [2005] WAIRC 02043; (2005) 85 WAIG 2993, (per Sharkey P with whom Beech CC and Gregor SC agreed) accepted the *Butterworths Concise Australian Legal Dictionary* definition of "an interest common to the public at large or a significant portion of the public and which may or may not involve the personal or proprietary rights of individual people."

54 Therefore, in that context, the Full Bench is required to consider the degree of importance of the particular circumstances of this case.

55 Ms Colomb was not represented in the hearing before the Commission. She gave her evidence-in-chief under questioning from the Commissioner. She recited the circumstances of the pre-arbitration conference; the Department communicating its change in instruction; her communications with her lawyer and his producing the invoices and her not having the money to meet the legal bills; that she said in response to a question by the Commissioner asking "did you have in your mind what would happen to Mr Spyker's claim of $5,500, if you said 'I'm not settling today'?"; she said "He may well have said that the settlement was a win." (ts 14). She confirmed that she had been thinking about it at the time, that if she walked out, was she liable for the fees and she said she was under the impression that she was liable, because the bills for both sets of fees were given to her by Mr Spyker at the time. Ms Colomb said she then had the fact of the Department now requiring her resignation as a condition of settlement sprung on her. She said "so I was rattled with the sudden…". The Commissioner asked her:

> "So the thing that rattled you was the Department's lawyer coming up and saying his client's instructions had changed and they now require a resignation?",

to which she answered "That's right" (ts 15).

56 After dealing with those issues over a number of pages of transcript, at p 16, Ms Colomb said:

> "So essentially, the - from the Department's actions and saying they didn't require a settlement in two months, I had gone from zero legal fees to 13,200 that I had no way of paying."

and that:

> "So I felt forced, I felt like I had no other option but to settle."

57 (While we note Ms Colomb's words "they didn't require a settlement in two months", we suspect she may have meant that the Department did not require resignation over the two months of negotiations.)

58 We agree with the Commissioner that Ms Colomb's state of mind as it was affected by the Department's conduct is a very important issue in her decision to settle and resign. However, in our respectful opinion, her evidence makes it clear that this was not the only influence on her state of mind. The other matters were the fact of her having engaged and re-engaged Slater and Gordon, having engaged Spyker Legal, being faced with substantial legal fees, having those legal fees drawn to her attention by Mr Spyker, and Mr Spyker's advice to settle. The respondent ought to be able to test Ms Colomb's evidence by reference to the documents set out in points (3) and (4) of the summons. The Commission would then need to consider the role each of those matters played in forming Ms Colomb's state of mind, not just the Department's conduct, and weigh the respective influences.

59 In our view, unless the Commission has before it the documents sought to be obtained by the summons, the Commission will be denied the opportunity to consider the full picture. The Department will be denied the opportunity of a fair hearing because it will not be able to properly put its case.

60 The situation will not be able to be recovered on appeal if the final decision goes against the Department because Spyker Legal is not a party to proceedings. If it were to be recoverable, then further costs, time and delay would eventuate.

61 In our opinion, these circumstances are important to the resolution of this claim, and it is in the public interest to allow the Department to appeal so as to avoid the real prospect that important evidence affecting Ms Colomb's state of mind is excluded, and would not be able to be remedied later. Therefore we conclude that an appeal should lie against the decision regarding the finding.

Ground 1

The advice

62 While the learned Commissioner concluded that Ms Colomb had not relied on advice, by reference to her evidence at transcript p 36 that "he didn't provide advice, per se", other parts of her evidence indicate otherwise. At transcript p 13, Ms Colomb said that after the Department's lawyer had spoken to her and Mr Spyker, the Department's lawyer "went to his room". She then recited what occurred between her and Mr Spyker. The Commissioner asked Ms Colomb about what happened in her discussion with Mr Spyker. He asked:

> The first thing Mr Spyker did was produce the two letters, the two invoices?---Yes.
>
> All right. What did he say to you?---Yeah, so he said, "Well, this is the first offer I'm going to put in". And I said, "I don't want to resign". And he said, "Well, you have to, there's - they've - you've heard what they've just said, they force you to resign". So negotiations continued and then - then he gave me the $13,000 - I think it's $13,200 altogether.

63 On being questioned by counsel for the Department about advice provided by Mr Spyker, Ms Colomb said:

> Well, he didn't provide advice, per se. But I knew that me refusing an offer because it was reasonable, I would still incur $13,200, and I would be back - I suddenly had a debt which I shouldn't have had if the employer hadn't lied about requiring resignation in June.
>
> So you considered the offer was reasonable, then, because you thought - I'll stop there. You considered the offer was reasonable?---Well, yeah - it wasn't $1, so I didn't think I would have any grounds, and I wouldn't be able to have a fight with a lawyer and say that it wasn't. If a lawyer thinks it's reasonable - yeah. (ts 36)

64 Then at transcript page 37, Ms Colomb said that she did not go through all of the documents with a fine-tooth comb at the time:

> "I just signed because my lawyer said I had to. And I didn't want to incur that $13,200."

65 This demonstrates that Ms Colomb gave express evidence that she received and acted on Mr Spyker's advice.

66 While the Commissioner said in his Reasons and during the course of the hearing that what he thought was relevant was the Department's actions as the employer and their effect on Ms Colomb's state of mind in settling her claim and resigning, it is clear that there were other things affecting her state of mind. They included the advice she received and the documents Mr Spyker presented to her.

Waiver of privilege

67 The next issue is whether Ms Colomb impliedly waived legal professional privilege. A client of a lawyer impliedly waives the legal professional privilege that protects their communication with their lawyers where they "assert a state of mind as to the very matters upon which legal advice was being taken" (*Australian Reliance Group Pty Ltd v Coverforce Insurance Brokers Pty Ltd [No 3]* [2017] WASC 60 at [28] per Chaney J).

68 We have set out earlier the exchanges between the Commissioner and Ms Colomb, and between counsel for the Department and Ms Colomb, about Ms Colomb's discussion with Mr Spyker. The Commissioner expressly asked Ms Colomb to tell him about what went on between her and her lawyer and what her lawyer said to her (see ts 13 -14). This was about Mr Spyker producing the invoices or letters from Slater and Gordon and his own firm's account. It was also about what Mr Spyker told her about the terms of the "no win, no pay deal". He revisited that issue with Ms Colomb at page 15 of the transcript. At page 16, the Commissioner asked Ms Colomb about whether Mr Spyker talked to her about whether she wanted to continue with settlement negotiations, and what was the conversation.

69 Therefore, during the course of Ms Colomb answering questions about her communications with her lawyer, communications over which she was entitled to maintain privilege, she gave answers that disclosed those communications, in relation to the advice she received from her lawyer which at least contributed to her decision to enter into the agreement and resign.

70 Whether or not Ms Colomb recognised that what she was receiving from Mr Spyker was advice, we conclude without reservation that it was advice. Ms Colomb opened the issue of that advice to scrutiny by saying in evidence, in effect, that her lawyer told her that the offer was reasonable, that if she did not accept a reasonable offer she was liable for the fees incurred and that "I just signed because my lawyer said I had to."

71 In this way, Ms Colomb's evidence and submissions were inconsistent with her maintaining the legal professional privilege to which she is otherwise entitled.

72 We would uphold Ground 1.

Ground 2

73 As the Department points out, there is a conflict between what Ms Colomb said in her evidence about having the documents covered by item 2 of the summons and what she said at the summons hearing. The Commissioner relied on her saying she would discover them to the Department.

74 Were the Commission dealing with counsel stating from the bar table that they had possession of and would produce the documents, we would have no hesitation in accepting that undertaking. However, given that Ms Colomb is self-represented, is not familiar with the processes and there was some confusion and lack of clarity in her evidence and submissions, for the sake of expedition and certainty, we would require that the documents in item 2 of the summons be produced as part of the summons.

Disposition of appeal

75 We would dispose of appeal by ordering that the appeal be upheld, and that the decision at first instance be varied to reflect the terms of points 2 to 4 inclusive of the summons, within 14 days.

EMMANUEL C:

76 The Chief Commissioner and Senior Commissioner set out the background to this matter. I gratefully adopt it other than in relation to the last sentences of [16] and [43], for reasons I will go on to explain.

Is the decision a finding?

77 I agree that the decision is a finding for the reasons set out in [47] – [50] in the reasons of the majority.

Is it in the public interest for an appeal to lie?

78 The majority set out the principles to apply when considering whether a matter is of such importance that it is in the public interest for an appeal to lie from [52] - [54] and I respectfully adopt them.

79 I consider that the matter is of such importance that it is in the public interest for an appeal to lie for two reasons.

80 First, Spyker Legal Pty Ltd (**Spyker Legal**) will not be a party to any final decision made in relation to Ms Colomb's unfair dismissal claim. That means the Department could not challenge the decision appealed here at the same time as challenging any final decision on the unfair dismissal claim.

81 Second, if the grounds of appeal are made out, then refusing to allow the Department to appeal would deny the Department a fair opportunity to defend the unfair dismissal claim.

82 In the circumstances of this matter, it is in the public interest for an appeal to lie.

Ground one

83 I consider the learned Commissioner was correct to find that Ms Colomb did not impliedly waive privilege in the documents in items 3 and 4 of the summons issued in February 2020 (**Summons**).

84 In summary, I do not consider that Ms Colomb put in issue the content of privileged communications the subject of items 3 and 4 of the Summons or otherwise sought to deploy such privileged material so that it would be unfair to allow the maintenance of the privilege.

The law

85 In its submissions the Department sets out a summary of the relevant law of constructive dismissal. I do not consider it necessary to comment about those submissions except to note that I do not agree with the Department's contention that the approach of the Industrial Appeal Court in ***Durham v Western Australian Government Railways Commission trading as Westrail*** (1995) 75 WAIG 3163 at 3166 supports the premise that in a constructive dismissal case, 'it is necessary to consider matters such as whether the person received advice, if so, *what advice they received*…' (emphasis added)

86 The facts set out in the Industrial Appeal Court's reasons detailed open communications and negotiations between the parties and their lawyers over several months culminating in an agreement and the associated filing of court documents to conclude litigation. I consider that the Department's submission goes too far in suggesting that decision supports the proposition that it is 'necessary', in such a case, to know the contents of privileged advice. The Industrial Appeal Court (and the Commission before it) did not have the benefit of privileged communications or advice and the reasons do not record or suggest that there was any waiver of privilege in the conduct of the matter.

87 It is trite to say that legal professional privilege is fundamental to our justice system. Per Deane J in ***Attorney-General for the Northern Territory v Maurice and others*** (1986) 161 CLR 475 at 490:

> It is a substantive general principle of the common law and not a mere rule of evidence that, subject to defined qualifications and exceptions, a person is entitled to preserve the confidentiality of confidential statements and other materials which have been made or brought into existence for the sole purpose of his or her seeking or being furnished with legal advice by a practising lawyer or for the sole purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings: see generally, *Baker v. Campbell* (58). That general principle is of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law in that it advances and safeguards the availability of full and unreserved communication between the citizen and his or her lawyer and in that it is a precondition of the informed and competent representation of the interests of the ordinary person before the courts and tribunals of the land. Its efficacy as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced. That being so, it is not to be sacrificed even to promote the search for justice or truth in the individual case or matter and extends to protect the citizen from compulsory disclosure of protected communications or materials to any court or to any tribunal or person with authority to require the giving of information or the production of documents or other materials: see *Pearse v. Pearse* (59); *Baker v. Campbell* (60). The right of confidentiality which the principle enshrines has recently, and correctly, been described in the European Court of Justice as a "practical guarantee" and "a necessary corollary" of "fundamental, constitutional or human rights": see *A.M.&S. Europe Ltd. v. Commission of The European Communities* (61); *Baker v. Campbell* (62). Indeed, the plain basis of the decision of the majority of this court in *Baker v. Campbell*

was the acceptance of the principle as a fundamental principle of our judicial system: see Murphy J. (63); Wilson J. (64); Deane J. (65); Dawson J. (66). Like other traditional common law rights, it is not to be abolished or cut down otherwise than by clear statutory provision. Nor should it be narrowly construed or artificially confined.

88 Also, as Kirby J observed in ***Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd and others*** [1996] HCA 15; (1996) 137 ALR 28 at 33:

> The law of legal professional privilege is an important branch of the law protecting the basic rights of persons in a society such as ours. Those rights include the right to approach lawyers without concern that matters disclosed, and advice received, in confidence will ordinarily enjoy the protection of the law. Increasingly, in recent years, this Court and other courts of high authority, have described such rights in the language of basic civil rights. They have also been explained as rights pertinent to the just operation of the adversarial system rather than, as they have sometimes been explained in older or other authorities, as rules of evidence or procedure. Within this Court, there have been divisions of opinion on this point. However, generally speaking, I consider that the trend of recent authority supports the submission that legal professional privilege constitutes an important civic right to be defended, as such, by the law.
>
> There is no doubt that legal professional privilege may be extinguished by clear statutory provision. It may also be waived by decision of the client.

89 In relation to waiver, Gleeson CJ and Gaudron, Gummow and Callinan JJ observed in ***Mann v Carnell*** [1999] HCA 66; (1999) 201 CLR 1 at [28]-[29]:

> At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that "waiver" is a vague term, used in many senses, and that it often requires further definition according to the context: ***Ross T Smyth & Co Ltd v T D Bailey, Son & Co*** [1940] 3 All ER 60 at 70; ***Larratt v Bankers and Traders Insurance Co Ltd*** (1941) 41 SR (NSW) 215 at 226; ***The Commonwealth v Verwayen*** (1990) 170 CLR 394 at 406, 422, 467, 472. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege: *Cross on Evidence*, 5th Aust ed (1996), par 25005; ***Attorney-General (NT) v Maurice*** (1986) 161 CLR 475 at 497-498. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication (***Benecke v National Australia Bank*** (1993) 35 NSWLR 110), or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received (***Lillicrap v Nalder & Son (a firm)*** [1993] 1 WLR 94; [1993] 1 All ER 724).
>
> Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law" (eg ***Goldberg v Ng*** (1995) 185 CLR 83 at 95). This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in ***Benecke v National Australia Bank***, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

90 As the Department submits, implied waiver turns on the inconsistency between the client's conduct and maintaining the privilege. It does not matter whether the client did not turn her mind to the question of whether her conduct would amount to a waiver of privilege: ***Mann v Carnell*** at [28]-[29].

91 The Department says two relevant propositions arise from the consideration by Chaney J of the application of the law regarding implied waiver in ***Australian Reliance Group Pty Ltd v Coverforce Insurance Brokers Victoria Pty Ltd [No 3]*** [2017] WASC 60 (**Coverforce**):

1. it is not sufficient to found a waiver of privilege that a pleading puts in issue the state of mind of the person claiming the privilege. What is necessary to found a waiver is conduct that directly or indirectly puts the content of the privileged communications in issue; and
2. it may be sufficient that the client is making assertions about their state of mind, in circumstances where there were confidential communications likely to have affected that state of mind.

92 While accepting the correctness of proposition 1., I consider that proposition 2. is better understood in the fuller context of the citation of Hodgson JA in ***Council of the New South Wales Bar Association v Archer*** [2008] NSWCA 164 [48] referred to by Chaney J in ***Coverforce*** at [26]. Specifically I refer to what Hodgson JA called the 'relevant unfairness'. His Honour observed:

> It is not enough to bring about a waiver of client legal privilege that the client is bringing proceedings in which the content of the privileged communications could, as a reasonable possibility, be relevant and of assistance to the other party. For the client to do this is not inconsistent with the maintenance of the privilege, and does not give rise to unfairness of the type in question. What would involve inconsistency and relevant unfairness is the making of express or implied assertions about the content of the privileged communications, while at the same time seeking to maintain the privilege. In this respect, it may be sufficient that the client is making assertions about the client's state of mind, in circumstances where there were confidential communications likely to have affected that state of mind.

93 The inclusion of the relevant element of unfairness lends a different character to proposition 2. above, including as it was applied in ***Coverforce***.

94 The requisite unfairness is picked up later in the Department's submissions which draw attention to the reasoning of the Full Court of the Federal Court in ***Commissioner of Taxation v Rio Tinto Ltd*** [2006] FCAFC 86; (2006) 151 FCR 341 (**Rio Tinto**) at [61]:

> Both before and after *Mann*, the governing principle required a fact-based inquiry as to whether, in effect, the privilege holder had directly or indirectly put the contents of an otherwise privileged communication in issue in litigation, either in making a claim or by way of defence. In *DSE* at [58], Allsop J put the matter somewhat more descriptively, saying waiver arises when:
>
> > the party entitled to the privilege makes an assertion (express or implied), or brings a case, which is either about the contents of the *confidential communication* or which necessarily lays open the confidential communication to scrutiny and, by such conduct, an inconsistency arises between the act and the maintenance of the confidence, informed partly by the forensic unfairness of allowing the claim to proceed without disclosure of the communication. (original emphasis)

95 The Department says that ***Gough & Gilmour Holdings Pty Ltd v Caterpillar of Australia Limited (No 1)*** (2001) 106 IR 239 (**Gough**) is a useful illustration of the principles from ***Rio Tinto*** and I will return to that later in my reasons.

96 With respect to fairness in connection with express or implied assertions about the content of privileged communications I also note the observations, also cited by Flick J in ***BrisConnections Finance Pty Ltd (Receivers and Managers appointed) v Arup Pty Ltd*** [2016] FCA 438, of Gyles J (with whom Tamberlin J agreed) in ***Bennett v Chief Executive Officer of the Australian Customs Service*** [2004] FCAFC 237, (2004) 140 FCR 101 at [68] where, referring to the decision in ***Mann v Carnell*** his Honour concludes:

> The test looks to inconsistency between the disclosure that has been made by the client on the one hand and the purpose of the confidentiality that underpins legal professional privilege on the other. It is not a matter simply of applying general notions of fairness as assessed by the individual judge. The authorities to which I have referred show that it is well established that for a client to deploy the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege.

97 The considerations of fairness in that context are an element in leading cases addressing waiver of privilege including ***Gough*** (see [47] – [49]) in which Bowland J adopts the approach of the majority in ***Telstra Corporation Ltd v BT Australasia Pty Ltd*** (1998) 85 FCR 152 (**Telstra**), a case with which the Full Court agreed in ***Perpetual Trustees (WA) Ltd v Equuscorp Pty Ltd*** [1999] FCA 925 (**Perpetual Trustees**), as follows:

> Where… a party pleads that he or she took certain action '*in reliance on*' a particular representation made by another, he or she opens up as an element of his or her cause of action, the issue of his or her state of mind at the time that he or she undertook such action. The court will be required to determine what was the factor, or what were the factors, which influenced the mind of the party so as to induce him or her to act in that way. That is, the party puts in issue in the proceeding a matter which cannot fairly be assessed without examination of relevant legal advice, if any, received by that party. In such circumstances, the party, by putting in contest the issue of his or her reliance, is to be taken as having consented to the use of the relevant privileged material, or to put it another way, to have waived reliance on the privilege which such material would otherwise attract. (original emphasis) [46]

98 The authorities relied upon by the Department are helpful in setting out the relevant principles, however, I consider that the circumstances in this matter are distinguishable from cases such as ***Coverforce*** and ***Gough***. I note the observation of the High Court in ***Goldberg v Ng*** [1995] HCA 39; (1995) 185 CLR 83 (at 95): 'The circumstances in which a waiver of legal professional privilege will be imputed by operation of the law cannot be precisely defined in advance.'

Application to the evidence

99 The Department submitted at the hearing about jurisdiction on 16 January 2020 (**Jurisdiction Hearing**) that it is the Department's conduct that the Commission needs to consider. The learned Commissioner agreed. In my view the learned Commissioner was correct to find that where an employee claims constructive dismissal, it is that person's state of mind, insofar as it was created or influenced by the former employer, that is relevant.

100 Contrary to the Department's submissions, that finding does not mean that a claim for unfair dismissal, based on constructive dismissal, would be successful where the employer's conduct was, objectively speaking, sufficient to have forced a person to resign, regardless of whether as a matter of fact the employer's conduct did 'force' the person to resign. Nothing in his reasons for decision suggests that was the learned Commissioner's view. It is clear from his reasons for decision that the Commissioner considered that he would need to examine whether the Department's conduct in fact did 'force' Ms Colomb to resign.

101 Commissioner Matthews did not conclude that Ms Colomb did not rely on advice. At most he said she did not say that she relied on advice. After the following exchange with the Commissioner, the Department's representative withdrew his submission that Ms Colomb's decision to resign was made with the benefit of advice:

> **CARROLL, MR:** And importantly, this included a term of the settlement that she voluntarily resigned from her employment. And that is clause 3.1, paragraph C of the agreement. Of course, if this Commission were to find that Ms Colomb did not voluntarily resign, she would not have complied with the terms of the settlement. Ms Colomb was represented by a legal practitioner for the conclusion of the settlement negotiations. Her decision, therefore, was made with the benefit of legal advice.

MATTHEWS C: She denied that. Whether you like it or not, the only evidence I have is Ms Colomb said, "I wouldn't call it advice".

CARROLL, MR: Yes, sorry. I do withdraw that. She was represented by legal practitioner when the settlement negotiations were concluded.

MATTHEWS C: You can't put it any higher than she had a lawyer.

CARROLL, MR: She had a lawyer, yes, sorry.

MATTHEWS C: She doesn't seem to have – so far as her uncontroverted evidence go - - -

CARROLL, MR: Yes.

MATTHEWS C: - - - seem to have got much from the lawyer

CARROLL, MR: Yes.

MATTHEWS C: - - - as far as she's concerned, in terms of guidance.

CARROLL, MR: I accept that based on the evidence. And as a side note, before I conclude my submissions, of course, if Ms Colomb has an issue with that, her claims lie somewhere else against someone else.

102 The Department's representative agreed that at most Ms Colomb had a lawyer when settlement concluded and she did not seem to 'have got much from the lawyer … in terms of guidance.'

103 In this case the Department contends that by oral evidence given by Ms Colomb at the Jurisdiction Hearing, Ms Colomb put her state of mind in issue in the proceedings. Respectfully, somewhat differently to the way set out in [43] of the majority's reasons above, the Department characterised that 'state of mind' as raising the question as to why Ms Colomb accepted the offer to settle: 'Was it because her will was overborne, and therefore she was not acting voluntarily, or was it a consensual, and mutual agreement?'

104 The Department does not contend that a waiver arises merely by claiming constructive dismissal, rather it contends in this matter that evidence was given in pursuit of that claim and it is that evidence which constitutes conduct inconsistent with the maintenance of privilege.

105 Ms Colomb was not represented at that hearing. I accept that does not prevent a waiver arising and that a waiver could arise unintentionally, per ***Mann v Carnell*** [29].

106 Specifically, at [52] of its written submissions, the Department relies on the following particular statements given in evidence by Ms Colomb to have put her state of mind, and reasons for her state of mind, in issue such that she has deployed or 'laid open to scrutiny' privileged communications or advice.

107 The first is a reference by Ms Colomb, in an uncertain way, to some obligation in or about May 2019 to pay her previous solicitors, Slater and Gordon, $10,000 and that she felt that her 'no win, no fee' arrangement with Slater and Gordon placed pressure on her such that she was being 'forced to resign' [AB 47]. I cannot conclude that this exchange lays open to scrutiny any privileged communication of the kind set out in items 3 and 4 of the Summons given that part of the Summons relates to advice from different solicitors (Spyker Legal) about the WorkCover pre-arbitration conference on 19 August 2019 (**WorkCover Conference**) some three months later or about legal advice regarding whether Ms Colomb would owe to Spyker Legal (and not Slater and Gordon) any legal fees.

108 The Department next refers to Ms Colomb saying that she did not have a choice but to resign [AB 51.8]. This evidence does relate to the WorkCover Conference. Ms Colomb is responding to questions by the learned Commissioner to explain a sequence of events and Ms Colomb's understanding of her obligations, including to pay legal fees, and choices during the WorkCover Conference. The transcript of the examination of this topic continues for a number of pages including the following conclusions that the Department also contends were expressed by Ms Colomb: 'that her lawyer told her she was being forced to resign [AB52.5], she felt like she had no option but to settle [AB 55.4].'

109 On the evidence, I cannot find that Ms Colomb's statements put privileged communications in issue as identified in the Summons.

110 Ms Colomb repeatedly explained in her evidence that she had formed her own understanding, whether misguided or not, about what would trigger an obligation to pay fees to Slater and Gordon and Spyker Legal. Her evidence was that during the WorkCover Conference she was shown by Spyker Legal their account for $5,500 and that she may also have been reminded about an amount that she may have owed Slater and Gordon, being $7,700. Critically, Ms Colomb's evidence is consistent that she had formed her own view about her obligation to pay both sets of lawyers even if she refused the Department's offer of settlement [AB 55.4]. Ms Colomb's evidence was that Mr Spyker did not provide her with advice or advise her on what would amount to a reasonable offer [AB 75.3 and AB 75.5].

111 Ms Colomb's observations that she felt did not have a choice but to resign, and she felt like she had no option but to settle were both clearly explained by Ms Colomb as arising from her belief, not informed by legal advice or having been advised, that the Department's offer to settle triggered an obligation for her to pay her solicitors in circumstances where she would not have had the means to do so without using settlement funds. This is consistent with the Department's own submission about Ms Colomb's reasons – see for example the Department's written submissions at [52(b)] referring to AB 53.5 and AB 75.5.

112 The Department includes as a matter that gives rise to the waiver that Ms Colomb contended that she did not have the funds to pay the legal fees unless she settled the claim. I cannot see how that statement about Ms Colomb's financial circumstances puts any privileged communication in issue.

113 Without forming any view about the reasonableness of her belief, Ms Colomb's evidence is consistent in explaining that she thought she had been 'tricked' by the Department into accruing legal costs in the arbitration process where she had not expected the Department to require her resignation as a non-negotiable component of the settlement of her workers' compensation claim. She assumed she would be liable to pay fees because of what she thought was in Slater and Gordon's fee agreement and her assumption that Mr Spyker's fee agreement would be similar. Her state of mind about being forced to resign centres entirely on her belief that the Department misrepresented the requirement to resign as part of settlement in order to 'trick her' to attend a pre-arbitration conference, thereby incurring legal fees she could only afford to pay by agreeing to settle. Ms Colomb does not rely on, or put in issue, any confidential communication from Mr Spyker to establish her state of mind.

114 A fair reading of the transcript shows that Ms Colomb's evidence was:

a. she agreed to attend the WorkCover Conference because the Department had said it would not require her resignation as part of the settlement of her workers' compensation claim;

b. Ms Colomb was required to be represented by a lawyer at the WorkCover Conference, something confirmed by WorkCover Arbitrator Sharp;

c. at the WorkCover Conference the Department said it would require her resignation as part of any settlement of her workers' compensation claim;

d. Ms Colomb incurred legal fees because of the Department's conduct;

e. based on Ms Colomb's reading of the Slater and Gordon fee agreement, her assumption that Mr Spyker's fee agreement was likely similar, and not on any legal advice, Ms Colomb understood that she would have to pay around $13,000 in legal fees, whether she accepted the Department's settlement offer or not, because:

i. the Department made an offer of at least one dollar; or

ii. the Department's offer would be considered a reasonable offer and receiving such a settlement offer would be considered a 'win' for the purpose of Slater and Gordon and Mr Spyker's fee agreements.

115 To the extent that the Department argues that Ms Colomb saying that 'her lawyer told her she was being forced to resign' [AB 52.5] puts in issue legal advice or communications, I do not agree. Rather, it is clear from the transcript, and the Department's own submissions, that her resignation was required by the Department as part of its offer of settlement. Ms Colomb's statement is only evidence of Mr Spyker informing Ms Colomb of what the Department's position and settlement offer was. Specifically, Ms Colomb's evidence is that in response to saying she did not want to resign her lawyer told her, 'Well, you have to, there's – they've – you've heard what they've just said, they force you to resign.'

116 The Department also relies upon a later part of the transcript where Ms Colomb is explaining why the Commission should look past the deed she signed recording the settlement reached during the WorkCover Conference – namely she argues she was forced into a situation where her 'employer's actions denied [her her] free will', and it was 'not a voluntary resignation'. Again, here Ms Colomb contends her belief that she was tricked into accruing legal costs and her understanding, uninformed by any legal advice, that those costs would have to be paid because the offer to settle was made. In doing so she has not put any legal advice in issue.

117 When Ms Colomb said 'she felt like she had no other option but to settle' [AB 55.4], it is clear from the context of her evidence that it was because of her understanding of how the costs agreement works, which she said 'is why [she] settled.' Reference to her being denied her free will was Ms Colomb's evidence that she was forced into a situation where her 'employer's actions had denied [her her] free will.' [AB 57.2] The employer's actions are those set out in [114] of my reasons.

118 When Ms Colomb said 'I just signed because my lawyer said I had to', she was speaking about an event that occurred some weeks after the WorkCover Conference, when she signed a document confirming that she resigned after the WorkCover Conference and had her lawyer change the wording of the resignation document from 'I wish to resign' to 'I hereby resign'.

119 The Department says Ms Colomb divulged the content of privileged communications as to her state of mind when she was asked what would happen to Mr Spyker's invoice for $5,500 if she had refused to settle, because she replied 'he may well have said that settlement was a win.' I disagree. Ms Colomb was merely speculating, as she was asked to, about what Mr Spyker would have done if she had behaved other than she did, against the background of her rather unclear impression that Mr Spyker's costs agreement would be like Slater and Gordon's, and that Slater and Gordon's costs agreement 'probably' said refusing a settlement offer was still a win for costs purposes. Ms Colomb speculating about what Mr Spyker may have said about something that did not happen does not amount to evidence about, deploying or putting in issue legal advice. It cannot be said that Ms Colomb's answer divulged the content or laid open to scrutiny privileged communications.

120 The essential conclusion from an examination of the statements that the Department relies upon is that the reasons *why* Ms Colomb accepted the offer to settle, being her relevant state of mind, do not require the revelation, or laying open to scrutiny, any privileged communication or advice. To adopt a similar approach to the ultimate reasoning of Bowland J in ***Gough*** (see [48]), the question is whether it would be fair to the Department to allow Ms Colomb to maintain privilege over, in summary, any document touching upon what occurred at the WorkCover Conference or any advice from Spyker Legal about the Department's offer to settle including whether Ms Colomb would owe Spyker Legal fees (items 3 and 4 of the Summons).

121 That question arises in circumstances which are not similar to those in ***Telstra***, ***Perpetual Trustees*** or ***Gough*** where the state of mind put in issue by a party was an understanding or belief arising from alleged representations by another party. And, in the circumstances of ***Gough*** at least, that case involved an attempt to rely on a representation inconsistent with an express commercial agreement entered into by that same party. Rather, the state of mind in this case arises, the Department submits, because Ms Colomb formed her own view that she had to pay legal fees and she did not have the funds to do so without

accepting the settlement offer. I would add that Ms Colomb considered that she had been 'tricked' into incurring at least some of those legal fees.

122 The Department points to the application of the relevant principles (discussed in [91] – [93] of my reasons) to the case in ***Coverforce***, where at [28] Chaney J held:

> To assert a state of mind as to the very matters upon which legal advice was being taken, then to decline to reveal that legal advice is, in my view, to act inconsistently with the maintenance of the privilege. The plea indirectly put the contents of the otherwise privileged communication in issue. That is so notwithstanding that no specific reference to the legal advice was contained in the pleadings.

123 The analysis of the principles in ***Coverforce*** applied to the facts of that case. In particular, that case involved:

a. a pleaded defence that each of the defendants had a bona fide belief about the operation of provisions of a shareholder agreement in a dispute about the transfer of shares and that their state of mind as to those issues was reasonable and held in good faith by each defendant; and

b. evidence given about the scope of work by lawyers in advising particular parties and disclosures between parties about some aspects of those lawyers' work.

124 Leading to the application of the principles in ***Coverforce***, highlighted by the Department, Chaney J concluded at [28]: 'That [state of mind] was a central question upon which Minter Ellison must have provided advice having regard to the nature of the retainer as explained by [the defendants]' and '[the defendants] were guided by legal advice obtained by Coverforce.'

125 In ***Coverforce***, the state of mind put in issue and its inconsistency with, and unfairness of, maintaining privilege in communications on that subject is clear.

126 The facts in this case are quite different and do not support the same conclusion as in ***Coverforce***. This case did not proceed on pleadings and the placing in issue of Ms Colomb's state of mind arises from evidence given by an unrepresented party who does not in her evidence describe the nature of her retainer or scope of advice given, nor does she say or imply that any advice affected her state of mind. The role of Ms Colomb's lawyer cannot be put any higher than that she had a lawyer with her at the WorkCover Conference as required by WorkCover. Unlike ***Coverforce***, in this case there is no basis to conclude that Ms Colomb relevantly received or was guided by legal advice. The inference drawn by Chaney J in ***Coverforce*** cannot be drawn here. There is no conduct that directly or indirectly put the contents of the privileged communication sought in issue.

127 Ms Colomb's evidence indicates her belief about a financial obligation, namely, to pay the bills of two different law firms, an obligation she thought would arise if she did not accept an offer made in the WorkCover Conference.

128 On the evidence, Ms Colomb's belief about her obligation to pay around $13,000 in legal fees was not the result of anything Mr Spyker said to her. Rather, it was the result of her reading of Slater and Gordon's fee agreement and her assumption that Mr Spyker's fee agreement said broadly the same thing.

129 None of Ms Colomb's evidence or submissions disclosed or deployed any confidential communications in relation to any advice she received from Mr Spyker.

130 Ms Colomb did not say that her lawyer told her the settlement offer was reasonable, nor that he said that if she did not accept a reasonable offer she would be liable for the fees incurred.

131 In fact Ms Colomb's evidence was that Mr Spyker 'did not give advice per se'. She denied her lawyer 'discussed with [her] his professional opinion about the reasonableness of the offer being made.' Rather, Ms Colomb 'assumed it would be classified a reasonable offer.'

132 As set out in ***Gough*** at [48], what must be balanced against the Department's submission is the 'high status of professional privilege and the careful protection which the law affords it'. In circumstances where Ms Colomb has volunteered to provide to the Department, in summary, any fee agreement with Spyker Legal and any correspondence from Slater and Gordon to Ms Colomb or Spyker Legal in relation to fees owing to Slater and Gordon (items 1 and 2 of the Summons), I do not consider that it would be unfair to the Department to deny access to items 3 and 4 of the Summons. The Department does not explain how any such privileged material is needed in order for the fair resolution of this matter. The reasons offered by Ms Colomb as to why she held the state of mind argued by the Department are either consistent with usual retainer agreements for solicitors, and the substance of those agreements will be available to the Department, and do not require access to any further privileged advice in order for the Department to respond or, as outlined above, Ms Colomb's contention that she did not have funds to pay legal fees which, if contested, can be answered without access to privileged material.

133 Ms Colomb has not put the contents of an otherwise privileged communication in issue. She has not made an assertion or brought a case which is about the contents of any confidential communication or which necessarily lays open to scrutiny any confidential communication. Ms Colomb's conduct has not been inconsistent with the maintenance of confidentiality. Even if I am wrong about that, I do not consider that it would be unfair to allow Ms Colomb's claim to proceed without disclosing the confidential communications in items 3 and 4 of the Summons. The circumstances of this matter do not give rise to a waiver of privilege.

134 I would not uphold ground one.

Ground two

135 I do not consider the learned Commissioner made an error of fact when deciding that item 2 of the Summons fell away.

136 Ms Colomb gave evidence at the Jurisdiction Hearing in January:

> **MATTHEWS C:** You wouldn't have had to pay Slater and Gordon's bill, we know that, because Slater and Gordon said you wouldn't have to pay that bill unless it's settled. And did you have any understanding about the circumstances in - or what the implications would be, for Mr Spyker's bill, if you'd simply got up and walked out?---I would - I - I was under the impression that I would have to pay all 13,200 if I got up and walked out, regardless.
>
> Okay. And tell me how you came to that impression?---Because the bills were both given to me, at the time.
>
> Okay?---And - - -
>
> Do you have them?---I - - -
>
> Do you have what Mr Spyker - well, you say given, it might have been he just showed, I don't know what happened?---No.
>
> Do you have them?---I went through my - I actually don't have the bills but I do have a trust account statement.
>
> But the things that you were - - -?---A reference, a bill number, I went back through, he hasn't given me a bill.
>
> Just on that day, you say that Mr Spyker produced, that was the word that you used, produced, pulled out and invoice and produced, did he give you copies of those to take away?---No.
>
> Okay. Did he keep them himself? Did he retain them?---Yes.

137 Then months later in April at the hearing about the Summons (**Summons Hearing**) this was said:

> **SPYKER, Mr:** But this whole question could avoid me completely, if they were just asked directly from Ms Colomb. And she has everything that I've given to her, in terms of cost agreement, written advice. Then there's correspondence from Slater and Gordon to Ms Colomb. Why is it being asked from me under point 2?
>
> **MATTHEWS C:** (Indistinct) as in your hands, I think? But Ms Colomb's made her position pretty clear, she's not waiving privilege, hence coming to you?
>
> **CARROLL, MR:** If I can talk to that point, Commissioner, as far as why it was issued to Spyker Legal? The Commission might recall that there was some significant question as to whether or not items 1 and 2 were within Ms Colomb's possession at the 16 January hearing. She certainly said she didn't have any document falling within item 2 or that particular document, as in the particular bill from Slater and Gordon.
>
> It was unclear, from my recollection, as to whether or not she had a copy of the cost agreement with Spyker Legal. Of course, item 3 wouldn't be something that is in Ms Colomb's possession. Item 4 I can accept, if written advice was given, would be something that was in - would be within Ms Colomb's possession and is something that could probably be sought by discovery. But of course, the Commission would be aware there's a discovery application before the Commission as well.
>
> **COLOMB, MS:** Can I speak on - - -
>
> **CARROLL, MR:** Not today.
>
> **SPYKER, MR:** Well, the - I mean, if I might just say - - -
>
> **MATTHEWS C:** (Indistinct) - - -
>
> **COLOMB, MS:** - - - (indistinct) - - -
>
> **MATTHEWS C:** - - - before you go on, Ms Colomb hasn't been greedy in asking for much time, Mr Spyker, so I'll let her say something if she'd like to.
>
> Yes, Ms Colomb?
>
> **COLOMB, MS:** I didn't have the documents with me at the hearing on 16 January, but I had them - I know I had them on my email and I said I would bring them to the substantive hearing if it was to go through.
>
> **MATTHEWS C:** Well, Mr Carroll - - -
>
> **COLOMB, MS:** (Indistinct) - - -
>
> **MATTHEWS C:** - - - wants them now, so you don't have any problems with providing the costs agreement to Mr Carroll?
>
> **COLOMB, MS:** No, I - I - it was already stated at the jurisdiction hearing that I would supply them at the substantive hearing if it was required, I just didn't - didn't have them - - -
>
> **MATTHEWS C:** If Mr - - -
>
> **COLOMB, MS:** - - - with me.
>
> **MATTHEWS C:** - - - Carroll wants them - I suppose, wants to see them before the substantive hearing.
>
> Is that right, Mr Carroll?
>
> **CARROLL, MR:** Yes, that's correct.
>
> **MATTHEWS C:** Right. Well - - -
>
> **COLOMB, MS:** Yes.

138 Item 1 is one document. At the summons hearing Ms Colomb agreed to provide documents, not a document. From the transcript it is clear that the Commissioner, Mr Spyker, the Department's representative and Ms Colomb were discussing the document in item 1 and the documents in item 2 of the Summons, and not just the document in item 1 of the Summons.

139 I do not consider that what Ms Colomb said at the summons hearing contradicted her evidence under oath, at least not in such a way as to mean that the Commissioner fell into error.

140 Ms Colomb's submission in April at the Summons Hearing was not inconsistent with the evidence she gave three months earlier at the Jurisdiction Hearing, where Ms Colomb gave evidence that she did not have the documents. As she explained at the Summons Hearing, she meant that she 'didn't have the documents at the hearing in January.' By the time of the Summons Hearing in April Ms Colomb had the documents. When Ms Colomb agreed to provide 'the documents', she was agreeing to provide the documents in items 1 and 2 of the Summons.

141 There was no error of fact. I would not uphold ground two.

142 For these reasons, I would dismiss the appeal.

CONCLUSION

143 For the reasons given by Scott CC and Kenner SC, the appeal is upheld.

2020 WAIRC 00780

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEPARTMENT OF EDUCATION WESTERN AUSTRALIA
	APPELLANT
	-and-
	SPYKER LEGAL PTY LTD, SARAH COLOMB
	RESPONDENT
CORAM	FULL BENCH
	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 4 SEPTEMBER 2020
FILE NO/S	FBA 3 OF 2020
CITATION NO.	2020 WAIRC 00780

Result	Appeal upheld, order varied
Appearances	
Appellant	Mr J Carroll (of counsel)
First Respondent	Mr W Spyker (of counsel)
Second Respondent	Ms S Colomb

Order

This appeal having come on for hearing before the Full Bench by written submissions dated Friday, 22 May 2020 and Tuesday 16 June 2020, and having heard Mr J Carroll of counsel on behalf of the appellant, Mr W Spyker on behalf of the first respondent and Ms C Colomb on her own behalf as second respondent, and reasons for decision having been delivered on 2 September 2020, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

1. THAT the appeal be upheld.

2. THAT the decision of the Commission dated 16 April 2020 be varied by deleting the order and substituting:

> "That Spyker Legal Pty Ltd produce to the Registry of the Western Australian Industrial relations Commission the documents sought in the summons filed on 7 February 2020 save for those set out in Item 1 of the summons, within 14 days of the date hereof".

By the Full Bench

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

2020 WAIRC 00181

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PROGRAMMED INDUSTRIAL MAINTENANCE PTY LTD
	APPELLANT
	-and-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	FULL BENCH
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER D J MATTHEWS
	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 19 MARCH 2020
FILE NO/S	FBA 14 OF 2019
CITATION NO.	2020 WAIRC 00181

Result	Directions issued
Representation	
Appellant	Mr A Longland and Mr G Giorgi of counsel
Respondent	Ms R Harding of counsel

Direction

Having heard Mr A Longland of counsel and with him Mr G Giorgi of counsel on behalf of the appellant, and Ms R Harding of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs —

(1) THAT the appeal before the Full Bench of the Western Australian Industrial Relations Commission be conducted on the papers and the hearing listed for 3 April 2020 be and is hereby vacated.

(2) THAT by 7 April 2020 the appellant file its full written submissions and a list of the legislation and authorities it relies upon.

(3) THAT by 1 May 2020 the respondent file its full written submissions and a list of the legislation and authorities it relies upon.

(4) THAT by 8 May 2020 the appellant file any written submissions in reply.

(5) THAT the Full Bench will advise the parties after 9 May 2020 whether a telephone hearing is required.

(6) THAT the parties have liberty to apply on short notice.

By the Full Bench

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2020 WAIRC 00232

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PROGRAMMED INDUSTRIAL MAINTENANCE PTY LTD
	APPELLANT
	-v-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER D J MATTHEWS
	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 1 MAY 2020
FILE NO.	FBA 14 OF 2019
CITATION NO.	2020 WAIRC 00232

Result	Direction issued
Representation	
Appellant	Mr A Longland and Mr G Giorgi of counsel
Respondent	Ms R Harding of counsel

Direction

HAVING HEARD Mr A Longland of counsel and with him Mr G Giorgi of counsel on behalf of the appellant, and Ms R Harding of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs —

THAT the direction issued by the Full Bench on 19 March 2020 be varied at par 3 by deleting the date 1 May 2020 and inserting in lieu thereof the date 5 May 2020; at par 4 by deleting the date 8 May 2020 and inserting in lieu thereof the date 12 May 2020; and at par 5 by deleting the date 9 May 2020 and inserting in lieu thereof the date 12 May 2020.

By the Full Bench

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2020 WAIRC 00758

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER APPL 58/2018 GIVEN ON 16 DECEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
FULL BENCH

CITATION	**:**	2020 WAIRC 00758
CORAM	**:**	SENIOR COMMISSIONER S J KENNER COMMISSIONER D J MATTHEWS COMMISSIONER T B WALKINGTON
HEARD	**:**	ON THE PAPERS. APPELLANT'S WRITTEN SUBMISSIONS FILED 7 APRIL 2020; RESPONDENT'S WRITTEN SUBMISSIONS FILED 5 MAY 2020; APPELLANT'S WRITTEN SUBMISSIONS IN REPLY FILED 12 MAY 2020
DELIVERED	**:**	WEDNESDAY, 2 SEPTEMBER 2020
FILE NO.	**:**	FBA 14 OF 2019
BETWEEN	**:**	PROGRAMMED INDUSTRIAL MAINTENANCE PTY LTD Appellant AND THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**The Western Australian Industrial Relations Commission**
Coram	**:**	**Chief Commissioner P E Scott**
Citation	**:**	**2019 WAIRC 00843**
File No	**:**	**APPL 58 of 2018**

Catchwords	**:**	Industrial law (WA) - Appeal against decision of Commission determining preliminary questions as to meaning of statute – Relevant principles of statutory interpretation applied – Meaning of "site" having regard to statutory context - Use of dictionary meanings - Re-enactment presumption - Preliminary question answered correctly
Legislation	**:**	*Construction Industry Portable Paid Long Service Leave Act 1985* (WA) *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA) Schedule 1 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) *Industrial Legislation Amendment Act 2011* (WA) *Industrial Relations Act 1979* (WA) s 49 *Industrial Relations Commission Regulations 2005* (WA) reg 103(12) *Interpretation Act 1984* (WA), in ss 18 and 19 *Long Service Leave Act 1958* (WA)
Result	**:**	Appeal dismissed

Representation:

Counsel:		
Appellant	:	Mr S M Davies SC
Respondent	:	Mr J B Blackburn SC
Solicitors:		
Appellant	:	Herbert Smith Freehills
Respondent	:	Jackson McDonald

Case(s) referred to in reasons:

ACT Construction Ltd v Customs and Excise Commissioners [1981] 1 WLR 1542

Australian Capital Territory (Chief Minister's Department) v Coe [2007] ACTSC 15; (2007) 208 FLR 448

Aust-Amec Pty Ltd t/a Metlab & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board (1995) 62 IR 412

Brown & Root Energy Services Pty Ltd v Construction Industry Long Service Leave Payments Board [2001] WAIRC 02000; (2001) 81 WAIG 665

Centurion Industries Limited v Construction Industry Long Service Leave Payments Board (1991) 71 WAIG 1300

Commissioner of Police v Ferguson [2019] WASCA 14; (2019) 54 WAR 177

Commonwealth v Baume (1905) 2 CLR 405

Construction Industry Long Service Leave Payments Board v Precision Corporation Pty Limited [1992] Library 920130

Construction Industry Long Service Leave Payments Board v Positron Pty Limited (1990) 70 WAIG 3062

Construction Industry Long Service Leave Payments Board v Doug Ritchie Brickpaving (1991) 71 WAIG 576

Esso Australia Resources Pty Ltd v Commissioner of Taxation [2011] FCAFC 154; (2011) 199 FCR 226

FI & JF Munro (trading as Mega Electrical) v Construction Industry Long Service Leave Board (1992) 59 SAIR 381

Fremantle Lawyers Pty Ltd and Ors v Sarich as executor of the estate of Saric and Ors [2019] WASCA 48; (2019) 54 WAR 113

Harrison v Melhem (2008) 72 NSWLR 380

Healy Airconditioning Pty Ltd v Construction Industry Long Service Leave Payments Board (1999) 79 WAIG 560

Huntlee Pty Ltd v Sweetwater Action Group Inc [2011] NSWCA 378; (2011) 185 LGERA 429

Konecranes Pty Ltd v Construction Industry Portable Paid Long Service Leave Board [2006] WAIRC 04331; (2006) 86 WAIG 1092

Mackay v Davies (1904) 1 CLR 483

Minister Administering the Environmental Planning and Assessment Act 1979 v Carson (1994) 35 NSWLR 342

Owners of Shin Kobe Maru v Empire Shipping Co Inc [1994] HCA 54; (1994) 181 CLR 404

Palgo Holdings Pty Ltd v Gowans [2005] HCA 28; (2005) 221 CLR 249

PMT Partners Pty Ltd (In Liquidation) v Australian National Parks and Wildlife Service [1995] HCA 36; (1995) 184 CLR 301

Programmed Industrial Maintenance Pty Ltd ACN 133892350 v The Construction Industry Long Service Leave Payments Board [2019] WAIRC 00843; (2020) 100 WAIG 40

Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme [2019] WAIRC 00860; (2019) 100 WAIG 125)

Re Bolton and Anor; Ex parte Beane [1987] HCA 12; (1987) 162 CLR 514

R v Regos & Morgan [1947] HCA 19; (1947) 74 CLR 613

Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees [1994] HCA 34; (1994) 181 CLR 96

Resmed Limited v Australian Manufacturing Workers' Union [2015] FCAFC 106; (2015) 232 FCR 152

Saeed v Minister for Immigration and Citizenship [2010] HCA 23; (2010) 241 CLR 252

Sparks 'N' Security Pty Ltd and Ritzline Pty Ltd t/a IC Cool Refrigeration, Mechanical and Electrical Services v Construction Industry Long Service Leave Payments Board [2017] WAIRC 00164; (2017) 97 WAIG 366

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 262 CLR 362

Taylor v Owners - Strata Plan No 11564 [2014] HCA 9; (2014) 253 CLR 531)

Thompson v Smith [1976] HCA 56; (1976) 135 CLR 102

Wacal Developments Pty Ltd v Realty Developments Pty Ltd [1978] HCA 30; (1978) 140 CLR 503

Williams v The Official Assignee of the Estate of William Dunn [1908] HCA 27; (1908) 6 CLR 425

Wilson v State Rail Authority of New South Wales [2010] NSWCA 198; (2010) 78 NSWLR 704

WorkCover Authority of New South Wales (Inspector Belley) v Freight Rail Corporation [2002] NSWIRComm 281; (2002) 117 IR 99

Reasons for Decision

1 The appellant, Programmed Industrial Maintenance Pty Ltd, is part of the Programmed Group of companies. In Western Australia, the appellant provides maintenance services under contract at established operational locations, principally in the resources sector. The respondent, The Construction Industry Long Service Leave Payments Board, is the statutory body responsible for the administration of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) in this State. The respondent notified the appellant it had to register under the Act. This was because the respondent considered that the appellant was an employer covered by the Act, as it employed employees in the construction industry. The Act requires contributions to be made to the respondent, under the statutory scheme, to confer long service leave entitlements on those employees.

Application to review

2 The appellant objected to the respondent's decision requiring it to register. It lodged an application to review the decision of the respondent under s 50(1)(b) of the Act. Such reviews are heard by the Commission.

3 The application to review came before the Commission constituted by the Chief Commissioner and by decision of 6 December 2019, the application to review was dismissed: ***Programmed Industrial Maintenance Pty Ltd*** ACN 133892350 ***v Construction Industry Long Service Leave Payments Board*** [2019] WAIRC 00843; (2020) 100 WAIG 40. The principal issue raised in the proceedings at first instance was whether the appellant's employees, who perform work on its clients' premises, do so "on a site" for the purposes of the definition of "construction industry" in s 3(1) of the Act. If so, two further questions were posed in relation to the exclusion provision in par (f) of the definition of "construction industry". The questions posed for determination at first instance were set out at par [3] of the reasons:

> The questions for determination are:
>
> 1. (a) Whether the applicant's employees performing work at the applicant's clients' premises carry out work 'on a site' within the meaning of the definition of construction industry in section 3(a) of the Act.
>
> (b) If the answer to (a) is 'yes':
>
> (i) whether if the majority of the work performed by the applicant is maintenance work carried out at the applicant's clients' premises, the applicant is 'substantially engaged in the industry described in this interpretation' such that paragraph 3(f) of the definition of construction industry in the Act does not apply and the question of whether the maintenance work is of a routine or minor nature does not arise;
>
> (ii) whether if the majority of the work performed by the applicant is maintenance work of a routine or minor nature carried out at the applicant's clients' premises, the applicant is not 'substantially engaged in the industry described in this interpretation' for the purposes of paragraph 3(f) of the definition of construction industry in the Act.

4 The learned Chief Commissioner concluded that the work performed by the appellant's employees was performed "on a site" within the definition of "construction industry". She held that on its proper construction, the words "on a site" means the site at which the activities in the first part of the definition are performed on the buildings and works etc that follow in sub pars (i) to (xviii). She rejected the appellant's principal contention that "on a site" and "on site" where used in the Act, means a "building site" or a "construction site". The learned Chief Commissioner also concluded that the exclusion in the definition in par (f) had no application. The application to review was dismissed.

5 The appellant now appeals to the Full Bench under s 49 of the *Industrial Relations Act 1979* (WA) from the decision to dismiss the application to review.

Grounds of appeal

6 The grounds of appeal are in these terms:

> 2. The learned Chief Commissioner erred in law in:
>
> (a) failing to find that the term "site", as it is used in the definition of "construction industry" in section 3 of the Act, means a construction site;
>
> (b) failing to have to regard or, alternatively, sufficient regard, to the rule of statutory construction that, where words are used in a group and a word in the group is ambiguous, an ambiguous word is to be construed *eiusdem generis*(sic). While the expression "construction industry" is a defined term in the Act, within the definition a word group is used ("of carrying out on a site construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to"), such that it is necessary to construe them *eiusdem generis*(sic). The word "construction" appears in its natural and ordinary sense in each of parts (a), (b), and (by way of incorporation by reference) (c) of the definition and, therefore, it was necessary to have regard to the ordinary and natural meaning of the word "construction" in construing the meaning of the terms "site" and "maintenance of or repairs to";
>
> (c) further to ground 2(b) above, failing to find that the term "maintenance of or repairs to" in the definition of "construction industry" in section 3 of the Act solely refers to maintenance of and repairs to construction or building projects;
>
> (d) failing to follow the decision of the Supreme Court of Western Australia in *Aust-Amec Pty Ltd t/a Metlab & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board*

(1995) WASC 718, which, properly understood, held that the expression "site", in the Act meant a "construction site" or "building site";

(e) failing to have regard to the mischief to which the Act was aimed to address, as explained by Owen J in *Construction Industry Long Service Leave Payments Board v Precision Corporation Pty Ltd* (unreported, Library No 920130, 4 March 1992) at page 9 and *Healy Air Conditioning Pty Ltd v Construction Industry Long Service Leave Payments Board* [1999] WAIRComm 17 at page 7. Accordingly, the Chief Commissioner erred by failing to interpret the meaning of "site" and "on a site" in a manner consistent with the purpose of the Act, and the mischief to which it is aimed at addressing;

(f) finding that the re-enactment presumption rule of statutory construction had an application to determining the proper construction of "construction industry" in section 3 of the Act in circumstances where the relevant re-enactment did not amend the definition of "construction industry" (at [134]) .

3. In finding that the Appellant is "substantially engaged in the construction industry as defined" the Act, the learned Chief Commissioner erred in law by:

(a) failing to have regard or, alternatively, sufficient regard, to the rule of statutory construction that all words in a statute are to be taken to have work to do by rendering the exception in paragraph 3(f) of the definition of "construction industry" nugatory in finding that a person can be "substantially engaged in the construction industry" as defined solely by reason of the fact that they perform work identified in the exception (at [135]-[137]);

(b) failing to find that, on a proper construction of the Act, the activity of maintenance and repairs of a routine or minor nature does not fall within the defined term "construction industry" in section 3 of the Act.

4. The learned Chief Commissioner erred in law in finding that the Appellant is substantially engaged in the "construction industry" (at [137]):

(a) as a consequence of the Chief Commissioner's finding that the Appellant's employees performing work at the Appellant's clients' premises are engaged in the "construction industry'' as defined in section 3 of the Act and, in so doing, failed to have regard or, alternatively, sufficient regard, to the decision of the Supreme Court of Western Australia in *Aust-Amec Pty Ltd t/a Metlab & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board* (1995) WASC 718 at [161.E], to the effect that the relevant employees, by reason of the nature of work they perform, may be 'in the construction industry', but their employer may not be;

(b) in circumstances where the only relevant evidence was unchallenged evidence led by the Appellant that it was solely engaged in the provision of "industrial maintenance services" (at [36]).

7 The appellant seeks orders it not be required to register as an employer under the Act or the matter be remitted back to the respondent for further determination according to law. Second, declarations are sought that the appellant engages no employees who work "on a site"; engages no employees in the "construction industry"; and is not an "employer" as provided in the Act.

Notice of contention

8 Besides the grounds of appeal, the respondent has filed a notice of contention under reg 103(12) of the *Industrial Relations Commission Regulations 2005* (WA) by which it says that the decision of the learned Chief Commissioner may be upheld on further grounds to those relied upon by her in her reasons for decision. Whilst grounds 3(d) and 4(b) were not pressed in the respondent's written outline of submissions, the grounds as filed are:

Grounds relied on

3. Other factors which supported the Chief Commissioner's finding that the word site is not confined to a construction site or building site included:

(a) In case the contrary is suggested, that it is not permissible to construe a statutory definition by reference to the term being defined;

(b) That of the 19 sub-paragraphs in paragraph (a) of the definition of construction industry, only one refers to a building or buildings;

(c) That paragraph (d) of the definition excludes the carrying out of work while on a ship, which indicates that but for the exclusion the definition is broad enough to include such work;

(d) That if the word site meant only a construction site or building site, the words "maintenance" and "repairs" in paragraph (a) of the definition would have little or no work to do (and the exceptions in paragraphs (e) and (f) even less).

4. Other factors which supported the Chief Commissioner's finding (at [106]) that the legislative intention was to provide a long service leave system to apply to employees who work in the construction industry and not only to itinerant workers included:

(a) that, in addition to s 21(2)(c) of the *Construction Industry Portable Paid Long Service Leave Act 1985* **(the Act)** to which the Chief Commissioner referred, s 51 of the Act envisages that an employee may accrue an entitlement to long service with the one employer; and

(b) that the *Construction Industry Portable Paid Long Service Leave Regulations 1986*, which commenced on the same day as the Act and formed part of a legislative scheme, when prescribing awards and classifications of work for the purpose of the statutory definition of employee, expressly limited the prescribed classifications of work for each of the prescribed Government awards to "temporary employees" (defined by reg 3(3) to mean "a person who does not hold a permanent position but whose continuity of employment depends on the availability of work") but placed no such limitation on the prescribed private sector awards.

5. The Applicant's contention that it was not substantially engaged in the construction industry, because (as was assumed for the purpose of the separate question) the majority of its work was maintenance work of a routine or minor nature, misconstrued paragraph (f) of the definition and gave it a circular operation. Whether an employer engaged on maintenance work is substantially engaged in the construction industry cannot be answered by reference to whether that work is routine or minor. It will depend on whether and the extent to which the work done by the employer is maintenance of the type described in paragraph (a) of the definition. In arguing that the work which its employees perform is not in the construction industry because the work, or the majority of it, is maintenance or repairs of a routine or minor nature, the Applicant in effect seeks to construe the exclusion in (f) as if it read simply "the carrying out of maintenance or repairs of a routine or minor nature", which gives the remaining words in the paragraph no work to do.

Factual background

9 For the proceedings at first instance, the facts were not in dispute. An extensive statement of agreed facts was filed, setting out the operations of the appellant, the categories of employees employed and their scope of work, the locations where the work is mainly engaged in and an outline of the contractual arrangements between the appellant and relevant clients in Western Australia. In addition, evidence was given by witness statement from Mr Kennedy, the appellant's Regional Manager Western Australia. Mr Kennedy described the operations of the company as principally the provision of industrial maintenance services in the main, to companies operating in the mining and resources sector in the State.

10 It was common ground that the work undertaken by the appellant for its clients falls into three broad categories, they being ongoing maintenance work, shutdown maintenance work and project work. This work was described by Mr Kennedy as performed on existing operational assets and was not work performed on a "greenfields" construction site or other site, involving the construction of new buildings, plant, or infrastructure.

11 As of July 2018, the appellant employed 1,694 employees in Western Australia in a range of classifications including boilermaker/welders; riggers; scaffolders; mechanical fitters/pipe fitters; mechanical tradespersons; painters and blasters; crane operators and trades assistants. It was also common ground that the employees were employed in classifications in prescribed awards set out in Schedule 1 to the *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA).

12 The evidence also was most of the appellant's work is performed on its clients' premises. The appellant does have two workshops in WA that provide support to those engaged on the client's premises. Mr Kennedy outlined some of this work for example for Alcoa at its Kwinana Refinery and at the BHP Nickel Refinery, amongst others. With the former, this involves more minor and routine maintenance work. With the latter, this involves more substantial maintenance work including the replacement of pipelines and structural beams under a schedule of works prepared by the client.

Decision at first instance

13 In her decision at first instance the learned Chief Commissioner relevantly found on the facts:

(a) that the appellant undertakes maintenance and repair work to existing operations. These existing operations including buildings, plant and equipment and structures of long standing;

(b) the work involved includes ongoing maintenance; shutdown maintenance and project maintenance work;

(c) the appellant undertakes ongoing maintenance work at its client premises by providing its labour who work side by side with the client's employees. This is ongoing, planned, and routine and most of it is mechanical maintenance work;

(d) shutdown maintenance involves work by the appellant's employees when the client's operations or parts thereof are shut down and are not in operational mode. This work sustains the client's assets;

(e) the third type of work, project work, is larger in scale and is "one off" type work typically costing in the region of $200,000 - $300,000;

(f) besides its work on its client's premises, the appellant also operates two mechanical workshops, one in Kwinana and one in Kalgoorlie. These workshops provide a support to the appellant's workforce in performing repairs and maintenance for a client; and

(g) in terms of its contractual arrangements, the appellant typically has "umbrella" agreements with its clients setting out schedules and rates for types of work and services, which are themselves indicative rather than prescriptive. The contracts do not provide for construction of new plant and equipment.

14 At [44] the learned Chief Commissioner concluded:

> 44 In summary, the works undertaken by PIM's employees is either or both of the repair, maintenance or replacement of established plant and equipment or the components of the plant and equipment. It is done on either a planned preventative basis or to deal with repairs, maintenance or replacements as issues arise. The work is conducted on the plant and equipment of PIM's clients on the clients' premises at mines, refineries,

smelters, factories and at a port. Some, but a smaller part, is work undertaken at PIM's workshops to support the work at clients' premises.

15 After referring to principles of statutory interpretation in her reasons, the learned Chief Commissioner, in relation to the meaning of "construction industry" and "site" concluded:

(a) the Act does not define "employer" in terms of whether an employer is engaged in the construction industry, rather, by reference to its employment of employees so engaged. In applying the observations of Ipp J in ***Aust-Amec Pty Ltd t/a Metlab & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board*** (1995) 62 IR 412 at 413, there may be employees within the meaning of the Act, not employed by employers as defined in the Act;

(b) that "the preliminary words of the definition of 'construction industry' mean the industry of carrying out, 'at a position, area, location, place or situation, a range of activities being construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to a range of buildings, structures, works etc and for specified purposes or works'";

(c) on this basis "construction industry" also includes "the carrying out, at a location, position, place or situation, of the maintenance of or repairs to, works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and by-products from material. Each activity is carried out on a site, or at a place; and

(d) that taken in its context, "on a site" means "the site at which the activities in the first part of the definition are performed to the buildings, swimming pools, structures etc or works listed in (i) - (xviii). Work performed away from where those buildings, swimming pools, roads etc and works are located (that is, away from the site or off-site) is not work in the construction industry within the meaning of the Act".

16 In terms of the mischief to be addressed on the enactment of the legislation, the learned Chief Commissioner concluded:

(a) in referring to the observations of Owen J in ***Construction Industry Long Service Leave Payments Board v Precision Corporation Pty Ltd*** [1992] Library 920130, that protecting the interests of itinerant workers does not form an express purpose of the Act and to confine it to such a purpose would be to introduce an artificial constraint on the description of the "construction industry";

(b) that the purpose of the Act from its terms is to provide a single scheme of long service leave for persons working in the construction industry as defined in the Act;

(c) that the re-enactment presumption, based on prior decisions of the Commission in relation to the definition of "construction industry" under the Act, informed the Parliament's consideration of the amendments to the definition of "employer" in 2011 and supported the conclusions as to the meaning of "on a site" and "onsite" for the definition of the construction industry; and

(e) the answer to question 1 posed is "yes" in that the appellant's employees performing work at the appellant's clients' premises are carrying out work "on a site" within the meaning of the construction industry in s 3(1) of the Act.

17 Finally, as to the exclusion provision in par (f) of the definition of the construction industry in s 3(1) of the Act, the learned Chief Commissioner concluded that despite the appellant's own description of being engaged in the industry of "maintenance services predominantly to the mining and resources sectors", on the evidence, the activities of the appellant fitted the description of the construction industry in s 3 and therefore, the appellant was "substantially engaged" in that industry.

Approach to interpretation

18 The issue before the Commission at first instance was largely, if not solely, one of interpretation. Relevant principles of statutory construction were recently set out by Buss J in the Industrial Appeal Court decision in ***Commissioner of Police v Ferguson*** [2019] WASCA 14; (2019) 54 WAR 177. At pars [70] – [73] his Honour referred to these principles:

70 In *Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd*,[2] French CJ, Hayne, Crennan, Bell and Gageler JJ observed:

> 'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text' (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47]; [2009] HCA 41). So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself [39].

See also Saeed v Minister for Immigration and Citizenship;[3] Thiess v Collector of Customs.[4]

71 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The statutory text is the surest guide to Parliament's intention. The meaning of the text may require consideration of the context, which includes the existing state of the law, the history of the legislative scheme and the general purpose and policy of the provision (in particular, the mischief it is seeking to remedy). See *CIC Insurance Ltd v Bankstown Football Club Ltd*;[5] *Project Blue Sky Inc v Australian Broadcasting Authority*;[6] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*.[7]

72 The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. See *Certain Lloyd's Underwriters v Cross*.[8] The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose. See *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd*.[9]

73 As Crennan J noted in *Northern Territory v Collins*,[10] '[s]econdary material seeking to explain the words of a statute cannot displace the clear meaning of the text of a provision (*Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ; [2006] HCA 11), not least because such material may confuse what was "intended … with the effect of the language which in fact has been employed" (*Hilder v Dexter* [1902] AC 474 at 477 per Earl of Halsbury LC)' [99]. That statement of principle applies to extrinsic evidence admissible at common law and also to extrinsic evidence admissible under s 19 of the *Interpretation Act 1984* (WA). In other words, the statutory text, and not non-statutory language seeking to explain the statutory text, is paramount. See *Nominal Defendant v GLG Australia Pty Ltd*.[11]

(Footnotes omitted)

19 (See too ***Fremantle Lawyers Pty Ltd and Ors v Sarich as executor of the estate of Saric and Ors*** [2019] WASCA 48; (2019) 54 WAR 113 per Buss JA at [137] - [144]). In D Pearce *Statutory Interpretation in Australia* 9th Edition at par 2.1, the learned author refers to and discusses the contemporary approach to interpreting legislation in the following way:

> **2.1** In a statement that has come to be quoted as the present basis for interpreting legislation, the plurality (Kiefel CJ, Nettle and Gordon JJ) in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 347 ALR 405; 91 ALJR 936 at [14] said:
>
> > The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.
>
> The courts recognise that the application of this approach will in most cases lead a court to having to make what is commonly referred to as a 'constructional choice'. The following observations of Gageler J in *SZTAL* at [37]-[39] are important to the making of this choice:
>
> > ... The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility 'if, and in so far as, it assists in fixing the meaning of the statutory text'.
> >
> > The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural', in which case the choice 'turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'.
> >
> > Integral to making such a choice is discernment of statutory purpose ....

20 In addition to these broad principles, are the provisions of the *Interpretation Act 1984* (WA), in ss 18 and 19, requiring first, when interpreting a written law, an approach in accordance with the purpose or object of the legislation (whether stated or not) is to be preferred and second, reference can be made to extrinsic material, including Parliamentary materials, in construing a written law.

Brief history of the Act and statutory scheme

21 Until the substantive provisions of the Act came into effect in December 1986, all employees throughout the State derived long service leave entitlements under the general *Long Service Leave Act 1958* (WA). Under that legislation, employees had to have 15 years of continuous service with one employer, to be eligible for long service leave, and at least 10 years' service to be eligible for pro rata long service leave. In response to what was seen to be the specific features of the construction industry, consistent with similar schemes elsewhere in Australia, the then State Government introduced the *Construction Industry Portable Paid Long Service Leave Bill 1985* into the Parliament. On its introduction, and in the Second Reading Speech accompanying the Bill, the responsible Minister, after referring to the need for continuous service of 10 and 15 years with one employer under the general industry scheme said (Parliamentary Debates, Legislative Assembly, 17 September 1985 at 1029):

> This industry is characterised by the short-term nature of employment contracts. This is an industry in which the mobility of labour is such that most employees are unlikely to become eligible for long service leave. Employers in the industry are able to receive service from their employees as do employers in other industries yet without in most cases having to pay long service leave.
>
> In the absence of any portable arrangements current long service leave provisions in the construction industry are clearly inconsistent with the principles of justice and equity central to this Government's philosophy. This anomalous situation has been recognised and corrected in all of the other States and the ACT - with the exception of Queensland.
>
> This legislation will provide a fair system of long service leave in the construction industry in Western Australia.

22 The responsible Minister further said (at 1030):

> The provisions of this Bill seek to make arrangements whereby employees in the construction industry in Western Australia can actually enjoy an entitlement which is already prescribed but, because of the intermittent nature of employment in the industry, is rarely enjoyed.

23 The scheme introduced by the legislation, provided portable long service leave entitlements to employees engaged in the construction industry. As opposed to the general scheme, whereby service with a single employer for the prescribed period was necessary, the scheme under the Act involved service in the industry, which could mean service with multiple employers. An employer required to be in the scheme makes contributions by way of a levy based on ordinary hourly rates of pay, under minimum prescribed annual hours of work. The payments are made into a fund administered by the respondent, established under s 5 of the Act. Under s 21 of the Act, a registered employee under the scheme is entitled to eight and two-third weeks of long service leave after 10 years' service and four and one-third weeks pro rata long service leave after 5 years of service. Such service need not be continuous and is to be counted, regardless of whether that service is with one or more employers in the construction industry.

24 There is a registration process set out in Part IV of the Act. An employer, that being as defined in s 3(1) as "a natural person, firm or body corporate who or which engages persons as employees in the construction industry" must register under the Act. The employer is then required to file with the respondent a return setting out employees employed by the employer and amounts assessed by the respondent regarding each employee. For the purposes of the Act, an "employee" relevantly is "a person who is employed under a contract of service in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification".

25 Under the terms of the *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA), there are prescribed awards and prescribed classifications of work set out in Schedule 1. These include awards made under both the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) and the IR Act. On a fair reading of the awards, they may be said to reflect generally those "construction industry" type of awards relating to that industry.

26 In relation to the first question posed in the proceedings at first instance, a constructional choice needed to be made as to the meaning of "on site" as set out in the definition of "construction industry" in s 3(1) of the Act. The choice is between its ordinary and natural grammatical meaning, as a place or location at which things occur, or whether it should be construed in an industry context, that being the construction industry, as meaning "a construction or building site", having regard to coherence with any identified statutory purpose.

27 As a definition, s 3(1) should not be read down unless the context in which it is used requires it, or such a reading down is consistent with the evident purposes of the statute: ***PMT Partners Pty Ltd (In Liquidation) v Australian National Parks and Wildlife Service*** [1995] HCA 36; (1995) 184 CLR 301. Section 3(1), as to the definition of "construction industry", is as follows:

> ***construction industry*** means the industry —
>
> (a) of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the following —
>
> (i) buildings; and
>
> (iia) swimming pools and spa pools; and
>
> (ii) roads, railways, airfields or other works for the passage of persons, animals or vehicles; and
>
> (iii) breakwaters, docks, jetties, piers, wharves or works for the improvement or alteration of any harbour, river or watercourse for the purposes of navigation; and
>
> (iv) works for the storage or supply of water or for the irrigation of land; and
>
> (v) works for the conveyance, treatment or disposal of sewage or of the effluent from any premises; and
>
> (vi) works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and by-products from materials; and
>
> (vii) bridges, viaducts, aqueducts or tunnels; and
>
> (viii) chimney stacks, cooling towers, drilling rigs, gas-holders or silos; and
>
> (ix) pipelines; and
>
> (x) navigational lights, beacons or markers; and
>
> (xi) works for the drainage of land; and
>
> (xii) works for the storage of liquids (other than water) or gases; and
>
> (xiii) works for the generation, supply or transmission of electric power; and
>
> (xiv) works for the transmission of wireless or telegraphic communications; and
>
> (xv) pile driving works; and
>
> (xvi) structures, fixtures or works for use on or for the use of any buildings or works of a kind referred to in subparagraphs (i) to (xv); and

(xvii) works for the preparation of sites for any buildings or works of a kind referred to in subparagraphs (i) to (xvi); and

(xviii) fences, other than fences on farms;

(b) of carrying out of works on a site of the construction, erection, installation, reconstruction, re-erection, renovation, alteration or demolition of any buildings or works of a kind referred to in paragraph (a) for the fabrication, erection or installation of plant, plant facilities or equipment for those buildings or works;

(c) of carrying out of work performed by employees engaged in the work referred to in paragraph (a) or (b) and that is normally carried out on site but which is not necessarily carried out on site,

but does not include —

(d) the carrying out of any work on ships; or

(e) the maintenance of or repairs or minor alterations to lifts or escalators; or

(f) the carrying out of maintenance or repairs of a routine or minor nature by employees for an employer, or another person under an arrangement with a labour hire agency, who is not substantially engaged in the industry described in this interpretation.

28 It is also convenient to mention at this point, as it was considered by the learned Chief Commissioner, and relates to one ground of appeal, that in 2011 amendments were made to the definition of "employer" in s 3 of the Act. By Part 2 of the *Industrial Legislation Amendment Act 2011* (WA), the definition was amended to include labour hire agencies as an employer, in a new par (b), as it is presently.

29 Consistent with the above authorities, despite what may have been said in Parliamentary debates leading to the enactment of the legislation, primacy must be given to the statutory text and not extrinsic materials, to discern the meaning of a written law. A priori assumptions should not be made. Parliamentary materials are not a substitute for the text as actually enacted in the law: ***Saeed; Re Bolton and Anor; ex parte Beane*** [1987] HCA 12; (1987) 162 CLR 514; ***Ferguson*** at [72]-[73], cited above.

Grounds 2(a) and (e)

30 The appellant submitted that the learned Chief Commissioner failed to find that the term "on a site" or "site" when used in the definition of "construction industry" in s 3(1), means a "construction site" or a "building site". The appellant contended that the Commission failed to construe the meaning of "site" consistent with the purpose of the Act.

31 In the latter respect, the appellant submitted that for the exercise engaged in by the learned Chief Commissioner, context is to be understood in its widest sense, which includes the general policy and purpose of a statutory provision. The contextual consideration, it was submitted by the appellant, is to be engaged in as a part of the first step in ascertaining the meaning of words used by Parliament in a statute. It was submitted by the appellant that Parliamentary statements are relevant to determine legislative purpose and ascertain the mischief sought to be addressed by a statute: ***Harrison v Melhem*** (2008) 72 NSWLR 380; ***Palgo Holdings Pty Ltd v Gowans*** [2005] HCA 28; (2005) 221 CLR 249. The appellant referred to observations of Allsop P (Giles, Hodgson, Tobias and Macfarlan JJA agreeing) in ***Wilson v State Rail Authority of New South Wales*** [2010] NSWCA 198; (2010) 78 NSWLR 704, that in resolving a controversy in relation to statutory meaning, a court may consider words used by Parliament in a statute, in both an historical and legal context. This does not mean considering subjective intent of the legislature but, informing the meaning of general words in a statute, by an understanding of context and the mischief to which the legislation is directed: at [12]-[15] appellant's written submissions.

32 The criticism by the appellant of the decision at first instance, was that the learned Chief Commissioner did not, at the commencement of her reasoning process, consider the legislative context. Rather, it was submitted that she only did so at the end of the process of reasoning which, on the appellant's submissions, led the learned Chief Commissioner to fail to identify and construe the meaning of the contested words in the legislation, having regard to this context and purpose. The appellant submitted that the learned Chief Commissioner failed to have regard or adequate regard to the legislative history of the Act, the Parliamentary materials, including the Second Reading Speeches, and the reference to the mischief that the Act sought to address, as set out by Owen J in ***Precision***.

33 In this respect too, the appellant referred to analogous statutory schemes in other jurisdictions, which, on the appellant's submissions, both at first instance and on this appeal, have similar objectives in enabling those persons employed in the construction industry to enjoy long service leave entitlements, despite the itinerant nature of their work. The appellant also, over the objection of the respondent, sought to refer to the Second Reading Speeches leading to the introduction of the legislation in the other jurisdictions, in aid of its general point about the purposes for which these schemes were developed. The respondent objected because it contended that this material was not put before the learned Chief Commissioner at first instance, and thus, offended against s 49(4)(a) of the IR Act. Given that the existence and purposes of analogous regimes in other States and Territories was raised in the appellant's written submissions at first instance, s 49(4)(a) does not preclude this material being raised by the appellant in its submissions in these proceedings.

34 The appellant contended that had the learned Chief Commissioner considered the foregoing matters contemporaneously with the ordinary grammatical meaning of the relevant text, then the conclusion that she ought to have reached was that the evident purpose of the of the Act was the difficulty that employees in the building and construction industry faced in becoming entitled to long service leave, because of the inherent itinerant nature of that industry. In not addressing these issues from the outset, the appellant contended that the learned Chief Commissioner arrived at a meaning of the expression "on a site", without sufficient regard to this context and purpose. The appellant submitted that despite the mischief identified by Owen J in ***Precision***, that being overcoming the itinerant nature of employment in the construction industry, the learned Chief Commissioner, in concluding that given the Act itself does not express such a purpose, was wrong to conclude that the decision in ***Precision*** placed an artificial restraint on the description of industry. The submission was made by the appellant

that ***Precision***, as a decision of a superior court, should have been followed by the learned Chief Commissioner, unless there was a compelling reason to not do so.

35 The appellant thus contended that when regard is had to the evident purpose of the Act, in choosing from possible dictionary definitions of the word "site", as meaning a location in the general sense, when an alternative definition was open, that being "a building or construction site", the learned Chief Commissioner was in error. Having regard to the legislative context, history and purpose, and the mischief sought to be addressed by the Act, the appellant's submission as to the meaning of "site" being a "construction site" is a more natural constraint on the language used and is the conclusion which the learned Chief Commissioner ought to have reached. Because of these errors and by extending the scheme of the Act beyond its intended reach, the appellant contended that inconvenient and absurd results flow. These include the imposition of onerous obligations on employers not engaged in the construction industry proper, as commonly understood, and the conferral of benefits on employees unnecessarily, as they would otherwise qualify under the general long service scheme in the State.

36 The respondent submitted that when the Commission's reasons are considered as a whole, the learned Chief Commissioner did have regard to the relevant legislative context, purpose, and history in construing the Act. Furthermore, that the Commission did not ignore legislative purpose and concluded, correctly, according to the respondent, that the Act contains no express purpose or policy and the conclusion that the purpose of the legislation, being to create a single long service leave system for employees in the "construction industry", as it is defined in s 3(1) of the Act, was the correct conclusion.

37 According to the respondent, it is evident from the definition of "construction industry" in the Act, on its plain terms, that despite what may have been said in the Parliamentary debates, that the evident purpose of the legislation is to cover every employee employed in a prescribed classification in the "construction industry" as defined, not only including those who might be described as working itinerantly or others working in what might be described as the "construction industry" or the "building industry", as those phrases may be commonly understood. The submission was that the learned Chief Commissioner also recognised the limitations on the use of Parliamentary materials in citing ***Saeed***, and she made no error in distinguishing the decision in ***Precision***, because the meaning of the word "site" did not arise for specific consideration in that case. The respondent submitted that the obiter observations of Owen J in ***Precision***, could not reasonably be construed as suggesting that the Act was to be limited to itinerant workers in the building industry. Regardless of what the Parliamentary materials may reveal, and what may have been said by way of obiter observations in ***Precision*** in relation to the plight of itinerant employees, the respondent contended that these considerations cannot detract from the importance of the statutory text as being paramount.

38 In this context, and looking at the Act read as a whole, the respondent submitted that the definition of "construction industry" in s 3(1), cannot be reasonably construed as addressing only the circumstances of itinerant employees. Nor is the Act confined to the "building and construction industry", understood in its ordinary parlance. The respondent said the contention of the appellant that the approach of the learned Chief Commissioner would have unintended and improbable consequences is erroneous, as it presupposes the Act being limited in the manner asserted by the appellant. It was the respondent's submission that contrary to its position, the appellant's approach that the Act only applies on a "construction site" proper, may limit and lead to disadvantage to some employees. An example cited by the respondent is where an employee engaged in a prescribed classification, carries out work for an employer on a construction site, and then undertakes the same work for another employer but on a "shut down" on an established operational site. In the latter case, this would not accrue service towards long service leave and may inhibit the accrual of an entitlement overall. When viewed in this way, the respondent contended this approach contradicts the purposive approach to interpreting the Act adopted by Owen J in ***Precision***, as itinerant employees are less likely, not more likely, to benefit.

39 Under the heading in her reasons, "Act text and structure" the learned Chief Commissioner reached her conclusion as to the meaning of "site", after considering the ordinary and natural meaning of the words used, taken from various dictionary definitions. Having started with the text, the Chief Commissioner reached her conclusions at [61]-[70] in the following terms:

> 61 The term 'on a site' is used twice within the definition. The term 'of sites' is used once and 'on site' twice. As noted in ***Commonwealth v Baume*** (1905) 2 CLR 405, sense is to be made of the whole statute, and 'no clause, sentence, or word shall prove superfluous, void, or insignificant' (p 414 per Griffith CJ). These terms of 'on a site', 'of sites' and 'on site' must have work to do. None of the three terms is defined in the Act. The first step must be to ascertain the meaning of the word common to them all of 'site'.
>
> 62 The Macquarie Dictionary defines 'site' as:
>
> ***Noun*** 1. the position of a town, building, etcetera., especially as to its environment.
>
> 2. the area on which anything, as a building, is, or has been or is to be situated.
>
> …
>
> ***Verb (t)*** (sited, siting)
>
> 4. to locate; place; provide with a site: ***they sited the school next to the oval***.
>
> [Latin ***situs*** position]
>
> 63 It also records terms incorporating 'site' as including building site, camp site, dating site, … sacred site … site specific', and 'offsite' and 'onsite'.
>
> 64 The Macquarie Dictionary also defines 'situate' as 'to give a site to; locate,' as an adjective. It defines 'onsite' as, an adjective, 'located or done at a particular site: an onsite inspection'.
>
> 65 The Australian Concise Oxford Dictionary defines site as, (a noun and verb):
>
> 1. the ground chosen or used for a town or building.
> 2. a place where some activity is or has been conducted (camping site; launching site).

66 It is also 'locate or place' and 'provide with a site'.

67 The Shorter Oxford English Dictionary on Historical Principles 3rd edition 1973 provides a helpful expansion, beyond merely a place, to include '(t)he situation or position of a place, town, building, etcetera', and 'the ground or area upon which a building, town, etcetera., has been built, or which is set apart for some purpose. Also, a plot, or number of plots, of land intended or suitable for building'.

68 Therefore, the preliminary words in the definition of construction industry mean that of the industry of carrying out, at a position, area, location, place or situation, a range of activities being the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to a range of buildings, structures, works etcetera, and for specified purposes or works.

69 The definition of construction industry is in two parts which need to be read together. The first part, disjunctively, includes the activities of construction, erection, installation etcetera in the preamble of paragraphs (a) and (b). The second part is made up of types of things to which those activities are performed, such as buildings, swimming pools, roads, etcetera. These, too, are described disjunctively. I propose to set out a number of examples of what is included in the construction industry when one item from the first part and one from the second are read together as the structure of the definition requires. The first example is the construction of buildings; the second, the erection of a breakwater; the third, the renovation of works for the storage or supply of water.

70 Using this approach, the construction industry also means the carrying out, at a location, position, place or situation, of the maintenance of or repairs to, works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and bi-products from materials. This last example is just as valid, then, as any of the others. Each of these activities is carried out on a site, or at a place.

40 Finally, on this point, the learned Chief Commissioner concluded at [74]:

74 Rather, I conclude that, read in context, 'on a site' means the site at which the activities in the first part of the definition are performed to the buildings, swimming pools, structures etcetera or works listed in (i) – (xviii). Work performed away from where those buildings, swimming pools, roads etcetera and works are located (that is, away from the site or off-site) is not work in the construction industry within the meaning of the Act.

41 Later in her reasons, under the heading "Itinerant work and the mischief to be addressed" at [97-108], the learned Chief Commissioner considered the mischief sought to be addressed by the Act, and the Parliamentary materials. This also included the decision in ***Precision***.

42 With respect, at the point of considering the various dictionary definitions, it would have been preferable, as a matter of interpretative technique, when presented with the two broad meanings, neither of which were "wholly ungrammatical or unnatural" (***SZTAL*** per Gageler J at [38] citing ***Taylor v Owners - Strata Plan No 11564*** [2014] HCA 9; (2014) 253 CLR 531), to have then considered which of the possible meanings of the word "site" was more consistent with the object or policies of the Act, and also having regard to s 18 of the *Interpretation Act.* That is, considering at the point of reviewing the dictionary meanings, the matters the learned Chief Commissioner did at [97] and onwards of her reasons. However, the learned Chief Commissioner clearly had regard to the primacy of the text, as she was required to do. Furthermore, in any event, the ultimate issue is whether, having adopted the course she did, the learned Chief Commissioner's conclusion in answer to question (1)(a), was correct.

43 It was common ground at first instance that the mischief sought to be addressed by the Act was the difficulty for those engaged in the construction industry to qualify for an entitlement to long service leave. This was accepted to be due to the inherently itinerant nature of the industry, with employees moving from job to job and not remaining in employment with one employer long enough to qualify under the LSL Act applying to employees generally throughout the State. That this was the motivation for bringing the Bill into the Parliament, is evident from the Second Reading Speeches referred to earlier in these reasons.

44 First, as observed by Ipp J in ***Aust-Amec*** at 419, the definition of construction industry inserted into s 3(1) is complex. The definition commences with the words "construction industry *means the industry*…" Whilst it could have been easily done, the draftsperson was not content to simply call the industry the "construction industry" or the "building industry", following the ordinary and commonly understood meaning of those terms. Instead, the draftsperson defined the industry to which the Act applies and did so expansively.

45 Second, the structure of the definition in s 3(1)(a) comprises a range of activities set out. These activities are all expressed disjunctively. They include, "maintenance of or repairs to" … There follows in pars (i) - (xviii) a range of structures and works upon which the activities in the first part of the definition are to be performed. As noted by the respondent in its notice of contention at par 3(b), only one, in sub-par (i) directly involves "buildings", although sub-pars (xvi) and (xvii) incidentally do so. If, as contended by the appellant, the definition should be read down and limited so the activities in the first part of the definition, of "construction, erection, installation …" are to be confined to performing such activities on a construction site or a building site, as commonly understood, then it is difficult to see why the draftsperson saw the need to extend the definition by including the works in sub pars (i) to (xviii). As submitted by the respondent in relation to this point, the specific things and works would be rendered superfluous.

46 Third, there follows in pars (b) and (c), additional activities to be included as the construction industry. In par (b), is the narrower activity of construction, erection, installation etc "but not maintenance of or repairs to" "on a site" in relation to the fabrication etc of plant and equipment to be used in building and works referred to in par (a). In par (c), is the capture of work within the definition of "construction industry", which would usually or normally be performed on site, but which is not necessarily so performed.

47 Finally, are the exclusions from the definition of construction industry in pars (d), (e) and (f). Notably in par (d) is the exclusion of *any* work on ships. Using the words "any work" must logically include the activities as expressed in the first part of the definition of par (a). That Parliament has considered it necessary to expressly exclude such work on ships, and not limit it to just "construction work", but "any work", including "maintenance of or repairs to" ships is of some significance. As noted in the respondent's notice of contention at par 3(c), this would suggest that without such an express exclusion, then any such work performed on ships would otherwise fall within the broad definition of construction industry, in s 3(1)(a) to (c).

48 Similarly, is the exclusion of work on lifts and escalators in par (e). Again, this suggests that without such an exclusion, this work would fall within the extended definition in s 3(1) on the basis lifts and escalators would be "structures, fixtures, or works for use on or for the use of any buildings or works…" in sub-par (xvi). Given this exclusion in (e), it would also suggest that major alterations to lifts or escalators, which could only conceivably be performed in an existing building, would otherwise fall within the definition of construction work as defined, as the alteration or repair of "structures, fixtures or works for use on or for the use of any buildings…" in sub-par (xvi).

49 As noted by the learned Chief Commissioner, the word "site" is not defined in the Act. In these circumstances, as she did, dictionary definitions may be resorted to in assisting the resolution of disputes as to meaning. Whilst this may be done, caution has been expressed that in using dictionaries to assist in ascertaining the meaning of a word used in a statute, which might identify a range of possible meanings, statutory context is always of importance (see D. Pearce *Statutory Interpretation in Australia* 9th Ed at pars 3.33 - 3.34). It would appear from the definitions the learned Chief Commissioner referred to, set out above, that the words could support either of a "position, ground or area where a building or a town is to be located" or the more general definition of "a place where some activity is to be conducted". The *Shorter Oxford English Dictionary on Historical Principles* 3rd Ed 1973, goes somewhat further, and specifically refers to "a plot, or number of plots, of land intended or suitable for building". I also note the Macquarie Dictionary definition of "site", referred to above at par 39, citing the learned Chief Commissioner's reasons at [62] – [64].

50 Having undertaken this process, the learned Chief Commissioner at [68] set out above, plainly preferred the more general meaning of "site" as the "position, area, location, place or situation…etc" to the more specific reference to an area or ground chosen for the location of an intended building, for example. She was fortified in this conclusion by reference to an earlier decision of the Commission in ***Brown & Root Energy Services Pty Ltd v Construction Industry Long Service Leave Payments Board*** [2001] WAIRC 02000; (2001) 81 WAIG 665 where Smith C (as she then was), adopted the same broader view of the meaning of "site".

51 The legislative history forms part of the context. I have briefly set out the history of the Act earlier in these reasons. As the Parliamentary debates reveal, similar statutory schemes for long service leave in the building and construction industry have existed in other States for many years. All seem to have been introduced to overcome the same mischief with which the Act is concerned, that being the inherent itinerant nature of employment in the building and construction industry, as characterised as project to project employment, meaning employees not having the required length of service to qualify for long service leave under the general schemes applying to all employees. This industry-specific, portable long service leave scheme, was to be set apart from the general long service leave legislation in each State, applying to employees generally which, but for the Act and its corresponding legislation in other States, would cover employees in the construction industry.

52 This mischief sought to be addressed by the Act was considered by Owen J in ***Precision***. The issue arising in ***Precision*** was whether the industry of carrying out the construction and installation of swimming pools and spa pools on a site fell within the definition of construction industry in s 3 of the Act. After setting out the scheme of the Act, and the factual background, his Honour referred to the definition of construction industry and noted that it "is a very wide definition". His Honour then considered the arguments of the parties in relation to the approach to interpreting the Act. Notably, the meaning of "site" or "on a site" did not specifically arise for consideration in ***Precision***. It was accepted by the defendant, that it engaged in the building and installation of swimming pools "on a site". Whilst there was argument before the Court as to whether the Act was remedial legislation or not, and therefore whether it should receive a beneficial interpretation, Owen J did not ultimately need to resolve that issue. His Honour did however, approach the issue before the Court by adopting a purposive approach to interpretation and said at p 9:

> I believe that I can decide this case by looking at the plain meaning of the words used. There is, in my view, no ambiguity. I should say that to the extent which it is necessary I would favour the purposive approach. The mischief which the Act attacks is the difficulty which employees in the construction industry face in qualifying for long service leave because of the itinerant nature of workers in the industry. The dominant purpose of the Act is to provide a mechanism for the employee to transport long service leave credits from employer to employer. The impost on the employers is a secondary, although essential, purpose. It is the means by which the scheme is funded.

53 However, given the issue to be decided in ***Precision***, these were obiter remarks, unnecessary for determining whether the construction and installation of swimming pools and spas fell within the extended definition in s 3(1) of the Act.

54 The learned Chief Commissioner had regard to the decision in ***Precision*** at [104] - [106]. She acknowledged the observations of Owen J as to the mischief sought to be addressed by the Act, which as I have said, appeared to be common ground in these proceedings. However, given the approach she took to the breadth of the definition of construction industry in s 3(1), read in the context of the Act as a whole, the learned Chief Commissioner said the legislation should not be viewed as limited only to itinerant employees. This conclusion was correct. It is one thing to observe that the mischief sought to be addressed by a statute is X, it is another to conclude that a statute is limited to X, when having regard to not only its history and context, but its text, read in its entirety. Put another way, such a conclusion as to the stated mischief to be addressed by the Act cannot, on the authorities, delineate the outer boundaries of the Act, if such a conclusion conflicts with its full text.

55 In this respect, any conflict between non-statutory materials and the text of a statute must be resolved in favour of the latter: ***Ferguson*** per Buss JA at [71] - [73], cited above. Accepting the mischief sought to be addressed as identified in ***Precision***, it is not inconsistent with that mischief, that the legislation extends beyond a building or construction site as commonly understood. An example, is where employees may engage in work on activities as set out in the definition, not on a building or construction site, but are employed on an irregular or "itinerant" basis, so achieving an entitlement to long service leave under the general legislation would be difficult. The Act, in applying to them, is operating no less beneficially to that person(s), as to those engaged on a construction site proper. On the evidence, the average length of service of the appellant's employees is about three and a half years and the majority of the appellant's employees are engaged on a casual basis, many of whom on the evidence of Mr Kennedy, are engaged on cyclical shutdown maintenance work. Taking the broader approach to the reach of the Act, is not to diminish its beneficial effect, rather, it is to extend it.

56 There is nothing in the long title of the Act to suggest that its scope was limited to persons who may not qualify for long service leave from the itinerant nature of their work. Nor is there any such qualification to the definition of "employee" in s 3(1). Nor is there anything to suggest in Schedule 1 in the Regulations, containing the prescribed awards and classifications of work, that "prescribed classifications" is to be limited in this way.

57 As noted by the respondent, in addressing in part its notice of contention at par 4(a), several other provisions of the Act would suggest the legislation is not limited to itinerant employees, as the appellant contended. It may be the case, as contemplated by s 21(2)(c) and (d), that service may be with one employer, however, "service" also contemplates multiple engagements by the same employer. And under s 51, an employer may recover amounts from the respondent where an employee becomes entitled to long service leave under an industrial instrument or other statute. Further, in the transitional provisions in cl 1 and 2, despite s 34 providing for contributions to be made by an employer to the respondent, if before the appointed day, an employee had "at least 10 years' continuous service with the employer", the employer would have to pay the respondent an amount reflecting that period of continuous service.

58 These contextual provisions tend against the contention advanced by the appellant that the Act should be read down to only apply to those itinerant employees engaged in the construction industry or the building industry, on a "construction site" or a "building site", as those terms are understood in ordinary parlance.

59 It is to be accepted that all words used in legislation have some work to do and be accorded some meaning: ***Commonwealth v Baume*** (1905) 2 CLR 405. In this context the appellant contended that in using the words "site" and "on a site", this was a deliberate choice made by the legislature. The submission was made that in choosing the dictionary definition of "site" that she did, at [74] of her reasons, the learned Chief Commissioner left it no work to do. It was said that if it is to simply mean the location or place at which the activities in the first part of the definition are performed on those things or works identified in sub-pars (i) to (xviii), then this adds nothing to the definition. This is so because on the appellant's construction, this occurs already as the works are done "to" the buildings, roads, etc in sub-pars (i) to (xviii).

60 I do not accept that construed in the manner that the learned Chief Commissioner did, the words "site" or "on a site" have no work to do. I consider that interpreting the words used in this manner does provide a linkage and marks out the boundaries of the definition of construction industry. The reference to the "site" is not in a vacuum, as simply a place where work is performed. If this was so, then there would be no distinction between work done in an employer's own premises and work performed outside of its premises, such as at a client's premises, as in the case of ***Aust-Amec*** and in the present case. As illustrated on the facts in ***Aust-Amec***, which I will come to in more detail below, as held by Ipp J, there is a material distinction between work performed of the kind contemplated in s 3(1), at for example, a contractor's client's premises and at a contractor's own premises or workshop. As pointed out by the respondent in its submissions, the facts of this case itself illustrate that distinction. Thus, work performed in an employer's workshop or otherwise on its own premises, to support the performance of work performed on the site of the buildings, plant, roads etc, by way of fabrication of items to be used or installed "on site", fall outside of the definition. There is no incongruity or absurdity, as a matter of constructional choice, when drawing such a distinction. Such an approach follows the breadth of the definition of construction industry, read to its fullest extent.

61 The respondent is correct to say in its written submissions and at par 3(a) of its notice of contention, that the appellant's reliance on using the ordinary and natural meaning of "construction industry", as an aid to interpreting the meaning used in the definition of the same term in s 3(1) of the Act, is with respect, misplaced and falls foul of the rule expressed most recently in ***Esso Australia Resources Pty Ltd v Commissioner of Taxation*** [2011] FCAFC 154; (2011) 199 FCR 226. This rule being that in interpreting a definition in a statute, it is not generally permissible to refer to the ordinary meaning of the term defined as an aid: ***Owners of Shin Kobe Maru v Empire Shipping Co Inc*** [1994] HCA 54; (1994) 181 CLR 404; ***Wacal Developments Pty Ltd v Realty Developments Pty Ltd*** [1978] HCA 30; (1978) 140 CLR 503.

62 The approach taken by the learned Chief Commissioner to the meaning of "on a site" for the purposes of s 3(1) of the Act, also follows a long line of cases of this Commission. I do not propose to consider them all. Several have considered and rejected similar arguments as to the scope of the Act, as arises in this case, in particular that the Act has no application to works performed on existing buildings, structures or operations, such as mining operations for example. This latter circumstance arose in the decision of the Commission in Court Session in ***Construction Industry Long Service Leave Payments Board v Positron Pty Limited*** (1990) 70 WAIG 3062. This case involved a challenge to a finding of a Board of Reference that employees of an electrical contractor, performing maintenance work on the treatment plant and on mobile equipment at an operational gold mine, were not engaged in the construction industry under the Act.

63 Although the specific issue of the meaning of the words "on a site" was not raised or determined, the Commission in Court Session had no difficulty in concluding that employing employees to engage in electrical maintenance work of the kind in issue, fell withing the meaning of "construction industry" in s 3(1)(a)(vi) of the Act. Whilst in its written submissions in reply the appellant contended that the conclusions reached in ***Positron*** did not establish that the mine concerned was operational, as opposed to being under construction, I do not think that a fair reading of that case supports this contention. Whilst the

summary of the facts was brief, there was no reference in the decision of the Commission in Court Session, to the gold mine, or any part of it, being under construction. If this was so, then I have no doubt this would have been a material fact recorded, as part of the Commission's consideration of the definition of "construction industry" under the Act.

64 Similarly, in ***Construction Industry Long Service Leave Payments Board v Doug Ritchie Brickpaving*** (1991) 71 WAIG 576, the Commission in Court Session upheld an appeal from a Board of Reference and concluded that the work of installing brick paving around mainly existing, but also new houses, constituted works in the construction industry for the purposes of s 3(1)(a)(ii) and (xvi) of the Act (see too ***Centurion Industries Limited v Construction Industry Long Service Leave Payments Board*** (1991) 71 WAIG 1300; ***Healy Airconditioning Pty Ltd v Construction Industry Long Service Leave Payments Board*** (1999) 79 WAIG 560; ***Konecranes Pty Ltd v Construction Industry Portable Paid Long Service Leave Board*** [2006] WAIRC 04331; (2006) 86 WAIG 1092; ***Brown & Root; Sparks 'N' Security Pty Ltd and Ritzline Pty Ltd t/a IC Cool Refrigeration, Mechanical and Electrical Services v Construction Industry Long Service Leave Payments Board*** [2017] WAIRC 00164; (2017) 97 WAIG 366; ***Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme*** [2019] WAIRC 00860; (2019) 100 WAIG 125).

65 Whilst in ***Quantum Blue***, the meaning of "on a site" was not a matter raised or argued, in that case I expressed, by way of obiter remarks, general agreement with the conclusions of Scott CC in ***Sparks.*** In ***Sparks,*** the learned Chief Commissioner concluded "on a site" was not restricted to a building site or a construction site. However, despite this, neither party submitted that I would not bring an impartial mind to resolving the present appeal: ***Resmed Limited v Australian Manufacturing Workers' Union*** [2015] FCAFC 106; (2015) 232 FCR 152. I also note the terms of s 15 of the IR Act in this respect.

66 As referred to by the learned Chief Commissioner at first instance, a broad approach to the construction of similar legislation in South Australia has been adopted. Whilst each statute must be considered in accordance with its specific terms, in ***FI & JF Munro (trading as Mega Electrical) v Construction Industry Long Service Leave Board*** (1992) 59 SAIR 381, the Industrial Magistrates Court of South Australia dealt with a case involving an electrical contractor, undertaking electrical maintenance and repairs on its customers' premises. The court adopted a broad interpretation of the definitions under the South Australian equivalent legislation. The phrase "building site" was not confined to the place at which new building and construction work was undertaken. Rather, it extended to "a place at which work to which the Act applies is carried out, namely a place other than the employer's place of business" at 387.

67 I am not persuaded that in terms of the conclusion reached by the learned Chief Commissioner, that error has been demonstrated. When her reasons for decision are read in their totality, she had regard to the context and purpose of the Act, including Parliamentary materials. The learned Chief Commissioner correctly concluded that the statutory text must prevail in the case of any inconsistency. These grounds are not made out.

Grounds 2(b) and (c)

68 These two grounds can be conveniently dealt with together. Ground 2(b) asserted that the word "site" in the definition in s 3(1) should be construed applying the *ejusdem generis* principle of statutory interpretation. Thus, the appellant contended that the word "site", along with the words "maintenance of and repairs to" in s 3(1) should be construed consistently with the specific words of "construction, erection, installation" etc, described by the appellant as specific words particular to the construction industry. The latter words "maintenance of or repairs to" should be read down, as only applying to "construction works" for example, cases where on a construction project proper, some maintenance or repairs are needed to a building or structure, prior to its commissioning. Reference was made to ***Doug Ritchie Brickpaving***, in which Beech C applied the principle to the interpretation of part of the definition in s 3(1)(a)(ii), albeit, as accepted by the appellant, a part not relevant to determining this appeal. There, Beech C applied the *ejusdem generis* principle to the words "roads, railways, airfields or other works for the passage of persons, animals or vehicles…" to hold that the work, at least making driveways at houses (both existing or new houses) was within sub-par (ii), as being works "for the passage of persons or vehicles": at 578. Given the facts and issues arising in ***Doug Ritchie Brickpaving***, I do not think the case assists the appellant.

69 In a similar vein, the appellant submitted that if this principle does have work to do, then the word "site" should also be read down to mean the site at which the building and construction works are undertaken, as those phrases should be ordinarily understood. If the answer to these two propositions is in the affirmative, then on the agreed facts, the appellant submitted that as the appellant's employees do not engage in maintenance or repairs on a site so construed, then the Act has no application to its employees engaged on this work. I note that from the outlines of submissions and the transcript of the proceedings at first instance, this matter does not appear to have been raised or argued before the learned Chief Commissioner. However, despite this, I will consider the argument on the basis that it may be said to fall within the broader rubric of construction generally.

70 Applying the *ejusdem generis* principle of statutory interpretation requires the identification of a genus as the first step in the process: ***R v Regos & Morgan*** [1947] HCA 19; (1947) 74 CLR 613. Also, whilst the rule normally applies if specific words are followed by general words, this is not always the case. It has been held to also apply where the general words precede the specific words: ***Huntlee Pty Ltd v Sweetwater Action Group Inc*** [2011] NSWCA 378; (2011) 185 LGERA 429.

71 The difficulty with this ground is there does not appear to be an identified genus to provide a hook on which the appellant may hang its coat. Second, and more problematic, the words "on a site" are plainly used in the first part of the definition of construction industry, not to refer to a general type of activity to which these specific types of activity i.e. "construction, erection, installation" etc may attach and qualify the meaning of. Rather, the words "on a site" are used in an entirely different way by the draftsperson, to signify the place, in a geographic sense, at which the activities following are to be performed. As to the words "or maintenance of or repairs to", these words are not any more general in meaning than the words which precede them.

72 As to the further argument that the word "construction" should be elevated and given precedence over and qualify the meaning of the words both preceding and following, I do not accept this construction. There is nothing in the language of the provision to suggest that the range of activities set out in the first part of the definition, all expressed disjunctively, should not be

understood in their ordinary and natural sense. They all operate independently on the works set out in sub-pars (i) to (xviii), and there is no more evident reason to single out "construction", as opposed to "renovation" or "demolition", or "maintenance of or repairs to" for example. Nor did Ipp J in ***Aust-Amec***, when considering the meaning of "maintenance" in referring to the authorities at 421, elevate the ordinary and natural meaning of the word, or qualify it, as only applying to maintenance of things being constructed, before completion, under s 3(1) of the Act (see ***ACT Construction v Customs and Excise Commissioners*** [1981] 1 WLR 1542).

73 Therefore, I am not satisfied these grounds of appeal have been made out.

Ground 2(d)

74 This ground contends that the learned Chief Commissioner failed to properly apply and follow the decision of Ipp J in ***Aust-Amec***. The appellant maintained this decision is authority for the proposition that the word "site" in the Act means a "construction site" or a "building site".

75 The decision in ***Aust-Amec*** turned on its own complex facts. The issue arising on this appeal, that being the meaning of the words "on a site" specifically, as set out in the definition of "construction industry" in the Act, was not a matter expressly arising for consideration in ***Aust-Amec***. What was in issue, was whether the employer plaintiffs, which involved three companies, of which one had several separate divisions, had to register under s 30 of the Act, as it then stood. The second issue was whether, if the answer to the first question was no, regardless, the plaintiffs had to contribute to the respondent regarding their employees, because the employees were engaged "in the construction industry". At the time of this decision, s 30 of the Act reflected in part, the definition of "employer" in s 3(1), but with the additional requirement that the employer be "in the construction industry". The third issue was if the plaintiffs had to contribute to the respondent, regarding which employees were they so liable. His Honour recognized that the issues to be determined, turned on the facts. Importantly also, Ipp J observed at the outset of his judgment at 414 that, "I shall make reference to whether those businesses are carried out on "a site" or at the plaintiffs' premises, as the place where the activities in question are performed is accorded substantial significance in the definition of "construction industry" under the Act…"

76 The first plaintiff, ***Aust-Amec***, operated three divisions; Metlab Mapel, SRC Laboratories and Wishaw Engineering Services. With Metlab Mapel, its business was non-destructive testing, heat treatment, metallurgy, mechanical testing, and inspection and expediting services. The non-destructive testing work could be performed during constructing buildings, plant, or equipment. Most non-destructive testing work was done on tanks, pipelines, and welds etc. A combination of testing on new construction and on existing machinery and equipment, including mining equipment, being dismantled for maintenance, was another activity. Ipp J said that 60% to 70% of the work performed was done "on site", as opposed to at the Metlab Mapel laboratories or workshop. Inspection services also included work on site to inspect and supervise welding work.

77 SRC Laboratories conducted testing of soil, rock, concrete, and other materials used in civil engineering works. At 416, Ipp J outlined this work, most of which was done at its laboratories, but sometimes temporary laboratories were established at construction sites. On the facts, the work of SRC, as set out by Ipp J, was the construction of roads, airports, runways, dams, and other civil engineering projects. The third division, Wishaw, conducted "condition monitoring and vibration analysis of machinery at operational sites". Such machinery included large electric motors, gearboxes, and conveyors. Employees also went to building and construction sites to test equipment as a part of commissioning: at 416 - 417.

78 The second plaintiff, ETRS, also undertook non-destructive testing work. Some of this work was done at its own laboratory premises and some of it was done on the clients' premises or at steel fabrication companies. Occasionally, work was done by employees on construction sites to test welds or equipment being installed: at 417. Most mechanical and metallurgical testing work was done at its laboratory. Occasional metallurgical testing work was done on a construction site. Third party inspection services on items during fabrication, and third-party inspection work, was done at manufacturers' workshops: at 417.

79 The third plaintiff, Passrust, also conducted non-destructive testing of various types. Typically, this involved non-destructive testing on equipment in mining such as on shovels, drills, trucks, or railcars etc. Most non-destructive testing was done on the clients' premises, either where the equipment was in operation or where it was made. On occasions, the company undertook testing on equipment being installed at construction sites. A little testing work was done at its own laboratory. And the business engaged in condition monitoring work, including inspection and surveillance of equipment between design and commissioning. This included supervision of construction and maintenance work by clients normally done at the clients' premises, where the equipment was being fabricated or where it was being used: at 418.

80 His Honour then set out the definition of "construction industry" under the Act at 419 and referred to the defendant's argument that the plaintiffs were engaged on work on a site and in the "maintenance of" one or more of the structures or works referred to in sub-paragraphs (i) to (xviii) of the definition, which I note is very similar to the contention put by the respondent at first instance in these proceedings. Ipp J considered the meaning of "maintenance" and some cases on the point and concluded at 421, that whilst not determinative, none of the work undertaken by the plaintiffs would ordinarily be described as such. As to whether the plaintiffs had to register (under the then s 30 of the Act), Ipp J concluded that they were not of themselves engaged "in" the construction industry, rather they were engaged in a "service industry relating to the construction industry": at 422.

81 As to the second issue of whether the plaintiff employers had to contribute to the Board under s 34 of the Act regarding their employees, Ipp J drew a distinction at 422, between an employer required to register under the Act and one who is not, and said this meant that an employer may not be "in" the construction industry, but may employ persons as employees, who were in the construction industry. On this point, his Honour observed at 422:

> This, together with the distinction to which I have already referred between an employer who is required to be registered and an employer who is not, contemplates that a mere employer (i.e. an employer who is not required to be registered) may not itself be "in the construction industry" but may employ employees (as defined) in the construction industry. Such an employee may be a person, employed by an organisation falling outside the construction industry, who performs

work within the construction industry. An example of this would be, say, a bricklayer employed by a university or a similar institution to maintain and repair existing buildings on a site, and to lay bricks on a site for new buildings.

82 The final issue dealt with by Ipp J was the extent to which employees of the plaintiffs were engaged in the construction industry. This was a question of fact and degree. As to Metlab Mapel, his Honour was not satisfied that employees engaged on non-destructive testing were engaged on work in the construction industry. The shop heat treatment employees did all their work at the employer's premises and thus, were not in the construction industry. The on-site heat treatment employees were also held not to be engaged in the construction industry. The same conclusion was reached in relation to mechanical testing employees: all at 423. The welding inspection service work, which involved inspectors doing on site visual inspections and supervision of welding done by others, may be in the construction industry, but the evidence was insufficient to reach that conclusion: at 424. As to the metallurgical and expediting employees, as the former did most of their work at Metlab Mapel's premises, they were not in the construction industry. As to the latter, the evidence was insufficient to make any findings: at 424.

83 As for SRC Laboratories, only those engaged in extraction of material from a site location (such as soil from a road) which could be by drilling, could be in the construction industry, but its other employees were not: at 424-425. As for Wishaw employees, Ipp J found at 425 they were not engaged in the construction industry. The ETRS employees working on non-destructive testing were not in the construction industry and most of the rest of the work performed was on its own premises and therefore, was not in the construction industry either: at 425. Finally, as for Passrust, Ipp J concluded that consistent with the other plaintiffs, non-destructive testing work was not in the construction industry. For the condition monitoring work, which may be done at premises where equipment is in use (i.e. already built), but most of which was done on site, his Honour found there was insufficient evidence as to the actual work done, and he was not prepared to make the orders sought: at 425.

84 I consider that regarding the appellant's arguments, it is reading too much into the decision of Ipp J to conclude that the case is authority for the proposition that the meaning of "site" in the definition of "construction industry" under s 3(1) of the Act, includes work only on a "construction site" or a "building site", as ordinarily understood. No such clear distinction was made by Ipp J. Apart from reference to ETRS, where it appears on the agreed facts that the work undertaken by this plaintiff took place on a construction site, no such conclusion was open for all the other plaintiffs. Passrust, for example, undertook much of its work at its clients' premises which was, on the facts, in the mining industry, where equipment was in use. Metlab Mapel conducted non-destructive testing on existing plant in use or being dismantled. Similarly, for Wishaw. There was no suggestion by Ipp J that this location of work, aside from the work done, was a disqualifying factor in determining whether the work by the particular employees was work performed in the construction industry, as defined under the Act. I think the most that can be taken from ***Aust-Amec***, as referred to at par 75 above, is the broad distinction, and significance accorded to, work done at an employer's own premises on the one hand, and work done elsewhere on "a site", without the necessity that the site be a "construction site" or a "building site", as commonly understood.

85 The example provided by Ipp J, set out above, of the University bricklayer, to illustrate the distinction between an employee working for an employer engaged "in" the construction industry, as opposed to one not so engaged, is of note. Ipp J did not appear to have any doubt that a bricklayer employed by a University to lay bricks to repair or maintain an existing building, as opposed to a new building, would be an employee engaged "in the construction industry", even though, self-evidently, the University employer would not be so engaged. In this example, his Honour appears to have had no difficulty so concluding, despite the relevant "site" in the example used, not being a construction site or a building site, as it is understood in ordinary parlance.

86 I therefore do not consider that the appellant can rely on ***Aust-Amec*** to support its principal argument in the way contended. I consider that the case largely turned on its facts; the meaning of "on a site" did not squarely arise for consideration; and at its highest, the case distinguished between work performed at an employer's own premises and work performed elsewhere, such as on a client's premises, or other location.

87 This ground of appeal is not made out.

Ground 2(f)

88 By this ground the appellant contended that the learned Chief Commissioner erred in applying the re-enactment presumption principle, to support her conclusions as to the proper meaning of "construction industry" in s 3(1). In her reasons, the learned Chief Commissioner concluded that when the Act was amended in 2011 to extend the meaning of "employer" in s 3(1), to include labour hire agencies in the definition, Parliament was taken to have known of the prior decision of the Commission in ***Positron***, to the effect that maintenance work on a treatment plant of a gold mine and on mobile plant, was work within the construction industry under the Act. The learned Chief Commissioner also concluded that despite no reference being made to it in Parliamentary materials when considering the 2011 amendments to the Act, it likely knew of the decision in ***Aust-Amec***. The learned Chief Commissioner concluded that applying the re-enactment presumption, assisted in confirming her earlier conclusions as to the scope of the Act.

89 Whilst various bases were advanced by the appellant to support this ground of appeal, as properly conceded by the respondent in its submissions, the re-enactment presumption only applies if the particular words in a statute have been judicially considered and, those same words are retained in a statute or provision of a statute, when repealed and re-enacted: ***Mackay v Davies*** (1904) 1 CLR 483 at 491; ***Williams v The Official Assignee of the Estate of William Dunn*** [1908] HCA 27; (1908) 6 CLR 425 at 452; ***Thompson v Smith*** [1976] HCA 56; (1976) 135 CLR 102 at 109. This does not alter the conclusion that contrary to the appellant's submissions, the presumption applies equally to specialist courts and tribunals, as to superior courts: ***Minister Administering the Environmental Planning and Assessment Act 1979 v Carson*** (1994) 35 NSWLR 342; ***WorkCover Authority of New South Wales (Inspector Belley) v Freight Rail Corporation*** [2002] NSWIRComm 281; (2002) 117 IR 99; ***Australian Capital Territory (Chief Minister's Department) v Coe*** [2007] ACTSC 15; (2007) 208 FLR 448.

90 The re-enactment principle was applied and affirmed in the oft cited case of ***Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees*** [1994] HCA 34; (1994) 181 CLR 96, as referred to by the learned Chief Commissioner. At 106, the High Court observed that:

> Parliament re-enacted, in s 4(1) of the Act, words almost identical to those considered in *Reg. v. Portus*. There is abundant authority for the proposition that where Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already "judicially attributed to [them]".

91 In the present circumstances, in ***Positron***, the case referred to and relied on by the learned Chief Commissioner to support the presumption, specific consideration was not given to the meaning of the words "on a site" as set out in the definition in s 3(1) of the Act. It was taken as common ground on the facts in that case that the work performed by the employees was done on a mine site on a treatment plant and on mobile plant. As the specific words in issue at first instance and on this appeal were not considered in ***Positron***, then the subsequent reference to ***Positron*** in Parliament, when considering the 2011 amendments to the Act, could not give rise to the presumption and respectfully, the learned Chief Commissioner was in error to hold it did.

92 Therefore, I would uphold this ground of appeal.

Ground 3(a)

93 By this ground, the appellant contended that the learned Chief Commissioner failed to have regard to the rule of statutory construction that all words in a statute are to be given meaning and effect, when she was considering the exception in s 3(f) of the definition of "construction industry". It was submitted that if a person is engaged in the construction industry for the purposes of the Act, only because they perform maintenance work of a routine or minor nature, then s 3(f) has no practical operation. It was submitted that by including the exception in s 3(f), the Parliament intended that a company performing only or mostly this work, is not to be regarded as engaged in the construction industry under the Act.

94 In her reasons, the learned Chief Commissioner approached this question based on the premise that most of the appellant's work for its clients was maintenance work of a routine or minor nature. She found that despite the appellant's own description of its activities as being "the provision of maintenance services predominantly to the mining industry", that on the learned Chief Commissioner's construction of s 3(1) of the Act, work by the appellant includes the "maintenance of or repairs to works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and by-products from materials". The learned Chief Commissioner also concluded that the appellant's work encompassed "renovation or works of the kind set out in (a) for the fabrication, erection, or installation of plant, plant facilities or equipment for those buildings of (sic) works": at [136].

95 On the appellant's approach to s 3(f), the words "maintenance of or repairs to" in s 3(1)(a) must be construed subject to the exception in s 3(f). Thus, on this basis, the appellant contended that if a company was "substantially engaged" in the construction industry solely on the footing they perform maintenance work of a routine or minor nature, the exception in par (f) would have no practical effect.

96 I do not accept this is the approach to interpreting the exclusion in s 3(f) to be preferred. There is no basis to exclude maintenance work of a routine or minor nature from the meaning of "maintenance of or repairs to" in the first part of the definition in s 3(1)(a). The language of s 3(f) ends with the words "who is not substantially engaged in the industry described in this interpretation", being an employer who does not employ employees substantially engaged in the work set out in s 3(1)(a), (b) and (c). The question to be asked is whether, in a particular case, an employer is substantially engaged in the construction industry, as set out in the definition. The answer to this question will depend on whether the definition of "employer" in s 3(1) is met. If the work done for example, is maintenance of or repairs to buildings or plant or equipment otherwise set out in s 3(1)(a), and that is the substance of the work that the employer performs, then s 3(f) could not be enlivened.

97 I consider that the example cited by the respondent in referring to the decision of the Commission in Court Session in ***Positron***, illustrates the intended operation of s 3(f). At 3064 - 3065, Martin C (Kennedy and Parks CC agreeing), considered that an example of the operation of this exclusion would be where a retail employer had its regular maintenance employees perform work, such as the remodeling of a showroom. The employer in that example would be engaged in an industry (i.e. the retail industry) far removed from the construction industry, but the work of the employees could fit the description of "maintenance work of a routine or minor nature". Similarly, is the example referred to by Ipp J in ***Aust-Amec***, set out above, of an employer as a University. If one substituted instead of bricklaying, some routine maintenance to a building or plant, this would also fall within the exclusion in s 3(f), as it would be undertaken by an employer "not substantially engaged in the industry described in this interpretation".

98 I am therefore not persuaded this ground is made out.

Ground 3(b)

99 This ground contends that the work involving "maintenance or repairs of a routine or minor nature" is not caught within the meaning of "maintenance" in the first part of the definition of construction industry in s 3(1)(a). The appellant submitted that when read with the exclusion in s 3(f), this is the correct construction and the learned Chief Commissioner should have found accordingly. This ground brings in for consideration par 5 of the respondent's notice of contention.

100 The appellant referred to the learned Chief Commissioner's conclusions at [136] - [137] of her reasons. At [136] she concluded that:

> The construction industry, as defined by the Act, encompasses the carrying out of maintenance of or repairs to works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and bi-products from materials. It also encompasses the renovation or works of the kind set out in (a) for the fabrication, erection or installation of plant, plant facilities or equipment for those buildings of [sic] works. This meets the description

of almost all of the work performed by PIM for its clients. I have set out in considerable detail in [6] to [44], the work described in the SOAF and Mr Kennedy's statement for those clients listed in [26] of these Reasons. With the possible exception of work for Patrick Stevedores Operations Pty Ltd, all of this work fits the description of work falling within the construction industry.

101 The appellant submitted this conclusion resulted in two errors. The first was said to be that it perpetuates the erroneous conclusions reached by the Commission as to the meaning of "site" and "maintenance and repairs", as considered in grounds 2(b) and (c) above. Second, and as also contended in ground 3(a) above, the approach taken by the learned Chief Commissioner renders the exception in par (f) nugatory. This was so, according to the appellant, because if an employer was in the construction industry solely because they perform maintenance or repair work of a routine or minor nature, then the exclusion in par (f) would have no effective operation. This supports, on the appellant's argument, the need to read s 3(1)(a) in referring to "maintenance of or repairs to", as being subject to the exclusion in par (f), unless the employer is *otherwise* engaged in the construction industry. The appellant cited the example of a company engaged in building and labour services on a construction site, to support its contention. If that company also engaged in some minor maintenance work, such as scaffolding or electrical work, then it would not be excluded by par (f) from the construction industry, because it would otherwise be substantially engaged in the industry.

102 The respondent objected to this approach. It submitted that the legislature's use of the exclusion in par (f), did not indicate an intention to exclude all maintenance work of a routine or minor nature. Rather, only such work if undertaken by an employer not substantially engaged in the construction industry. The respondent distinguished between par (f) and the exclusions in pars (d) and (e) and submitted that unlike the unqualified exclusions in those two pars, par (f) does not exclude all such maintenance work. It is qualified. There is no basis to read into par (f), the word "otherwise", or words into the phrase "maintenance of or repairs to" in s 3(1)(a), which was the import of the appellant's submissions.

103 Whilst it was not entirely clear from the appellant's written submissions, if the thrust of its argument is that the words used in the first part of the definition in s 3(1)(a) of "maintenance of or repairs to" should be read as excluding work of a "routine or minor nature", then as I have mentioned above at par 96, there is no warrant to read the definition in this way. There is no reason to give the words used in s 3(1)(a), referring to the activities to be performed on the works following in the definition in sub-pars (i) - (xviii), other than their ordinary and natural meaning. The words are not qualified and do not suggest that they mean other than *all* maintenance or repair work, regardless of whether it could be classified as major, minor, routine or not routine.

104 In discussing ground 3(a) above, a focus, if not the focus of the exclusion in s 3(f), is whether the employer is or is not substantially engaged in the construction industry, as that is defined in the definition in s 3(1)(a) to (c) of the Act. The Parliament has not sought to exclude all maintenance or repair work of a routine or minor nature, because this is not what par (f) says. If it were intended to do so, the exclusion would have been easily expressed, in the same terms as the exclusions in pars (d) and (e) for example, as the respondent submitted. In my view, par (f) is intended to exclude those employers who may be said to be only partially engaged in the construction industry, because they are substantially engaged in another industry: ***Positron*** at 3064 - 3065; ***Healy*** at 562.

105 An effect of the appellant's argument, if accepted, would be that an employer, substantially engaged in the industry of renovations and alterations for example, one activity specified in the first part of the definition in s 3(1)(a), could perform maintenance or repair work of a routine or minor nature and be in the construction industry. However, an employer engaged in the industry of maintenance and repairs of a routine nature, an activity also covered, would not be in the construction industry. I do not consider the appellant's construction of the exclusion in par (f), read with s 3(1)(a) of the Act, is the preferred approach.

106 This ground is not made out.

Grounds 4(a) and (b)

107 These two grounds can be conveniently dealt with together. First, it was contended by the appellant that the learned Chief Commissioner was in error by concluding that the appellant's employees were engaged in the construction industry, and failed to have proper regard to ***Aust-Amec***, to the effect that despite such a finding, the employer may not be in the construction industry. Second, this error occurred because on the unchallenged evidence, the appellant was engaged in the industry of the "provision of industrial maintenance services".

108 The appellant submitted that although s 30(1) of the Act has now been amended to remove the requirement for an employer to be "in" the construction industry, to be registered, ***Aust-Amec*** remains as authority for the proposition that determining whether employees are "in the construction industry" in the definition of "employer" in s 3(1) of the Act, still requires consideration of whether the employer itself is also engaged in the construction industry. This was said to be based on the contention that the definition of "employer" involves an act undertaken by an employer, to engage a person as an employee, and that act must be undertaken "in the construction industry".

109 Based on the evidence before the Commission at first instance, the appellant contended that it was open to find and the learned Chief Commissioner should have found, that the appellant is engaged in the industry of "industrial maintenance", similar to one plaintiff in ***Aust-Amec*** being found by Ipp J, to have been in "the service industry relating to the mining industry".

110 I do not consider these submissions are correct.

111 First, whilst said to be reliant upon the decision of Ipp J in ***Aust-Amec***, the submissions of the appellant on these grounds contradict his Honour's view as to the meaning of "employer" in s 3(1), the first part of which in (a), remains unchanged since the decision. It is clear from his Honour's analysis of the Act, as to the status of an "employer" as then (and as still now) defined and an "employee" as then (and as still now) defined, there is a distinction between an employer who may be in the construction industry and one not in the construction industry. The distinction being that even if an employer is of itself not

engaged in the construction industry, its employees may be so, if the substance of the work they perform falls within the definition of "construction industry" in s 3(1). This was the distinction referred to by the learned Chief Commissioner at [58] – [59] of her reasons.

112 As noted by the respondent in its submissions, Ipp J in ***Aust-Amec***, dealt with this distinction at 422, in citing the bricklayer example, set out above, at par 81.

113 Importantly also, Ipp J in ***Aust-Amec*** concluded on the evidence, that the then requirement on an employer to register under s 30(1), that it be "in" the construction industry, was not met because none of the plaintiffs' work, in non-destructive testing, was "maintenance" as referred to in the definition of "construction industry" in s 3(1) of the Act. It was on this basis that the plaintiffs themselves were not engaged "in" the construction industry. Having so concluded, his Honour then had to consider, as the next step, given the definition of "employer" in s 3(1), focusing as it does on whether the employees themselves are engaged in the construction industry, whether the plaintiff's employees could be so described. At 433 Ipp J posed the question in this way:

> In the circumstances, the plaintiff's entitlement to the orders claimed depends on whether any of their employees are employees "in the construction industry"…Whether a person is an employee in the construction industry depends not only on whether some of the work carried out by him or her is in the construction industry, but, also, on the degree to which that work forms part of the overall duties of the person concerned.

114 It is clear from ***Aust-Amec*** that Ipp J recognised the bifurcation in the definitions of both "employee" and "employer" under the Act. In considering, for the purposes of s 3(1), whether an employee is engaged in the construction industry, so the employer will have to make contributions to the respondent on their behalf, does not necessitate the conclusion that their employer must also be engaged in the construction industry, under the Act.

115 And when considering the definition of "employer" in s 3(1), his Honour noted also at 422, that the exclusion from the definition of "a Minister, authority or council prescribed…", which remains in the definition, supported his construction of the definition of "employer". It did so because in Ipp J's opinion, but for this exclusion, such persons would be within the scope of the definition, although ordinarily, they would not be regarded as being in the construction industry. This supports the conclusions that the learned Chief Commissioner reached at [58]-[59], and that the characterisation of the industry of the employer, contrary to the appellant's submissions, is not a factor in determining whether particular employees are in the construction industry.

116 Finally, the conclusion of Ipp J at 422, that the plaintiffs were engaged in a "service industry to the construction industry", was based on his consideration of the facts, which stand in contrast to the facts in this case. In ***Aust-Amec***, the plaintiffs' non-destructive testing was held not to be "maintenance", as set out in the definition of construction industry, in s 3(1) of the Act.

117 Therefore, these grounds of appeal are not made out.

Conclusions

118 Despite the upholding of appeal ground 2(f), which is not of sufficient moment to disturb the principal conclusions reached by the learned Chief Commissioner, I am not persuaded that the appeal has been made out. I would dismiss the appeal.

MATTHEWS C:

119 I have had the benefit of reading the draft reasons of the Senior Commissioner. I agree with those reasons and have nothing to add.

WALKINGTON C:

120 I also have read the draft reasons of the Senior Commissioner. I too, agree with those reasons and have nothing further to add.

2020 WAIRC 00760

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PROGRAMMED INDUSTRIAL MAINTENANCE PTY LTD
	APPELLANT
	-and-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	FULL BENCH
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER D J MATTHEWS
	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 2 SEPTEMBER 2020
FILE NO/S	FBA 14 OF 2019
CITATION NO.	2020 WAIRC 00760

Result	Appeal dismissed
Appearances	
Appellant	Mr S M Davies SC
Respondent	Mr J B Blackburn SC

Order

The appeal having come on for hearing before the Full Bench by written submissions filed on 7 April, 5 May and 12 May 2020, and having heard Mr S M Davies SC on behalf of the appellant, and Mr J B Blackburn SC on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

FULL BENCH—Appeals against decision of Industrial Magistrate—

2020 WAIRC 00782

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BALLARD HAY PTY LTD ABN 57165688853
	APPELLANT
	-and-
	MICHAEL JOHN BAYNTUN
	RESPONDENT
CORAM	FULL BENCH
	CHIEF COMMISSIONER P E SCOTT
	COMMISSIONER D J MATTHEWS
	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 4 SEPTEMBER 2020
FILE NO/S	FBA 7 OF 2020
CITATION NO.	2020 WAIRC 00782

Result	Appeal discontinued

Order

On 27 July 2020, the appellant filed a notice of appeal to the Full Bench;

On 27 August 2020, the appellant provided notice to the Commission of its intention to discontinue the matter; and

On 1 September 2020, the respondent informed the Commission that he had no objection to the matter being discontinued;

NOW THEREFORE, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and regs 37 and 103A of the *Industrial Relations Commission Regulations 2005*, hereby orders —

THAT the appeal be and is hereby discontinued by leave.

By and for the Full Bench

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

PRESIDENT—Unions—Matters dealt with under Section 66—

2020 WAIRC 00786

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00786
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT
HEARD BY WRITTEN SUBMISSIONS	**:**	MONDAY, 31 AUGUST 2020, THURSDAY, 3 SEPTEMBER 2020
DELIVERED	**:**	FRIDAY, 4 SEPTEMBER 2020
FILE NO.	**:**	PRES 4 OF 2020
BETWEEN	**:**	MICHAEL BARRIE CLANCY
		Applicant
		AND
		THE AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH
		Respondent

CatchWords	**:**	Industrial law (WA) – Elections for registered industrial organisation – Delays in conducting election of councillors – Orders regarding non-observance of rules of the organisation – Circumstances relating to COVID-19
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 6(ab), 6(f), 66, 69(2)
Result	**:**	Order issued
Representation:		
Applicant	**:**	Mr M Clancy on his own behalf
Respondent	**:**	Mr S Barry

Reasons for Decision

1 According to rule 20 of the Rules of the Australian Nursing Federation Industrial Union of Workers Perth (ANF), the elections of officeholders are required to be held between 1 July and 30 August in the year in which they fall due.

2 This is an application by Michael Barrie Clancy, a member of the ANF, for an order pursuant to s 66 of the *Industrial Relations Act 1979* (WA) (the Act) waiving the requirement to comply with rule 20 to enable the ANF to conduct its 2020 elections later than the time required.

3 In support of the application, Mark Anthony Olson, the Secretary, has sworn an affidavit in which he set out that he wrote to the Registrar on 20 August 2020, requesting that an election be conducted for a number of positions on the ANF Council. The Registrar responded that the request had not been made in accordance with s 69(2) of the Act because it had not been made in sufficient time to enable the Electoral Commission to conduct the election within the time required by the ANF's Rules.

4 Mr Olson explained that the ANF had been unable to request that the election be undertaken within time due to a number of factors:

(a) the senior staff member previously responsible for arranging elections left the ANF in January 2020 and was unable to be replaced prior to the COVID-19 pandemic;

(b) the issues associated with the COVID-19 pandemic have resulted in an extremely busy workload for ANF staff, particularly for Mr Olson;

(c) the majority of ANF staff are still working remotely from the office and have been doing so since March 2020; and

(d) as a result of these factors, the request to the Registrar was unintentionally delayed.

5 Mr Olson says that this is the first time in his knowledge that the ANF's elections have been delayed outside the period stipulated in its Rules.

6 Mr Olson says that, if the application under s 66 of the Act is granted, the election will be conducted as soon as practicable. He also notes that he has appointed the ANF's Senior Industrial Officer to ensure that all future elections are conducted in accordance with the Rules and the Act.

Consideration and conclusion

7 Rule 20 – Elections, rule (1) of the ANF's Rules requires that the elections for the offices of President, Senior Vice-President, Vice-Presidents, Executive and Councillors shall be conducted between the first day of July and the thirty-first day of August in the year in which those positions become vacant pursuant to the Rules, providing that the Returning Officer may call for nominations prior to 1 July in the year of the election.

8 I am aware that in the last six months other industrial organisations have experienced difficulties in complying with their Rules in relation to conducting meetings and elections.

9 The ANF's members in particular will have been affected by the current COVID-19 emergency. This in turn will have affected the ANF in providing support and service to its members. The administrative arrangements outlined by Mr Olson demonstrate that the ANF, like many organisations, has faced challenges in performing its functions. There is no suggestion that the circumstances have arisen due to neglect, but rather due to the current exceptional circumstances.

10 I also take account of the objects of the Act. Section 6 – Objects, subsections (ab) and (f) provide for the promotion of the principles of freedom of association and the right to organise, as well as the encouragement of democratic control of registered organisations and the full participation by members. Nothing before me suggests that the deferral of the elections by around three months on this occasion will undermine those objects.

11 It is necessary and desirable for the elections to take place as soon as possible. The ANF seeks an order which would expire on 1 December 2020. This means that the elections must be conducted before then.

12 In the circumstances, I intend to order that:

(a) observance of the requirement in Rule 20 of the ANF's Rules, to hold elections between 1 July and 31 August 2020, be waived; and

(b) until the Returning Officer has declared the result of the election, those officers holding office due for election between 1 July and 31 August 2020, the subject of Rule 20 – Elections, are hereby deemed to continue to hold such offices and have authority to exercise the powers, duties and functions of the respective offices;

(c) unless this order is extended, varied or revoked, it shall operate until 30 November 2020; and

(d) there be liberty to the parties to apply.

2020 WAIRC 00784

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL BARRIE CLANCY
	APPLICANT
	-and-
	THE AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 4 SEPTEMBER 2020
FILE NO/S	PRES 4 OF 2020
CITATION NO.	2020 WAIRC 00784

Result	Order issued
Appearances	
Applicant	Mr M Clancy, in person
Respondent	Mr S Barry, as agent

Order

This matter having come on for a directions hearing before me on 27 September 2020, and having heard Mr M Clancy on his own behalf, and Mr S Barry on behalf of the respondent, and having considered the parties' documents, the Chief Commissioner, pursuant to the powers conferred under s 66(2) of the *Industrial Relations Act 1979*, hereby orders that —

1. Observance of the requirement in Rule 20 of the ANF's Rules, to hold elections between 1 July and 31 August 2020, be waived; and
2. Until the Returning Officer has declared the result of the election, those officers holding office due for election between 1 July and 31 August 2020, the subject of Rule 20 – Elections, are hereby deemed to continue to hold such offices and have authority to exercise the powers, duties and functions of the respective offices;
3. Unless this order is extended, varied or revoked, it shall operate until 30 November 2020; and
4. There be liberty to the parties to apply.

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

INDUSTRIAL MAGISTRATE—Claims before—

2020 WAIRC 00794

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00794
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 20 AUGUST 2020
DELIVERED	**:**	THURSDAY, 10 SEPTEMBER 2020
FILE NO.	**:**	M 94 OF 2019
BETWEEN	**:**	DAVID JONES
		CLAIMANT
		AND
		ODYSSEY MARINE PTY LTD
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) – Alleged contravention of an enterprise agreement – Alleged contravention of a National Employment Standard – Claim for untaken paid annual leave upon termination of employment – Construction of annual leave clause of the relevant enterprise agreement – Alternative claim for set off of alleged entitlements paid
Legislation	**:**	*Fair Work Act 2009* (Cth)
		Industrial Relations Act 1979 (WA)
Instruments	**:**	*Go Inshore Port Hedland Agreement 2009* (Cth)
		Go Inshore Port Hedland Agreement 2013 (Cth)
		GO INSHORE Port Hedland Agreement 2016 (Cth)
Case(s) referred to in reasons:	**:**	***David Jones v Odyssey Marine Pty Ltd*** [2020] WAIRC 00118
		City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union (2006) 153 IR 426; [2006] FCA 813
		Transport Workers' Union of Australia v Linfox Australia Pty Ltd (2014) 318 ALR 54
		Kucks v CSR Ltd (1996) 66 IR 182
		Amcor Ltd v CFMEU [2005] HCA 10
		The Australian Maritime Officers' Union v Curtis Island Services Pty Ltd [2015] FWC 1836
		WorkPac Pty Ltd v Rossato [2020] FCAFC 84
		Mildren v Gabbusch [2014] SAIRC 15
		Miller v Minister of Pensions [1947] 2 All ER 372
		Briginshaw v Briginshaw [1938] HCA 34
Result	**:**	The Claim is dismissed
Representation:		
Claimant	**:**	Mr P. Mullally (agent) from Workclaims Australia
Respondent	**:**	Mr A. Pollock (of counsel) as instructed by Mills Oakley

REASONS FOR DECISION

1 The dispute in Mr David Jones' (Mr Jones) claim against his previous employer, Odyssey Marine Pty Ltd (Odyssey), concerns the accumulation and taking of annual leave while on an Even Time Roster.

2 This dispute has been determined, in part, by the Industrial Magistrates Court of Western Australia (IMC) dismissing Mr Jones' claim as it relates to his employment period covered by two previous industrial agreements, *Go Inshore Port Hedland Agreement 2009* (Cth) and *Go Inshore Port Hedland Enterprise Agreement 2013* (Cth) (the 2009 and 2013 Agreements respectively) (the Summary Decision).[1]

3 The remainder of the dispute concerns the construction and application of cl 24 of the *GO INSHORE Port Hedland Enterprise Agreement 2016* (Cth) (the 2016 Agreement) for the period of employment from 16 May 2016 to 15 August 2018 (the Claimed Period).

4 At the conclusion of the hearing, the subject of this decision, Mr Jones abandoned his contention that he was a continuous shift worker, which only had a bearing on the amount of annual leave he may have been entitled to.

5 Mr Jones was employed as a Master on an Even Time Roster of 28 days on and 28 days off where the parties were covered by the 2016 Agreement (the Even Time Roster).

6 Mr Jones claims:

- he was entitled to four weeks annual leave for each year of service under cl 24.2.2 of the 2016 Agreement or, alternatively, s 87(1)(b) of the *Fair Work Act 2009* (Cth) (FWA);
- Odyssey failed to provide him with paid annual leave during his employment by incorrectly describing part of the 28 days off (on the Even Time Roster) as being paid annual leave; and
- therefore, failed to pay him untaken paid annual leave upon termination of his employment contrary to s 90(2) of the FWA.

(the Claim).

7 Odyssey denies the Claim and says:

- on its proper construction, cl 24.4 of the 2016 Agreement operates to deem full-time employees to have taken accrued annual leave during off duty periods;
- cl 24.4 of the 2016 Agreement imposes a reasonable requirement to take paid annual leave in particular circumstances or otherwise deals with the taking of paid annual leave pursuant to s 93(3) and s 93(4) of the FWA; and
- Mr Jones received paid annual leave during the off duty periods of the Even Time Roster and had no balance of accrued and untaken annual leave at the cessation of his employment.

8 Schedule I outlines the jurisdiction and practice and procedure relevant to the IMC.

Background Facts

9 Mr Jones was employed by Odyssey as a casual Deckhand from 5 January 2011 to 9 December 2011 and as a permanent full time Master from 6 May 2012 to 15 August 2018.

10 The parties agree:

- the 2016 Agreement covered Mr Jones and applied to his employment with Odyssey for the Claimed Period;
- Mr Jones is a '***national system employee***' as that term is defined in the FWA;
- Odyssey is a '***national system employer***' as that term is defined in the FWA; and
- the National Employment Standards (NES) and the FWA applied to Mr Jones's employment.

11 I adopt the relevant part of the Summary Decision where I am satisfied that the contents remain the same for the purpose of this decision:[2]

> *Odyssey paid annual leave as it accrued with the taking and payment of annual leave occurring during the 28 days off period. The effect of Odyssey's payment of accrued annual leave during the off roster period is that annual leave did not accrue beyond the immediately preceding on duty roster period. In that sense it was a zero-sum balance with, on Odyssey's view, there being no (or little) accrued entitlement to paid annual leave or remaining unpaid annual leave at the time of Mr Jones' employment termination. Odyssey says this is entirely consistent with the application of the relevant clauses of the Agreements on the Even Time Roster.*
>
> *Mr Jones maintains that he never took annual leave and that the 28 days off cannot be, and was not, taken as annual leave.*

12 Clause 24 of the 2016 Agreement provides as follows:

> *24.1 Full-time Employees are entitled to paid annual leave … under the NES.*
>
> *24.2 For each year of service the NES entitles Full-time Employees to:*
>
> *24.2.1 4 weeks of paid annual leave; or*
>
> *24.2.2 5 weeks of paid annual leave if the Full-time Employee is a 'continuous shiftworker' as defined in clause 11.4 of this Agreement.*
>
> *24.3 Annual leave entitlements accrue on the basis of 38 ordinary hours of work per week and are paid at the Base Hourly Rate of Pay. Full-time Employees are not entitled to annual leave loading.*
>
> *24.4 Full-Time Employees are entitled to paid annual leave in accordance with the FW Act. It is acknowledged and agreed that accrued paid annual leave is taken during off duty periods not at work as part of the Even Time Roster.*
>
> *24.5 The Company and Full-Time Employees shall work together to ensure annual leave balances are maintained at reasonable levels to alleviate staffing disruptions and the need for additional resources.*
>
> *24.6 An Employee may cash out any portion of accrued annual leave that is in excess of four (4) weeks.*

13 The 2016 Agreement was approved pursuant to s 186 of the FWA.

Issues For Determination

14 The following issues require determination:

(a) What is the proper construction and application of cl 24 in the 2016 Agreement?

(b) Is Mr Jones entitled to the payment of untaken paid annual leave under s 90(2) of the FWA for the Claimed Period?

(c) If the answer to (b) is yes, should any amounts owed for the Claimed Period be set off against payments made to Mr Jones?

Mr Jones's Contentions

15 Mr Jones contends that:

(a) he did not apply for or take annual leave during the Claimed Period;

(b) his right to annual leave arises under the NES contained in the FWA or under cl 24.4 of the 2016 Agreement;

(c) *deemed* annual leave under cl 24 of the 2016 Agreement (if Odyssey's contention is accepted) is inconsistent with the provision of annual leave in the NES;

(d) while cl 24.4 of the 2016 Agreement provides that the parties acknowledge and agree that paid annual leave is taken during the off roster periods, the clause does not state that during this period an employee is *deemed* to be on annual leave. It was open to the relevant parties as part of the negotiation process to have expressly stated in the 2016 Agreement that annual leave was *deemed* to have been taken during the off roster periods, but no such language was used in cl 24;

(e) Odyssey's interpretation of cl 24 of the 2016 Agreement is not in accordance with authorities on the proper interpretation of modern awards and industrial agreements, namely it does not have regard to the legislative context of the FWA (and the NES), it is devoid of any clear intention of depriving an employee of his or her right to payment of annual leave, there is no system in place to apply for annual leave to ensure annual leave balances were kept at a reasonable level or to apply to have annual leave cashed out, the Even Time Roster is to compensate an employee for working 28 days on 12 hour shifts, and it results in an unfair and unjust outcome for an employee;

(f) he did not apply for annual leave and was paid an 'all in salary' for 28 days work and 28 days non-work, and nothing in the 'all in salary' was referrable to annual leave; and

(g) the recording on the pay slips of annual leave is no more than a reallocation of annual salary, and annual leave is specifically included in the 2016 Agreement and is not referrable to, or included in, what is meant by annual salary in cl 17.2 of the 2016 Agreement (by reason of the words '*save for those that are otherwise specifically included in this Agreement*').

Odyssey's Response

16 Odyssey's response to Mr Jones' contentions is:

(a) two-fold:

(A) the Even Time Roster discharges the annual leave entitlement where annual leave is built into the off duty time and the amendment to cl 24 of the 2016 Agreement properly construed did not alter the existing Even Time Roster arrangements under the 2009 and 2013 Agreements; and

(B) if its preferred construction of cl 24 of the 2016 Agreement is not accepted, Mr Jones has been paid amounts on account of annual leave capable of being set off against any amount owed such that there is a zero-balance owing;

(b) in support of (A), eight contextual reasons, which when considered alongside the principles in construing industrial agreements, demonstrate that while the effect of cl 24 of the 2016 Agreement was intended to be changed, it was not in a manner that changed how employees working on an Even Time Roster were to accrue and take annual leave;

(c) the eight contextual reasons are supported by the evidence of Mr Wesley van der Spuy (Mr van der Spuy), Chief Executive Officer of Odyssey, and by reference to the 2009 and 2013 Agreements;

(d) in support of (B), payments were made to Mr Jones on account of annual leave expressly referrable to Odyssey's discharging its obligation to provide paid annual leave. Further, Mr Jones had the benefit of the purpose for which annual leave is paid and provided;

(e) in response to Mr Jones' submissions, cl 24.4 of the 2016 Agreement is a term which reasonably requires an employee to take paid annual leave in particular circumstances. The NES does not prohibit enterprise agreements containing terms reasonably requiring employees to take paid annual leave in particular circumstances. Further, it was unnecessary for Mr Jones to apply for annual leave where there was no change in circumstances and annual leave was discharged while in the off duty period.

What Is The Proper Construction And Application Of Cl 24 In The 2016 Agreement?

17 The preferred construction of the relevant annual leave clauses in the 2009 and 2013 Agreements was determined from the words used in the context of the whole of the Agreements and the work arrangements provided by the Even Time Roster.

18 The conclusion in the Summary Decision in respect of the 2009 and 2013 Agreements was that the taking of annual leave was intended to, and in fact was, incorporated into the off duty period and that this was accounted for by paying annual leave on an accrued basis for the preceding period. The effect was a zero-sum balance of annual leave, accrued or otherwise.

19 The obvious re-drafting of the annual leave clause, cl 24 in the 2016 Agreement, left open the question of what was intended by its amendment and what relevance that may have in respect of how cl 24 of the 2016 Agreement was expected to operate. That is, resolution of the construction of the clause was not a matter of merely reading the words in the context of the 2016 Agreement and understanding the operation of the Even Time Roster.

20 The contentious parts of cl 24 of the 2016 Agreement are sub-cl 24.4, sub-cl 24.5 and sub-cl 24.6.

21 The three central pillars of Mr Jones' argument why cl 24 of the 2016 Agreement should be construed in favour of the claimant are:

(1) the absence of the word *deemed* in the clause demonstrates a lack of express intention to deprive employees of their statutory entitlements under the NES and the 2016 Agreement;

(2) there was no application or proper accounting process for the taking of annual leave where leave liability and the cashing out of annual leave was anticipated; and

(3) the recording on payslips of annual leave is no more than a reallocation of an annual salary.

22 The principles for construing industrial instruments, including enterprise agreements, are uncontroversial. I adopt the principles referred to in the Summary Decision, which can be broadly summarised as follows.

23 The interpretation of an industrial instrument begins with consideration of the natural and ordinary meaning of the words used.[3] An industrial instrument is to be interpreted in light of its industrial context and purpose and must not be interpreted in a vacuum divorced from industrial realities.[4] An industrial agreement must make sense according to the basic conventions of English language.[5] The circumstances of the origin and use of a clause is relevant to an understanding of what is likely to have been intended by its use.[6] Narrow and pedantic approaches to the interpretation of an industrial agreement are misplaced.[7]

Is the exclusion of deeming language determinative of the intention of cl 24 of the 2016 Agreement?

24 The Summary Decision at [20] to [25] discussed leave entitlements in the context of an even time roster referred to in ***The Australian Maritime Officers' Union v Curtis Island Services Pty Ltd*** [2015] FWC 1836 (***Curtis Island***). I adopt those paragraphs in these reasons.

25 Importantly in ***Curtis Island***, at first instance and on appeal, it was acknowledged that days off on an even time roster are not paid leave as that term is ordinarily understood, but, having regard to the words used in the analogous annual leave clause in ***Curtis Island*** and the particular work arrangements, it was clearly intended that the off duty period satisfy the taking of all leave.

26 The analogous annual leave clause in ***Curtis Island*** expressly stated that a period of non-duty (or off duty) roster period was *deemed* to have satisfied the employees entitlement to annual leave provided in the NES.

27 Clause 24 of the 2016 Agreement contains no such express reference and, therefore, it is perhaps understandable why Mr Jones has formed the view about the purported intention of cl 24 of the 2016 Agreement and how it is to operate. To that end, Mr Jones says cl 24 of the 2016 Agreement expresses no clear intent to otherwise displace his basal annual leave entitlements, save that he accepts under the terms of cl 24.4 of the 2016 Agreement it is '*acknowledged and agreed that accrued paid annual leave is taken during the off duty periods*'.

28 Mr Jones relies on the words, or lack of words, contained in cl 24 of the 2016 Agreement in support of his preferred construction of the clause.

29 Odyssey's response to Mr Jones' proposition is that proper consideration of the clause requires something more than consideration of the words themselves and that something more is, in part, contained in the uncontroverted evidence of Mr van der Spuy about his involvement in the 2016 Agreement bargaining process and the reasons for the amendment.[8]

30 In summary:

- Odyssey sought to future proof its work force in the event it tendered for work that required the implementation of non-Even Time Rosters and, in doing so, amended the 2016 Agreement to enable more flexibility to engage employees to work something other than an Even Time Roster;[9]
- the 2009 and 2013 Agreements did not anticipate a rostering structure other than an Even Time Roster and thus did not address the accrual of annual leave outside of this structure. The 2016 Agreement amendments were designed to address the possibility of a different rostering structure and the accrual of annual leave that may flow from that and how annual leave in that context would be managed;[10]
- the amendments to cl 24 in the 2016 Agreement were not intended to change the historical and prevailing operation of how annual leave was accrued and taken to that contained in the 2009 and 2013 Agreements;[11]
- clause 24 of the 2016 Agreement was drafted in similar terms to that contained in an enterprise agreement for Total AMS Pty Ltd, a competitor, and is also consistent with other competitor's enterprise agreements both in content and application within the Even Time Roster structure;[12]
- during the bargaining process for the 2016 Agreement, Mr van der Spuy met with employee and union representatives where the purpose of the amendments was discussed and the existing arrangements for annual leave for the Even Time Roster were maintained;[13]

- prior to the employee vote and on behalf of Odyssey, he sent an email to all employees to be covered by the 2016 Agreement with an explanatory table of the 2016 Agreement clauses. In that explanatory table reference was made to annual leave and stated '[a]*nnual leave is accrued in accordance with the Fair Work Act. Accrued paid annual leave is taken during off duty periods not at work as part of the even time roster, as per the current arrangement*';[14]
- the reference to '*current arrangement*' in the email was a reference to the current annual leave clause applicable at the time of the bargaining process, namely cl 22 of the 2013 Agreement;[15] and
- while the amendments in the 2016 Agreement were to address alternative future roster structures, Odyssey did not employ any employees on a non-Even Time Roster as scopes of work did not require, and have not yet required, it.[16]

31 The effect of this evidence, which I accept, is that I find that one of the purposes (if not the sole purpose) of the amendments to the 2016 Agreement was to enable a more flexible rostering structure in the event Odyssey's scope of work changed. The consequence to this was that provision was made to annual leave in cl 24 so as to accommodate annual leave for a rostering structure other than an Even Time Roster.

32 Consistent with this finding is that certain other clauses in the 2016 Agreement were amended to reflect the possibility of an alternative rostering structure being implemented (albeit that ultimately this did not occur). For example, cl 12.3 of the 2013 Agreement provided for an Even Time Roster which could only be varied by agreement between the parties, whereas cl 12.1 of the 2016 Agreement provides for the same Even Time Roster but cl 12.3 provides that employees agree to roster flexibility in certain circumstances and in respect of different projects.

33 I further find that Odyssey's intention was for annual leave in cl 24 of the 2016 Agreement to operate in the same manner to which it operated under cl 22 of the 2013 Agreement (and to cl 15.3.1 of the 2009 Agreement) for employees on an Even Time Roster. I find that this intention was also reflected in the relevant workforce.

34 Consistent with this finding is that implicit in the 2016 Agreement being approved following the employee vote in April 2016, there was no identifiable dispute between the parties or the applicable union prior to its approval. That is, if there was evidence of a dispute as to the terms of the 2016 Agreement, particularly cl 24, then I would have expected Mr Jones to refer to this evidence in support of the Claim and his preferred construction of the clause. No such evidence was led by Mr Jones and, therefore, I reasonably find there was no dispute as to the amendment of the cl 24. The consequence of this is that it supports the finding that Odyssey's employees (and the applicable union) understood that the effect of the amendments to cl 24 of the 2016 Agreement did not change, and were not intended to change, how annual leave was to operate under an Even Time Roster.

35 In addition, following approval of the 2016 Agreement no employee took annual leave during the on duty periods.[17] Mr Jones applied for annual leave during an on duty period following the birth of a child, but this was refused, and he was granted parental leave.[18]

36 The simple point that flows from this is that nothing changed with respect to Mr Jones' work arrangements, including in relation to the operation of the Even Time Roster, how annual leave was accrued and how it was accounted for on the payslips, as a result of the transition from the 2013 Agreement to the 2016 Agreement.

37 Therefore, consistent with the conclusions above, in my view, the fact that cl 24 of the 2016 Agreement did not expressly state that annual leave was *deemed* to have been included in the off duty period is not determinative of the intention and purpose of the clause. The intention and purpose of the clause is capable of being deduced by reference to other relevant factors.

<u>The relevance of an application and accounting process for the taking of annual leave</u>

38 Mr van der Spuy agreed that Mr Jones (and any other employee) did not apply to take annual leave. While annual leave records were maintained on an external database by an external consultant, Mr Jones' payslips showed a regular accrual and deduction of annual leave over a four-week cycle. The pattern in the payslips show Mr Jones' annual leave accruing during the on duty period and then taken in the off duty period.[19]

39 Mr Jones says without an application and accounting process in relation to annual leave, there is no mechanism for ensuring annual leave balances are maintained at reasonable levels or for annual leave to be cashed out.[20] I infer from this that Mr Jones implies that cl 24.5 and cl 24.6 of the 2016 Agreement must have some relevance to the workforce and that their inclusion in the 2016 Agreement anticipated annual leave accruing on an Even Time Roster.

40 Mr van der Spuy's evidence in response is that cl 24.5 and cl 24.6 of the 2016 Agreement was inserted into the 2016 Agreement to deal with the scenario of an employee working a roster other than an Even Time Roster, where the possibility of accrued annual leave and its associated liability might arise.[21]

<u>Whether the recording on payslips of annual leave is a reallocation of annual salary?</u>

41 Mr Jones says that the recording on his payslips of annual leave is a reallocation of his annual salary. That is, the recording of annual leave on the payslip does not support the fact that he applied for or was provided with paid annual leave in accordance with his application.

42 In support of this, Mr Jones says that the annual salary under the 2016 Agreement, unlike cl 14.3 of the 2013 Agreement, does not include a component for annual leave and relies upon the words in brackets in cl 17.2 of the 2016 Agreement, '*save for those that are otherwise specifically included in* [the] *Agreement*'.

43 The annual salary is inclusive of all notional allowances, overtime and penalty rates other than those specifically included in the 2016 Agreement,[22] and Mr Jones says annual leave is an entitlement specifically included in the 2016 Agreement.

44 Odyssey responds by saying Mr Jones misunderstands the operation of the Even Time Roster, where each 28 days off roster period comprises of paid off duty days and paid annual leave days. Further, Odyssey says the 2016 Agreement schedules certain payments made to employees, whereas the 2013 Agreement included those payments as part of the body of the Agreement. Therefore, when read as a whole, the annual salary includes annual leave, along with other payments.

45 Clause 17.2 of the 2016 Agreement provides:

> *Full-Time Employees will be paid an annual salary in accordance with Schedule 1. The annual salary is paid in respect of any and all entitlements arising in respect of all time working on duty and time not working off duty as part of the Even Time Roster within that 12 month period (save for those that are otherwise specifically included in this Agreement).*

46 I accept Odyssey's characterisation of cl 17.2 of the 2016 Agreement and what it includes. It is apparent from the wording in cl 17.2 of the 2016 Agreement, '[t]*he annual salary is paid in respect of <u>any and all entitlements</u> arising*' from the Even Time Roster (emphasis added). These words, when read with the whole of the 2016 Agreement, reflect that the entitlements *otherwise* specifically included in the 2016 Agreements are the amounts referred to in sch 2 to sch 5, and are either separate to that of a full-time employee or in addition to work carried out as an employee.

47 For example, the amount in sch 2 of the 2016 Agreement is the day rate for casual employees and includes a 20% loading for all entitlements usually associated with permanent employees: cl 6.6 of the 2016 Agreement. The amount in sch 3 of the 2016 Agreement only arises if a full-time employee makes their own travel arrangements to attend and leave the work site: cl 17.13 of the 2016 Agreement. The amount in sch 4 only arises if an employee is '*not provided with food or incidentals while on duty … for each working day*': cl 15.1 of the 2016 Agreement. The amount in sch 5 only arises if an employee is requested while off duty to deliver a vessel between ports for refit and are paid a day rate to do so: cl 17.19 of the 2016 Agreement.

48 I further note cl 23.1 of the 2016 Agreement relating to public holidays provide that public holiday entitlements are to '*be taken in accordance with the NES*'. However, cl 23.2 of the 2016 Agreement provides for the scenario where an Even Time Roster may include public holidays, but employees agree that the annual salary and the off duty periods, amongst other things, reflect the reasonableness of requests to work on public holidays:[23] cl 23.2 of the 2016 Agreement.

49 Notwithstanding what is contained in the 'note' to sch 1 of the 2016 Agreement, in my view, this merely serves to reinforce that the annual salary is an inclusive amount, including inclusive of annual leave, unless *otherwise* provided. The amounts *otherwise* provided are those contained in sch 2 to sch 5.

50 Therefore, in my view, the amount recorded as annual leave on the pay slips is not a reallocation of annual salary, where the amount of annual salary includes a component for annual leave. However, of itself, this is also not determinative of the preferred construction of cl 24 of the 2016 Agreement, where Mr Jones' claim concerns the application and taking of annual leave as part of the Even Time Roster.

<u>What is the preferred construction of cl 24 of the 2016 Agreement?</u>

51 The starting point is that Odyssey's employees, including Mr Jones, are entitled to be *paid* annual leave in accordance with the FWA: cl 17.2 of the 2016 Agreement.

52 Mr Jones' '*entitlement to <u>paid</u> annual leave*' arises under s 87(1)(a) of the FWA, which '*accrues progressively … and accumulates from year to year*' (emphasis added): s 87(2) of the FWA. '*Paid annual leave may be taken for a period agreed between an employee and his or her employer*' and '[t]*he employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave*': s 88 of the FWA.

53 However, s 93(3) of the FWA provides that a '*modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable*'. Further, a '*modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave*': s 93(4) of the FWA.

54 What do the words '[i]*t is acknowledged and agreed that accrued paid annual leave is taken during off duty periods not at work as part of the Even Time Roster*' mean, if they do not mean that accrued annual leave can only be taken during off duty period?

55 These words are plain and unambiguous. There is no other period of the Even Time Roster to take accrued annual leave if the parties to the 2016 Agreement agree that it can only be taken during the off duty period. In addition, the only evidence before the IMC regarding the reasonableness or otherwise of the requirement to take annual leave during the off duty period was that lead by Odyssey, namely:

- the predominate industry practice reflects not only the Even Time Roster structure, but also the accrual and taking of annual leave in the same manner as Odyssey;[24]
- the taking of annual leave during the off duty time is part of the acknowledgment that employees in the industry have an extended period of paid time off in contrast to other employees who have traditionally four to five weeks of paid annual leave;[25]
- the structure of Odyssey's annual leave clause is consistent with key competitors' enterprise agreement annual leave arrangements;[26] and
- while Mr Jones' was refused two requests to take annual leave during the on duty period, he was granted access to other leave types for the same period.[27]

56 Therefore, while the NES and the FWA provide for an entitlement to *paid* annual leave (consistent with the wording in cl 24.4 of the 2016 Agreement), the 2016 Agreement requires an employee (including Mr Jones) to *take* paid annual leave in particular circumstances, provided the requirement in the particular circumstances is reasonable. The requirement in Mr Jones' case is that '*accrued paid annual leave is taken during off duty periods not at work*' and the particular circumstance is being '*part of the Even Time Roster*'.

57 Having regard to the evidence outlined in paragraph [55] above, I find that the requirement to take accrued paid annual leave during the off duty period is reasonable, having regard to the particular circumstances. Namely, the net effect of the Even Time Roster is that employees are paid an annual salary which includes six months of the year off duty (noting the 12 hours per day worked while on duty), but the Even Time Roster does not prohibit access to other types of leave while at work during the on duty period (such as sick leave and parental leave) where appropriate.

58 I find that the preferred construction of cl 24.4 of the 2016 Agreement is that accrued paid annual leave was incorporated into Mr Jones' off duty time on the Even Time Roster. The practical manner in which this was done was annual leave was deducted in the subsequent off duty period as and when it accrued in the preceding on duty period.

59 The reasons are as follows (consistent with the findings made):

- one of the purposes (if not the only purpose) for the re-drafting of the annual leave clause in cl 24 of the 2016 Agreement was to provide for employees working a non-Even Time Roster if Odyssey successfully tendered for different scopes of work;
- Odyssey intended for the existing arrangements relating to annual leave under previous iterations of the enterprise agreements to continue in the same manner under the 2016 Agreement;
- Odyssey conveyed both the purpose and the intention of cl 24 of the 2016 Agreement to its workforce prior to the vote on the 2016 Agreement;
- no objection or dispute arose in respect of the existing annual leave arrangements (under the 2013 Agreement) being continued under the 2016 Agreement;
- the 2016 Agreement was approved by the Fair Work Commission;
- accordingly, the only reasonable inference to be drawn is that Odyssey's workforce understood the existing annual leave arrangements under an Even Time Roster would continue in the same manner under the 2016 Agreement where other working conditions also remained the same (in particular, the Even Time Roster continued in the same manner that it had under the 2013 Agreement); and
- not only did the Even Time Roster under the 2016 Agreement continue in the same manner as it had under the 2013 Agreement, the manner in which annual leave was recorded on Odyssey's payslips continued in the same manner under both enterprise agreements. That is, consistent with the 2009 and 2013 Agreements, paid annual leave was accrued and taken in the same ratio.

60 Therefore, I find that notwithstanding cl 24.4 of the 2016 Agreement does not use *deeming* words with respect to the incorporation of accrued paid annual leave as part of the off duty period, the common understanding of Odyssey and its employees is that accrued paid annual leave formed part of the off duty period on the Even Time Roster.

61 This is also consistent with the known annual leave arrangements for industry competitors, in an industry where employees have extended periods of off duty time.

62 The preferred construction of cl 24 of the 2016 Agreement is likewise consistent with what was intended to constitute the annual salary referred to in cl 17.2 of the 2016 Agreement, and where it appears that it was never otherwise countenanced by Odyssey that employees may indirectly receive an increase of approximately 7 - 8% in annual salary (in addition to the 2.2% provided by the 2016 Agreement).

Outcome

63 I am satisfied that the preferred construction of cl 24 of the 2016 Agreement means that all accrued annual leave was paid by Odyssey to Mr Jones during the course of his employment where the annual leave accrued and was incorporated into and paid as part of the off duty period on the Even Time Roster.

64 I am further satisfied that at the time of the termination of his employment, Mr Jones had no accrued and untaken annual leave, and, therefore, Odyssey has not contravened s 90(2) of the FWA.

65 Accordingly, I find the Claim unproven and the Claim is dismissed.

Odyssey's Alternative Argument Concerning Set-Off

66 In the alternative and had cl 24 of the 2016 Agreement been interpreted as suggested by Mr Jones, Odyssey says that any amounts paid in annual leave are capable of being set off against the amount sought by Mr Jones.

67 It is arguably unnecessary to determine Odyssey's alternative argument where I found the Claim unproven. However, I make the following comments.

68 The Summary Decision at [68] to [69] briefly discussed the law in relation to claims for set-off. I adopt those paragraphs in these reasons.

69 In addition to those paragraphs, the Full Court of the Federal Court published its reason for decision in ***WorkPac Pty Ltd v Rossato*** [2020] FCAFC 84 (***Rossato***). His Honour White J at [818] to [864] reviewed the law as in related to claims for set-off and at [865] summarised the applicable principles into four propositions:

> *(a)* … *application of the parties* [employment] *contract* … [if the parties] *agree that a sum of money is paid and received for a specific purpose which is over and above or extraneous to an award entitlement, the* [employment] *contract precludes the employer from later seeking to rely on the payment as satisfying an award obligation which is outside the agreed purpose of the payment* … [A]*n employer cannot later reallocate an amount agreed to be paid to an employee in respect of* [one purpose] … *(for example, ordinary hours of work) to meet a claim in respect of* [another purpose] … *(for example, overtime pay)* … *If* [the purpose of the payment] *arises out of the same purpose as the award obligation, it can be set off;*
>
> *(b)* … *application of the common law principles* … [w]*hen there are outstanding award or enterprise agreement entitlements, a payment designated by the employer as being for a purpose other than satisfaction of the award entitlement cannot be regarded as having satisfied the award or enterprise agreement';*
>
> *(c) close regard must be had to the character of the payment on which the employer relies for the claimed set off and the purpose … for which it was made; and*
>
> *(d) the purpose for which a payment was made will be a question of fact in each case. It may be express or … implied from the parties' agreement or from the employer's conduct.* (original emphasis)

70 Odyssey contends that the payments made to Mr Jones were directly on account of an entitlement to paid annual leave (as recorded on the pay slips) and these payments have the requisite 'close correlation' with the obligation to pay paid annual leave. Accordingly, Odyssey contends that it is entitled to set off those payments against any accrued and untaken annual leave balance if found to have existed at the time of the termination of Mr Jones' employment.

71 Odyssey says the circumstances in the Claim are materially different to that in ***Rossato*** where Mr Jones had the composite benefit of annual leave by being paid amounts expressly referrable to annual leave for the benefit of rest and recreation.

72 In response, Mr Jones says that he was only ever paid his annual salary and that was to work for 28 days and not to work for 28 days. Further, he never applied to take annual leave during the off duty period and, therefore, annual leave accrued and was never taken during the Claim Period.

73 Odyssey's alternative argument and the response to that argument is circular.

74 However, *if* the preferred construction of cl 24.4 of the 2016 Agreement was that paid annual leave was not intended to be incorporated into the off duty roster and consequently paid annual leave was intended to be leave additional to off duty time, then an entitlement flows from this.

75 In my view, if this separate and additional entitlement to paid annual leave did arise (because it was not intended for annual leave to accrue and then be taken during the off duty period), it follows that only off duty time was accounted for and the accrued annual leave was not taken. In that circumstance, there could be no claim for set off.

76 The corollary of this is that this arguably further buttresses the preferred construction of cl 24.4 of the 2016 Agreement, but perhaps not in the way Odyssey intended in its submissions on set off. That is, by agreeing to take annual leave during the off duty period, it was never intended employees get *further* entitlements to not be at work when they are already being paid to not be at work.

Result

77 The Claimant's claim is dismissed.

D. SCADDAN

INDUSTRIAL MAGISTRATE

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[1] ***David Jones v Odyssey Marine Pty Ltd*** [2020] WAIRC 00118.
[2] ***Jones v Odyssey Marine*** [12], [13].
[3] ***City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union*** (2006) 153 IR 426, 438.
[4] ***City of Wanneroo*** 438, 440.
[5] ***City of Wanneroo*** 440.
[6] ***Transport Workers' Union of Australia v Linfox Australia Pty Ltd*** (2014) 318 ALR 54.
[7] ***Kucks v CSR Ltd*** (1996) 66 IR 182; ***Amcor Ltd v CFMEU*** [2005] HCA 10.
[8] Exhibit 4 – Affidavit of Wesley John van der Spuy sworn 12 August 2020.
[9] Exhibit 4 [14].
[10] Exhibit 4 [15], [16].
[11] Exhibit 4 [13].
[12] Exhibit 4 [10], [16].
[13] Exhibit 4 [17], [18].
[14] Exhibit 4 [19], annexure WVDS-1.
[15] Exhibit 4 [20], annexure WVDS-2.
[16] Exhibit 4 [21].
[17] Exhibit 4 [22].
[18] Exhibit 4 [27].
[19] Exhibit 4 [24], [25], annexure WVDS-3.
[20] Clause 24.5 and cl 24.6 of the 2016 Agreement.
[21] Exhibit 4 [15], [16].

[22] Schedule 1 of the 2016 Agreement.
[23] See also s 114(2) to s 114(4) of the FWA.
[24] Exhibit 4 [7], [8].
[25] Exhibit 4 [8].
[26] Exhibit 4 [10].
[27] Exhibit 4 [27].

Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court Of Western Australia Under The *Fair Work Act 2009* (Cth): Alleging Contravention Of Enterprise Agreement

Jurisdiction

[1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA.

[2] The IMC, being a Court constituted by an industrial magistrate, is an '***eligible State or Territory court***': FWA, s 12 (see definitions of '***eligible State or Territory court***' and '***magistrates court'***); *Industrial Relations Act 1979* (WA), s 81 and s 81B.

[3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA, s 544.

[4] The civil penalty provisions identified in s 539 of the FWA include the terms of an enterprise agreement where the agreement *applies* to give an entitlement to a person and to impose an obligation upon a respondent employer: FWA, s 51(2). The agreement *applies* if it *covers* the employee or the employee organisation and the employer, the agreement is in operation and no other provision of the FWA provides that the agreement does not apply: FWA, s 52(1) (when read with s 53 of the FWA).

[5] An obligation upon an '***employer***' covered by an agreement is an obligation upon a '***national system employer***' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA, s 42, s 53, s 14 and s 12. An entitlement of an employee covered by an agreement is an entitlement of an '***employee***' who is a '***national system employee***' and that term, relevantly, is defined to include '*an individual so far as he or she is employed … by a national system employer*': FWA, s 42, s 53 and s 13.

Contravention

[6] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the Court may make orders for an *employer* to pay to an employee an amount that the employer was required to pay under the modern award: FWA, s 545(3)(a).

[7] The civil penalty provisions identified in s 539 of the FWA include:

- Contravening a term of an enterprise agreement: FWA, s 539 and s 50.
- Contravening a NES: FWA, s 539 and s 44(1)

[8] An '***employer***' has the statutory obligations noted above if the employer is a '***national system employer***' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA, s 14 and s 12. The obligation is to an '***employee***' who is a '***national system employee***' and that term, relevantly, is defined to include '*an individual so far as he or she is employed … by a national system employer*': FWA, s 13

[9] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the Court may make orders for:

- An *employer* to pay to an employee an amount that the employer was required to pay under the FWA: FWA, s 545(3).
- A *person* to pay a pecuniary penalty: FWA, s 546.

[10] In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible State or Territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: ***Mildren and Anor v Gabbusch*** [2014] SAIRC 15.

Burden and standard of proof

[11] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

> *It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.*

[12] In the context of an allegation of the breach of a civil penalty provision of the FWA it is also relevant to recall the observation of Dixon J said in ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336, 362:

> *The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

[13] Where in this decision I state that 'I am satisfied' of a fact or matter I am saying that 'I am satisfied on the balance of probabilities' of that fact or matter. Where I state that 'I am not satisfied' of a fact or matter I am saying that 'I am not satisfied on the balance of probabilities' of that fact or matter.

CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE—Matters dealt with—

2019 WAIRC 00845

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN WALLIS
	APPLICANT
	-v-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 9 DECEMBER 2019
FILE NO.	APPL 47 OF 2019
CITATION NO.	2019 WAIRC 00845

Result	Direction issued
Representation	
Applicant	Mr C Fogliani of counsel
Respondent	Ms B Swanson of counsel

Direction

HAVING heard Mr C Fogliani of counsel on behalf of the applicant and Ms B Swanson of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the respondent shall file a notice of response by no later than 20 December 2019.

(2) THAT the applicant and respondent file an agreed statement of facts (if any) no later than five (5) working days prior to the date of hearing.

(3) THAT the applicant and respondent file an outline of submissions and any list of authorities upon which they intend to rely no later than three (3) working days prior to the date of hearing.

(4) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2020 WAIRC 00791

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00791
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 6 DECEMBER 2019, TUESDAY, 12 MAY 2020
DELIVERED	**:**	TUESDAY, 8 SEPTEMBER 2020
FILE NO.	**:**	APPL 47 OF 2019
BETWEEN	**:**	GLENN WALLIS Applicant AND THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD Respondent

Catchwords	**:**	Industrial law (WA) - Dispute as to entitlements to long service leave - Relevant "reviewable decision" - Whether employee engaged in the construction industry - Definition of "construction industry" - Employee engaged in repair and maintenance of railway maintenance machinery - Employee not employed in the construction industry - Application dismissed
Legislation	**:**	*Construction Industry Portable Paid Long Service Act 1985* (WA) ss 3(1), 50 *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA) Schedule 1 *Industrial Relations Act 1979* (WA) s 27(1)(n) *Industrial Relations Commission Regulations 2005* (WA) reg 102A

Result**:** Application dismissed

Representation:

Counsel:

Applicant**:** Mr C Fogliani of counsel

Respondent**:** Ms R Harding of counsel

Case(s) referred to in reasons:

Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme [2019] WAIRC 00860; (2019) 100 WAIG 125

Programmed Industrial Maintenance v Construction Industry Long Service Leave Payment Board [2020] WAIRC 00758

Aust-Amec Ltd t/a Metlab Mapel & SRC Laboratories and Ors v Construction Industry Long Service Leave Payments Board (1995) 15 WAR 150; (1995) 62 IR 412

Construction Industry Long Service Leave Payments Board v Positron Pty Ltd (1990) 70 WAIG 3062

Reasons for Decision

1 The present matter is an application to review under s 50 of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA). The applicant alleges that the respondent erred in its decision to deem him ineligible to accrue benefits to long service leave under the Act, because he was not employed in the "construction industry". The applicant maintains that he was employed in the construction industry and seeks orders accordingly.

2 A preliminary issue arises, raised by the Commission with the parties. That issue is whether the decision of the respondent set out in its letter to the applicant dated 15 October 2019 was the relevant "decision" under s 50(1) of the Act from which the present application to review is brought. This arises because at an earlier time, on 13 February 2019, the respondent wrote to the applicant's employer, Monadelphous Engineering Associates Pty Ltd, to inform it that it did not have to record service and make contributions under the Act for employees engaged in a classification occupied by the applicant. The present application to review has been brought from the "decision" set out in the respondent's letter of 15 October 2019, which letter makes no reference to the earlier letter from the respondent to Monadelphous dated 13 February 2019. The letter of 15 October 2019 was to the effect that the applicant would no longer accrue "days of service" as the applicant's work was not considered work "in the construction industry" as specified in s 3(1) of the Act.

3 On the face of it, both letters appear to constitute "reviewable decisions" for the purposes of s 50(1)(e) of the Act, as they deal with an "entitlement of an employee to long service leave".

4 Aside from this preliminary issue, the substantive issue to be determined is whether the work performed by the applicant, as a Track Machine Specialist Mechanical Fitter, who performs maintenance work, comprising diagnostic testing, maintenance, and repairs to track maintenance machines used by Rio Tinto to maintain its railway, is work in the "construction industry" as defined in s 3(1) of the Act.

5 The applicant maintained this work was "maintenance of or repairs to railways" under the definition of "construction industry" set out in s 3(1)(a)(ii) of the Act. The respondent disputed this contention and submitted that such work performed by the applicant did not involve, of itself, maintaining or repairing railways. Rather, the work engaged in by the applicant was the maintaining and repairing of equipment used in maintaining railways and therefore is not work that falls within the definition of "construction industry" and the applicant has no entitlement to long service leave under the Act.

Factual overview

6 The facts are not essentially in dispute. The applicant was initially employed by Fluor Rail Services from 18 January 2012 to 18 June 2018. He was employed in the position of a Mechanical Fitter and he performed repairs and servicing work on mechanical equipment used to maintain and repair the Rio Tinto railway network. This machinery included large track maintenance machines (track tampering machines) and other mobile equipment, used on the railway. The applicant was based at the Rio Tinto 6 Mile Workshop in Dampier. About 50% of his time was spent in the workshop servicing and repairing rail maintenance equipment and the other 50% of his time was out in the field, doing diagnostic testing, maintenance and repairs to track maintenance equipment and machines. This work also involved breakdown support to keep the track maintenance machinery operating.

7 Photographs of the machinery and equipment that the applicant maintained were set out at pp 57 - 68 of the applicant's book of documents. The applicant accepted these machines and equipment were not connected to the railway itself. They could be removed by a crane.

8 In June 2018, the applicant's position with Fluor was made redundant because Rio Tinto changed its contracting arrangements. Shortly after, Monadelphous took over the railway maintenance contract with Rio Tinto. On 11 July 2018, the applicant started employment with Monadelphous doing the same work he did for Fluor. The title of his position was different as a "Specialist Mechanical Technician - Step 1". The applicant continued to work in both the Rio Tinto workshop and out onsite, to the same extent as he did with his previous employer.

9 There was also no dispute that the work performed by the applicant fell within a classification of work in a "prescribed award", as set out in Schedule 1 of the *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA). The classification being an "Engineering Tradesperson Level 1 Engineering/Production Employee", in the Metal Trades (General) Award 1966.

10 Whilst it seems from the documents in evidence that during his employment by Fluor, Fluor was contributing to the respondent on the applicant's behalf, this situation changed during the applicant's employment with Monadelphous. When Monadelphous attempted to register the applicant under the Act, the respondent did not accept the registration because the respondent did not consider that the applicant was an employee engaged in the "construction industry" for the purposes of s 3(1) of the Act. In January 2019, correspondence passing between Monadelphous and the respondent raised queries about the work performed by the applicant and other employees engaged on similar duties. Once all the requested information was provided by Monadelphous to the respondent, as I have mentioned above, by letter dated 13 February 2019 (p 23 respondent's documents), the respondent informed Monadelphous that employees engaged as Track Machine Specialist Electricians and Mechanical Fitters, maintaining and repairing track machines, were not employees covered by the Act.

11 In the letter, in summary, the respondent considered this work involved work on mobile plant and equipment, that did not otherwise fall within the definition of "construction industry" in s 3(1) of the Act. The applicant said that he noted that he no longer received credits for long service leave from the respondent once his employment changed from Fluor to Monadelphous. This led the applicant to correspond with the respondent from March to September 2019, in relation to this issue. Copies of this correspondence was at pp 44 - 52 of the applicant's book of documents.

12 The upshot of this correspondence was a letter from the respondent to the applicant, as I have mentioned above, dated 15 October 2019. In it, again in summary, the respondent informed the applicant that the work he was performing in the Rio Tinto workshop was not regarded as "onsite work" and thus was not eligible for long service leave under the Act. In relation to the "onsite" work performed by the applicant, in maintaining and repairing track maintenance machines and equipment, the respondent said this work was not covered by the Act as it was work performed on mobile plant, not being a structure or fixture, for the purposes of the definition of "construction industry" under the Act. Whilst acknowledging that the applicant had received service contributions made to the respondent from his former employer, Fluor, the respondent said they were made in error and that the company could seek a credit for those contributions.

13 The mechanics of how contributions are made to the respondent and the respondent's internal processes were dealt with in the evidence of Mr Cinquina and Ms Van Bosch. The system of the respondent in relation to contributions by employers seems to be on a self-assessment basis, with the respondent relying on information given to it by an employer. Checking and review processes of returns seems to occur when a claim for payment of long service leave is made or a query is raised. This is largely due to the many employees and employers in the scheme. Where an employer has been found to have wrongly contributed to the fund, refunds can be made.

14 Both Mr Cinquina and Ms Van Bosch were taken to the respondent's letter of 13 February 2019. The letter was signed by Ms Van Bosch. Both said this was a decision reached by the respondent that work done by Monadelphous on mobile plant was not covered by the Act. It would appear, however, that the applicant was not made aware of this letter or the decision it constituted. This was plainly a decision that would affect an employee's entitlement to long service leave under the Act for the purposes of s 50(1)(e). Despite this, Mr Cinquina also accepted, when put to him, that the respondent's letter of 15 October 2019 to the applicant also constituted a decision by the respondent that the applicant could not receive long service leave under the Act because the applicant was not employed in the construction industry. It was also Mr Cinquina's opinion that the letter of 15 October 2019 constituted a decision that whilst the applicant was employed by Fluor, he was also not entitled to receive contributions into the scheme under the Act, for the same reasons as the decision was made that Monadelphous did not have to make contributions.

15 That the respondent appears to have made two decisions, one on 13 February 2019 and the other on 15 October 2019, in relation to both the employer's obligations and the applicant's entitlements under the Act, without the applicant being aware of the former decision, is a complication in these proceedings and is a matter upon which I comment further below.

Consideration

Preliminary issue

16 Given that two "decisions" were made by the respondent in relation to the applicant's eligibility to receive long service leave benefits under the Act, arising from his employment by Monadelphous, the issue arises as to which decision enlivens the present application for review. By s 50 of the Act, the jurisdiction is conferred on the Commission to review a decision of the respondent. Section 50 provides:

> **50**. Review of Board's decision
>
> (1) In this section —
>
> ***reviewable decision*** means a decision by the Board —
>
> (a) to refuse to register an employee; or
>
> (b) to require an employer to register under this Act; or
>
> (c) to remove the name of an employer or employee from the employers register or the employees register respectively; or
>
> (d) as to the assessment of the amount of ordinary pay of an employee under section 34; or
>
> (e) as to the entitlement of an employee to long service leave; or
>
> (f) as to the amount of any moneys to be paid in respect of a long service leave entitlement whether pro rata or otherwise.
>
> (2) A person who is aggrieved by a reviewable decision may, in the manner and time prescribed by regulations made under section 51A(3), refer the decision for review to the WAIRC constituted by a single commissioner.

(3) On a referral of a decision under subsection (2), the WAIRC is to inquire into the circumstances relevant to the decision and may —

(a) affirm the decision; or

(b) vary the decision; or

(c) set aside the decision and —

(i) substitute another decision; or

(ii) send the matter back to the Board for reconsideration in accordance with any directions or recommendations that the WAIRC considers appropriate.

17 For present purposes, the relevant provision is s 50(1)(e), dealing with a decision that affects an employee's entitlement to long service leave under the Act. Both the letter of 13 February 2019 and the letter of 15 October 2019 from the respondent, are "decisions" of the respondent. The letter of 13 February 2019 advised Monadelphous, as the applicant's employer, that after due investigation by the respondent, Monadelphous employees employed in Track Machine Specialist classifications were not "eligible employees" as defined under the Act and that "Monadelphous was not required to record service and make contributions under the Act for Track Machine Specialist Electricians and Maintenance Fitters maintaining and repairing Track Machines". Plainly such a decision was a "reviewable" decision under s 50(1)(e) of the Act because thereafter, being employed by Monadelphous in such a classification, despite having received contributions for service from his former employer, Fluor, the applicant was no longer, in the view of the respondent, to receive such contributions from Monadelphous.

18 On the evidence of the applicant, he was not aware of the letter of 13 February 2019. He said that he raised questions with the respondent because he was six months away from qualifying for pro rata long service leave. He also said that he spoke to a Monadelphous superintendent who made enquiries and informed him that Monadelphous had missed the then quarter for contributions for presumably the last quarter of 2018. At that point, the applicant escalated the matter with the respondent, by way of a "Days of Service Query" which ultimately led to the letter of 15 October 2019.

19 There can be no doubt that the letter of 15 October 2019 is also a "reviewable decision" for the purposes of s 50(1)(e) of the Act. Surprisingly, however, there was no reference made in this letter to earlier correspondence to Monadelphous in February 2019, informing Monadelphous it did not have to make contributions under the Act. It was clear that the applicant was employed in a Track Machine classification. This information was provided to the respondent by Monadelphous in email exchanges between Monadelphous and the respondent in January 2019, which included the applicant's name, classification and work performed. This information led to the respondent's decision, set out in its letter of 13 February 2019, to Monadelphous.

20 It is therefore of some regret it took the respondent a further eight months to resolve an issue raised by the applicant, that would appear to have been resolved in early 2019. In that time, the applicant underwent a period of unnecessary uncertainty as to his entitlements under the Act. Whilst Mr Jacques who handled the applicant's query also gave evidence and admitted the delay was his error, it is suggested the respondent review its internal systems to avoid such a situation in the future. I would have thought the information leading to the letter of 13 February 2019 should have been readily available if cross-referenced with the applicant's employer as "Monadelphous", in his query dated 19 March 2019 (see p 24 respondent's book of documents). At the time of the applicant's query, the decision had already been made by the respondent, that persons employed in the applicant's class of work were not eligible to receive contributions under the Act.

21 Returning to the s 50(1)(e) point, it seems on the evidence, as I have mentioned, that the applicant was not aware of the respondent's decision as set out in its letter to Monadelphous of 13 February 2019. For the purposes of s 50(2) of the Act, a person "aggrieved" by a "reviewable decision" may refer the decision to the Commission for review. To be "aggrieved" by a decision carries with it the inference that the affected person knows of the decision to which s 50(2) refers. As the applicant only learned of the respondent's decision made as set out in its letter of 15 October 2019 to the applicant, I consider that for the purposes of s 50(1) of the Act, and reg 102A of the *Industrial Relations Commission Regulations 2005* (WA), this was the "decision" from which the application to review has been properly brought and within the time limit as prescribed.

22 Despite this conclusion, had I reached the view that the relevant "reviewable decision" was that set out in the respondent's letter of 13 February 2019, I would have in the circumstances, extended the time for the institution of the application to review, under s 27(1)(n) of the *Industrial Relations Act 1979* (WA).

The merits

23 The issue on the merits turns on whether the applicant's employment was covered by the Act, so he had an entitlement to accrue service towards long service leave. This requires the conclusion to be reached that the definitions of both "employee" and "employer" in s 3(1) of the Act are met. They relevantly provide as follows:

employee means —

(a) a person who is employed under a contract of service in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification; or

(b) an apprentice;

employer means —

(a) a natural person, firm or body corporate who or which engages persons as employees in the construction industry; or

(b) a labour hire agency which arranges for a person who is a party to a contract of service with the agency (***person A***) to do work in the construction industry for another person (***person B***), even though person A is working for person B under an arrangement between the agency and person B,

but does not include a Minister, authority or local government prescribed under subsection (4)(c);

24 There is no dispute that the applicant was engaged in a classification of work in a prescribed industrial instrument and therefore the applicant was "substantively occupied" in this work: ***Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme*** [2019] WAIRC 00860; (2019) 100 WAIG 125 at par 28. However, as most recently discussed by the Full Bench of the Commission in ***Programmed Industrial Maintenance v Construction Industry Long Service Leave Payments Board*** [2020] WAIRC 00758, to enable the applicant to receive benefits under the Act, his employment must also meet the test of Monadelphous being an "employer" of the applicant. This requires consideration of whether the applicant was an employee "in the construction industry". Given the evidence, that the work performed by the applicant for both Fluor and Monadelphous was the same, with the only difference being in the title of his position, it is only if the Commission concludes that the applicant was employed in the "construction industry" that consideration can be given to the applicant's arguments in relation to his prior period of employment with Fluor.

25 For present purposes, "construction industry" is defined in s 3(1) of the Act as follows:

> ***construction industry*** means the industry —
>
> (a) of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the following —
>
> …
>
> (ii) roads, railways, airfields or other works for the passage of persons, animals or vehicles; and …

26 It was not contended by the applicant that his employment with Monadelphous fell within any other part of the definition, other than that set out immediately above. The meaning of "construction industry" in s 3 of the Act was extensively considered by the Full Bench in ***Programmed Industrial Maintenance***. It is necessary to focus on that part of the applicant's work performed "on site", as opposed to work performed at the workshop premises of Monadelphous' client, Rio Tinto. This means work performed away from an employer's own premises but does not necessitate the work be performed on a "construction site" or a "building site". It was common ground that the work performed by the applicant was split on a 50/50 basis between work performed in the Rio Tinto workshop and work performed out in the field. It also seemed common ground on the evidence, that the work performed by the applicant for Monadelphous, involved maintenance and repairs to track maintenance machines and other machinery and equipment, which was used to maintain and repair the Rio Tinto railway. The applicant himself accepted in his evidence, that he did not perform repair or maintenance work on the railway itself.

27 If the applicant was engaged on work in the Rio Tinto workshop, as seemed accepted by the applicant in his submissions, this is not work performed "on a site" for the purposes of the definition of "construction industry" in s 3(1) of the Act: ***Aust-Amec Ltd t/as Metlab Mapel and SRC Laboratories and Ors v Construction Industry Long Service Leave Payments Board*** (1995) 15 WAR 150; (1995) 62 IR 412. The "construction industry" is that as set out in s 3 of the Act, and is not confined to the commonly understood meaning of "construction industry" or "building industry" and it is an expansive definition: ***Programmed Industrial Maintenance*** at [44].

28 I therefore consider that the applicant's work "on site" for about 50% of his time was sufficient to conclude that the applicant's work was to a substantial degree, work involving "on site" work. If the work performed otherwise falls within the definition of "construction industry" in s 3(1), then the Act has application to the applicant's employment.

29 The applicant argued that he was engaged in "the industry of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to … railways". He submitted that in maintaining track machines and other equipment used by Monadelphous to maintain the Rio Tinto railway, he was an integral part of this industry, as he characterised it. As the applicant worked on "mobile plant" as it has been described, he relied on the decision of the Commission in Court Session in ***Construction Industry Long Service Leave Payments Board v Positron Pty Ltd*** (1990) 70 WAIG 3062. There, the Commission in Court Session concluded that employees engaged by a contractor to perform electrical maintenance work on the treatment plant of a gold mine, including on mobile plant, were employed in the construction industry. From this case, the applicant contended that it may be open to conclude that work performed on mobile plant is not precluded from the definition of "construction industry" in s 3(1) of the Act. This means, that the work by the applicant on what was accepted to be mobile track maintenance machines and other mobile plant, is to be included in the definition of "construction industry" too.

30 The applicant contended that his work is the performance of work on a site, "in the industry of construction, reconstruction, alteration, and maintenance of and repairs to … a railway being the Rio Tinto railway" (applicant's outline of submissions at [44]).

31 I do not accept this contention.

32 To conclude that the applicant was employed in the construction industry, requires the conclusion that the applicant was engaged on work involving "the maintenance of or repairs *to* … railways …". This is so, as affirmed by the Full Bench in ***Programmed Industrial Maintenance***, because the activities of the first part of the definition in s 3(1), all expressed disjunctively, are to be performed on the things, structures or works, set out in pars (i) - (xviii) of the definition. The words "the industry" after the words "construction industry means" do not enlarge or otherwise alter the scope of the words following, setting out the activities in the first part of the definition in s 3(1).

33 Importantly also, the definition means the performance of these activities "to" the matters set out in pars (i) - (xviii). Whilst this simple word has many meanings, in the context in which it is used, according to the Shorter Oxford Dictionary it means relevantly:

> "**(III)**. Expressing the relation of purpose, destination, result, effect, resulting condition or status. **(1)**. Indicating aim, purpose, intention, or design … **(2)**. Indicating destination, or an appointed or expected end or event. **(3)**. Indicating result, effect, or consequence: So as to produce, cause or result in. **(4)**. Indicating a state or condition resulting from some process: So as to become …".

34 In applying this part of the definition to the work of the applicant, he was not engaged on work for either Fluor or Monadelphous, involving maintenance of or repairs to railways themselves, as the definition requires. He was engaged on work better described as maintaining and repairing machines and other equipment, that is used to repair or maintain railways. The work that the applicant was performing was one step removed from the work to be performed "to" railways in the required sense. If one wishes to describe the work as an industry, it could be part of the industry of mechanical or machinery maintenance. However one describes the applicant's work, it was not work in the "construction industry" for the purposes of the Act.

35 Whilst the applicant referred to ***Positron*** as assisting his argument that maintaining and repairing mobile track maintenance machines fell within the scope of the Act, I do not think that ***Positron*** can be taken that far. There are three reasons for this. First, the work in that case was found to be within the definition of "construction industry" because the employees concerned were performing maintenance of or repairs to "works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and by products from materials;" in par (vi) of s 3(1)(a). This is a much broader category of work than the quite specific class of work in this case, of "the maintenance of or repairs *to*… railways" in par (ii), and this broader category of works is not relied on by the applicant in this case. Second, there is no reference to "mobile plant" in the definition in s 3(1) of the Act, or indeed anywhere in the Act. This appears to be a characterisation placed on the legislation by the respondent. The issue of whether or not a person is engaged as an employee in the "construction industry", depends not on whether a person works on mobile plant, but rather, whether they engage in work falling within the definition in s 3(1) of the Act. Finally, and in any event, the summary of facts in ***Positron*** was very brief and it is not open to draw any direct parallels between the facts in that case and the facts in this matter.

36 Thus, I think that the respondent, in its letters of 13 February 2019 and 15 October 2019, to the extent that they relied on the work of the applicant being characterised as work on "mobile plant", reached the correct decision but for the wrong reason. This does not however, for the purposes of this review application, alter the conclusion that I have reached that the applicant was not engaged in the "construction industry" in s 3(1) of the Act. Given this conclusion, it is unnecessary to finally decide whether the letter of 15 October 2019 constituted a "reviewable decision" in relation to the applicant's prior employment with Fluor. However, I have considerable doubt it would.

37 The application to review is dismissed.

2020 WAIRC 00792

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN WALLIS
	APPLICANT
	-v-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 8 SEPTEMBER 2020
FILE NO/S	APPL 47 OF 2019
CITATION NO.	2020 WAIRC 00792

Result	Application dismissed
Representation	
Applicant	Mr C Fogliani of counsel
Respondent	Ms R Harding of counsel

Order

HAVING heard Mr C Fogliani of counsel on behalf of the applicant and Ms R Harding of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2020 WAIRC 00352

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRANDON SACKMANN
	APPLICANT
	-v-
	CPB ELECTRICAL AND GAS SERVICES PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 24 JUNE 2020
FILE NO.	B 73 OF 2020
CITATION NO.	2020 WAIRC 00352

Result	Directions issued
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr B Ramsden

Directions

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr B Ramsden on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

(1) THAT the respondent provide to the applicant a copy of the applicant's timesheets for the period of his employment by no later than 1 July 2020.

(2) THAT the applicant file any amended claim within 28 days of receipt of the applicant's timesheets from the respondent.

(3) THAT the respondent file any amended response within 14 days of service of any amended claim.

(4) THAT the matter be listed for hearing for one day on a date to be fixed.

(5) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2020 WAIRC 00755

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRANDON SACKMANN
	APPLICANT
	-v-
	CPB ELECTRICAL AND GAS SERVICES PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 28 AUGUST 2020
FILE NO/S	B 73 OF 2020
CITATION NO.	2020 WAIRC 00755

Result	Dismissed
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr C Rimmer of counsel

Order

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr C Rimmer of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2020 WAIRC 00727

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DRAGAN KUZMANOVIC
	APPLICANT
	-v-
	SCAFFOLD LOGISTICS PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 17 AUGUST 2020
FILE NO/S	B 77 OF 2020
CITATION NO.	2020 WAIRC 00727

Result	Order issued
Representation	
Applicant	Mr D Kuzmanovic
Respondent	Mr C Hallinan

Order

HAVING heard Mr D Kuzmanovic on his own behalf and Mr C Hallinan for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the respondent be and is hereby permitted to appear, make submissions and give evidence by video-link in accordance with reg 44 of the Industrial Relations Commission Regulations 2005 (WA).

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2020 WAIRC 00732

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00732
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 18 AUGUST 2020
DELIVERED	**:**	TUESDAY, 18 AUGUST 2020
FILE NO.	**:**	B 77 OF 2020
BETWEEN	**:**	DRAGAN KUZMANOVIC Applicant AND SCAFFOLD LOGISTICS PTY LTD Respondent

Catchwords	:	Industrial law – Denied contractual benefits – Principles applied – Annual bonus – Performance indicators met
Legislation	:	
Result	:	Application upheld. Order issued
Representation:		
Applicant	:	In person
Respondent	:	Mr C Hallinan

Case(s) referred to in reasons:

Hotcopper Australia Ltd v David Saab [2001] WAIRC 03827; (2001) 81 WAIG 2704

Reasons for Decision

Ex Temporé

1 This is a denied contractual benefits claim. The applicant was employed by the respondent as its Operations Manager on 8 April 2019. His employment ended on 27 May 2020 as a redundancy, which is not relevant for the purposes of the present claim.

2 The applicant was employed under a written contract of employment, a copy of which was tendered as exhibit A1. The contract of employment sets out the terms and conditions of the engagement between the applicant and the respondent as the Operations Manager. In addition to the substantive terms in the contract there are set out at schedule 1 in the contract, particulars of the applicant's engagement, his date of engagement, his position, his duties, the probation period and importantly for present purposes, his annual salary package of $150,000 per annum paid on a weekly basis.

3 Additionally, in schedule 1 item 7 of the applicant's contract of employment was a further term providing for an annual bonus of $15,000 on achievement of key performance indicators. Furthermore, item 7 sets out that there will be a review of the salary package conducted at the end of each 12-month period. Other relevant terms of the contract were cls 5.1 which refers to Item 7 of Schedule 1, 5.6 dealing with salary review and 5.7 dealing with performance review, most particularly.

4 The applicant testified that in accordance with his contract of employment, after commencement in about the first week, he was provided by his general manager, Mr Payne, a document. The document was described by Mr Kuzmanovic, the applicant, as his key performance indicators. The document which is part of exhibit A2 tendered by the applicant, is headed "Personal Objectives and Key Performance Indicators 2019/20". This “Key Performance Indicators and Personal Objectives” document, sets indicators and criteria, and those objectives include HSEQT, people, cash, partnership and growth. The document then sets out a description of the performance indicator, and has three measures of performance, “threshold, target and outstanding”.

5 The applicant testified that in accordance with the respondent's practice, he undertook a performance appraisal with the general manager on 26 March 2020. This “Role Performance Appraisal” was over the prior 12-month period of the applicant's employment. The performance appraisal document, a part of exhibit A2, entails two parts. Firstly, was a self-assessment undertaken by the applicant, which is the final four pages of the document, by which the applicant assessed his own performance against his key performance indicators. Secondly, was the completion of the role performance appraisal form by the general manager.

6 The applicant testified that in accordance with the contract of employment and the “Key Performance Indicator and Personal Objectives” document provided to him at the commencement of his employment, that he met at least the “threshold” on two key performance indicators and on the other three key performance indicators he attained at least two performances at “target” level and one at “outstanding” level. This is reflected on the front of the role performance appraisal form at the bottom of the first page of the document, where the "review of major skills required to fulfil this position's duties" was completed by the general manager.

7 I note that on the second page of the performance appraisal document, it is signed by both the applicant as the employee and the reviewer, being the general manager. I note also that there is a general comment on the top of the second page of the role performance appraisal document. That general comment is about the applicant’s performance and the note reads as follows:

> Strong performer across all operational requirements. Great personal and leadership qualities. Drove strong operational culture. Regularly challenged himself with networking activities, and in and outside of hours identified maximum areas of improvement internally, and drove compliance to quality.

8 On the performance appraisal form which I have said was signed by both the applicant and his general manager, there are also some comments about future performance in the review period ahead.

9 The applicant testified that thereafter on 11 May 2020, he received a letter from his general manager informing him that as a result of restructuring of the respondent's business and changes in economic circumstances, his position as operations manager was to be made redundant. The letter of 11 May, which was tendered as exhibit A3, referred to various payments that the applicant would be entitled to receive on termination of his employment. I note towards the bottom of the page, where the letter refers to payments upon his departure, including “normal pay, redundancy payment, annual leave, and reimbursements”, there is also an entry for “annual bonus $15,000”. That letter is signed by the general manager of the respondent and it was also dated and signed by the applicant on 11 May 2020.

10 Somewhat curiously, a little later, on 18 May 2020 the applicant received a further document by way of a letter from Mr Adshead, the CEO of the respondent. This letter referred to the termination of the applicant's employment to be effective on 27 May 2020. The letter referred to a meeting between the applicant and the general manager, Mr Payne, on 13 May 2020, and confirmed that his position was being made redundant due to a restructuring of the business and other matters.

11 The letter from Mr Adshead also refers to what is described as a "discretionary bonus payment". The letter under this heading is as follows:

> A bonus payment will be reviewed in line with Scaffold Logistics Pty Ltd bonus payment policy and timeframes based on financial performance of the business and KPI assessment.

12 The applicant says that despite various requests after his employment came to an end, he has not been paid the bonus as was promised to him.

13 As this is a denied contractual benefits claim, the well settled principles in ***Hotcopper Australia Ltd v David Saab*** [2001] WAIRC 03827; (2001) WAIG 2704 apply. The matter turns on what entitlement the applicant had under his contract of employment. Clause 5, remuneration, of the contract, set out in exhibit A1, in my view is clear. Clause 5.1, which I have mentioned earlier, refers to the applicant's entitlement set out in item 7, schedule 1 to the contract. That refers to the applicant's salary package of $150,000 per annum, and an annual bonus of $15,000, on achievement of key performance indicators.

14 It also provides, as I have indicated, that a review would be conducted of the applicant's salary package at the end of each 12-month period. Whilst cl 5.6 and 5.7 of the contract of employment refer to a salary review and performance review respectively, in my view, these matters do not deal with the issue of a bonus, which in my opinion, based upon the plain terms of the contract, stands alone as a separate entitlement set out in the Schedule to the contract.

15 Furthermore, there is the terms of cl 5.5 providing for an incentive plan which, apparently, was to be implemented prior to the completion of the applicant's probation period. Whilst there was no evidence about this matter, in my view from a review of cl 5.5, that deals with a separate matter and is unrelated to the individual bonus claim or payment to the applicant.

16 Whilst the respondent contended that the bonus under item 7 in schedule 1 of the contract of employment was only payable on the combination of the achievement of personal key performance indicators and key performance indicators of the respondent's business as a whole, by way of a review of a manager one step removed, and on the authority of the CEO of the respondent, in my view that is not what item 7 of schedule 1 says at all. In my view, the bonus entitlement set out in item 7 is unqualified and is plain and clear on its terms as a matter of construction of the contract.

17 Whilst the respondent referred to a document which, whilst not tendered in evidence was put to the applicant in his evidence, entitled "A balanced score card" which appears to have been seemingly produced some time in April 2020, that document contained a coloured spreadsheet which on my review was incomplete, had no information in it as to actual year to date financial performance figures whatsoever. The applicant's evidence was that he had not seen that spreadsheet previously. It would also appear to be the case that the document itself refers to the performance of the respondent's business looking forward, not retrospectively, from the commencement of the applicant's employment.

18 In my opinion, this contractual benefits claim is clear cut. I have no doubt on a proper construction of the applicant's contract of employment, having read schedule 1, item 7, in accordance with its plain terms, and the contract as a whole, that the applicant was entitled to a $15,000 annual bonus on the satisfaction of key performance indicators given to him at the commencement of his employment by his general manager. The evidence is that the applicant did meet these key performance indicators, and in my view the terms of his contract of employment, as to his annual bonus entitlement were met. Given that item 7 of Schedule 1 contains an annual performance review, where performance against KPI's would be assessed, it is logical to infer any bonus be payable from the time of the annual review.

19 On the basis of the evidence and all of the material before the Commission, I am satisfied that the applicant has established on the evidence that he had a contractual entitlement to an annual bonus of $15,000 on achievement of key performance indicators. Those key performance indicators were met by way of his annual performance review, conducted by the General Manager, and there is nothing in the contract document at all, which supports the respondent's assertion as to its qualification of the bonus payment.

20 Accordingly, the Commission will order that the respondent pay to the applicant by way of a denied contractual benefit an annual bonus the sum of $15,000 gross, within 14 days of today.

2020 WAIRC 00736

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DRAGAN KUZMANOVIC
	APPLICANT
	-v-
	SCAFFOLD LOGISTICS PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 18 AUGUST 2020
FILE NO/S	B 77 OF 2020
CITATION NO.	2020 WAIRC 00736

Result	Application upheld. Order issued
Representation	
Applicant	In person
Respondent	Mr C Hallinan

Order

HAVING heard Mr D Kuzmanovic on his own behalf and Mr C Hallinan for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the respondent pay to the applicant the sum of $15,000 gross by way of a denied contractual benefit within 14 days of the date of this order.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2020 WAIRC 00796

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00796
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 31 AUGUST 2020
DELIVERED	**:**	FRIDAY, 11 SEPTEMBER 2020
FILE NO.	**:**	B 94 OF 2020
BETWEEN	**:**	RICHARD STERN Applicant AND TONY'S AUTO AUCTIONS PTY LTD Respondent

CatchWords	**:**	Industrial law (WA) – Denied contractual benefit claim – Claimed entitlement to royalties from television advert – No employment contract existed between parties - Claim for denied contractual benefit dismissed
Legislation	**:**	
Result	**:**	Claim dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr P Pernechele as agent

Reasons for Decision

(Given extemporaneously at the conclusion of proceedings – as edited by Commissioner Matthews)

1 Mr Stern, by an application for denied contractual benefits filed on 21 July 2020, seeks the payment of royalties related to a piece of acting that he says he did for the respondent in 2014. He says the piece of acting resulted in the production of a television commercial which was played on television in 2014, 2015, 2016, 2017, 2018 and 2019. He says that he has not been paid royalties for the years 2018 and 2019, having received the royalties for the showing of the advertisement on television in the previous years.

2 Mr Stern asserts that he was an employee of the respondent and that his entitlement to royalties may be enforced as an incident of his employment contract. He is not able in these proceedings to produce a written employment contract.

3 Mr Stern says, nonetheless, that he was informed there was an employment contract between himself and the respondent and there is an inference available that he was employed by the respondent. When pressed on why I ought draw that inference he referred to:

(1) in 2014 he said, his agent had said the matter was nothing to do with her anymore;

(2) a director of White Pixel Productions confirmed that, after that point in time, any arrangement for payment of royalties was one between himself and the respondent; and

(3) bank statements that indicated that the respondent, or someone from that business, had paid him the royalties in the years other than 2018 and 2019.

4 These were the three things upon which the applicant relied to try and establish, or have me draw an inference of, employment.

5 Employment is indicated by a person establishing that an entity had the requisite measure of control over a person in relation to their work. There are certain long-term established indicia of that control such as the payment by the putative employer of pay as you go tax, the putative employee having to deal with the putative employer in relation to issues such as attendance at work or leave from work, and ongoing direction from the putative employer to the putative employee in relation to the organisation of the putative employee's work life.

6 Mr Stern, by way of submissions to me, me not having called upon him to go into the witness box, tells me that he made an advertisement for the respondent back in 2014 and that he had very little else to do with the business after that time, that he received some royalty payments from the respondent but they ceased and were not paid in the calendar years 2018 and 2019. He claims that under the contract of employment he is entitled to payment of royalty money for those years.

7 I find that no question arises as to whether Mr Stern was an employee of the respondent. He has raised nothing to make me think he was controlled by the respondent in the relevant way, and certainly not in the years 2018 and 2019 to which his claim relates. If there had been any document, a letter or something that had passed between the applicant and the respondent of a contractual nature that suggested employment, or Mr Stern had told me something from the bar table about being directed or controlled on an ongoing basis, or even over a short period of time, by the respondent, in such a way as to have me thinking about the question of employment, I may have heard more in relation to this matter. However, nothing Mr Stern has told me gives me any pause for thought on the question of there being an employment relationship between the applicant and the respondent, and for that reason I told Mr Stern the claim would be, and it is now, dismissed.

2020 WAIRC 00797

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD STERN
	APPLICANT
	-v-
	TONY'S AUTO AUCTIONS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 11 SEPTEMBER 2020
FILE NO/S	B 94 OF 2020
CITATION NO.	2020 WAIRC 00797

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr P Pernechele as agent

Order

HAVING heard from the applicant in person and Mr P Pernechele, as agent, for the respondent on Monday, 31 August 2020;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order that the application be, and is hereby, dismissed.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

CONFERENCES—Matters referred—

2020 WAIRC 00685

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 7 AUGUST 2020
FILE NO/S	CR 34 OF 2018
CITATION NO.	2020 WAIRC 00685

Result	Discontinued by leave
Representation	
Applicant	Ms R Cosentino of counsel
Respondent	Mr R Andretich of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2020 WAIRC 00742

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WARREN MEDCRAFT
	APPLICANT
	-v-
	METLABS AUSTRALIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 26 AUGUST 2020
FILE NO/S	B 94 OF 2018
CITATION NO.	2020 WAIRC 00742

Result	Application filed 18 August 2020 dismissed
Representation	
Applicant	Mr G McCorry (as agent)
Respondent	Mr G Rogers (of counsel) and with him Ms L Jeffers (of counsel)

Order

HAVING heard from Mr G McCorry, as agent, for the applicant and Mr G Rogers, of counsel, for the respondent on Wednesday, 26 August 2020;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* order that the application filed 18 August 2020 be, and is hereby, dismissed.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

2020 WAIRC 00787

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WARREN MEDCRAFT
	APPLICANT
	-v-
	METLABS AUSTRALIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 7 SEPTEMBER 2020
FILE NO/S	B 94 OF 2018
CITATION NO.	2020 WAIRC 00787

Result	Orders issued
Representation	
Applicant	Mr G McCorry (as agent)
Respondent	Mr G Rogers (of counsel) and with him Ms L Jeffers (of counsel)

Orders

AND HAVING heard from Mr G McCorry, as agent, for the applicant and Mr G Rogers, of counsel, for the respondent on Tuesday, 1 September 2020 now therefore I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* order that:

1. the applicant file written closing submissions by close of business, Friday, 11 September 2020;
2. the respondent file written closing submissions by close of business, Friday, 18 September 2020;
3. any further hearing to be held on a date to be fixed by the Western Australian Industrial Relations Commission; and
4. the parties have liberty to apply.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

2020 WAIRC 00741

REVIEW OF DECISION - S.61A - OSH ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN ROSSI
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSION
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 25 AUGUST 2020
FILE NO.	OSHT 4 OF 2020
CITATION NO.	2020 WAIRC 00741

Result	Direction issued
Representation	
Applicant	Mr Don Sly and Mr Steven Rossi
Respondent	Mr Joseph Lloyd (of counsel)

Direction

HAVING heard from Mr D Sly on behalf of the applicant, with him Mr S Rossi on his own behalf and Mr J Lloyd (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Industrial Relations Act 1979*, hereby directs:

1. THAT the applicant file and serve upon the respondent any outline of witness evidence upon which he intends to rely by no later than 1 September 2020;
2. THAT the respondent file and serve upon the applicant any witness statements upon which it intends to rely by no later than 8 September 2020;
3. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as evidence in chief;
4. THAT the applicant file and serve upon the respondent an outline of submissions by no later than 18 September 2020;
5. THAT the respondent file and serve upon the applicant an outline of submissions by no later than 25 September 2020;
6. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2020 WAIRC 00793

REVIEW OF DECISION - S.61A - OSH ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY RAYMOND MORAN
	APPLICANT
	-v-
	WORKSAFE WA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 8 SEPTEMBER 2020
FILE NO.	OSHT 7 OF 2020
CITATION NO.	2020 WAIRC 00793

Result	Direction issued
Representation	
Applicant	Ms M Saraceni (of counsel)
Respondent	Ms T Hollaway (of counsel)

Direction

HAVING heard from Ms M Saraceni (of counsel) on behalf of the applicant and Ms T Hollaway (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT all matters requiring to be served on either party or the Tribunal may be served by email on each parties' nominated email address and proof of service is by the email sent notification;
2. THAT any request for production of documents or materials relevant to this matter for either party be by letter of request served no later than 15 September 2020;
3. THAT, subject to any valid objection(s), each party to provide relevant documents or materials requested by the other party by 22 September 2020;
4. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as evidence in chief;
5. THAT the applicant file and serve upon the respondent any witness statements upon which he intends to rely by no later than 3 November 2020;
6. THAT the respondent file and serve upon the applicant any witness statements upon which it intends to rely by no later than 17 November 2020;
7. THAT the applicant file and serve upon the respondent and outline of submissions by no later than 24 November 2020;
8. THAT the respondent file and serve upon the applicant an outline of submissions by no later than 1 December 2020;
9. THAT the parties shall give notice to each other of any witnesses required to attend the hearing for cross-examination at least 3 days prior to the hearing;
10. THAT the application be listed for hearing for one day on a date to be fixed;
11. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2020 WAIRC 00726

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 1 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PONNURAJAH (PON) RATNASINGHAM
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER D J MATTHEWS - CHAIRMAN
	MR G LEE - BOARD MEMBER
	MS M BASTIAN - BOARD MEMBER
DATE	FRIDAY, 14 AUGUST 2020
FILE NO	PSAB 22 OF 2019
CITATION NO.	2020 WAIRC 00726

Result	Orders issued
Representation	
Appellant	Mr M Amati (as agent)
Respondent	Ms J Vincent (of counsel) and with her Mr T Ledger (of counsel)

Order

WHEREAS this matter is listed for a five-day hearing to commence on Thursday, 20 August 2020;

AND WHEREAS the appellant filed an application requesting discovery, production or inspection of documents relevant to the appeal on Monday, 10 August 2020;

AND WHEREAS the respondent objected to part of the application by submissions filed Tuesday, 11 August 2020;

AND WHEREAS the application filed Monday, 10 August 2020 was listed for hearing on Friday, 14 August 2020;

AND HAVING heard from Mr M Amati, as agent, for the appellant and Ms J Vincent, of counsel, and with her Mr T Ledger, of counsel, for the respondent on Friday, 14 August 2020, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that:

1. the respondent disclose to the appellant, the appellant's agent and, where admitted into evidence, members of the Public Service Appeal Board the following complaint files held by the respondent numbered by complaint ID:

   - 141202;
   - 141733;
   - 148012;
   - 158032; and
   - 153812.

   Comprising, as applicable:

   (a) complaint form;
   (b) evidence;
   (c) correspondence between the complainant and officers of the respondent;
   (d) correspondence between the accused and officers of the respondent;
   (e) correspondence between officers of the respondent; and
   (f) drafts and final versions of formal documentation including requests for information, investigation reports and outcome letters; and

2. the remainder of the application filed Monday, 10 August 2020 be, and is hereby, dismissed.

(Sgd.) D J MATTHEWS,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2020 WAIRC 00753

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATASHA STEPHENSON
	APPLICANT
	-v-
	M.J EDWARDS T/AS M.J EDWARDS & J.PENDARVIS
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 26 AUGUST 2020
FILE NO.	U 27 OF 2020
CITATION NO.	2020 WAIRC 00753

Result	Direction issued
Representation	
Applicant	Ms E Creek (of counsel)
Respondent	Mr M Edwards

Direction

HAVING heard from Ms E Creek (of counsel) on behalf of the applicant and Mr M Edwards on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT each party shall give an informal discovery by serving its list of documents on each other by no later than 1 October 2020;
2. THAT inspection and provision of the documents to each other shall be completed by no later than 15 October 2020;
3. THAT each party shall provide the names of witnesses they intend on calling to give evidence at the hearing by no later than 14 days prior to the hearing;
4. THAT the applicant and respondent file and serve an outline of submissions and and any list of authorities upon which they intend to rely by no later than 7 days prior to the hearing;
5. THAT the matter be listed for hearing for 1 day on a date to be fixed; and
6. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2020 WAIRC 00729

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THIERRY LIEBGOTT
	APPLICANT
	-v-
	NORTH METROPOLITAN TAFE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 18 AUGUST 2020
FILE NO/S	U 39 OF 2020
CITATION NO.	2020 WAIRC 00729

Result	Orders issued
Representation (by correspondence)	
Applicant	Mr S Kemp (of counsel)
Respondent	Ms A Davies (of counsel)

Order

HAVING heard from Mr S Kemp, of counsel, for the applicant and Ms A Davies, of counsel, for the respondent by correspondence on Monday, 17 August 2020;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* and by consent make the following orders:

(1) Orders 3 to 5 of the orders made on 8 July 2020 are vacated and replaced with the following orders.

(2) Not later than 21 August 2020:

  (a) the parties will exchange lists of the names of the witnesses they intend to call at the hearing;
  (b) the applicant will provide a summary of any evidence it intends to lead:

    (i) from the applicant that goes beyond the statements he made to the independent investigator and which form part of the investigator's report; and

    (ii) from any of its witnesses other than the applicant.

(3) Not later than 28 August 2020 the respondent will provide a summary of any evidence it intends to lead:

  (a) from any witness who was interviewed by the investigator, that goes beyond the statements the witness made to the independent investigator and which form part of the investigator's report; and
  (b) from any other witness.

(4) Not later than 3 September 2020 the parties will:

(a) prepare an agreed bundle of documents consisting of the investigator's report, the correspondence between the parties in the course of the disciplinary process and any further documents on which they intend to rely at the hearing, which bundle will be tendered in evidence on the basis that the documents are what they purport to be; and

(b) notify the other party of the names of the witnesses that are required for cross-examination.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

2020 WAIRC 00264

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN OTS
	APPLICANT
	-v-
	ENABLE WA INC
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 7 MAY 2020
FILE NO/S	U 44 OF 2020
CITATION NO.	2020 WAIRC 00264

Result	Orders issued
Representation	
Applicant	In person
Respondent	Mr I Mumford and Ms M Venter

Order

HAVING heard from the parties during conciliation conferences on Thursday, 23 April 2020 and Thursday, 7 May 2020;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* hereby order that:

(1) the respondent file written submissions in relation to jurisdiction by close of business, Thursday, 21 May 2020;

(2) the applicant file written submissions in response by close of business, Thursday, 4 June 2020; and

(3) the parties have liberty to apply.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

2020 WAIRC 00728

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN OTS
	APPLICANT
	-v-
	ENABLE WA INC
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 17 AUGUST 2020
FILE NO/S	U 44 OF 2020
CITATION NO.	2020 WAIRC 00728

Result	Orders issued
Representation	
Applicant	In person
Respondent	Mr M Poole (of counsel)

Order

HAVING heard from the applicant in person and Mr M Poole, of counsel, for the respondent on Monday, 17 August 2020 now therefore I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* and by consent, hereby order that:

(1) By 4:00 pm on 31 August 2020, the respondent file any evidence and documents verified by statutory declaration on which the respondent intends to rely in support of the respondent's jurisdictional objections to the applicant's claim;

(2) By 4:00 pm on 31 August 2020, the respondent file an outline of submissions and list of authorities in support of the respondent's jurisdictional objections to the applicant's claim;

(3) By 4:00 pm on 7 September 2020, the applicant file any evidence and documents verified by statutory declaration on which the applicant intends to rely in response to the respondent's jurisdictional objection to the applicant's claim;

(4) By 4:00 pm on 7 September 2020, the applicant file an outline of submissions and list of authorities in response to the respondent's jurisdictional objection to the applicant's claim;

(5) The Commission shall determine the respondent's jurisdictional objection to the applicant's claim on the papers; and

(6) The parties have liberty to apply.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Fire and Emergency Services - Fleet and Equipment Services Agreement 2020 AG 18/2020	09/15/2020	Department of Fire and Emergency Services	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Senior Commissioner S J Kenner	Agreement registered
Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2020 AG 17/2020	09/03/2020	Public Transport Authority of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Commissioner T Emmanuel	Agreement registered
Public Transport Authority/ARTBIU Railway Employees (Network and Infrastructure) Industrial Agreement 2020 AG 19/2020	09/04/2020	Public Transport Authority of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Commissioner T Emmanuel	Agreement registered

NOTICES—Union Matters—

2020 WAIRC 00756

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. PRES 3 OF 2020

APPLICATION TO BRING THE MASTER LADIES' HAIRDRESSERS' INDUSTRIAL UNION OF EMPLOYERS OF W.A. INTO COMPLIANCE WITH ITS REGISTERED RULES

NOTICE is given of an application by Mr Les Marshall and Mr Barry Berger to bring the Master Ladies' Hairdressers' Industrial Union of Employers of W.A. into compliance with its registered rules in accordance with section 66 of the *Industrial Relations Act 1979* (WA).

The Application may be inspected at my office by appointment at 111 St Georges Terrace, Perth by any interested person without charge and any such person who satisfies the Chief Commissioner that he/she has a sufficient interest or desires to object to the application may do so by giving written notice to the Commission and to the applicants within 28 days of this notice.

(Sgd.) S BASTIAN,
[L.S.] Registrar.

31 August 2020

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2020 WAIRC 00754

REVIEW OF DECISION - S.61A - OSH ACT

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	CRAIG CHADWICK
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 27 AUGUST 2020
FILE NO/S	OSHT 3 OF 2020
CITATION NO.	2020 WAIRC 00754

Result	Application discontinued by leave
Representation	
Applicant	In person
Respondent	Ms B Rositano (of counsel)

Order

WHEREAS this is a referral pursuant to section 61A of the *Occupational Safety and Health Act 1984* (WA) to review the decision of the Worksafe Western Australia Commissioner to refuse to register the applicant as an assessor for licenses to perform high risk work in accordance with regulation 6.22 of the *Occupational Safety and Health Regulations 1996* (WA);

AND WHEREAS on 19 August 2020, the Tribunal commenced hearing the matter;

AND WHEREAS at the hearing the applicant sought to discontinue the referral;

AND WHEREAS on 19 August 2020, the applicant filed a *Form 1A – Multipurpose Form*, to discontinue in respect of the referral;

NOW THEREFORE, the Occupational Safety and Health Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) grants leave to the applicant to discontinue the referral and orders:

THAT the application be and is hereby discontinued by leave.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2020 WAIRC 00733

REFERRAL OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	STEPHEN PETER MAGYAR
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER OF THE DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 20 AUGUST 2020
FILE NO/S	OSHT 4 OF 2019
CITATION NO.	2020 WAIRC 00733

Result	Name of applicant and respondent amended
Representation	
Applicant	Mr M Amati
Respondent	Ms M Jones (of counsel)

Order

HAVING heard from Mr M Amati on behalf of the applicant and Ms M Jones (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) and *Occupational Safety and Health Act 1984* (WA), hereby orders:

THAT the name of the applicant be amended to 'Stephen Peter Magyar' and the name of the respondent be amended to 'Chief Executive Officer of the Department of Transport'.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2020 WAIRC 00734

REFERRAL OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	STEPHEN PETER MAGYAR
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER OF THE DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 20 AUGUST 2020
FILE NO/S	OSHT 4 OF 2019
CITATION NO.	2020 WAIRC 00734

Result	Consent Order issued
Representation	
Applicant	Mr M Amati
Respondent	Ms M Jones (of counsel)

Order

WHEREAS on 13 May 2019, the WorkSafe Western Australian Commissioner, referred this matter to the Occupational Safety and Health Tribunal for consultation on issues relevant to setting up Safety and Health Representatives pursuant to s 30(6) of the *Occupational Safety and Health Act 1984*;

WHEREAS on 16 August 2019, the Tribunal convened a conference between the parties and the conference was adjourned to allow the parties to engage in protracted consultations and negotiations; and

WHEREAS on 17 July 2020, the parties, by consent, provided the Occupational Safety and Health Tribunal, by way of a jointly signed Deed, as **attached**, that an agreement had been reached on all of the matters in dispute;

NOW THEREFORE, the Occupational Safety and Health Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984*, hereby orders:

(1) THAT the terms of the agreement are ratified by the Occupational Safety and Health Tribunal, pursuant to s 51J(5)(b) of the *Occupational Safety and Health Act 1984*; and

(2) THAT this application be, and is hereby discontinued.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.