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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—
Appeals against decision of Commission—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Brian William Altaras

(Appellant)

and

Martin Wiedermann trading as Guardian Industries.

(Respondent)

No. 15 of 1999.

BEFORE THE FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY
SENIOR COMMISSIONER G L FIELDING
COMMISSIONER S A CAWLEY

28 April 1999.

Reasons for Decision.

INTRODUCTION

THE PRESIDENT: This is an appeal against the whole of the decision of the Commission at first instance in matter No 156 of 1998, brought under s.49 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act"), the decision being appealed against having been given on 17 December 1998.

GROUNDS OF APPEAL

The appellant now appeals against the decision on the following grounds—

"1. The decision of the Learned Commissioner is against the weight of evidence in that the Learned Commissioner—

(a) Failed to take cognisance of the evidence of Hans Stiller that the Respondent had questioned him about a relationship between the Appellant and Tracey Streleuinas which supported the Appellant's claim that he was dismissed because of this alleged relationship and further found against the weight of evidence that the comments to Mr Stiller regarding that relationship made by the Respondent were intended as being humerous (sic).

(b) Relied upon evidence that the Appellant had mishandled the preparation of contracts but failed to take cognisance of the evidence that none of these allegations were ever put to the Appellant before his dismissal or as a reason for his dismissal.

(c) Found as a fact that David Wiedermann had more dealings with the day to day activities of the Appellant than Martin Wiedermann where on a proper consideration of the evidence there is no evidence to support thus finding and indeed the evidence is to the contrary.

(d) Found as a fact that the Respondent had specifically prohibited the Appellant from dealing with fencing firms other than ARC Fencing when the evidence including the evidence of the Respondent did not on a proper consideration thereof allow that conclusion to be reached.

(e) Did not place sufficient or any weight on the evidence that the amount of fencing orders placed through ARC Fencing by the Respondent through all its sales representatives in the last year of the Appellant's employment was only $14,000-00 out of the Respondent's total turnover of over 3,000,000-00 representing less than half of one percent thereof.

(f) Found that the Appellant had misbehaved in placing his feet on a desk when there was no evidence that the Appellant was ever during the course of his employment advised that this conduct (if it occurred) was inappropriate in all the circumstance of the work place and the terms of the Appellant's employment.

(g) Failed to place due weight on the evidence that the Appellant had never been warned by Mr Martin Wiedermann or Mr David Wiedermann that his employment was in jeopardy for any reason until his dismissal.

(h) Placed undue weight on evidence of faulty preparation of contractual documentation by the Appellant when there was no evidence before the Commission that any contractual difficulties arose out of the preparation of documents by the Appellant which caused loss or inconvenience to the Respondent.

(i) Found as a fact that the Appellant had recommended fencing other than ARC Fencing to the Respondent's clients when a proper consideration of the evidence could lead only to a conclusion that the Appellant had at the most only advised clients to shop around and assisted some clients from time to time in obtaining a price from Machine Man Fencing.

2. (a) It is considered that the matter is of such importance that in the public interest an appeal should lie in that it is always in the public's interest that justice be done and that evidence be considered and weighed objectively and that findings of the Commission be in accordance with the evidence presented.

(b) It is further considered that if the decision is allowed to stand it wi11 be authority for the proposition that an employee can be dismissed for alleged misconduct without any prior written or oral warning that his conduct places his employment in jeopardy being issued to him, in circumstances where no specific act on his part, taken on its own, is sufficient in itself to justify dismissal."

BACKGROUND

On 28 January 1998, the appellant sought orders in the Commission alleging that he had been unfairly dismissed by the respondent.

He commenced work with the respondent in October 1995 and was continually employed by the respondent until 12 January 1998, when he was dismissed.

The dismissal occurred, according to the appellant, after Mr Martin Weidermann, a Director of the respondent, accused the appellant of having an affair with another employee of the respondent, which the appellant denied.

The appellant complained that Mr Weidermann refused to listen to his denials and said that either the appellant or the other employee would have to be dismissed.

Three days later, Mr Wiedermann told the appellant that he had been informed by a client that the appellant had recommended that the client buy pool fencing from a retailer other than the respondent as nominated supplier and refused to listen to his protestations that he had not done so.

The position of the respondent was that Mr Weidermann, in jest, mentioned an affair with a lady but made no serious allegation in that respect against the appellant.

There was a meeting between the appellant and Mr Weidermann on 12 January 1998, brought about by a telephone call having been received by the respondent from a client who asked for the business telephone number of an "opposition" fencing company.

The customer told the respondent that the appellant had recommended that she get her pool fencing from a competitor of ARC Fencing. This was said, on behalf of the respondent, to be in direct contravention of specific instructions from the respondent. The respondent's case was that the appellant had been warned on two previous occasions not to recommend fencing produced by an opposition fencing company and, in addition, according to the respondent, the appellant had become lazy in his work.

Ultimately, the reason for the dismissal was said to be misconduct constituted by a breach of trust in recommending the product of a fencing company other than the nominated supplier to the respondent's customers.

At all material times, the respondent company operated a business in Cessnock Way in Rockingham; its head office was on Great Eastern Highway, Redcliffe.

The Redcliffe business had been running for 38 years. Later, the respondent purchased land in Rockingham and opened the business there in order to have two geographically separated branches of the business, both of them involved in the manufacturing, retailing and installing of swimming pools, and the retailing of pool accessories. The business, as a retailer, sold swimming pool accessories such as heaters, filters, pumps, salt water chlorinators and other types of equipment including outdoor furniture.

The appellant was employed by the respondent at Rockingham for 2 1/4 years as a salesman selling pools. Part of his duties, the respondent alleged, was to ensure that fencing was installed with the pool because of the "safety requirements of the law".

The respondent had commercial arrangements with one supplier, ARC Fencing, to provide fencing and a salesman, such as the appellant, was required by the respondent to sell ARC Fencing products and no others, according to the respondent's witnesses. According to Mr Martin Weidermann, the respondent advertised in the newspaper from time to time, including in its advertisements references to ARC Fencing; but, at other times, it might concentrate on advertising furniture to go with pools.

Fencing was not only sold by advertising, but, according to Mr Martin Wiedermann, automatically part of the sale of the pool, since customers prefer to buy the whole lot together, that is, the pool, the fence and the accessories. The fence does not necessarily, therefore, need advertising regularly. Importantly, the respondent's customers would automatically buy the fence unless they were advised by someone else to buy elsewhere and the appellant was instructed many times to promote ARC Fencing, according to the Messrs Weidermann.

THE EVIDENCE

I briefly summarise the evidence hereunder.

Mr Brian William Altaras

Mr Brian William Altaras, the appellant, gave evidence at first instance, to the effect that he was, at the time when he gave evidence, unemployed. He had previously been employed by the respondent company and, in fact, commenced employment as a salesman, going between the two stores at Redcliffe and Rockingham, in October 1995. In and after 1996, the appellant sold only from the Rockingham store.

He gave evidence that the business of the respondent was the selling of swimming pools and accessories.

The appellant said that the only time that he was spoken to about his method of operation was early in 1996, when Mr Martin Weidermann told him that he had been informed that the appellant had taken a "spiff" from people. A "spiff" is a commission or a gift from a supplier directly. Mr Weidermann suggested that this spiff was received from Machine Man Fencing. This was denied by the appellant. The appellant said that he did not recommend any particular fencing company, but that he suggested two or three different ones. However, he said that he recommended that the customers shop around to get the best price.

According to the appellant, Mr Martin Weidermann then picked the telephone up and spoke to his son, David, and said "It's okay, Brian doesn't recommend any one particular company. He recommends two or three." At that stage, the appellant said, he was not directed to suggest only ARC Fencing products.

The appellant said that he thought that his relationship with Mr Martin Weidermann to that time was pretty good, although, according to the appellant, Mr Weidermann is a very aggressive man and loses his temper easily.

The appellant said that at about 9.00 am on 9 January 1998, Mr Martin Weidermann spoke to him about a relationship which Mr Martin Weidermann alleged that he, the appellant, had with Ms Tracey Strelcuinis. He did so, having called the appellant into his office (see pages 8-9 of the transcript at first instance (hereinafter referred to as "TFI"). The appellant was flabbergasted and denied it. No-one else was present. The conversation seems to have become somewhat heated. The appellant then spoke to Mr Hans Stiller about this matter who said to the appellant that he, Mr Stiller, had been cross-examined by Mr Weidermann about the so-called affair.

The appellant said in evidence that he had no relationship with Ms Strelcuinis at all and had never taken her out. He had met her socially only twice when he was in a beer garden where she was present with her friends and family.

On the following Sunday at lunchtime, when Tracey arrived at work, the appellant approached her and asked why she said to Mr Martin Weidermann that she had been having an affair with the appellant. She denied this entirely and said that she had never said to Mr Weidermann that she was and that she

would resign immediately. Mr Peter Weidermann was there and he said not to worry about it because it would pass over tomorrow, and that he, Mr Peter Weidermann, would sort it out.

On Monday, 12 January 1998 at about 8.30 am, Mr Martin Weidermann came in and screamed and shouted at the appellant, also becoming agitated. Mr Martin Weidermann said that he had had a telephone call from somebody and that that person wanted a business card from some company that the appellant had recommended. (The appellant described Mr Martin Weidermann as an aggressive person.)

Mr Weidermann came to the appellant's office and said "I think you better go, we're finished." The appellant asked what he was being dismissed for and Mr Weidermann said "For committing industrial espionage." Mr Weidermann said "You can take your personal things and your briefcase and leave everything else. Do not touch anything of mine or Guardian Industries'."

The appellant asked, "could I have my money, could I give – you know, my – the payment so I can get paid", and Mr Weidermann said "No, post it to me" and asked him to leave and escorted him from the building.

The appellant denied that, before his dismissal, he had been warned that his performance was unsatisfactory.

Sales, at that time from Rockingham, equalled the whole of Perth sales. The nearest rival salesman in the firm was Mr Malcolm Lane. Turnover for the appellant's sales was approximately $1.38 million, which was half of total turnover whilst he was employed by the respondent. He did not remember that he ever put his feet up on the desk. He said that he does read novels, as all salesman do, because "it is a business where you either go in with nothing to do for days or you are on it "full pelt"".

The appellant did not remember it ever happening that he ignored customers. Indeed, he denied that he ignored customers. He denied that he had failed to follow lawful instructions to attend to customers or caused disharmony by informing other employees that their employment with Guardian Industries was insecure or unsafe. He did not cause problems for other employees, he said. The only complaint he had had about his work at his employment was that he was not pressing hard enough on the duplicates and that came from Mr Martin Weidermann's wife, Mrs Mary Weidermann. He said that he had not, as far as he knew, failed to inspect sites prior to installation of pools or that he failed to follow the respondent's instructions for drawing up contracts, site plans, and examinations of the premises prior to installation of the pools, etc. No-one ever told him how to draw up a contract. He also received no instructions for drawing up site plans and examining premises (see page 14(TFI)).

The appellant said that there were numerous advertisements for Guardian Pools, but there was no mention of fencing before advertising in the "Sunday Times" on 24 January 1998 and the "West Australian" on 7 February 1998.

The appellant emphasised in evidence that everybody, i.e. customers, were inclined to save money and that the way in which he "sold", was to attempt to sell the pool only, since it would be impossible to beat competitors on price if he added extras such as fencing, paving, etc. That is why he recommended that people arrange fencing, paving, etc. direct (see page 23(TFI)). He said that Mr Martin Weidermann knew how he sold pools (see, also his reporting this in cross-examination (pages 50-51(TFI)).

One order was placed with Machine Man Fencing by David Weidermann and that was during the time of the appellant's employment, he said. The appellant did not negotiate with ARC Fencing, nor did he sell any ARC Fencing, so far as he could remember. He said, also, that he did not sell any other fencing supplier's fencing and, in fact, did not get involved with it; he had never even measured a fence. He just told customers to shop around and get the best price that they could.

The appellant's evidence was that he had received no written warning from his employer about any misconduct, received no oral complaint from Mr Martin Weidermann, for whom he worked directly, and received no indication from anyone that his employment was in jeopardy.

Since his dismissal by the respondent, the appellant had received unemployment benefits, he said. The appellant gave evidence, too, of his unsuccessful attempts to find new employment (see page 28(TFI)). The appellant said, in cross-examination, that he had been six months out of work until the time of hearing (see pages 57-58(TFI)). He had made two to three applications for jobs per fortnight.

The appellant denied that he had failed in his duty of trust and said that he was unfairly dismissed.

In cross-examination, the appellant said that he was described as a pool consultant, but he was a pool salesman by profession.

The appellant said that the reason for his dismissal was that it was said that he was having an affair with Tracey Strelcuinas, the secretary at the Rockingham premises. According to the appellant's evidence, she told him that she was never accused by Mr Martin Wiedermann of having an affair with the appellant. She said that she had never even discussed such an allegation with Mr Martin Weidermann.

The appellant denied having sold any fencing for anybody; not Machine Man or Westralian Steel and not the two local people in Rockingham. He did refer a customer to Machine Man Fencing when she required a curved structure for her fencing. He said that he did not sell fencing whilst employed by the respondent (see page 150(TFI)). He said, also, that ARC Fencing was too expensive and that, if it were part of his employment to sell fencing, then he would not have been there.

The appellant denied that he "showed" a poor demeanour and attitude at work. The appellant denied that he ever put his feet up on the desk, but he certainly did sit in his office and read when he had nothing to do. He denied that he ignored customers, although he was shown some letters of complaint by J Moffat and Judy Sharp, written after his dismissal.

The appellant said that his duties were to sell swimming pools, that his turnover was very, very good, that he was doing the job to the best of his ability, working seven days a week and that nobody ever said that he was not doing his job well. In fact, the opposite was said. The appellant said that one would not sell as many pools in winter as in summer.

The appellant said that he had searched the newspapers at the Battye Library and found no reference to ARC Fencing in advertisements for the respondent until 7 February 1998. There had been a very old ARC sign at Guardian premises at Rockingham. There was now, at the date of his giving evidence, a brand new sign he said.

The appellant had previously worked for Sapphire Pools as a salesperson. There were only two or three contracts returned to him to be dealt with when he left. In cross-examination, he was referred to Machine Man Fencing leaflets which were kept in his drawer and said that there were hundreds of business cards for fencing and landscaping. When anybody brought cards in, these were left in the drawer. He reiterated in cross-examination that he did not sell any fencing at all. He retained a customer's deposit from a customer of Guardian Industries because he said that he did not want to send it through the post.

The appellant denied that he sold or promoted Machine Man fencing or anyone else's. He said that he issued customers with cards from anyone who brought cards in for landscaping or anything else. On one occasion, he referred a customer to Machine Man Fencing because she wanted a curved fence, and he put it through Guardian Industries accounts.

The appellant denied receiving training from Guardian Industries as to how their site plans and inspection sheets were written up (see page 40(TFI)). He did have experience from his previous employment of writing up contracts, site plans and inspection sheets. He was shown contracts involving Craig and Vicki Marshall, Stephen Riddiough, and Sharon Hitchcock.

The separation certificate issued by the respondent in respect of the appellant's termination of employment bears the notation "promoting and recommending competitor's products to our customers". In cross-examination, the appellant maintained his denial of having had an affair with Ms Streleuinas, but maintained that that was what he was accused of.

The appellant had a business card at the time he was employed. He did not deal directly with any of the contractors or constructors of swimming pools, he said.

He denied that he was dismissed for not handing over a $500.00 deposit because the pool had not yet been sold. Contracts would be approved by Mr Martin Weidermann. If not approved, contracts would be handed back to him to be fixed. At the time he walked out the door, he had not been informed that he was being dismissed for withholding a deposit.

Mr Hans Stiller

Mr Hans Stiller, an employee of Guardian Industries, was involved in, what he called, doing handovers, taking care of the pools and delivering furniture, gave evidence. He was employed there during the time of the appellant's employment by the respondent. Mr Ken Samson was the other salesman who was there, before the appellant. A person whom Mr Stiller called Tracey, the secretary, was there. Two of the Weidermann family came over to help sometimes. Mr Stiller said that he did not know what brand of fencing customers used. Most of the time he gets there, i.e. to the pool site, before the fencing is up.

There was a discussion between Mr Weidermann and the appellant. Mr Weidermann asked Mr Stiller whether he had heard if there was something going on between the appellant and Tracey. Mr Stiller said that he did not know and laughed at this, because he did not think that anything was going on. This was about four weeks before the appellant was dismissed. Mr Stiller made a joke of the conversation; he said that Tracey had told him that she was having an affair and she said it jokingly, too.

Mr Stiller did not recall any letter of 7 September 1998 to the effect that the firm was no longer promoting ARC Fencing. Mr Stiller said that he had seen the appellant leaning back with his feet on the desk, and reading novels. No other salesmen or members of staff were seen by him doing this. The office was not busy all the time, he agreed; indeed, in winter, sometimes people would not come in for the whole day. The appellant did once ask Mr Stiller, in front of his family, whether he thought his job was safe, which gave him concern. He said that this conversation occurred at his home, not at work, and this subject had never been discussed at work.

Mr Martin Weidermann

Mr Martin Wiedermann gave evidence that he was the Supervisor and Managing Director of the respondent company. The respondent has had the agency for ARC Fencing for 28 years and the business at Redcliffe had been running for 38 years, Mr Weidermann said. His son, David, encouraged him to expand into Rockingham, which he did. David manages Redcliffe and, together with Robert McNamara, manages the installation and deliveries of pools and fencing and accessories through Redcliffe, that is the head office.

The appellant's duties were those of a salesman in the Rockingham branch, selling pools and everything that was part of the pools. One of the most important things, by law, was fencing, Mr Weidermann said. A pool should not be installed without a fence around it and, many a time, a pool came into the Rockingham area and there was no fence on site; this forced them to send down all the way from Redcliffe with temporary fencing to put around the pool until the customer got his own fencing.

Like the appellant, Mr Weidermann said that the pool industry was very competitive. The peak of the season is from July to mid January.

It was part of the appellant's duties to sell fencing and the respondent sold ARC fencing. He was instructed to promote ARC Fencing (see page 116(TFI)). Most of the respondent's advertising is in the "West Australian" and the "Sunday Times". ARC Fencing was advertised; it goes on and off. Sometimes, in advertising, they would concentrate on furniture and then, in another year, they specialise with fencing in advertising, Mr Weidermann said.

Mr Martin Weidermann instructed the appellant to promote and sell ARC Fencing many times; he berated the appellant once for putting his feet on the desk, and for having his back to the entrance to his office and, therefore, to a customer.

Mr Martin Weidermann denied any headbutting incident with a customer.

On 23 December 1997, two days before Christmas, he asked the appellant to go and attend to customers on the premises and the appellant said he had already seen then and they were "tyre kickers". If any customer called the appellant a man with bad manners or complained about his attitude, the appellant called that person a liar, Mr Martin Weidermann said.

Mr Martin Wiedermann said that he did not have any problems with customers himself. There was no head-butting incident involving Mr Martin Weidermann and a customer, on Mr Weidermann's evidence.

Photographs were tendered and admitted into evidence; one of an employee, Mr McNamara, said to show how the appellant used to sit in his office reading novels and the next one was the pool display area which could not be seen from the position where the appellant was sitting.

On 2 January 1998, Mr Martin Weidermann said, he went into the appellant's office and told him to go and talk to customers, and he said "I like it cool". Mr Martin Weidermann then suggested, he said, that the showrooms were just as cool as the appellant's office, but that did not make any difference to the appellant because he kept on reading novels. This occurred, even though he directed the appellant otherwise.

One evening, according to Mr Weidermann, Tracey telephoned him and Mr Weidermann's wife answered the telephone. Tracey said that her job was at stake because "Brian was in Maddington", and, according to Peter Stewart, the Manager of Sapphire's statement, Brian was a little bit under the weather and told Peter Stewart that Tracey would have to be sacked.

Mr Martin Weidermann also gave evidence as follows. Mr Samson, who was a salesmen at Rockingham, left because he had an argument with the appellant. Mr Samson left in disgust, saying that he was not prepared to work with the appellant, Mr Weidermann said. David Weidermann telephoned Mr Martin Weidermann regularly, complaining about the contracts put together by the appellant; sometimes Mr Martin Weidermann tried to correct the appellant himself and sometimes he got David to get onto him. Malcolm Lane also had conversations with him and so did Robert McNamara. People from the Redcliffe office did ring up constantly complaining about contracts, site plans and the general "write up" of paperwork by the appellant.

There were particular problems with a "Billabong" pool which would not fit the site.

The paperwork done by the appellant was sloppy, untidy and irresponsible and left them wide open.

A bundle of contracts was tendered, to purportedly establish this evidence.

On 9 January 1998 was the discussion of the alleged affair with Tracey. Mr Weidermann said that he said to the appellant "it is not a crime to have an affair with a lady", and Brian said that he was not having an affair with Tracey, Mr Weidermann said "I never mentioned Tracey", and told him to get on with his job and that was the end of it. He asked Hans Stiller whether there was something really going on and Hans Stiller said he did not know and Mr Weidermann said "don't forget, it's none of our business", and that was the end of it. He said that he often forgot dates and faces.

Mr Weidermann gave the following further evidence. On 12 January 1998, the appellant walked in, sat in his chair again with his feet on the desk and started reading novels. At approximately 10.00 am, Mr Martin Wiedermann was in Tracey's office to help her sort out some accounts and Mr Weidermann answered the telephone. The caller on the other end was a lady requesting the replacement of a business card of "the fence man in Maddington" whose fence she was supposed to buy. She said that she had lost the business card for the Maddington fence man given to her by their salesman, Brian Altaras (the appellant). She said that Mr Altaras did not recommend fencing and she did not know that they sold fencing. He asked for her name and address, but she hung up.

Mr Martin Weidermann then rang David Weidermann in Redcliffe and told him that the appellant still seemed to be promoting the opposition's product, in this case, again, the fencing, and David said that he did not think they should put up with it much longer. Mr Martin Weidermann said that he called the appellant into his office and asked "What the heck is the matter with you, you can't keep on selling fencing or promoting fencing from our opposition, why don't you sell our fencing?" The appellant said "I can't." Mr Weidermann

said "Well, in that case, we can no longer afford to keep you employed. You're dismissed." (see pages 73-84(TFI)). There was no mention in that evidence of the appellant of what Mr Martin Weidermann said, when the appellant was dismissed, about retaining a deposit, sloppy preparation or unsatisfactory demeanour.

Mr Martin Weidermann gave this evidence, too. After Mr Weidermann told the appellant that he was dismissed, he escorted him to his office, told him to empty his briefcase and leave all the Guardian Industries belongings behind. The appellant said that he had a couple of unfinished deals in the books and asked whether he could finish them and Mr Weidermann said "That's okay, if you have already started work on them." One of the pools he sold and the other one he did not.

The appellant came back some time later, having been written a letter requiring him to surrender a $500 deposit on a transaction, and to return the key to the premises. He was paid his commission and $250 was deducted from his commission because of the cancellation and then, a few weeks later, there was a summons for unfair dismissal.

Mr Martin Weidermann said that the appellant was dismissed because of the fencing, because he lost too much money on it, because they could not afford to lose the margin on the fence and they needed to cover their overheads (see page 88(TFI)), and because of his shocking behaviour in the last three weeks of his employment, as well as many other mistakes and many other negligence cases that they had had over the last twelve months. However, the fencing was the most important. Mr Weidermann said that, after the dismissal, he noticed that a number of his company's customers had Machine Man fences and he said the customers admitted that Brian (Altaras) had given them the Machine Man business card and told them to buy the fence there.

Mr Martin Weidermann said that it would be impossible for the appellant to be reinstated and that he had not been unfairly dismissed.

In cross-examination, Mr Weidermann affirmed that Mr Samson left because he found it impossible to get on with the appellant, and that, from October 1995 to 12 January 1998, they advertised ARC Fencing products many times. He said that the advertising sign for ARC at the premises had been erected approximately four years before, although the appellant denied in evidence that it was there before the appellant left. Mr Weidermann reiterated that the appellant was dismissed for misconduct and the fencing brought it to a head: the appellant promoted opposition's products while working in the respondent's employ. Machine Man Fencing is not cheap. ARC Fencing is expensive but they have cheap fencing too, he said.

Mr Weidermann said that 15-20 more pools were sold at Redcliffe per year than the appellant sold.

The pool fencing income was not negligible and was a most important sideline because fences are compulsory for pools. The appellant sold very little fencing. He was, too, a very bad pool salesman. From 12 January 1998 to the date of hearing, the respondent had sold $42,000 worth of fencing. He said that the Redcliffe head office and factory handled all the installations, including the delivery and installation of fencing. He did not deny that the proceeds of fencing sales was a very small part of annual turnover (see page 99(TFI)).

Mr Martin Weidermann said that he never formed any suspicion that the appellant was having an affair with Tracey. He did not hear Mr Stiller say that he said to Mr Weidermann that they had an affair, he did not talk to Mr Stiller about the affair. It was not his business if they had an affair. He did not question Mr Stiller about their having an affair (Mr Stiller, however, said that he had). He often spoke to Mr Stiller in German.

Six times he had warned the appellant about sitting in his room with his feet up reading a novel, Mr Martin Weidermann said. He kept giving the appellant chance after chance. He did not write to him about his faults because he had not needed to write to staff in 38 years of business. He said that he knew nothing of the substance of a letter from David Weidermann dated September-October 1995 advising salesmen not to offer ARC Fencing.

Letters of complaint referred to were received long after the dismissal (see page 103(TFI)).

Mr Martin Weidermann received a number of complaints about the appellant: he was insolent, he ignored Mr Weidermann's express directions, did not complete his contracts, was not selling the number of pools he should have been selling. Nonetheless, he kept on giving the appellant chance after chance until, finally, it could not be tolerated any more. He did not call the appellant in and ask him about an alleged affair with Tracey. He gave warnings regarding the selling of competitors' fencing to the appellant before he was dismissed.

Mr Keith Paul Hitchcock

Mr Keith Paul Hitchcock, who did electrical work for Guardian Industries (the respondent) for their pools in the Rockingham/Mandurah area, gave evidence. He had signed a contract with Guardian for his own personal pool. They agreed on the price with Martin Weidermann and the appellant went to the contract site. There was fencing there that is provided, but the appellant handed them a brochure for Machine Man Fencing. Mr Hitchcock rang several places to get prices on the fencing. Machine Man Fencing ended up the cheapest, so they used them. He produced a leaflet for Machine Man which the appellant showed him. The fencing of the pool is definitely Machine Man fencing. The brochure was handed to Mr Hitchcock after he had told the appellant that he wanted to do the fencing himself. The appellant said "Try these guys. Mention my name and you'll get a good price, they'll do a good price."

Mr Hitchcock rang four suppliers but none of them was ARC Fencing. He picked people out at random from the Yellow Pages. Martin Weidermann left the question of fencing to the appellant. In cross-examination, Mr Hitchcock said that the appellant actually told them not to bother going to ARC because they were too expensive (see page 122(TFI)).

Mr David Paul Weidermann

Mr David Paul Weidermann gave evidence. He is the Manager of Guardian Industries and he covered the whole of the Redcliffe branch, but really the whole pool side. He is a qualified architect. He trained the appellant in the way they wanted things done (see pages 123-124 (TFI).

The sign "Smorgon ARC Authorised Distributor" on the fence of the ARC Fence sign was on the premises whilst the appellant was employed by the respondent (see pages 123-124(TFI)). The appellant was also given a price manual for ARC Fencing.

Mr David Weidermann gave instructions to the appellant concerning ARC Fencing, gave him an ARC price manual with the various styles of fence and a brochure from ARC and went through the various styles with him, how to measure up each panel and the gate and how to price it all up, as well as labour. It was part of the appellant's employment to promote that particular fencing.

ARC Fencing is sold from both branches, that is, Rockingham and Redcliffe. When the appellant came, the sale of fencing died completely. The appellant was meant to sell swimming pools and his duty would be to serve the customers, give them brochures, show them various pools and try to sell the pools to them. His duties also involved his going out on site with the buyers, checking the site, making sure it was possible to put the pool in, making sure they did not have a problem with access for machinery, filling out the contract, collecting a deposit, drawing up a plan to go to Council to get it passed, and then having the contract signed, getting the associated details to Redcliffe where the contract would be administered, the pool made and the work continued from there.

Mr David Weidermann criticised plans drawn up by the appellant as poorly drawn and sloppy (see page 127(TFI)). He said that he actually redrew some of the appellant's plans for him, but the appellant never adhered to what ought to be done and he had to repeatedly, as with contracts, alter them and take them back to the appellant (see pages 123-131(TFI)). Twice a week he would be ringing the appellant with a problem with a contract, or because the plan was not drawn or was badly done. There were ambiguous bits often that the appellant would have in the contract. It costs a lot of time and effort, these problems, he said.

The appellant had said that he could not sell the fencing at Rockingham and gave the price of ARC Fencing as the reason

for it (see page 132(TFI)). Martin and David Weidermann discussed the fact that no fencing was being sold at Rockingham, although it was part of the appellant's duties to sell fencing. It was not part of his duties to recommend competitors' fencing. He had never directed the appellant not to sell ARC Fencing. He had never permitted the appellant to sell "any other person's fencing" (see pages 133-134(TFI)).

They investigated and found that quite a number of telephone calls were made from the Rockingham branch to Machine Man Fencing during the appellant's employment (see pages 133-134(TFI)). Mr David Weidermann also visited a number of people who said that the appellant had referred them to Machine Man Fencing. Craig and Vicki Marshall were among them. Mr Martin Weidermann and Mr David Weidermann had a telephone discussion about a lady who had got a business card from a customer who said that she had been referred to a fencing contractor by the appellant in the Maddington area. They discussed whether they should dismiss him or what they should do about it. They did not particularly want to get rid of him.

Although the fencing was one thing, there was quite a number of other things that were more than a bit of concern, Mr David Weidermann said in evidence. The appellant was very reluctant to listen to what he was told. He continued to do things that he was told not to do. It was becoming difficult to work with him and have him selling pools when he made continual mistakes and, when corrected, would not listen.

Mr David Weidermann said to his father in a second telephone conversation that day that, with all the problems they had had with the appellant, they had to turn around and dismiss him. The appellant was referring customers to Machine Man Fencing, they concluded, when he had been instructed to sell ARC Fencing. A year before, Mr David Weidermann had seen leaflets of Machine Man Fencing near the appellant's telephone, which he instructed him to throw in the bin.

A number of warnings were given to the appellant in relation to quite a number of things. In particular, contracts, the way he did his plans, his whole procedure of going about it in regard to his site inspections, that he did not confirm accesses at times, and, in one case, he had not even checked to see if the pool would fit in.

Mr David Weidermann also gave evidence about the Billabong pool referred to by his father in evidence (see page 136(TFI)).

There was the appellant's attitude to the promotion of ARC Fencing, which he said he could not sell because it was too expensive. From Mr David Weidermann's point of view, the fencing business was a problem, but the dismissal was more to do with the basic inability of the appellant to write up plans. About one in every four contracts has some ARC Fencing in it, he said. He did not say that the appellant was entirely responsible for the downturn in fencing sales of ARC Fencing. He said that one difficulty was that the appellant had been instructed to sell a product and then "you find out that he is referring other products and, therefore, you do not know where that starts and where that ends. For all they knew, that could be the tip of the iceberg".

There were a lot of problems with the appellant's pool sales. The appellant was selling pools, but more were sold out of Redcliffe than Rockingham. Mr David Weidermann said that the fact that the effect on the business of the appellant not promoting ARC Fencing was negligible was not the issue which concerned him. The issue which concerned him was the appellant's non-performance and that he was promoting someone else's product, instead of theirs. That is what he made his judgment more on, and not specifically ARC Fencing (see page 149(TFI)). He did not say to the appellant, "Your job is at risk", in those exact words. He did, nonetheless tell the appellant that this could not continue, that he had to change the way he did his contracts, that he had to do it correctly, because they could no longer put up with the way he was dealing with it. Mr David Weidermann reiterated in cross-examination that the appellant was repeatedly told that he had to do things the correct way, how to do them and that he had to perform in that regard.

Mr Weidermann also referred to problems with siting of pools because the site had not been properly checked. The "Billabong" would not fit into Mr Luck's premises.

Mr David Weidermann said, in evidence, that he had never seen his father become violent with customers.

He said that it took him, Mr David Weidermann, a lot to want to dismiss a person, and very few had been dismissed from Guardian Industries.

Mr Weidermann also said that, when the appellant told them, as he did, that he had difficulty in selling ARC Fencing, he was not sacked at that point "because you don't get rid of a workman because he can't do one thing but can do other things" (see page 152(TFI)).

The appellant was told not to sell other people's fencing and to throw Machine Man Fencing pamphlets into the rubbish bin, Mr Weidermann said. His father did not raise the question of any relationship between the appellant and Ms Strelcuinas with him (see page 153(TFI)). Mr David Weidermann said that he did not write a letter in September or October 1995 pushing ARC Fencing.

He reiterated in cross-examination of all the problems which he said that the respondent had had with contract writing, plans and the appellant's poor performances in those regards and that this was the final straw, selling the product of an opposition (see pages 138-140(TFI)).

He did not deny in cross-examination that the total turnover for fencing was small. The downturn in fencing sales was not entirely due to the appellant, he admitted. He admitted that the appellant was selling pools and that there was no doubt about that. He asserted that more pools were sold out of Redcliffe (see page 145(TFI)).

Mrs Winsome Maxwell

Mrs Winsome Maxwell gave evidence that she and her husband bought a pool in 1994 and they obtained a Judgment in the Local Court against the appellant for $5,500 in another matter. On a judgment summons, she said the appellant said that he earned $1,800 in the month of October 1995.

Mr Craig Andrew Marshall

Mr Craig Andrew Marshall entered into a contract with Guardian Industries on 19 September 1996. The salesman, namely Mr Brian Altaras, the appellant, gave him a contact number for a place in Maddington called the Machine Man and told him that if he contacted them, they would be able to supply him with fencing. He was aware that Guardian Industries sold other fencing because the appellant told them. He was unable to recall if the appellant, at any time, mentioned ARC Fencing. He rang Machine Man Fencing and they put the fence in for him.

Mr Albert Robert McNamara

Mr Albert Robert McNamara gave evidence that he had been employed by the respondent, Guardian Industries, for 18 years, handling installations, production and servicing. He had been involved in manufacturing in the back of the workshop for ten years and in the office side for about eight years. He worked there whilst the appellant was employed by Guardian Industries. The Rockingham plans received from the appellant, on quite a few occasions, required those at Redcliffe to call back and verify things in the contract for his different abbreviations of what he put on there, the fencing, the paving, the site positioning of pools, measurements of pools, accesses to jobs, etc. Quite a few times, they had to take down rolladoors to get in or they could not get in or arrange access through another backyard because of the appellant's unsatisfactory site plans.

Similarly, with his contracts. There was one between Guardian Industries and Stephen Riddiough. Another one was a contract between Guardian Industries and Phillip Groves. None of the Messrs Weidermann said to him, at any time, that the appellant had to go or was to be sacked, Mr McNamara said.

Mr Neil Francis Jury

There was evidence from Neil Francis Jury. Mr Jury gave evidence that he had been with ARC Fencing for the previous five years to the date of hearing. There had been a very strong relationship between ARC Fencing and Guardian Industries, he said. He did have a conversation with the appellant and, at the time, they had a display at Guardian Industries at Rockingham, where there was a home centre. The appellant did not seem very interested in talking to Mr Jury. The impression Mr Jury got from the discussion with the appellant was that there seemed to be no interest in actually selling the

ARC fencing because it was too dear and it was too hard. They then discussed this with the ARC State Manager, Mr Steve McInerney and Mr Jury went back to Rockingham.

Mr Malcolm Stanley Lane

There was evidence, too, from Mr Malcolm Stanley Lane, Sales Manager for Guardian Industries. He had had a conversation with the appellant. Guardian Industries sells a particular fencing, Smorgon ARC. It was sold from the Rockingham branch. The appellant said that there was a problem selling ARC Fencing because of the cost, but the appellant did not specifically mention any competitor's fencing to him. He told the appellant that Guardian only sells Smorgon ARC Fencing and no other brand because they were reliable and do the job properly and that, if the appellant found it necessary that he should sell anybody else's fencing, he would require permission from Martin or David Weidermann. It was part of his duties to sell ARC Fencing only. The appellant did not seek approval to do otherwise from either Martin or David Weidermann, to his knowledge. They (the respondent) do sell a considerable amount of ARC fencing, he said. The appellant did sell almost as many pools as he did and was "a reasonable salesman, a nice salesman" (see pages 196-197(TFI)).

There was no directive that ARC Fencing not be sold from the Rockingham premises.

COMMISSIONER'S FINDINGS

The Commissioner had the benefit of seeing and hearing a number of witnesses give evidence. The only witnesses who gave evidence for the appellant were Mr Hans Stiller and the appellant. Mr Martin Weidermann, a Director of the respondent, and Mr David Weidermann, another Director of the respondent, gave evidence for the respondent. There was also evidence from Mrs Winsome Maxwell; from a Mr Craig Andrew Marshall, a customer of Guardian Industries which was accepted by the Commissioner as truthful; and Mr Robert McNamara who gave evidence about the quality of work emanating from the Rockingham office and whose evidence was also accepted as truthful.

There was evidence, too, from a Mr Neil Jury and Mr Malcolm Lane, whose evidence was not doubted by the Commissioner.

The Commissioner, upon hearing the evidence of the appellant, doubted its quality and that of Mr Martin Weidermann. In fact, the Commissioner observed that, if there was no corroborating evidence, he would find it difficult to decide the truth of the matter. However, he was assisted in this matter, he said, by the evidence of Mr David Weidermann, who had more dealings on a day to day basis with the appellant than did Mr Martin Weidermann.

The Commissioner, therefore, found, having examined the evidence of the witnesses, that the appellant had a poor record in dealing with the contractual side of the business of the respondent. The Commissioner also found that the appellant had been instructed in the respondent's requirements by Mr David Weidermann, that, for a considerable period, Mr David Wiedermann continued to have problems with contractual and administrative work done by the appellant, and that these problems had the potential to cost the respondent quite an amount of money by exposing it to legal action by customers.

The Commissioner observed that he was satisfied that Mr Weidermann had brought these matters to the attention of the appellant in such a way that the latter knew that he had to improve his work performance.

The Commissioner accepted the evidence of Mr David Weidermann that he had found out that the appellant had been recommending Machine Men Fencing to customers and had made enquiries about this. The employer, he found, was entitled to reach the conclusion, having regard to "all of the other things that had occurred", that the conduct of the appellant was inimical to the respondent's best interests.

Mr Hans Stiller, in evidence, corroborated Mr Martin Weidermann's view that the appellant did not behave in a proper way as a salesman, the Commissioner found.

ISSUES AND CONCLUSIONS

This was a discretionary decision, as that is defined in Norbis v Norbis 65 ALR 12.

The Full Bench may not interfere with the exercise of discretion at first instance, unless it finds that the exercise of the discretion miscarried, applying the principles enumerated in House v The King [1936] 55 CLR 499 (HC) and Gromark Packaging v FMWU 73 WAIG 220 (IAC).

As to findings made based on the evidence of witnesses seen and heard by the Commission, the well known principle in Devries v Australian National Railways Commission [1993] 177 CLR 472 (HC) reads as follows—

> "A finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against—that finding. If the finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the judge has failed to use or has palpably misused his advantage, or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable."

(but see State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq) and Others (1999) 160 ALR 588 (HC)).

The Commissioner heard the evidence of Mr Stiller and observed that he had no reason to disbelieve him. Accordingly, it was open to the Commissioner, therefore, to find that, contrary to what Mr Martin Weidermann said, the latter asked Mr Stiller whether he had heard whether something was going on between the appellant and Ms Strelcuinas. That being so, the Commissioner found that there was no substance to the allegation that Mr Martin Weidermann, in effect, arranged the dismissal of the appellant because of jealousy.

This was the inference, he said, which he was invited to draw from allegations that Mr Weidermann had alleged that the appellant and the former's secretary, Ms Strelcuinas, were having an affair. Mr Stiller's evidence, which the Commissioner accepted, was held to have had a humorous side. On a reading of Mr Stiller's evidence, I see no reason why the Commissioner should not have accepted it.

Accordingly, the key to his agitation was held by the Commissioner to be the problem with fencing sales raised by the customer who telephoned for a replacement business card.

The Commissioner did not accept the evidence of the appellant, nor did he accept the evidence of Mr Martin Weidermann, except where it was corroborated by the evidence of Mr David Weidermann and/or other witnesses. It follows that the Commissioner, not believing the appellant, did not have to accept his version of a discussion in which the appellant alleged that an alleged affair with Ms Strelcuinas was discussed, even though he did not accept Mr Martin Weidermann's version.

Ms Strelcuinas was not called to give evidence, but it was open to the Commissioner to find that any alleged affair with Ms Strelcuinas was not the reason for the appellant's dismissal, having regard to Mr Stiller's evidence, even though he did not find the uncorroborated evidence of Mr Martin Weidermann credible. There was, of course, some evidence from Mr David Weidermann, Mr Martin Weidermann and Mr McNamara that site plans were inadequately prepared and contracts not competently drafted. In the latter area, it does not, on the evidence, seem to have been a serious problem.

The appellant, in evidence, explained these matters. There was some evidence from Mr Stiller that the appellant sometimes put his feet on the desk. There was evidence from Mr Martin Weidermann to that effect. There was no evidence that this was frequent. The appellant admitted that he had done this, and he denied that he had sat with his back to customers. Somewhat cogently, he said that his income was commission dependent on sales, so that he certainly would not ignore customers. It was the undisputed evidence that, in winter, there were sometimes very few customers coming to the premises.

Further, it was not in real dispute that his sales were high and almost equal to those of his sales manager, Mr Malcolm Lane, on the latter's evidence. His selling was not criticised by Mr David Weidermann.

Mr Lane described the appellant in evidence as "a reasonable salesman, a nice salesman". Mr Martin Weidermann tried to say that he was not a competent salesman, but he was, in my opinion, in the face of other evidence, correctly disbelieved.

On the evidence of the appellant, as corroborated by Mr Lane and, to some extent, by Mr David Weidermann, the Commissioner was entitled to find that the appellant was a competent salesman, as such. There was no reason given to him at the time that his dismissal was due to his sales results, nor was it asserted to be the case in evidence. There was no assertion, either, that the appellant's failure to account for $500 commission until later was a cause for dismissal. In any event, this occurred after his dismissal and he did account.

I now come to the only expressed reason for the appellant's dismissal. That is, the only reason expressed at the time, on all of the evidence. This was his alleged promotion for sale of fencing other than ARC Fencing, which was the fencing sold and recommended by the respondent.

It was not in dispute that the turnover from fencing was only a very small part of the turnover of Guardian Industries from the sale of swimming pools and swimming pool fittings and accessories. There was the evidence of the appellant that he did not sell fencing at all, but gave the names of suppliers of fencing so that the purchaser could get the best price for fencing and other accessories. That, he explained in evidence, enabled him to sell the pools, which is what he did. He did, quite clearly, tell a number of people, including Mr David Weidermann that ARC Fencing was too dear and too hard to sell.

The appellant was not dismissed nor expressly warned of his jeopardy in relation to that statement. However, there was evidence from Mr Lane, Mr Martin Weidermann and Mr David Weidermann that the appellant was told that it was part of his duties to sell ARC Fencing only and that his had always been the case. Mr David Weidermann gave evidence that he told the appellant to throw Machine Man Fencing leaflets out when he found them in the appellant's office. (Mr Lane and Mr David Weidermann also denied the appellant's assertion that salesmen were not instructed to sell ARC Fencing.)

Mr Neil Jury of ARC Fencing gave evidence of a strong relationship between ARC and Guardian Industries. There was evidence from Mr Craig Marshall that the appellant referred him to Machine Man Fencing. There was evidence, too, from Mr Keith Paul Hitchcock that he was handed a brochure for Machine Man Fencing by the appellant who told him to mention the former's name and he would get a good price. Indeed, he said that he should not go to ARC because they were too expensive.

Then there was the fact that the appellant had given a Machine Man card to the customer who rang on the morning when he was dismissed.

The Commissioner accepted the evidence of other witnesses that it was the appellant's duty to sell ARC fencing and that he had promoted other fencing. On the evidence which I have outlined, it was open to him so to do, particularly when he did not accept the credibility of the appellant as a witness. I saw nothing, on an examination of all of the evidence, to persuade me that that view of the appellant as a witness was wrong.

The next question is whether the appellant was warned or whether any failure to warn him before dismissal was unfair. He was, on the evidence, never warned that his employment was in jeopardy, before his dismissal, orally or in writing. He was, on the evidence, on a number of occasions, told that it was his duty to sell ARC Fencing. There is no evidence that he was checked when he said that it was too hard to sell.

There was evidence, accepted by the Commissioner, that the appellant was warned about putting his feet on the desk (admitted by him) and inattention to customers, something which he denied. There was evidence, too, from Mr David Weidermann, accepted by the Commissioner, that the appellant was told a number of times about drafting contracts correctly and about preparing site plans. There was some evidence of problems with these matters. In particular, this was the main problem which Mr David Weidermann had with the appellant's performance. On the evidence, it was open to find that that was not raised as a ground for dismissal and was only alleged after proceedings got underway.

The fact of the matter, too, was that the appellant's competence as a salesman was borne out by Mr Lane and not challenged by Mr David Weidermann. He was not dismissed for being an incompetent salesman, nor was he even, on the evidence, told that he was.

I turn now to the grounds of appeal.

Ground 1(a) is, for the reasons I have set out above, not made out because the finding was open to the Commissioner to make, once he did not accept the evidence of the appellant, of Mr Martin Weidermann and accepted the evidence of Mr Stiller.

As to Ground 1(b), it was open to find some mishandling of contracts, but this was not alleged against him at the time of dismissal. That it was not might discount the seriousness of it.

As to Ground 1(c), it is clear that Mr David Weidermann did not have the amount of day to day dealings with the appellant that his father did. However, on the evidence, he had significant infrequent dealings with the appellant. There was sufficient evidence for the Commissioner to find, expressly and by implication, that the respondent had prohibited the appellant from selling or promoting fencing products which were not those of ARC Fencing.

It is quite clear that insufficient weight was placed on the tiny amount of sales by the respondent overall of ARC Fencing. However, Mr David Weidermann's evidence that he was given chance after chance was accepted and, on a reading of the transcript of his evidence, I see no reason to quarrel with that decision. It did not render the dismissal unfair that the appellant was not given the reasons later referred to in evidence, by way of complaint about his performance.

Mr David Weidermann had, on his evidence, brought the matters of complaint to the appellant's attention in such a way that he knew that he had to improve his performance. The Commissioner found, as he was entitled to find, that, notwithstanding Mr David Weidermann's instructions to him, that for a considerable period, Mr David Weidermann had problems with contractual and administrative work done by the appellant, with the potential for extra cost and exposure to litigation to arise as a result. There was corroboration from Mr McNamara. There was also some evidence that, at least, sometimes the appellant did not behave properly. Mr Stiller gave some evidence to that effect.

He had, on all of the evidence of the Messrs Weidermann and Mr Lane, been told that his duty was to sell ARC Fencing and that exclusively. There was evidence that he did promote Machine Man Fencing. That was contrary to his duty. The Commissioner accepted their evidence and it was open to him to do so. Thus, it was not unfair that all of these matters were not raised upon his dismissal.

It was open to find that the appellant was put on sufficient notice and given the opportunity to mend his ways.

The Commissioner, on the evidence of Mr Hitchcock and Mr Marshall, was entitled to find, as he did, that persons were referred to Machine Man Fencing and, in one case, at least, were directed from ARC Fencing when the clear evidence of three witnesses was that he was directed to sell and promote ARC Fencing only.

I do not see the principle in Shire of Esperance v Mouritz 71 WAIG 891 (IAC), nor Margio v Fremantle Arts Centre Press 70 WAIG 255 as being obstacles to a finding that the dismissal was not unfair in the circumstances of this case, for those reasons.

There was no error in terms of the principle expressed in Devries v Australian National Railways Commission (op cit). No appeal ground fatal to the decision at first instance is made out.

It was open to the Commissioner to find, for the reasons which I have outlined, that the dismissal was not harsh, oppressive and unfair (see Miles and Others t/a Undercliffe Nursing Home v FMWU 65 WAIG 385 (IAC)). The exercise of discretion, therefore, did not miscarry.

I would, for those reasons, not substitute the exercise of the Full Bench's discretion and find that the dismissal was unfair.

Ground 2 is groundless and irrelevant because the decision was a final decision and not a "finding", as defined in s.7 of the Act.

SENIOR COMMISSIONER G L FIELDING: The facts in this matter have been set out sufficiently in the reasons for decision prepared by the President. I therefore need not repeat them on this occasion.

The nature of the proceedings before the Commission at first instance was such that the outcome of those proceedings depended upon the determination of conflicting allegations concerning the circumstances surrounding the dismissal of the Appellant from his employment. The learned Commissioner resolved that conflict in favour of the Respondent. He resolved the matter in that way because in general he preferred the evidence adduced by and on behalf of the Respondent to that of the Appellant.

In essence the grounds of appeal attack the learned Commissioner's assessment of the credibility of the evidence adduced in the proceedings. The Appellant argues that the learned Commissioner either failed "to take cognizance of" or "place sufficient weight" on the evidence of the Appellant and that of Mr Stiller, a fellow employee, and that the learned Commissioner placed "undue weight" on the evidence of the Respondent's principals.

Essentially the Appellant is asking the Full Bench to re-hear the matter on the papers. That is not a legitimate process for the Full Bench to adopt. The principles governing the determination of appeals of this nature are well settled. Only if it is clear that the member of the Commission who heard the matter at first instance failed to use or misused the advantage of having both observed and heard the witnesses, or if the findings under attack are inconsistent with the incontrovertible facts or otherwise improbable should the Full Bench, which has not had that advantage, interfere with findings of fact based on the assessment of their credibility (see: *Cain v. Shuttleton (1996) 76 WAIG 4872, 4874)*. As pointed out by the Industrial Appeal Court in *Federated Miscellaneous Workers Union of Australia, WA Branch v. Board of Management Narambeen District Hospital (1992) 72 WAIG 471 at p. 473* "It is an extremely difficult task for an appellant to overturn a finding of fact based on credibility".

Whilst I would not have been surprised if the learned Commissioner had come to a different conclusion on the facts, it cannot be said that he misused the advantage of observing and listening to the witnesses or that the findings of fact based on his assessment of the credibility of the respective witnesses was perverse. The learned Commissioner noted that the Appellant denied most of the allegations put to him on behalf of the Respondent but clearly he did not find the Appellant's evidence convincing. He doubted "the quality of the evidence given by the Appellant". Clearly that was an assessment he was entitled to make. Similarly, he had reservations as to the quality of the evidence adduced by the Respondent's managing director, Mr Martin Weiderman. However, he preferred the evidence of Mr Weiderman to that of the Appellant essentially because his evidence was consistent with that of Mr David Weiderman, the Respondent's manager, whom he regarded as "a sound witness". Again, that was a judgement which he was entitled to make and was in a better position to make than is the Full Bench. He had the benefit of observing and listening to the witnesses, a very real benefit and a benefit which the Full Bench does not have. Furthermore, what Messrs David and Martin Weiderman said about this matter was at least in part supported by the evidence of Messrs Marshall and McNamara whose evidence the learned Commissioner accepted as being reliable, as he was entitled to do.

In this matter all the findings made by the learned Commissioner were supported by evidence given by the witnesses the Commissioner found to be the most credible. In particular, there was ample evidence to support the finding that the dismissal was not linked to the "affair" the Appellant was alleged to have had with a fellow employee. Not only is that finding consistent with the evidence of Messrs David and Martin Weiderman, but there was no direct evidence to the contrary. Instead, the Commission was invited to infer that this was the real reason for the dismissal. The Commission expressly declined to draw that inference. Having regard to the evidence of Messrs David and Martin Weiderman that is not surprising. Furthermore, what they said in this respect is to some extent verified by the evidence of Mr Stiller, a fellow employee of the Appellant. Mr Stiller testified that Mr Martin Weiderman questioned him about the Appellant's alleged "affair" as early as "up to four weeks" before the Appellant was dismissed. Furthermore, the evidence of Mr David Weiderman in particular, supports the learned Commissioner's finding that the Appellant had been warned that if he continued to handle contracts for the sale of the Respondent's swimming pools in the way he had, his employment could not continue. The fact that his handling of these matters in an unsatisfactory way is not only supported by the evidence of Mr Weiderman, but in part supported by the evidence of Mr McNamara, another employee of the Respondent. Likewise, there was ample evidence that the Appellant had been told he was not to promote fencing manufactured by Machine Man as an adjunct to selling pools manufactured by the Respondent. That much is clear from the evidence of Messrs David and Martin Weiderman, particularly the former whom the learned Commissioner regarded as being a reliable witness. Although the Appellant denied he had ever been warned in this respect or indeed that his performance was less than satisfactory his evidence in this regard was in direct conflict with that of both Messrs David and Martin Weiderman. It was for the learned Commissioner to resolve that conflict. There is no compelling reason on reading the transcript of the proceedings why that conflict should be resolved in favour of the Appellant. There is ample evidence to support the findings made by the learned Commissioner in favour of the Respondent in this regard.

Having found that the Appellant was instructed not to sell fences manufactured by Machine Man and having found that he had been advised that his employment would be at risk unless he altered the way in which he conducted sales for the Respondent, it is difficult to see how the termination of his employment could be said to be either harsh, oppressive or unfair. He appears not only to have been in breach of his duty of fidelity to the Respondent, but also could be said to have been disobedient in a manner which went to the foundation of his contract of employment, quite apart from any consideration of his general work performance. On that basis it was clearly open to the Respondent to dismiss the Appellant summarily as it did. Certainly it was open to the learned Commissioner to conclude, as he did, that the Appellant had not discharged the onus the Appellant bore to establish, on the balance of probabilities, that the termination of its employment was either harsh, oppressive or unfair.

In circumstances, I would dismiss the appeal.

COMMISSIONER S A CAWLEY: This is an appeal against a decision of the Commission constituted by a single Commissioner to dismiss a claim by Brian William Altaras ("the appellant") that he had been unfairly dismissed by Martin Wiedermann trading as Guardian Industries. The decision issued on 17 December 1998. The ground on which the appellant seeks to overturn the order is that the Commissioner's decision is against the weight of the evidence in that he —

(a) Failed to take cognisance of the evidence of Hans Stiller that the Respondent had questioned him about a relationship between the Appellant and Tracey Streleuinas which supported the Appellant's claim that he was dismissed because of this alleged relationship and further found against the weight of evidence that the comments to Mr Stiller regarding that relationship made by the Respondent were intended as being hum[o]rous.

(b) Relied upon evidence that the Appellant had mishandled the preparation of contracts but failed to take cognisance of the evidence that none of these allegations were ever put to the Appellant before his dismissal or as a reason for his dismissal.

(c) Found as a fact that David Wiedermann had more dealings with the day to day activities of the Appellant than Martin Wiedermann where on a proper consideration of the evidence there is no evidence to support thus finding and indeed the evidence is to the contrary.

(d) Found as a fact that the Respondent had specifically prohibited the Appellant from dealing with fencing firms other than ARC Fencing when the evidence including the evidence of the Respondent did not on a proper consideration thereof allow that conclusion to be reached.

(e) Did not place sufficient or any weight on the evidence that the amount of fencing orders placed through ARC Fencing by the Respondent through all its sales representatives in the last year of the Appellant's employment was only $14,000-00 out

of the Respondent's total turnover of over [$]3,000,000-00 representing less than half of one percent thereof.

(f) Found that the Appellant had misbehaved in placing his feet on a desk when there was no evidence that the Appellant was ever during the course of his employment advised that this conduct (if it occurred) was inappropriate in all the circumstance of the work place and the terms of the Appellant's employment.

(g) Failed to place due weight on the evidence that the Appellant had never been warned by Mr Martin Wiedermann or Mr David Wiedermann that his employment was in jeopardy for any reason until his dismissal.

(h) Placed undue weight on evidence of faulty preparation of contractual documentation by the Appellant when there was no evidence before the Commission that any contractual difficulties arose out of preparation of documents by the Appellant which caused loss or inconvenience to the Respondent.

(i) Found as a fact that the Appellant had recommended fencing other than ARC Fencing to the Respondent's clients when a proper consideration of the evidence could lead only to a conclusion that the Appellant had at the most only advised clients to shop around and assisted some clients from time to time in obtaining a price from Machine Man Fencing.

Fundamentally these go to an argument that the Commissioner erred in his evaluation of the evidence before him in reaching the conclusions he did as to the facts. The Appellant argues that the Full Bench, having regard for the record, should reach different conclusions.

I agree with the Senior Commissioner that it is not for the Full Bench on appeal to rehear a matter on the papers. And while I too consider that it would have been unremarkable had the Commissioner at first instance come to a different conclusion in the matter, I adopt the reasoning of the Senior Commissioner as to why it is not for the Full Bench to interfere now. As Franklyn J stated in the matter of Gromark Packaging and the Federated Miscellaneous Workers Union of Australia, WA Branch stated *((1993) 73 WAIG 220 at 224)*—

> ...An appellate court does not overturn findings of fact unless satisfied that the trial judge has misdirected himself or that "any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion)" *(Paterson v Paterson (1953) 89 CLR 212 at 224* and see *Warren v Coombes (1979) 53 ALJR 293*; (*1979) 142 CLR 531 at 300*). As to inferences, an appellate court may itself decide on the proper inferences to be drawn from facts which are undisputed or established by the findings of the trial judge (*Warren v Coombes, supra*) but it shall give full weight and respect to the conclusions of the trial judge. An inference properly open on such facts is only to be overturned if considered wrong. The same principles apply to the Full Bench on appeals to it.

The onus is on the appellant here to persuade the Full Bench that the Commission at first instance, which had the advantage of seeing witnesses first hand, fundamentally erred in conclusions going to their credibility.

I agree with the conclusion of the Senior Commissioner that this onus has not been discharged, adopt his reasoning and have nothing to add. I would dismiss the appeal accordingly.

THE PRESIDENT: For those reasons, the appeal is dismissed.

Order accordingly.

APPEARANCES: Mr B W Altaras on his own behalf as appellant.

Ms D Baruffi (of Counsel), by leave, on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Brian William Altaras

(Appellant)

and

Martin Weidermann trading as Guardian Industries

(Respondent)

No 15 of 1999.

BEFORE THE FULL BENCH.

HIS HONOUR THE PRESIDENT P J SHARKEY
SENIOR COMMISSIONER G L FIELDING
COMMISSIONER S A CAWLEY

28 April 1999.

Order.

THIS matter having come on for hearing before the Full Bench on the 11th day of March 1999, and having heard Mr B W Altaras on his own behalf as appellant and Ms D Baruffi (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 28th day of April 1999 wherein it was found that the appeal should be dismissed, it is this day, the 28th day of April 1999, ordered that appeal No 15 of 1999 be and is hereby dismissed.

By the Full Bench.

(Sgd.) P. J. SHARKEY,
[L.S.] President.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch

(Appellant)

and

John Holland Construction & Engineering Pty Ltd

(Respondent).

No. 1953 of 1998.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY
COMMISSIONER S A CAWLEY
COMMISSIONER A R BEECH.

29 April 1999.

Reasons for Decision.

INTRODUCTION

THE PRESIDENT: This is an appeal made under s.49 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act") against the decision of the Commission, constituted by a single Commissioner, given on 12 October 1998 in matter No CR 315 of 1997, on the grounds which are substantial, there being 34 paragraphs and which are set out in the Schedule to the Grounds of Appeal.

It is apparent that the appeal is against the whole of the decision. The decision was constituted by an order dismissing the application made by the appellant organisation on behalf of one of its members, Mr Dean Thomas Foelmli.

It is against that decision that the appellant appeals on the following grounds, as amended upon the hearing of the appeal.

GROUNDS OF APPEAL

"1. The Commission erred in fact and law in finding that the applicant was dismissed for reasons other than fighting when such finding was not open on the evidence.

2. The Commission erred in fact in finding that Mr Foelmli got out of his seat and walked down the bus after Mr Bond when there was no direct evidence to support this and the hearsay evidence was considered to be unreliable by the witness Macaree.
4. The Commission erred in fact and law in accepting Macaree's assertion that he considered all options prior to dismissing Foelmli when that evidence was not credible.
5. The Commission erred in law in not finding that the employer had not discharged its onus of proving that summary dismissal was justified in these circumstances.
6. The Commission erred in fact and law in preferring the evidence of Macaree to the evidence of Craig, who was present at the relevant time and considered that the incident on the bus was a minor scuffle and did not warrant reporting.
7. The Commission erred in fact and law in finding that "the investigation satisfied Macaree that Foelmli had misconducted himself by his aggressiveness towards Bond, such that Bond struck him" when Macaree's(sic) was unable, in his evidence, to clearly articulate the elements of misconduct which were said to constitute serious misconduct and where Macaree's evidence in chief was that Foelmli was dismissed for fighting.
8. The Commission erred in fact in finding that the evidence of Craig was that Foelmli was not simply sitting back and reacting to Bond's aggression when the evidence did not disclose this.
9. The Commission erred in fact in finding that the evidence of Macaree, that Giles and Bertani gave him information which indicated that Foelmli followed Bond as he walked down the aisle of the bus, did occur, when the evidence of Macaree was that he did not believe aspects of what Giles and Bertani told him and therefore the whole of that evidence was unreliable.
10. The Commission erred in fact and law in finding that Foelmli was not acting defensively but rather was acting in an aggressive, provocative and abusive manner.
11. The Commission erred in fact and law in finding that Foelmli escalated the aggression by following Bond down the bus, when there was no credible evidence to support such a finding.
12. The Commission erred in fact and law in finding that Bond hit Foelmli to got in first because he believed that Foelmli was going to hit him when the evidence was that, after having hit Foelmli, Bond then had to be restrained from further assaulting Foelmli.
13. The Commission erred in fact and law in finding that "there can be no suggestion that Foelmli or his representatives were not aware of what was in Macaree's mind..." prior to his dismissal, when the evidence does not support such a finding.
14. The Commissioner erred in law in holding that it was unnecessary for Macaree to put each and every aspect of his decision to specify the basis upon which he proposed to conclude that termination was appropriate and to provide Foelmli with an opportunity to respond, was an unnecessarily technical approach.
15. The Commission erred in fact and law in concluding that Foelmli acted in an aggressive, abusive, provocative, hostile and confrontational manner.
16. The Commission erred in fact and law in concluding that Foelmli was not innocent of any wrongdoing.
17. The Commission's discretion miscarried in that it preferred the evidence of Macaree over the evidence of Foelmli and Craig.
18. The Commission erred in fact and law in finding that the witness Craig considered the incident in question to be "of a very serious nature" when the evidence was that Craig considered it to be a minor matter which is an everyday occurrence in the context of a remote construction project and did not warrant reporting.
19. The Commission erred in that its decision, upon the facts, was unreasonable and plainly unjust in that the decision was more concerned about sending the wrong message to other employees rather than focussing on the particular facts and circumstances of the matter which was before it.
20. The Commission erred in fact and law in finding that work places, such as the one at which the applicant worked, required employees to conduct themselves in a controlled manner, when the evidence of Craig and Macaree was that at such work places—
    a. Minor scuffles happen every day;
    b. Tempers get frayed; and
    c. Things get out of hand quickly.
21. The Commission erred in fact and law in finding that Foelmli's response, to Macaree's comments, after speaking to Bertani and Giles, was to "refine" his version of events, when this was not supported by any evidence.
22. The Commission erred in fact and law in finding that Foelmli's initial comment to Bond was abusive when the evidence does not support such a finding.
24. The Commission's discretion miscarried in that it did not give sufficient consideration to the evidence of Foelmli when he said that he did not consider that he was intimidating Mr Bond in any way.
25. The Commission erred in fact and law in finding that the witnesses Craig and Kennedy warned Foelmli that he would be likely to be dismissed, if he pursued the incident, because they considered the matter to be of a very serious nature, when the evidence and submissions on behalf of the respondent, did not support such a finding.
26. The Commission's discretion miscarried when it did not have sufficient regard for the fact that other persons on the bus had been abusive and provocative towards Bond and also towards Foelmli and by failing to consider that this may have had an impact on both Bond and Foelmli and have contributed to the reactions and behaviour of both Bond and Foelmli (see transcript page 32, page 33-34).
28. The Commission erred in fact and law, and its discretion miscarried, when, in considering the evidence of the witness Craig, it did not have sufficient regard for the fact that Craig said that the area outside the bus was not well lit and that inside the bus there were no lights, and that it was "...completely dark...".
29. The Commission erred in fact and law and its discretion miscarried when it relied on the evidence of Mr Craig who said that there was a fair degree of aggression on both parts, when the evidence did not support such a conclusion.
30. The Commission erred in fact and law and its discretion miscarried when it ignored the direct evidence of Foelmli and preferred the unreliable evidence of Craig and Macaree, who in turned relied on the hearsay evidence of Bertani and Giles, when it found that Foelmli was not acting defensively when he stood up and moved into the aisle.
31. The Commission erred in fact and law and its discretion miscarried when it found that the initial comment from Mr Foelmli to Mr Bond, when Bond entered the bus, constituted provocation.
32. The Commission erred in fact and law and its discretion miscarried when it found that Foelmli's initial comment to Bond when he got on to the bus constituted abuse.
33. The Commission erred in fact and law and its discretion miscarried when it did not find, on the weight of the evidence, that the conduct of both Foelmli and Bond, prior to the headbut, was a minor scuffle which is a daily occurrence on an isolated construction site, and further by not giving sufficient consideration to

the surrounding facts including that these workers had all just finished a long shift, it was 4.00am and there had been considerable agitation against both Foelmli and Bond by the other workers.

34. On the facts of this case the Full Bench should infer that the decision of the Commission was unreasonable or plainly unjust and for that reason, the Commission failed to properly exercise its discretion."

BACKGROUND AND EVIDENCE

The application alleged that on or about 22 October 1997, the respondent dismissed Mr Dean Thomas Foelmli from its employment in circumstances which the appellant alleged were harsh, oppressive or unfair and sought reinstatement and compensation for loss of earnings. That application was, of course, opposed at first instance by the respondent to this appeal, who was the respondent employer at first instance.

Mr Foelmli commenced employment with the respondent on 28 February 1997 and, at the time of the termination of his employment, he was a rigger/scaffolder at the HBI plant being constructed at Port Hedland in this State. His duties included, also, temporary bus driving. He had worked for a number of years in the industry, and, indeed, had worked previously for the respondent in 1994, 1995 and 1996.

At the commencement of his employment, Mr Foelmli signed a letter, which was an offer of employment, to indicate his acceptance of that offer. A number of conditions were contained within the letter including the requirement to abide by all site rules and safety standards, and it included a copy of the "House Rules".

The letter of offer contained clause 18 "Dismissal", which stated in clause 18(f) the following—

"18 Dismissal

The following are offences (if proven) which will result in instant dismissal –

...

f) Fighting within the boundaries of the work site."

Rule 3 of the "House Rules" includes the following—

"3. Serious Misconduct

For actions of conduct or performance as set out in Serious Misconduct, the disciplinary procedures can result in instant dismissal.

The following list contains examples of the types of actions which constitute serious misconduct and, if proven, could result in instant dismissal.

NB: The list is inclusive of, but not limited to—

- Refusing to obey a lawful and reasonable instruction; this includes refusal to perform assigned work, alternative duties, or continuous refusal to work reasonable overtime as requested in accordance with the relevant Award and/or agreed Contract of Employment.

.....

- Intimidating, or assaulting other employees, customers or clients on John Holland or Client property or when attending John Holland functions.
- Sexual harassment in the work place.
- Divulging confidential John Holland information, unauthorised possession of John Holland documents or making public statements detrimental to John Holland's operation."

Rule 4 refers to less serious misconduct, is set out in detail in AFMEPKIU v John Holland Construction and Engineering Pty Ltd 78 WAIG 3870 at 3871 and includes the following—

"The following list contains examples of the types of actions which constitute less serious misconduct and shall result in a warning being issued.

Note: Warnings are not limited to the repetition of the same type of offence.

.....

- Acting in an irresponsible manner, defacing John Holland or Client property or indulging in practical jokes which may endanger other employees.
- Verbally abusing other employees in the work place.

.....

- Such other matters as may be advised by the employer from time to time."

It was not in issue that it was a condition of his employment and known to Mr Foelmli and other persons who were his co-employees that fighting on the work site was, to put it loosely, "a dismissible offence".

On Monday, 13 October 1997 at about 4.30 am, which was at the end of the nightshift, Mr Foelmli was preparing to drive a bus which took personnel from the site to the car park in the camp. It was part of his duties to drive such a bus. Some of the employees were late, getting onto the bus, and Mr Kenneth Robert Craig, the night shift supervisor, told Mr Foelmli to wait for latecomers. Mr Foelmli said that some people were urging him to leave the latecomers behind. In any event, there was criticism of the latecomers by employees already on the bus. This did not make Mr Foelmli angry, on his evidence.

There was then an incident involving Mr Foelmli and a Mr Christopher Reid Bond. Mr Bond was the last person to get onto the bus. Mr Bond was told by Mr Foelmli, in somewhat abusive terms, to be on time the next day. He said "Bondy, tomorrow you can be on effing time." (Mr Bond was not called to give evidence.)

Mr Foelmli was seated in the driver's seat of the bus and Mr Bond walked down the aisle of the bus and, about halfway down the bus, responded to Mr Foelmli, saying "Who the eff are you, you four-eyed c... to tell me what to do?" Mr Foelmli says that he told Mr Bond to "shut the eff up and sit down", and Mr Bond turned and walked towards the front of the bus from where he was, six seats down the bus. Mr Foelmli said that he thought Mr Bond was going to "have a go at him" and, because he felt he would have been trapped if he had remained in the driver's seat, he stood up and moved to the first step in the aisle beside the driver's seat. He said that his getting up did not inflame the situation, and that he got up out of his seat because he was going to be assaulted and did not intend to sit there whilst that was occurring (see pages 62-63 of the Appeal Book (hereinafter referred to as "AB").

There was then a heated argument between the two, where they were face to face and screaming at each other (see page 63(AB)). This continued for a minute or two. Mr Foelmli denied that he used threatening words or made any physical gestures to indicate that he was going to strike or wanted to fight Mr Bond, nor did he invite Mr Bond to fight him. Mr Foelmli said in evidence that he was well aware of the respondent's policy concerning fighting and did not want to lose his job. He said that he did not consider that he was intimidating Mr Bond. He was of the opinion that Mr Bond was going to have a go at him, so he went to turn away from Mr Bond and go back to the driver's seat. However, before he could do so, Mr Bond head-butted him in the face, injuring his nose, into which his glasses smashed and splitting his lip. This was done without warning. Notwithstanding this, Mr Foelmli says that he did not retaliate. There was no evidence that Mr Foelmli did retaliate, or that he physically attacked Mr Bond.

Mr Carlo Bertani then intervened, grabbed Mr Bond (and, indeed, restrained him), and told him not to touch Mr Foelmli as there were foremen outside the bus. One of the foremen, Mr Craig, then got onto the bus and told them to calm down (see page 149(AB)).

Mr Foelmli then drove to the car park with everyone on the bus, but noticed that he had bled as a result of Mr Bond's head-butt. (Mr Foelmli asserted that the car park was not part of the site.) He was very angry when he noticed that he was bleeding, when he got out of the bus, Mr Foelmli challenged Mr Bond to "have a go". Others around them told them to calm down. Mr Bond abused him again, got into his car and left. Mr Foelmli then drove the bus to the camp, then went home.

Mr Foelmli said in evidence that it was not his intention to instigate a fight with Mr Bond; that he made the comments he did because Mr Bond hit him and assaulted him and that he did not intend to have another go at him in the car park.

Mr Foelmli said that his challenge to Mr Bond in the carpark was not on site, because they were outside the site fence.

Mr Kenneth Robert Craig (who was called to give evidence on behalf of the respondent), the night shift supervisor, confirmed that there was a delay in the bus moving off because there was a mix-up with roster sheets being filled out, leading to some workers having to be taken off the bus to re-sign the roster sheets. Mr Craig said, also, that tempers were a bit frayed. He was outside the bus, and gave evidence of what he saw, from outside the bus, involving Mr Foelmli and Mr Bond. He said that he had a clear view of the access onto the bus (see page 54(AB)). He said that Mr Bond was the last person on the bus, that Mr Foelmli said something to him, and Mr Bond replied "I've taken enough shit from you during the night at work. I don't have to take it from you after hours." (see page 74(AB)).

Mr Craig said that he actually saw Mr Bond sit down in a seat three or four seats down the aisle. He also gave evidence that he could not hear what Mr Foelmli said to Mr Bond at the beginning because of the noise, but he could hear what Mr Bond said because the latter spoke loudly.

Mr Craig said that he saw Mr Foelmli get out of his seat and walk down the bus after Mr Bond, a distance of about three seats, when they were in the bus. However, he said that his view of what then occurred was obscured by a panel in the bus and all he saw at that point, was Mr Foelmli "flying backwards into the windscreen". Mr Craig said that he saw no head butt. His vision was obscured by a panel on the bus. Mr Craig said in cross-examination that he assumed that Mr Foelmli went a distance equal to the space occupied by three seats down the aisle. He could not accurately recount the number of seats. Mr Foelmli went behind the panel. In cross-examination, he admitted that Mr Foelmli had not moved a couple of metres down the bus (see page 82(AB)).

Mr Craig had assumed, he said, that Mr Foelmli had been pushed because he did not see any head-butt. He said that there was a very heated argument and aggression on the part of both of the two gentlemen concerned. However, he said in cross-examination that did not hear what was said. Mr Craig said that it would not be easy to quickly get out of the driver's seat. Mr Craig said that, in getting out of his seat and walking down the bus, Mr Foelmli possibly inflamed the situation. In cross-examination, Mr Craig said, too, that, if Mr Foelmli had seen Mr Bond coming back down the bus, it would not be unreasonable for him to get up and make a move to be able to get off the bus. He said that he did see Mr Bond's silhouette but that it was completely dark inside the bus.

Mr Craig did not report the incident because, at the time, he was not aware of any head-butt. He did not, therefore, think that it warranted reporting because it was just another minor scuffle. Mr Craig said that, if it had been more than a minor scuffle, he would have reported it (see page 76(AB)). He said that there were always minor altercations on a job like that, with people away from home and that they try and keep them, in the beginning at least, in house. He said that this was a minor sort of incident and that it was all over with.

In cross-examination, Mr Craig said that he did not think that the incident constituted a dismissible offence, but once he heard about the head butt, then he changed his mind and thought that it did constitute a dismissible offence. Mr Craig also said that he thought that Mr Foelmli would be dismissed because it was a very heated argument and there was a fair degree of aggression on both parts (see page 82(AB)). Indeed, Mr Craig said that going down the aisle was an aggressive act on the part of Mr Foelmli. Mr Craig also said that it would have been safer to go out the door than down the aisle.

However, when Mr Foelmli wanted to have the matter of the head-butt pursued, Mr Craig did advise Mr Foelmli that it would be best forgotten and that if it went further, both Bond and Foelmli would probably lose their jobs.

On 17 October 1997, Mr Foelmli approached Mr Craig again and asked what was being done about the incident. Mr Craig then informed the Reactor Supervisor that Mr Foelmli wanted to pursue the matter. Mr Craig said that he told Mr Foelmli that he was told that it was a gas plant issue and to keep out of it.

Mr Foelmli continued to press for the incident to be dealt with. Mr Craig tried to convince him not to pursue it, however, Mr Foelmli was adamant about it. Mr Craig thought that Mr Foelmli had said "Why would I be dismissed? I wasn't doing anything."

Mr Craig told Mr Foelmli that he would probably be dismissed because he assumed that Mr Foelmli had acted aggressively. However, Mr Foelmli told Mr Craig that he (Foelmli) was not at fault.

Mr Craig said in evidence that he had known Mr Foelmli for quite some time and that he got on well with him. Mr Richard Day (Mr Foelmli's own foreman), also warned him of the risk of dismissal were he to pursue the matter. Mr Craig said that Mr Foelmli was a good worker.

On 19 October 1997, a week after the incident on the bus, Mr Foelmli arrived at work for the night shift and was told that he would be working with Mr Bond, who would be the crane driver. He said that he refused to work "under Mr Bond's hook" because he did not feel safe. Mr Phillip Abel, the supervisor, then told him to do different work, but also told him to see Mr John McKay, a supervisor, who told him that if he did not work "under Mr Bond's hook", then the matter would be referred to the Industrial Relations Officer and Mr Foelmli would be sacked. Mr Foelmli maintained his refusal and subsequently saw Mr Macaree about the matter.

Mr John Kennedy, the Night Shift Gas Plant Supervisor (also called to give evidence on behalf of the respondent), gave evidence that, following the incident, he had kept Mr Foelmli and Mr Bond apart, at work. On 20 October 1997, however, he was unable to do this and Mr Foelmli refused to work with Mr Bond on the night shift. Mr Foelmli had approached Mr Kennedy in an agitated and aggressive state, saying that he did not want to work with Mr Bond. Mr Foelmli was, according to Mr Kennedy, swearing and yelling that something had to be done about the situation, and threw his safety harness on the ground.

Mr Kennedy and Mr John McKay, also a supervisor, listened to his description of the incident on the bus. Mr Kennedy said that they would not be able to work apart indefinitely, but he had no concern that Mr Bond would work unsafely in such a manner to put Mr Foelmli in any danger. Mr Foelmli had said to Mr Kennedy that he feared for his safety if he worked under the hook of the crane being operated by Mr Bond.

Mr Foelmli wanted Mr Bond put back on the day shift, so that the two of them would not have to work together, but Mr Kennedy did not believe that it was Mr Foelmli's place to make that decision.

Mr Foelmli finally refused to work with Mr Bond, but Mr Kennedy had understood by then that Mr Bond was apologetic about what had occurred on the bus, although he did not know whether Mr Bond had apologised to Mr Foelmli. Mr Kennedy also said that he had seen Mr Bond and did not think that he was the sort of person under whose crane it was unsafe to work.

Mr Kennedy said that he warned Mr Foelmli against reporting the matter and pursuing it, as it was likely that he would be dismissed (see page 100(AB)). Mr Kennedy did not put a report in because he was not a witness to the incident. He gave evidence that Mr Foelmli was quite a good worker, but that he just had a little bit of an attitude problem as far as other workers on the job were concerned and he lost his temper a little bit and was not in control of safety when he was in an agitated state. Mr Kennedy also described Mr Foelmli as being, at times, loud and aggressive on the job.

On 20 October 1997, Mr Foelmli went to see Mr Frank Vella, the AMWU representative. Mr Foelmli went home from work after he had refused to work with Mr Bond.

THE INVESTIGATION

There was an investigation of the incident about which evidence was given by Mr Stewart Kenneth Macaree. Mr Macaree was the person who undertook an investigation of the incident in his capacity as Industrial Relations Manager for the respondent at the HBI plant. He decided to terminate Mr Foelmli's employment. He gave evidence that he had not been on the site for a long period when he first became aware of the incident on the bus. The names of the people were not familiar to him, however. Mr Macaree agreed that there was some incidents of fighting on the site where a termination did not occur (see page 108(AB)).

Mr Macaree also said that what occurred depended wholly and solely on the circumstances of each particular case (see page 108(AB)).

Mr Macaree's first knowledge of the incident was at 6.00 am on Tuesday, 21 October 1997 when he was told of it by Mr Bill Boucher, the night shift's safety adviser. Mr Boucher's told Mr Macaree about the matter because Mr Foelmli had refused to work with Mr Bond. Mr Boucher also told him about the incident on the bus on the previous Monday.

At about 7.05 am on 20 October 1997, Mr Macaree was approached by Mr Foelmli who said that he would not work with Mr Bond because of the fight. Mr Foelmli further said that he believed he was being set up by being asked to work with Mr Bond. Mr Foelmli then gave him a description of what had happened on the bus on 14 October 1997 and what had occurred subsequently. According to Mr Foelmli, he told Mr Macaree that he and Mr Bond had had a heated argument and that Mr Bond had head butted him. Mr Macaree made it clear in evidence that Mr Foelmli had told him that he, Mr Foelmli, had followed Mr Bond down the bus and that Mr Bond had turned and head butted him.

Mr Foelmli also gave Mr Macaree the names of two potential witnesses to the incident and Mr Macaree told Mr Foelmli that he would make some enquiries and speak with Mr Bond. They discussed the incident and the situation for some time between half an hour and an hour.

Mr Macaree advised Mr Foelmli that a potential outcome was his dismissal and that he should be represented. Mr Macaree also said that he would investigate the incident. As a result, the appellant organisation became involved.

Mr Macaree then requested that the Construction Managers at the gas plant and the reactor obtain written reports of the incident from those whose names had been given. He obtained these written reports.

At 6.00 pm that night, when Mr Bond came on for night shift, Mr Macaree spoke to him and he gave a similar account of the incident to what Mr Foelmli had given, except that he said that he was abused while approaching the bus, that he was abused as he continued down the bus, and that he had head butted Mr Foelmli. He felt that he was humiliated, that he had head-butted Mr Foelmli because the latter was extremely aggressive and he was reacting to his aggression.

Mr Bond said, according to Mr Macaree, that he knew Mr Foelmli was going to hit him when Mr Foelmli came down the bus. Mr Bond said that he was an older man in his mid-forties and he wanted to get in first.

Mr Macaree then spoke to Carlo Bertani and Matthew Giles, the two witnesses nominated by Mr Foelmli.

Mr Bertani told Mr Macaree that Mr Foelmli had followed Mr Bond down the bus and there was a bit of a flare-up. Mr Giles told Mr Macaree that Mr Foelmli got out of his seat and followed Mr Bond down the bus, that there was a tangle and both rushed at each other. Mr Giles told Mr Macaree, also, that he did not see any contact between the two of them. Mr Bertani said, also, that he did not see any physical contact, but believed there was equal aggression on both sides and indicated that he had restrained Mr Bond by putting his arms around his shoulders. Mr Macaree believed that they had seen the head-butt, but were protecting Mr Bond and he did not regard them as reliable witnesses.

Mr Macaree's evidence was that, although witnesses to the scuffle claim not to have seen the head-butt, he believed that, having been able to describe the details they had seen, it was unlikely that they had not seen the head-butt. Mr Macaree decided that they had seen it, but that they had tried to protect their workmate.

On 22 October 1997, Mr Foelmli received a telephone call asking him to come to work, he not having gone to work that night because he was in a distressed state.

Again, Mr Macaree spoke to Mr Foelmli and advised him of what they had told him and Mr Foelmli asked him what he would have done in the circumstances and asked whether he would have walked away. Mr Macaree said that he responded to the effect that if he knew that his job was on the line, he would not have done anything. Mr Foelmli told him, according to Mr Macaree, that it was appropriate to meet aggression with aggression.

Mr Macaree had spent a number of hours discussing the matter with union representatives, Mr Frank Vella, the shop steward and Mr Joe Craig, the North West organiser for the AMWU, including the detail of the incident and the interpretation of the policy and House Rules, whether there was provocation and what the term meant and industry standards regarding fighting and whether Mr Foelmli's conduct warranted dismissal. This occurred from about 7.00 pm to 11.00 pm on that day. Mr Foelmli sat outside the office, but, according to Mr Macaree, was in and out of the office.

Mr Foelmli had received advice from solicitors on the Sunday night via the telephone from Melbourne as to whether the circumstances could justify his dismissal and, late that evening, in the presence of union representatives.

Mr Macaree advised Mr Foelmli that his employment was to terminate for serious misconduct. Mr Foelmli told him that he had done nothing wrong and would leave it in the union hands to clear his name. At 11.00 pm, Mr Foelmli left and did not return to work.

Mr Macaree said that, in advising Mr Foelmli that he was to be dismissed, he did not actually enunciate the particular aspects of the conduct which resulted in that conclusion but said that, in the context of the lengthy and detailed discussions he had had with Mr Foelmli and his representatives, those matters had been canvassed.

Mr Macaree gave evidence that the serious misconduct committed by Mr Foelmli was that referred to in the House Rules as "intimidating or assaulting other employees, customers or clients on John Holland or Client property or when attending John Holland functions."

Mr Macaree said that aggressive behaviour towards another employee, falling short of physical contact being made, could constitute intimidating behaviour, and, further, that it is not simply that Mr Foelmli abused Mr Bond and that he got out of his seat and walked towards him; it was also the manner in which this was done.

Mr Macaree said in evidence that the conclusion which he reached after his investigation was that Mr Foelmli had initiated the verbal exchange, but he had come from his seat and advanced some distance down the bus and met Mr Bond at that point; that Mr Bond had head butted Mr Foelmli; that the former had felt threatened by Mr Foelmli's actions. Mr Bond, an older man, thought that he was going to be hit and the two witnesses nominated by Mr Foelmli, Messrs Giles and Bertani, had confirmed this.

Mr Macaree concluded "absolutely" on the basis of the information from the witnesses that, up to the point of the head-butt, there were equal levels of aggression on the part of both. Overall, however, his view was that there were not equal levels of aggression but that it was not necessarily the person who throws the first blow who instigates or is involved in the most aggression.

Mr Macaree's evidence was that, in deciding to dismiss Mr Foelmli, he did not specifically contemplate his work record. Further, he did not specifically contemplate any alternative to dismissal, but he wanted to consider all of the options. He said that a final written warning was a consideration, but because of the circumstances, he believed that termination was appropriate. However, he did not specifically discuss the options with Mr Foelmli or his representatives.

Mr Macaree did read Mr Foelmli's personnel file but found nothing in it in terms of previous warnings or other useful information and the file did not contain any information about whether Mr Foelmli was a good employee or not.

Mr Bond did resign. Mr Foelmli said that he had ample opportunity to put his case to Mr Macaree (see page 68(AB)). However, in re-examination, he said that he had ample opportunity to put his case, but not to hear what else arose out of the investigation. The investigation, on the evidence, was limited to this incident.

As to the investigation, Mr Macaree gave evidence that Mr Joe Craig and Mr Vella were in and out of his office non-stop, but Mr Foelmli was given every opportunity to respond to the allegations against him, that he was represented at all stages by Mr Joe Craig and Mr Frank Vella and that he took advice from solicitors. Finally, after the event (see page 113(AB)), Mr Macaree said that he made it clear to supervisors that the incident had not been reported when it should have been reported and, in future, such incidents should be reported.

Mr Macaree told Mr Foelmli, in the presence of Mr Vella, that Mr Foelmli could either resign or be sacked. Mr Vella told Mr Macaree, according to Mr Macaree, that Mr Foelmli had not retaliated after Mr Bond assaulted him. That, of course, was the case. Mr Joe Craig obtained statements from witnesses who had been in the bus.

The Commission received no first hand evidence from Mr Bond, Mr Bertoni, Mr McKay or Mr Giles.

FINDINGS

The Commission found—

1. That it was not for the Commission to decide whether it would have dismissed the employee.
2. That it was satisfied that, insofar as it was within his power, Mr Macaree conducted as full and extensive an investigation into all of the relevant matters surrounding the incident, as far as was reasonable in the circumstances.
3. Mr Macaree honestly and genuinely believed and had reasonable grounds for believing, on the information available to him at the time, that Mr Foelmli was guilty of misconduct, as alleged.
4. Mr Foelmli's conduct and his comments to Mr Bond, in rising from his seat and following Mr Bond down the bus and in the heated argument in which they were engaged, was aggressive, abusive, provocative, hostile and confrontational.
5. There was a mislabelling of Mr Foelmli's conduct but this did not constitute an unfair dismissal; rather the conduct was the type of conduct which can justify instant dismissal for serious misconduct. I n that regard, he had not been harshly, oppressively or unfairly treated.
6. The respondent was entitled to come to the conclusion that Mr Foelmli had seriously misconducted himself.
7. There was no unfairness in the dismissal.

ISSUES AND CONCLUSIONS

The decision in this matter was a discretionary decision, as such a decision is defined in Norbis v Norbis 65 ALR 12.

Accordingly, it is for the appellant to establish that the exercise of the discretion at first instance miscarried, applying the principles enunciated in House v The King [1936] 55 CLR 499 (HC) and Gromark Packaging v FMWU 73 WAIG 220 (IAC). The Full Bench may not interfere with the decision at first instance, when it is a discretionary decision, unless the appellant establishes that the exercise of the discretion miscarried upon the proper principles.

Insofar as the matter was decided on questions of credibility, having regard to the advantage enjoyed by the Commission in seeing the witnesses, then the principle laid down in Devries and Another v Australian National Railways Commission and Another [1992-1993] 177 CLR 472 (HC) applies. In that case, Brennan, Gaudron and McHugh JJ held that—

> "A finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding. If the finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the judge has failed to use or has palpably misused his advantage, or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable."

Deane and Dawson JJ, in that same case at page 479, held that—

> "An appellate court which is entrusted with jurisdiction to entertain an appeal by way of rehearing from the decision of a trial judge on a question of fact must set aside a challenged finding of fact which is shown to be wrong.
>
> ... where it appears that a challenged finding has, to a significant extent, been based on the trial judge's observation of the demeanour of the witnesses, the members of an appellate court are inevitably placed in a position of real disadvantage compared with the trial judge. Even in such a case, however, the "court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions".
>
> ... "the Court of Appeal ... must be guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances ... which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses..."""

Devries Case (op cit) and others, including Abalos v Australian Postal Commission (1990) 17 CLR 167, were considered by the High Court (Gaudron, Gummow, Kirby, Hayne and Callinan JJ) in the State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq) and Others (1999) 160 ALR 588.

In that case, it was held that the circumstance where a judge was heavily swayed by his impression of a witness while giving evidence does not preclude a court of appeal from concluding that, in the light of other evidence, a primary judge had too fragile a base to support a finding that a witness was unreliable.

Kirby J quoted, at page 608, in the report of the judgment in that case, what he had said in Ahmedi v Ahmedi (1991) 23 NSWLR 288 at 291 (CA NSW)—

> "If the mere incantation of Abalos v Australia Postal Commission is henceforth to deprive this court of the power and duty of review of factual conclusions, a great deal of injustice will uncorrected and the clearly expressed will of parliament, defining the jurisdiction of this court, will be frustrated. I do not believe that that is what Abalos or any other judicial authority does provide or could provide."

THE EVIDENCE AND EVIDENTIAL FINDINGS

There is no doubt that there was a policy of the respondent for its employees which effectively forbade fighting. There is no doubt that this was well known to the appellant's member, Mr Foelmli, and to others. Indeed, it was not in dispute that it was a term of Mr Foelmli's contract of employment. There is no doubt that, on Monday, 13 October 1997 at about 4.30 am at the end of the night shift, Mr Foelmli, as part of his duties, was preparing to drive a bus which took personnel from the site to the car park and the camp.

Further, a number of persons were late onto the bus and Mr Foelmli was told by the supervisor concerned, Mr Craig, to wait for latecomers. Mr Foelmli did this, although he was subject to urging by some other people who were complaining, being already on the bus, that he should move on, leaving the latecomers behind.

Then came the incident which was at the heart of this matter. Mr Foelmli said, in evidence, that he was telling latecomers, as it were, to get a move on and that he said to Mr Bond as he got on the bus, Mr Bond being indubitably the last person to get on the bus, "Bondy, tomorrow can you be on effing time." He was then seated in the driver's seat of the bus.

It is not apparent to me that the manner in which that was expressed could be properly characterised, as the Commissioner did, as abusive. It was a comment including an indelicate but commonly used expletive, requesting that Mr Bond be on time next day. It was said in the context of Mr Foelmli telling workers who were late to be on time when he had 15 or 20 other workers on the bus complaining about the lateness of their colleagues.

According to Mr Foelmli, Mr Bond walked down the aisle of the bus and responded by saying to him, "Who the eff are you, you four-eyed c... to tell me what to do?" Mr Craig, who also gave evidence, said that he was standing outside the bus and he could not hear what Mr Foelmli said because of the noise, but he did hear what Mr Bond said, because Mr Bond spoke loudly. He did say that he could not recall properly what Mr Bond said except that it was something like "I've taken enough s..t from you all night at work and I don't need to put up with it now", or words to that effect.

Mr Foelmli said in his statement that the words that I said that he used above, were used as Mr Bond walked down the aisle of the bus. Mr Foelmli said that he told Mr Bond to "Shut the eff up and sit down" and that Mr Bond then turned and walked towards the front of the bus. Mr Craig said that he had

seen the silhouette of Mr Bond go down the bus, but that it was very dark in the bus. He said, also, that he saw Mr Foelmli get out of his seat, but that his vision was partly obscured by a panel and that Mr Foelmli would not have advanced down the bus more than about two metres or the length of three seats on the aisle.

Mr Foelmli said that Mr Bond had turned and walked back towards the front of the bus. He said that he thought that Mr Bond was going to "have a go" at him and he had nowhere to go because he was seated in the driver's seat behind the steering wheel of the bus and the old change bench. He said that, as Mr Bond was walking down the bus, he got out of the driver's seat and stood on the first step in the aisle of the bus beside the front seat. He got out of the driver's seat because he feared being attacked. On all of the evidence, he did not get out of the bus.

According to Mr Macaree, who made enquiries of Mr Bond, Mr Bond said that he was humiliated by the statement made by Mr Foelmli.

There was, thus, a conflict between the evidence of Mr Craig and Mr Foelmli as to whether Mr Foelmli had walked down the bus towards Mr Bond. That he found that Mr Foelmli did so was quite significant, in Mr Macaree's deliberations.

In any event, it was not in dispute that Mr Foelmli had, as he said in his evidence, a "face to face verbal argument which was very heated" with Mr Bond. This argument, according to Mr Foelmli went on for one to two minutes and he did not use any threatening words, make any physical gestures to indicate that he was going to strike Mr Bond or wanted to fight him and did not invite Mr Bond to fight. He said that he was well aware of John Holland's policy about fighting and he did not want to lose his job. It is noteworthy that he said that he thought Mr Bond was going to "have a go" at him, so he went to turn away from him and go back to the driver's seat, but, before he could do so, Mr Bond head butted him in the face, smashing his glasses onto his nose and injuring his nose and also splitting his lip.

There was no evidence that Mr Foelmli had visited any violence upon Mr Bond. According to Mr Macaree (as I have outlined it above), Mr Bond had said that he felt threatened and got in first by head butting. Mr Carlo Bertani had grabbed Mr Bond after he head butted Mr Foelmli and that is not in dispute. He allegedly said "Don't touch him, there are foremen outside the bus", referring to Mr Ken Craig and Mr Richard Day, who were outside the bus.

It was, on the evidence, unnecessary, one infers, to restrain Mr Foelmli.

Mr Craig then got onto the bus and told them to calm down. At no time, was it said in evidence that, on the bus, Mr Foelmli acted or retaliated physically before or after he was assaulted by Mr Bond. Indeed, there was no evidence that Mr Foelmli used any threatening words, made any physical gestures, or indicated that he wanted to fight, or invited Mr Bond to fight.

Mr Foelmli then drove the bus, wiping blood off his face, to the car park.

In the car park, Mr Foelmli was angry and said to Mr Bond "Come on, if you want to have a go. Come on, you prick." He was calmed down by a number of other men and Mr Bond abused him and left. He was angered by the injuries which he had received. Further, he was of opinion that the car park was off the BHI site.

According to Mr Macaree, it was not in dispute that Mr Foelmli had suffered the injury that he claimed he had suffered. Mr Macaree said that Mr Foelmli had first told him when the matter was investigated some days later, that he had said that he had followed Mr Bond down the bus, but after he had consulted with the union officials, Mr Foelmli had changed his story. Mr Craig did nothing about the matter by way of reporting it because he thought it was a minor incident and there was evidence that minor physical scuffles on site like that were not uncommon. That evidence came from Mr John Kennedy and from Mr Craig, both of whom said that they attempted to sort these matters out in house.

This continued to be the case, even after Mr Craig, who had first thought the matter was a scuffle because he thought Mr Foelmli had been pushed, not head butted, did find out that there was a head butting involved.

Mr Foelmli was very aggrieved by what had occurred and, as a result, various supervisors, including Mr Phillip Abel, arranged it so that Mr Bond, who was a crane driver, and Mr Foelmli would not have to work together.

Eventually, on 19 October 1997, Mr Foelmli said that he would not work with Mr Bond, as he put it, "under Chris Bond's hook", because he did not feel safe. He said this to Mr John McKay, a supervisor, who told him that if he did not, he would be sacked due to what had happened a week ago. Mr Ken Craig was there, as was Mr John Kennedy. According to Mr Kennedy, Mr Foelmli became annoyed and threw his safety harness on the ground. He then told Mr McKay that he was going home and he was told by Mr McKay that he would not be paid.

Mr Foelmli went to the shed, grabbed his tools and asked Mr Craig if he could drive him to the gate to pick up his car and, on the way, told him the story. He went home and contacted his own foreman, Mr Richard Day and told him what had happened.

There was evidence that he had been asked not to proceed further with the matter because he would be dismissed. Mr Craig told him this, amongst others, apparently.

In the meantime, the matter had been reported to the Industrial Relations Manager, Mr Stuart Macaree. The matter was, in fact, the matter of his refusing to work because he felt unsafe with Mr Bond. It was the evidence of Mr Kennedy that such a view was not warranted, from his knowledge of Mr Bond. There was then an investigation of the matter and Mr Macaree called for reports from various supervisors. On Monday morning, 20 October 1997, Mr Foelmli went into work and saw Mr Frank Valla, the AMWU shop steward, and told him what had happened. They then proceeded to see Mr Macaree.

There was a conversation between Mr Macaree and Mr Foelmli which, Mr Foelmli said, lasted about an hour and Mr Macaree thought was between a half hour and an hour, in which he described everything that had happened in relation to the safety issue with Mr Bond and the incident on the bus.

The next night, the night of 20-21 October, Mr Foelmli was extremely upset by the incident and did not go to work. He rang in sick.

On Wednesday, 22 October 1997, he received a telephone call from Mr Frank Valla saying that Mr Macaree wanted to see him. It was not in issue that, on the occasion when Mr Foelmli had told Mr Macaree his story, Mr Macaree said that it was a serious matter which might end up in his dismissal and that he ought to get union representation.

Mr Foelmli had, on the Sunday night, received legal advice from a solicitor in Melbourne.

Mr Macaree told Mr Foelmli and Mr Valla that he had investigated the matter and that Mr Foelmli could resign or be sacked. As a matter of record, Mr Bond did resign after the investigation, in the course of which Mr Macaree interviewed him.

The Northwest organiser for the appellant organisation, Mr Joe Craig, arrived and Mr Valla went to see him. The matter was discussed by them between 7.00 pm and 11.00 pm. The organiser also spoke to Mr Carlo Bertani, as did Mr Macaree. Mr Macaree also spoke to Mr Matthew Giles, who had been on the bus at the time of the incident.

Mr Macaree expressed the view that Mr Giles and Mr Bertani, who described the matter in terms of being a scuffle, were not witnesses who were reliable because they were attempting to ensure that their workmate or workmates were not dismissed.

Notwithstanding the lengthy discussion of the matter, during which, for part of the time, Mr Foelmli sat outside, Mr Macaree was insistent that Mr Foelmli resign or get the sack. According to Mr Macaree, Mr Foelmli was in and out of the office where he and Mr Valla and Mr Craig were discussing the matter from time to time.

Mr Foelmli, at the end, spoke to Mr Macaree and told him that he had done nothing wrong and he would leave it in the union hands to clear his name. He was, therefore, dismissed for misconduct.

Mr Macaree was adamant in his evidence that he had not considered the problem which arose because Mr Foelmli refused to work under Mr Bond's hook and, indeed, I do not think that there was any suggestion upon appeal that he did. Further, he did not consider the incident in the car park, at least in the reasons he gave for the dismissal, in evidence, although Mr Randles submitted that, to paraphrase, it was indicative of a mind set.

Mr Macaree said that Mr Bertani had said words to the effect that Dean had followed Chris down the bus and there was a bit of a flare up. He did not see any physical contact, but if one goes, they both should go because there was equal aggression on both sides. Mr Bertani did say that he had restrained Mr Bond by putting his arms around his shoulders and pulling him down between the bus seats.

Mr Giles said words to the effect that the blokes from the gas plant were late for the bus. Dean got out of his seat and followed him down the bus and there was a tangle and both rushed at each other, but he did not see any contact made. He said that, when Chris got on the bus, as he was going down the aisle, they were both giving as good as they got.

The original report, of course, was about Mr Foelmli refusing to work, according to Mr Kennedy, who said that he did not raise with Mr Macaree the other problem.

Mr Macaree said in evidence that he asked direct questions of witnesses, including Mr Foelmli. There is no evidence that Mr Foelmli was able to hear what Mr Giles, Mr Bertani and Mr Bond said. There is no doubt that it is company policy and that it is a necessity to keep a very tight rein on acts of aggression or fighting or anything of that nature, as Mr Macaree said in evidence.

At page 113 (AB), Mr Macaree described Mr Foelmli's involvement in the whole incident and the conclusion he reached in these terms—

> "I believe that at the commencement of it, he had initiated the verbal exchange. I believe that he had come from the bus driving seat and advanced some distance down the bus. He had met Mr Bond at that point. Mr Bond had head butted Mr Foelmli but Mr Bond had felt threatened by Mr Foelmli's actions and Mr Bond conveyed to me that he thought he was going to be hit, and, being an older man, he wanted to take the first action. I mean, that view was substantiated by what the two witnesses who Mr Foelmli had nominated had said to me when I had spoken to them."

He also said that, during the investigation, he had kept either Mr Foelmli or his representatives updated on where things were and when it got to the point of looking like Mr Foelmli having to go, he advised that. Before he was dismissed, Mr Foelmli was given the option to resign.

The actual dismissal occurred a week after the event on the bus. Mr Macaree informed supervisors and foremen that this incident should have been reported, subsequent to Mr Foelmli's dismissal. According to Mr Craig (see page 84(AB)), Mr Foelmli had said that he did not see why he should be dismissed because he had done nothing wrong. At page 83(AB)), Mr Craig was a little equivocal about what had occurred.

The Commission found that Mr Foelmli's conduct and his comments to Mr Bond, in his rising from his seat and following Mr Bond down the bus and in the heated argument in which they were engaged, was aggressive, abusive, provocative, hostile and confrontational: that there was mutual and equal aggression and abuse and that this was initiated by Mr Foelmli.

In my opinion, there was mutual and equal aggression and abuse, but it is not necessarily the case that it was initiated by Mr Foelmli. The verbal abuse of each other was characterised, on Mr Foelmli's part, as serious misconduct.

However, the Commissioner found that Mr Foelmli did not engage in intimidatory behaviour, in a technical sense, in that he intended to frighten or overawe Mr Bond, because there was equal aggression and abuse. That is quite clear from the evidence. It was not, in my opinion, initiated necessarily by Mr Foelmli, who made a relatively innocuous comment about Mr Bond not being late, next day, to which Mr Bond obviously took exception. The comment was obviously made in the context of the bus' departure being delayed by a number of people who were late, the last of whom was Mr Bond.

This was followed by a not inoffensive response from Mr Bond, which probably caused Mr Foelmli to get up from his seat. If what Mr Foelmli recounted was what Mr Bond said, then what Mr Bond said was genuinely offensive. If Mr Craig's version, which, on his own account was not a clear recollection of what Mr Bond said, was accurate, then it was less offensive, but nonetheless somewhat offensive. There was then a verbal confrontation between the two which did not have to, and did not, gravitate to the physical until Mr Bond head butted Mr Foelmli. It is, of course, clear that later in the car park, Mr Foelmli wanted to go on with the matter, but was restrained. It was also the case that Mr Bond had to be restrained, but Mr Foelmli did not.

As the Commissioner observed, there was no absolute rule that fighting in the workplace, let alone a threat to fight, justifies dismissal and the Commission must have regard to the context in which the violence or threat of violence takes place, including the extent to which if there was any provocation and the nature of the violence in question.

There is no doubt that fighting in the workplace, in this instance, forbidden, too, by the terms and conditions of employment, was serious misconduct warranting dismissal. The question was whether the dismissal was unfair. The Commissioner's function was to decide whether the dismissal was harsh, oppressive and unfair, not to consider whether she should substitute her decision for that of the employer. It is trite to say that, when dismissals or a dismissal following a fight occurs, as with any dismissal, whether the dismissal is unfair depends on the circumstances of the particular case.

In this case, there was more blame apportionable to Mr Bond, but the question was whether Mr Foelmli's dismissal was unfair.

There was mutual and equal aggression and abuse, but not physical aggression, on the evidence, on the part of Mr Foelmli. Further, Mr Foelmli could not unequivocally be said to have instigated the fight, even if he had followed Mr Bond down the bus, because Mr Bond had, on Mr Foelmli's evidence, and even on Mr Craig's, made an overtly provocative remark. As I have said, I do not think it was open to the Commissioner to find that the incident was instigated by Mr Foelmli, when all he said, even if it were irritably said (which was denied by him), was not to be late tomorrow, using at the same time a commonly used expletive, which does not seem to me to have been used offensively in the circumstances.

On balance, I am of opinion that, however, there was such an aggressive, abusive confrontation that the participants might reasonably have expected that it would lead to blows and, in that sense, the confrontation was the fault of both participants. Whether Mr Foelmli followed Mr Bond down the bus aisle is not that important. In any event, however, there was sufficient evidence from Mr Craig, if it were accepted, that Mr Foelmli did move down the bus after Mr Bond and there was further evidence from Mr Macaree, if that were accepted, that Mr Foelmli admitted that to him and did not change his story until after he had seen the union representative. It is clear that all of this evidence was accepted.

The Commissioner was entitled to find that the conduct of Mr Foelmli was conduct justifying a dismissal for serious misconduct, and that, further, his conduct constituted a serious breach of his contract of employment.

It is clear that the Commissioner accepted Mr Macaree's evidence and, indeed, there is nothing, in my reading of the transcript that indicates that it was not open to the Commissioner so to do. That being so, of course, there was more cogent evidence that what occurred was brought on by both persons.

The fact that this refusal led to, but was not a reason for, the dismissal, even though Mr Foelmli had raised it only in the context of his inability to work with Mr Bond, was not unfair because it had been made clear to Mr Foelmli by Mr Craig and others that, if he did report the matter, it would lead to dismissal and he was aware, as he said in his own statement, that fighting, which this was, might well lead to dismissal. Further, Mr Macaree gave evidence that he did not consider Mr Foelmli's refusal to work in the course of his investigation (there was nothing submitted which would persuade me that that was not the case), nor was it submitted, nor on the evidence, that that was a reason for dismissal. The Commissioner accepted Mr Macaree's evidence.

In all of the circumstances, the conclusion reached by the Commissioner was not an erroneous one, for those reasons.

It was submitted that there was a failure to take mitigating circumstances into account relating to Mr Foelmli's work performance and record beyond that contained in his personnel file.

Mr Craig said that he got on well with Mr Foelmli, that he worked with him for some years and that he was quite a good worker. Mr Kennedy said that Mr Foelmli was a good worker, but had an attitude problem and displayed aggressiveness and temper. He said this in respect of the incident which occurred in relation to the safety harness, which was after the bus incident. Mr Foelmli did lose his temper a bit and was not in control of safety when he was in an agitated state, Mr Kennedy said (see page 91(AB)). That comment seemed to me to be a general comment. He said "There was times around, scuffles and things like that, where things were loud and aggressive on the job."

The assessment of all supervisors was that Mr Foelmli was not at risk, and Mr Craig was of the view that there was aggression on both parts in the matter.

The Commissioner found that Mr Foelmli's record, for this reason, was not such as to save his job, given the circumstances of the incident and, whilst I might take the view that it was, I am not persuaded, in all the circumstances of this matter, to so find.

There was evidence before the Commission that Mr Macaree did consider whether a written warning rather than dismissal was the answer, but discarded it because of the seriousness of the incident. There was evidence, therefore, it was open to accept, that Mr Macaree considered alternatives to dismissal. In fact, it is fair to say that Mr Macaree was engaged in a properly painstaking process when he investigated the dismissal, and rightly so.

Further, there was sufficient in the evidence of Mr Craig and Mr Foelmli for the conclusion to be reached which was reached by Mr Macaree, without having to go to hearsay evidence and, similarly, for the Commissioner to reach the conclusion which she did on the sworn evidence before her.

PROCEDURAL FAIRNESS

I now turn to the question of whether there was a denial of procedural fairness in the dismissal and I have to say that there was not, because—

(a) That, from the beginning, the foremen, Mr Craig and Mr Kennedy had warned Mr Foelmli that if he pushed the matter, he risked dismissal.

(b) Initially, Mr Macaree heard what Mr Foelmli had to say at length and warned him that he should get union representation because he might be facing dismissal.

(c) Mr Foelmli had the opportunity to obtain legal advice and did so.

(d) Mr Foelmli was not able to hear directly what was said against him, but it is quite clear that the union organiser and shop steward were arguing his case, knew what was being considered and, indeed, that he was being given an opportunity to come into the office and discuss these matter from time to time himself. He was also outside the office where his representatives could obtain his instructions.

(e) There was almost four hours of discussion about the matter by Mr Foelmli's representatives, with him in the vicinity and sometimes in the office.

(f) The risk of dismissal was emphasised and comprehensively considered.

(g) Mr Foelmli's case was argued at length by his representatives.

(h) The reasons for the likely dismissal were clear enough for Mr Foelmli to know what he was facing.

(i) Mr Foelmli admitted that he had a proper opportunity to put his side of the case and it would seem that he had adequate opportunity to deal, through his representatives, with the versions given by other witnesses.

FINALLY

The Commission's task was to decide whether, given the evidentiary burden on the employer to establish that the dismissal in this case was justified, and, given that it was discharged, the appellant had not established that Mr Foelmli, on all of the evidence, was unfairly dismissed when it bore the burden of doing so. It has not been established that the exercise of the discretion has miscarried. Even if, for reasons of approach, the exercise of discretion miscarried. I would not consider, for the reasons I have expressed above, that the Full Bench should substitute a different exercise of discretion.

I agree with Mr Randles' submission that the appeal really dealt with two points and that many of the grounds of appeal were particulars of those points.

In my opinion, therefore, it is quite clear that Mr Foelmli was not denied procedural fairness. Mr Macaree went out of his way to see that he was afforded it.

I have considered all of the grounds, I have considered all of the evidence and all of the submissions with care. However, for the reasons that I have set out above, I am not persuaded that the exercise of discretion miscarried and would, for those reasons, dismiss the appeal, no ground of appeal having been made out.

COMMISSIONER S A CAWLEY: This is an appeal against the decision of the Commission constituted by a single Commissioner issued on 12 October 1998 in Matter No. CR 315 of 1997. The dispute the subject of the decision at first instance was raised initially in the Commission for conciliation proceedings pursuant to section 44 of the (WA) Industrial Relations Act, 1979 and, those proceedings not resulting in any resolution, the issue in dispute was referred for arbitration.

The parties to the dispute were The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch (the appellant here) and John Holland Construction and Engineering Proprietary Ltd ("the respondent"). The issue to be determined was whether the dismissal of Mr Dean Foelmli by the respondent was harsh, oppressive and unfair. The decision of the Commission at first instance issued on 12 October 1998. The Commission concluded that the claim of unfairness had not been made out and dismissed the application.

The appellant now applies to the Full Bench for an order that the decision be quashed, that there be a finding of the Full Bench that the dismissal of Foelmli was unfair and the matter of appropriate remedy be remitted back to the Commission to be dealt with in accordance with the law.

Thirty seven grounds were raised by the appellant but three were withdrawn by leave when the matter proceeded. Broadly, these go to what are said to be errors in fact and the application of the law. The principles governing the determination of appeals on grounds of such nature are well established. (See *House v The King (1956) 55 CLR 499; Norbis v Norbis (1986) 161 CLR 513*). These emphasise that only if it is clear that at first instance there has been a failure to use or a misuse of the advantage of seeing and hearing witnesses or the conclusions under attack are inconsistent with uncontrovertible facts or are improbable should an appellate court which has not had that advantage, interfere with findings of fact based on the assessment of credibility. Those principles bind the Full Bench (See *Gromark Packaging v The Federated Miscellaneous Workers Union, W A Branch (1993) 73 WAIG 220*) and as has been pointed out by the Industrial Appeal Court it "is an extremely difficult task for an appellant to overturn a finding of fact based on credibility" (*Federated Miscellaneous Workers Union of Australia W A Branch v Board of Management, Narembeen District Hospital (1992) 72 WAIG 41 at 43*).

I am not persuaded by the appellant that the findings of fact identified in the grounds should be interfered with by the Full Bench. However I agree with Commissioner Beech that this appeal should be upheld and the matter remitted for further consideration in accordance with the law for the following reasons.

Foelmli was dismissed for misconduct. The employer had an evidentiary onus to satisfy the Commission at first instance of the misconduct said to have given rise to the right to summarily dismiss. That is a question of fact. Once found by the Commission the next step was to determine whether the

consequence of the misconduct, dismissal, was unfair in all the circumstances. That is a discretionary judgement. (See the decision of the Industrial Appeal Court in *Gromark Packaging v The Federated Miscellaneous Workers Union of Australia WA Branch, supra, at 223*).

It seems to me and largely for the reasons expressed by Commissioner Beech in his reasons, that the Commission at first instance, having found as fact the misconduct of Foelmli did not proceed then to apply the dicta of the Industrial Appeal Court, *Undercliffe Nursing Home v The Federated Miscellaneous Workers Union of Australia WA Branch* in considering whether the consequence of dismissal for misconduct was unfair having regard not only for the processes applied and considerations of the employer but also the circumstances of the employee.

COMMISSIONER A R BEECH: In my view this appeal turns upon the complaint of the appellant that the test of whether a dismissal is harsh, oppressive or unjust was "not appropriately applied" (transcript p4). It is quite clear that the task of the Commissioner at first instance was to decide whether the employer's right to dismiss Mr Foelmli has been exercised so harshly or oppressively towards him as to amount to an abuse of that right (*Undercliffe Nursing Home v F.M.W.U.* (1985) 65 WAIG 385).

Mr Foelmli was summarily dismissed for misconduct. It is certainly the case that where an employee has been summarily dismissed for misconduct, the employer bears an evidentiary onus to show that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; that it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto and that having done those things, the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged and that taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal (*Western Mining Corporation Ltd v AWU* (1997) 77 WAIG 1985; *Shire of Esperance v Mouritz* (1991) 71 WAIG 891). However, the Commission will err if it only asks itself the question whether or not the employer has discharged that onus but then does not go on to ask itself whether, in all the circumstances of the case, the employer's right to dismiss has been exercised so harshly or oppressively towards the employee as to amount to an abuse of that right. The Commission will have asked itself the wrong question and it will have made an error which will be corrected on appeal as happened in *Federated Clerks' Union v George Moss* (1990) 71 WAIG 318. In that matter the Full Bench stated—

> In the reasons for decision at first instance, the Commission, having outlined the facts, said (see pages 13-14 (A.B.))—
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> > "The Commission must also be mindful of precedent decisions that have defined its role regarding the consideration of an alleged unfair termination as being to establish whether an employer acted reasonably in the given circumstances and not whether the Commission would have come to a different conclusion had it been required to make the decision in the first instance."
> >
> > The Commission at first instance clearly erred in law in applying such a test. The test is that enunciated by the Industrial Appeal Court of this State in The Undercliffe Nursing Home v. F.M.W.U. 65 WAIG 385 (the Undercliffe Case) and the Acosta Case (op. cit.). The test is clearly not whether the employer acted reasonably, but whether he/she/it acted so unfairly, unjustly, harshly or oppressively that the dismissal ought to be held to be unfair. In applying the test which it did the Commission at first instance clearly erred.
> >
> > (Ibid. at 323)

In this case, the Commissioner at first instance correctly identified the tests. However, she then states (at AB 14 and 15)—

> …it is not the role of the Commission to consider all of the evidence and decide whether in the light of that evidence it would have dismissed the employee. Rather it is to review the respondent's conduct of the investigation and the respondent's considerations and decide if the respondent has done those things as thoroughly as possible in the circumstances, and based on the information available to it at the time, come to a conclusion in a fair manner and in good faith.

In that statement, and with respect, the Commissioner only asked herself the question whether or not the employer has discharged the onus upon it.

In the balance of her Reasons for Decision the Commissioner at first instance examined the actions of the respondent with great particularity. She justified her conclusion that in so far as it was within his power, Mr Macaree, on behalf of the respondent, conducted as full and extensive investigation into all of the relevant matters surrounding the incident as far as was reasonable in the circumstances. She considered Mr Macaree's initial involvement and the steps that he took which eventually lead to the decision to summarily dismiss Mr Foelmli. She considered whether or not Mr Macaree honestly and genuinely believed, and had reasonable grounds for believing on the information available to him at the time, that Mr Foelmli was guilty of a misconduct as alleged. The Commissioner at first instance herself reviewed the evidence regarding Mr Foelmli's conduct and reached the conclusion (AB 16) that Mr Foelmli's conduct was more than "verbal abuse of other employees in the workplace" and that it was more akin to the examples of conduct in the "serious misconduct" list. However, the Commissioner at first instance did not reach those conclusions to answer the question of whether the dismissal was harsh, oppressive or unfair but rather to support her own conclusion that Mr Macaree did not come to a wrong conclusion and to conclude herself that Mr Foelmli's conduct was within the type of conduct which can justify instant dismissal for serious misconduct. She concluded that because his conduct was within the type of conduct which can justify instant dismissal for serious misconduct he had not been harshly or oppressively or unfairly treated. However, the task of the Commissioner at first instance was not only to decide whether Mr Foelmli's conduct was within the type of conduct which can justify instant dismissal for serious misconduct. The task of the Commissioner was also to decide whether the employer's right to dismiss has been exercised so harshly or oppressively towards the employee as to amount to an abuse of that right. The two concepts are readily distinguishable. An employer has a legal right to dismiss an employee if the employee misconducts him or herself. However, not all misconduct justifies dismissal (*Laws v The London Chronicle (Indicator Newspapers) Ltd*, [1959] 1 W.L.R. 698; *in re Homebush Abattoir* [1966] A.R. (NSW) 371). The concept that a dismissal may be harsh, oppressive or unfair goes beyond establishing that a misconduct occurred which may justify dismissal. It goes not only to the reason for the dismissal but to the consequence of the dismissal overall. It recognises that although there may be reason for the dismissal, the overall effect of the dismissal may be harsh, oppressive or unfair. I do not necessarily disagree with Mr Randles' submission (transcript on appeal pp 81-84) that merely because Reasons for Decision do not contain every single matter which passes through the mind of the court at first instance, that does not mean to say that it did not occur. It is certainly not necessary for the Commission to refer to all of the evidence in its Reasons for Decision (*re F.M.W.U. Rules* (1985) 65 WAIG 2033 Brinsden J at 2034) and where the decision of the Commissioner at first instance was one that was reasonably open of the evidence, the failure of the Commission at first instance to state all of the reasons for reaching its conclusion will not be fatal on appeal. However, where, as here, the Commissioner at first instance did not answer the question before it, is not open to conclude that the Commission did not err.

The Commissioner stated that she had considered the authorities presented to her and the evidence before her, in particular Mr Macaree's evidence. Viewing the matter as a whole she found that the investigation conducted by Mr Macaree on behalf of the respondent was thorough, that Mr Foelmli and all his representatives had an opportunity to know the allegations and to respond and in fact to debate with Mr Macaree the situation in the context of the workplace as a whole. She noted that if there had been any error on Mr Macaree's part it was a failure to take into account any

mitigating circumstances relating to Mr Foelmli's work performance and the record beyond that contained within his personnel file. However, the Commissioner reached the conclusion that the failure of Mr Macaree in that regard did not itself result in Mr Foelmli being treated harshly or oppressively or unfairly by the respondent in its decision to terminate his employment (AB 16). The Commissioner's ultimate conclusion was—

> In all of the circumstances I am not satisfied that the respondent failed to provide Foelmli with an industrial "fair go".

That conclusion is in the context of her consideration of whether the respondent had denied Mr Foelmli procedural fairness. However, and significantly, the Commissioner did not go on to decide whether or not the dismissal in all of the circumstances was harsh, oppressive or unfair. For that reason I would uphold the appeal.

Whether the respondent adopted a fair procedure in its investigation and in its eventual decision to dismiss Mr Foelmli is only one of the circumstances the Commission is to take into account. Every case must be judged on its own facts

As Franklyn J. observed in *BHP Iron Ore Ltd v T.W.U.* (1993) 73 WAIG 529 at 530:

> ''...As was said by the learned authors of "The Law of Employment" Macken, McCorry (sic) and Sappideen (3rd ed) at 275—
>
> > ''In determining whether the dismissal is unfair the tribunal must have regard to all the relevant circumstances relating to the particular employee. These include not only matters specifically related to the employee's work record but also whether the applicant will be able to find alternative employment and the financial and social consequences of dismissal. The question whether a dismissal is harsh, unjust or unreasonable is determined having regard to the circumstances at the time of dismissal.''

A material factor will be the employee's length of service (*Undercliffe*, *op. cit.* at 387). There is considerable force in that part of Ground 36 of the appeal which is to the effect that the Commissioner failed to take into account Mr Foelmli's "lengthy and good work record". There was evidence that although Mr Foelmli had been employed on this occasion for approximately eight months, he had previously been employed by the respondent intermittently over a four-year period (AB 147). It would be reasonable to take his previous work history into account given that there is no evidence of any warning or reprimand being given to him during all of that time and that the respondent was prepared to re-employ him on each occasion.

Other material factors to be taken into account include the evidence that he was regarded as a good worker and that there was no indication to the contrary on his personnel file (AB 140). This evidence would negate the evidence referred to by the Commissioner that Mr Foelmli has an attitude problem and is loud and aggressive on the job (AB 13). It is also material that he had not retaliated in the incident. Further, the fact that it was Mr Foelmli himself who was effectively the instigator of the respondent's investigation into the incident results in an implication positive to him in all of the circumstances.

There is no absolute rule that fighting in the workplace, let alone threatening and abusive behaviour, justifies dismissal (see for example *UFTU v Pay-Co Products* (1990) 70 WAIG 2497 at 2499; *Forest Products, Furnishing and Allied Industries Union v Wesfi Pty Ltd* (1992) 72 WAIG 610 and see also *Yew v ACI Glass Packaging* (1996) 71 IR 201). It is therefore quite significant that the Commissioner did not conclude that the incident constituted a "fight". These considerations would readily permit the conclusion on a proper exercise of the Commissioner's discretion that the employer's right to dismiss Mr Foelmli was exercised so harshly or oppressively towards him as to amount to an abuse of that right. I would therefore remit the matter back to the Commissioner at first instance to decide whether the employer's right to dismiss Mr Foelmli has been exercised so harshly or oppressively towards him as to amount to an abuse of that right.

I have not been persuaded that the appeal should be upheld on other grounds. Where, as here, there is evidence from which it is open to the Commission at first instance to make the findings which she did the appellant has a difficult task in persuading an appeal bench that the Commissioner was in error. This is all the more so when the credibility of witnesses is to be assessed in order to make those findings.

THE PRESIDENT: For those reasons, the appeal is upheld and the matter remitted to the Commission to hear and determine according to law.

Order accordingly

APPEARANCES: Ms J Harrison on behalf of the appellant.

Mr A J Randles, as agent, on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch

(Appellant)

and

John Holland Construction & Engineering Pty Ltd

(Respondent).

No. 1953 of 1998.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY
COMMISSIONER S A CAWLEY
COMMISSIONER A R BEECH.

4 May 1999.

Order.

This matter having come on for hearing before the Full Bench on the 5th day of March 1999, and having heard Ms J Harrison, as agent, on behalf of the appellant and Mr A J Randles, as agent, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 29th day of April 1999 wherein it was found that the appeal should be upheld, it is this day, the 4th day of May 1999, ordered and directed as follows—

(1) THAT appeal No 1953 of 1998 be and is hereby upheld.

(2) THAT the decision of the Commission in matter No CR 315 of 1997 made on the 12th day of October 1998 be and is hereby suspended and the application be remitted to the Commission to hear and determine in accordance with the reasons for decision and according to law.

By the Full Bench,

(Sgd.) P.J. SHARKEY,
[L.S.] President.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Growers Market Butchers

(Appellant)

and

Stephen Backman.

(Respondent)

No 2220 of 1998.

BEFORE THE FULL BENCH.

HIS HONOUR THE PRESIDENT P J SHARKEY
COMMISSIONER S A CAWLEY
COMMISSIONER C B PARKS

15 April 1999.

Reasons for Decision.

THE PRESIDENT: This is an appeal brought under s.49 of the Industrial Relations Act 1979 (as amended) (hereinafter called "the Act") against the decision of the Commission at first instance, constituted by a single Commissioner. The decision was made upon an application by the respondent to this appeal for an order pursuant to s.29 of the Act on 6 May 1998 in matter No 792 of 1998.

GROUNDS OF APPEAL

It is against that decision that the appellant now appeals on the following grounds, as amended by leave of the Full Bench on the application of the agent for the appellant, upon the hearing of the appeal—

"3. GROUND 1: RESPONDENT FAILED TO ADEQUATELY MITIGATE HIS ECONOMIC LOSS AFTER TERMINATION—

3.1 The learned Commissioner erred in law and in fact when, based upon the weight of evidence, he awarded compensation to the Respondent from date of dismissal up to the 19th day of October 1998, by not taking into consideration—

(a) the Respondent for a five week period from the 15th day of September 1998 until the 19th day of October 1998, after finding suitable employment, was not actively trying to mitigate his loss. Refer to Pages 26, 92, 93 and 111 of the Transcript of Proceedings.

(b) The overall failure by the Respondent to give any substantial details of efforts to obtain suitable employment in his occupation as a butcher, given the evidence of an expert witness, a Mr M.J. Darcy describing the Respondent as an "extremely professional" butcher. Refer to Page 32 of the Transcript of Proceedings.

(c) The Appellant seeks an Order from the Full Bench for the amount of $3,705.00 gross be deducted from the compensation amount awarded by the learned Commissioner. This is due to the Respondent's failure to demonstrate serious attempts to mitigate his loss during this period.

(d) From the date of termination to the 19th day of October 1998, the Respondent failed to demonstrate the nature and number of positions applied for in the Mandurah and Rockingham areas. Refer to Pages 92-93 of the Transcript of Proceedings.

3.2. The learned Commissioner erred in law when he applied the principle that compensation for loss of income by the Respondent should be for the total amount of unemployment, up to the 19th day of October 1998, being 24 weeks wages amounting to $17,124.00 less income earned, when considering—

(a) In Bradley Rickard Smith *v.* CDM Australia Pty Ltd (1997) 78 WAIG 307, the Full Bench noted—

"Primarily, the task is to ask what loss or injury has been suffered as a result of the dismissal. The answer involves a consideration of a range of factors, and not merely a consideration of the income lost by the employee during the resultant period of unemployment.." Refer to Pages 92-3, 111 of the Transcript of Proceedings).

(b) What is "fair and reasonable" in all of the circumstances, not just some of the circumstances (See Sangwin –v- Imogen Pty Ltd T/A Carleton Custom Von Doussa J.)

David James Grace *v.* David Evans Real Estate, No. 1911 of 1997 (1998) 78 WAIG 141 at 1412-1413. The Respondent's 24 weeks of unemployment was the primary consideration, rather than considering all circumstances including the interests of the employer.

(c) The Respondent had an obligation in law to mitigate his loss (Cf Maria Teresa Bechara *v.* Gregory, Harrison, Healy & Co. (IRC of A) No. 1129/94, 19 April 1996, (Unreported).

(d) The remainder of the quantum of compensation is excessive due to—

(i) The Respondent's period of service with the Appellant company was very brief: totalling only ten weeks. Refer to Page 3 of the Transcript of Proceedings.

(ii) The Respondent gave no convincing evidence during the hearing, based on the weight of the evidence, that the employment relationship could have been reinstated or expected to continue past his date of termination, as the employment relationship between the two parties was rapidly deteriorating. The Commissioner erred in law when he compensated the Respondent for a further 18 weeks of pay, for this reason. Refer to Pages 3-4, 44-47, and 52 of the Transcript of Proceedings.

(iii) The Respondent failed to demonstrate to the learned Commissioner that the Appellant company had committed a flagrant breach of unfair dismissal case law and procedures, that merited a high compensation quantum payment. See Michael Slifka *v.* J.W. Sanders Pty Ltd, (Federal Court) 19th of December 1995, VI 9412741R. Cf Gilmour *v.* Cecil Bros FDR and others, 76 WAIG 4434 (FB).

(iv) The Respondent failed to demonstrate that he was making a serious effort to mitigate his loss, after taking into consideration his work experience in the meat industry. Refer to pages 6, 24, 34-36 of the Transcript of Proceedings.

(v) That the balance of compensation is excessive, as the Respondent failed to demonstrate that the dismissal caused him sufficient "shock, humiliation and stress" supposed as the result of the dismissal, that would justify the awarding of 23 weeks compensation for loss of the position. Refer to Burazin *v.* Black Town, City Guardian Pty Ltd (1997), 41 AILR 3-453; cf Gilmour *v.* Cecil Bros FDR and others, 76 WAIG 4434 (FB)."

BACKGROUND

The respondent (who was applicant at first instance) claimed that he had been unfairly dismissed from employment with Growers Market Butchers, which operates a mixed business in Pinjarra Road, Mandurah, part of which is a butcher shop in which the respondent, a butcher by trade, was employed. In fact, he is an experienced butcher, having been engaged in that occupation for 26 years.

The appellant commenced business in premises previously a place where Better Value Meats, another firm, carried on business, in February 1998. The respondent had been employed by Better Value Meats and was dismissed from that employment when that business was sold to the appellant.

The respondent, however, was asked by the appellant to come to work on the following Monday and he did so, performing the same duties as he had performed when the shop was in the hands of Better Value Meats. Indeed, he ran it as he had run the shop under Better Value Meats.

The respondent did attempt to get assistance from experts in the meat retailing business and, in fact, from Mr Mervyn Darcy of the National Meat Association. Mr Darcy's duties involved him in training and retailing and advice to members of the Association about the business of meat retailing. He had visited the shop on many occasions on a professional basis and he gave advice about displays and the advertising of products and also as a customer. He said that the product from the shop had been satisfactory in his expert view.

In May 1998, the respondent was told that his services were no longer required and would occur at the time when a three month probationary period was to be brought to an end. The respondent knew nothing about such a period, which had never been mentioned to him. He was surprised when he was asked to go and being of the view that he had tried to make the business operate effectively and profitably.

The Commission heard evidence from Mr Darcy and the respondent and also Mr Christopher Robin Brett, who described himself as the part-owner of the appellant and who was the only witness for the appellant.

FINDINGS AT FIRST INSTANCE

The Commissioner at first instance found as follows—

1. That the Commissioner accepted the evidence of the respondent and of Mr Mervyn Darcy and would not accept that of Mr Brett.
2. That the dismissal was harsh, oppressive and unfair.
3. That there was no period of probation ever agreed.
4. That because Mr Brett was absolutely certain that he did not want the respondent in the butchery as a manager, a reinstatement was impracticable. The Commissioner, in fact, found that there would be a lack of confidence in the ability of the respondent to manage the business and that it was impracticable to reinstate him.
5. The Commissioner went on to assess an amount of compensation and invited the parties (see page 25 of the Appeal Book (hereinafter referred to as "AB")) to discuss an acceptable arrangement for payment by instalments and gave liberty to apply to fix the amount of compensation and the instalments by which the payment was to be made.

On 15 September 1998, the Commissioner had said that he would fix compensation, based on the loss of wages (see page 111 of the transcript at first instance (hereinafter referred to as "TFI"), but heard no submissions which would cause him to reach the conclusion that he should add anything more to the assessment of the compensation other than the recompense from the time that the employee was dismissed at his ordinary weekly wage until he achieved employment on 19 October.

He sought a statutory declaration of the wages earned in that time, which included all social security payments and any earning which would be deducted from the total amount paid. He then directed "the parties should confer about the total sum to be paid in accordance with my decision".

THE ORDER AND EVENTS PRECEDING THE ORDER

The recital to the order of 26 November 1998 included the following—

> "WHEREAS the parties have advised the Commission that upon the finding of unfairness by the Commission they agree that the total sum of compensation should be fixed at $17,124.00;"

There is no copy of the Minute of Proposed Order in the Appeal Book.

There is a statutory declaration, filed by the respondent, dated 24 October 1998 in respect to monies earned since the termination of his employment (see page 39(AB)).

In addition, Mr Christopher Chadd, the agent for the respondent on this appeal, wrote on 26 October 1998 to the Associate to the Commissioner in respect to monies earned by the respondent since the termination of his employment (see page 40(AB)).

By letter of 5 October 1998 (not included in the Appeal Book, but appearing on the original file), T C Crossley & Associates, in a letter signed by Mr T C Crossley, advised that he was unable to locate Mr Chadd, and refers to an amount of $17,043.00 as being the amount of compensation to be paid, representing 23 weeks at $741.00 net per week, and further advising that such an amount would be hard to pay within the 21 day period from the date of the order and asking permission to give consideration to ordering that the amount be paid at $1,420.35 per month.

The statutory declaration of the respondent dated 21 October 1998 was forwarded by Mr Christopher Chadd to the Associate to the Commissioner by letter dated 22 October 1998.

By letter dated 22 October 1998, forwarded to both Mr Crossley and to Mr Chadd, the Associate to the Commissioner wrote, formal parts omitted, as follows—

> "I refer you to page 17 of the Decision where the Commissioner stated that—
>
> — the parties should confer about the total sum to be paid and
>
> — that the parties are directed to discuss an acceptable arrangement for payment by instalments."
>
> If nothing is heard from the parties within 7 days, the Commissioner will determine the matter."

By letter dated 23 October 1998, Mr Crossley wrote to the Associate to the Commissioner advising, inter alia—

> "I have attempted to negotiate with Mr Chad (sic) on behalf of his client, to reach agreement over the final amount of compensation and the question of compensation.
>
> We can only agree that 24 weeks at the rate of $741.00 equals $17,784.00. We have been advised that Mr Backman has received Social Security payments amounting to $5,730.00, with casual earnings of $710.00.
>
> In our discussions we have deducted the casual earnings to arrive at a figure of $17,074.00. Unfortunately, we could not reach agreement on instalments.
>
> .....
>
> Accordingly, we seek leave of the Commissioner to apply for 12 monthly instalments of $1,422.84, less the relevant taxation, commencing 14 days of the Order (sic)."

By letter dated 23 October 1998, Mr Chadd wrote to the Commissioner advising that they were unable to reach agreement and inviting him to fix the amount of the compensation and instalments to be made.

By letter dated 26 October 1998, Mr Chadd wrote to the Associate to the Commissioner, forwarding a further statutory declaration by the respondent to replace the statutory declaration of 21 October 1998.

By letter dated 3 November 1998, the Associate to the Commissioner wrote to Mr Crossley, formal parts omitted, as follows—

> "A letter was received from you dated 23 October 1998, stating that discussions between the parties have deducted the casual earnings to arrive at a figure of $17,040.00 for compensation.
>
> On 26 October 1998, we received an amended Statutory Declaration from the applicants agent, stating a further income of $268.09 has been received by the applicant (copy attached).
>
> The Commissioner intends to deduct this amount from your figure of $17,040.00. If you agree with this please advise by 4 November 1998."

By facsimile communication dated 3 November 1998, Mr Crossley communicated with the Associate to the Commissioner, formal parts omitted, as follows—

"Thank you for your facsimile.

The figures appear correct. Therefore I presume the amount of $268.09 is deducted from $17,040.00, if so I agree with your figures.

My client would still like instalment system please.

Thank you for your assistance."

On 11 November 1998, the Associate to the Commissioner forwarded a Minute of a Proposed Order to Mr Crossley, which, formal parts omitted, reads as follows—

"WHEREAS on 21 October 1998, the Commission issued Reasons for Decision in this matter; and

WHEREAS the Commission found that the applicant had been unfairly dismissed and it was impracticable to reinstate him and therefore decided to fix compensation; and

WHEREAS Mr Crossley who appeared for the respondent, made submissions that the respondent was unable to pay compensation of a lump sum and sought an order for payment by instalments; and

WHEREAS the Commission decided that it would grant payment by instalments and directed the parties to discuss arrangements for such payment; and

WHEREAS the parties have advised the Commission that they agree to the total sum of compensation should be fixed at $16,806.00; and

WHEREAS the Commission has decided that the compensation will be paid in six equal monthly instalments;

NOW THEREFORE, pursuant to the powers vested in it by the Industrial Relations Act 1979, the Commission hereby orders—

1. THAT the applicant was unfairly dismissed.
2. THAT the applicant be paid compensation in the sum of $16,806.00 to be paid in six equal monthly instalments."

The letter advised that, if the Commissioner did not receive a response by 4.00 pm on Friday, 13 November 1998, the final order would issue. A similar letter with enclosure was sent on the same day to Mr Chadd.

At page 41(AB), there is a letter from the agents for the appellant dated 11 November 1998 and signed by Mr T C Crossley, Industrial Agent, in which he advises that the minute of proposed order should be amended in one respect so as to read as follows—

"Whereas the parties have advised the Commission that they agree to the total sum of compensation should be fixed at $16,806.00 based on the Commission's determination in the Reasons for Decision"

There is then a notation by the Associate that the Commissioner instructed her to list the matter for speaking to the minutes, and it was so listed on 26 November 1998.

On 26 November 1998, Mr Chadd and Mr Crossley appeared to speak to the minutes and there was transcript of the proceedings. The figure which should apply was said by Mr Chadd to be "$17,784.00 less $659.75".... giving... a figure of $17,124.25".

At page 5 of the transcript of that date, the following exchange took place—

"GREGOR C: So that the number that should go in by consent into the order is 17,124?

MR CROSSLEY: Yes, that's correct.

GREGOR C: Okay."

There was then discussion about whether the sum of $17,124.00 should be shown as gross or not and further discussion about other matters and the Commissioner then read out the amendment to be made to the Minutes of Proposed Order, which is what appeared in the order, namely—

"WHEREAS the parties have advised the Commission that upon the finding of unfairness by the Commission they agree that the total sum of compensation should be fixed at $17,124.00"

and that in Order No 2.—

"the applicant be paid compensation in the sum of $17,124.00 to be paid in six equal monthly instalments."

QUANTUM AND MITIGATION

In this case, the following was the situation as regards evidence, cross-examination, submissions, addresses and findings as to quantum and mitigation.

There was evidence in chief as to mitigating loss or injury, namely that the respondent was unemployed as at the time of the hearing, i.e. 15 September 1998, that he had tried to seek employment since he was dismissed and was starting a job on 19 October 1998 (see pages 2-3 (TFI)). Thus he was unemployed from 2 May 1998 to 19 October 1998.

In cross-examination (see pages 26-27(TFI)), he was asked if he had (apart from social security payments) earned "money from your casual employment". He gave evidence that he had one week's work at Dewsons in Hamilton Hill and that was all. His gross pay from the appellant was $741.00 per week. Tax payable was $192.70. Thus, his nett weekly wages was $548.30. He received, during unemployment, $290.00 per fortnight social security payments.

Mr Mervyn James Darcy was called to give evidence, as a person with knowledge of the meat industry in his capacity as Human Resources Manager, and gave evidence that he would have no problem if somebody asked him to employ the respondent.

There was no submission by Mr Crossley that the appellant had not mitigated the respondent's loss and no evidence adduced to that effect. There was a submission that the sum the respondent claimed was 24 weeks as the amount of the salary he was paid by the appellant, and deducting social security of $145.00 per week, the amount claimed was in the order of $10,000 (see pages 92-94 (TFI)). There was no submission as to quantum by Mr Crossley.

The Commissioner's approach to the matter was, formally expressed, in error (see pages 105-106 (TFI)), relying on inappropriate authority. However, he correctly found that the only loss claimed (and I might say so proven) was the 24 (23) weeks' loss of wages to which I have already referred.

He then set out to assess compensation for the loss proven, which was within the s.23A cap.

The Commissioner then, quite correctly, observed that he would need a statutory declaration of earnings "achieved in that time" which he would deduct from the total amount to be paid.

Statutory Declaration – 24 October 1998 (page 39(AB))

This statutory declaration was filed as an amendment to an earlier statutory declaration. According to that the appellant received one week at Rules and one week at Farmer Jacks.

$2,610.00	Newstart
$2,728.00	Family Payment
$5,977.00	

Its contents were not challenged nor was it sought to cross-examine further or adduce further evidence.

Speaking to the Minutes – 26 November 1998

On 26 November 1998, when a Speaking to the Minutes occurred, Mr Crossley said—

"Certainly, upon your decision, yes we do agree upon the 24 weeks."

However, he agreed that the money "put in the order was okay" (see page 2 of the transcript of 26 November 1998). The amount of social security payments, amounting to $5,730 with casual earnings of $710, was deducted according to Mr Crossley's letter, to arrive at a figure of $17,074. Mr Crossley said that his principal could not argue with the statutory declaration which was filed. The parties agreed that the total sum to be fixed as compensation was $17,124.00.

ISSUES AND CONCLUSIONS

The decision in this matter was a discretionary decision, as that is defined in Norbis v Norbis 65 ALR 12.

It falls to the appellant to establish that the exercise of discretion by the Commission at first instance miscarried according to the principles in House v The King [1936] 55 CLR 499 (HC) and Gromark Packaging v FMWU 73 WAIG

220 (IAC). Unless that is done, the Full Bench may not interfere with the decision made at first instance.

MITIGATION

A major ground of appeal in this matter alleged that the respondent did not mitigate his loss.

1. The duty to mitigate loss in claims of unfair dismissal lies on the claimant employee (see Bogunovich v Bayside Western Australia Pty Ltd 79 WAIG 8 (FB)).
2. In practical terms, this requires the employee to diligently seek suitable alternative employment (see Brace v Calder and Others [1895] 2 QB 253).
3. The onus of proof of failure to mitigate loss is on the respondent (see Metal Fabrications (Vic) Pty Ltd v Kelcey [1986] VR 507 (FC), Goldburg v Shell Oil Co of Australia Ltd (1990) 95 ALR 711 (FC), Prus-Grzybowski v Everingham and Others (1986) 45 ALR 468, 87 FLR 182 (Fed Ct FC) and McGregor on Damages (15th Edition 1988) at page 723.
4. (a) The obligation to mitigate loss is an obligation to act reasonably in the mitigation of loss but not an obligation which a reasonable and prudent person would not undertake.
   (b) This duty to act reasonably to mitigate damage does not generally require the employee to take employment of a different or inferior kind (see "Truth" and "Sportsman" Limited v Molesworth [1956] AR(NSW) 924; Bostik (Australia) Pty Ltd [1991] v Gorgevski (No 1) 36 FCR 20; 41 IR 452 and compare Dunstan v The National Mutual Life Association of Australia Ltd (1992) 5 VIR 73).
   (c) In some cases, it may be unreasonable not to accept employment at a lower status and salary level (see Yetton v Eastwoods Froy Ltd [1967] 1 WLR 104, for example).
5. (a) There is, of course, no recovery for the loss avoided, unless the matter is collateral (see W R Freedland "The Contract of Employment" (1976) at page 26).
   (b) Salary or wages, including any fringe benefits received from a new employer, will reduce the damages payable (see Bold v Brough Nicholson and Hall Ltd [1964] 1 WLR 201; Lavarack v Woods of Colchester [1967] 1 QB 278 at 301; Hutt v The Cascade Brewery Ltd (unreported) (Supreme Ct Tas) per Wright J and Golja v Lord (unreported) 21 February 1996 (IRC of Aust) per Madgwick J).
6. Expenses incurred in seeking alternative employment to mitigate one's loss may be taken into account (see Brookton Holdings No V Pty Ltd v Kara Kar Holdings Pty Ltd (1994) 57 IR 288.

In this case, the respondent gave evidence at first instance of his inability to find employment and that employment which he did obtain, both casual and, in the end, more substantial, coming on 19 March 1999.

It was not put to the respondent in cross-examination that he had not mitigated his loss. It was not put to him or submitted to the Commission that he had not diligently sought suitable alternative employment. He gave evidence that he had looked for work from Mandurah to Fremantle, which is not an insignificant geographical area. It was not put to him or submitted to the Commission at first instance that he had not acted unreasonably in so doing. His obligation was to act reasonably and the evidence was that he did.

The onus of proof of failure to mitigate loss was on the appellant and there was neither evidence led to discharge the onus, nor any assertion in cross-examination or submissions that that was so.

The Commissioner was entitled to find that the loss had been mitigated. There was no express finding, but it was implicit in the finding as to quantum that the loss was a mitigated loss. In any event, it was not submitted that it was not.

There was ample unchallenged evidence of mitigation of loss, albeit expressed shortly, as I have outlined it above.

Next, in agreeing an amount as I have said above, there was a concession by which the appellant was bound. Further, the appellant, having conducted its case on the basis that mitigation was not put in issue, is now bound by the conduct of its case and should not be permitted to challenge on appeal what it specifically did not challenge at first instance (see Metwally v University of Wollongong (1985) 60 ALR 68 (HC)).

Further, the matter of a failure to mitigate was not raised at first instance. Had it been raised by way of challenge, the respondent might wish to have dealt with it in more detail in evidence or wished to call more evidence. This, therefore, on the authority of FCU v George Moss Limited 70 WAIG 3040 (FB), was not an argument which it was permissible to put under s.49(4) of the Act.

QUANTUM OF COMPENSATION

Although the approach to the grounds of appeal under this head were somewhat ambiguous, in that it was not clear to me how much they were pursued, I propose to make some observations about them.

Albeit that the Commissioner formally adopted the wrong principles in his reasons, he nonetheless seems to have applied the right principles in finding the loss and assessing compensation.

The quantum was the only amount, subject to the deductions made, which the Commissioner was able, as a matter of law and fact, to make, on the evidence. The respondent proved a loss of earnings at the rate at which he had been paid by the appellant during a period when, except for some casual employment, he was unable to find employment. No submissions were made as to that loss by Mr Crossley. No issue was taken with submissions made by Mr Chadd, at first instance, in that regard. No submissions were made as to what should be the amount of compensation by Mr Crossley.

The parties set out to agree quantum on the basis of Mr Chadd's submissions as accepted by the Commissioner. The Commissioner's finding was in accordance with the evidence by statutory declaration and made with the agreement of the parties. The respondent is bound by the case which it put (see Metwally v University of Wollongong (op cit)) (see also Smith v NSW Bar Association 108 ALR 55 (HC) and The Chamber of Commerce and Industry of Western Australia v FMWU and Others 74 WAIG 38 at 40-42 (FB).

Further, I was not persuaded, either, that this ground, not having been raised at first instance, was such a matter that should be permitted to be raised on appeal pursuant to s.49(4) of the Act, having regard to the principles in FCU v George Moss Limited (op cit).

FINALLY

I have considered all of the grounds of appeal, all of the submissions, relevant material and evidence. Further, I am not persuaded that the exercise of discretion should be interfered with on any of the grounds of appeal.

No ground of appeal has been made out, and I would, for those reasons, dismiss the appeal.

COMMISSIONER S A CAWLEY: This is an appeal against the decision of the Commission in the case of a claim by Stephen Backman (the respondent here) that Growers Market Butchers (the appellant here) had unfairly dismissed him from his employment.

The appellant operates a business in Mandurah. Part of that business is a retail butcher outlet. The appellant took over the business in early 1998. Backman is a butcher by trade. He had been employed by the previous operator of the business and, when asked by the appellant, agreed to a contract of employment with it in the meat section. The ordinary weekly wage for the position was $741.00. In May 1998 the appellant terminated Backman's employment. By way of a claim filed pursuant to section 29(1)(b)(i) of the Industrial Relations Act, 1979 ("the Act") Backman claimed that that dismissal was unfair. That claim was heard by the Commission constituted by a single Commissioner. Reasons for decision were published on 21 October 1998. Findings of unfair dismissal, the impracticability of any reinstatement of the employment and the conclusion that compensation for loss should be awarded are expressed therein with the parties being directed to "discuss an acceptable arrangement for payment in instalments".

The Commissioner goes on to state "In the absence of agreement liberty is reserved for either [party] to apply to the Commission to fix the amount of compensation and the instalments by which payment is to be made" (Appeal Book : Page 25). The order finalising the matter issued on 26 November 1998. The preamble to that order includes a statement to the effect that the parties had advised the Commission that they agreed that the total sum of compensation should be fixed at $17,124.00. The order reflects this sum in compensation and provides for payment to be made in monthly instalments (Appeal Book : Page 8). That decision is now appealed by the employer.

It is convenient at this point to note that the notice of appeal against the decision at first instance and the grounds filed are a model of muddle. The notice as filed is stated to be against the decision (which is the order which issued) but then goes on to state it is against—

> The following part or parts of the said decision, namely part of the decision in reference to—
>
> (a) Failure by the Respondent to mitigate his economic loss following termination and;
>
> (b) Non-reinstatement to former position as a butcher without loss of wages
>
> on the ground/s set forth in the attached schedule.

What follows is said to be "Particulars of claim" to be read "in conjunction" with the Notice of Appeal and the statement that the appeal is against two "aspects" of the Order. Two "grounds" are identified. One is that Backman failed to adequately mitigate his economic loss after termination. The other is stated as "Reinstatement or compensation on a finding of unfair dismissal" which, on reading further, turns into an assertion that the Commission at first instance erred in fact and law, in concluding that reinstatement was impracticable. As to relief, the Full Bench is asked to set aside the order of the Commission at first instance but then to vary it and to vary it by inserting a conclusion that reinstatement is "now impractical due to the time lapse between the date of termination until hearing and determination before the Full Bench" and to reduce the compensation to Backman to $2,964.00 minus "appropriate taxation".

More could be said about all this and the confused and confusing citation of "authorities" in support of propositions peppered through the subparagraphs to the "grounds"; which propositions bear no relation to the said "grounds". But there is enough in the foregoing to justify the observation that it would be entirely understandable if any party faced with such a notice of appeal as filed here was left, at best, in a state of mystification as to what it was which was under attack. The fact that on the day of hearing of the appeal by the Full Bench Mr Crossley (who appeared as agent for the appellant) was able to amend the grounds of appeal, by leave, to delete some parts does not alter that.

In applying to amend the grounds of appeal Mr Crossley confirmed that the appellant sought to argue a single ground and went on to affirm that this was the question of quantum of compensation as per Ground 1 of paragraph 3 of the schedule (Appeal Book : Pages 2, 3 and 4) and for an order of the Full Bench per paragraph 5.(3) of the schedule (Appeal Book : Page 5). Subsequently, however, Mr Crossley confirmed in answer to other questions from members of the Full Bench that the complaint sought to be raised on appeal was that the amount of compensation awarded was too high because the Commissioner at first instance did not have proper regard for the onus on the respondent to mitigate his loss. This appeal is limited to that point.

The remedy sought by the appellant from the Full Bench is a reduction of the sum of compensation awarded from $17,124.00 to $2,964.00 "less the appropriate taxation within 14 days of the Full Bench Order." (Appeal Book : Page 5).

It is trite law that a party claiming compensation for loss as a result of an unfair dismissal has an onus to mitigate such loss as far as possible. The discharge of that onus is a matter for discretionary judgement in a particular case. On appeal here it is for the appellant to persuade the Full Bench that there has been an error in the exercise of that discretion. As stated by Dixon, Evatt and McTiernan JJ in their High Court judgement in the case of *House v The King* 55 CLR at 505—

> …
>
> It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials to do so. It may not appear how the primary judge has reached the result embodied in his order but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In some such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

The Commission at first instance had available to it evidence of attempts to mitigate the loss of employment. Backman gave evidence at the hearing on 15 September 1998 that since his dismissal he had sought employment in the region from Mandurah to Rockingham and was to start a new job on 19 October 1998 (Transcript of proceedings at first instance: Page 3). This evidence was not challenged in cross examination and no questions at all on mitigation were put to Backman by Mr Crossley. In all it was open to the Commissioner at first instance to accept Backman's evidence of attempts to find other work.

There was also evidence of mitigation of loss. The matter of remuneration for some short term employment between the time of dismissal of Backman and the date of hearing was identified by Backman's advocate in answer in part to questions from the Commission at first instance, as were unemployment benefits and the costs of looking for work in the region (Transcript of proceedings at first instance : Pages 92-93). Backman was required by the Commissioner to produce a statutory declaration of any such earnings and social security benefits received since the dismissal and the parties' representatives were directed to confer then as to the compensation award to be made for loss (Transcript of proceedings at first instance : Page 111). It was made clear by the Commissioner at that time that any payments disclosed in that statutory declaration were to be deducted from a sum calculated as equivalent to the ordinary weekly wage from the time of dismissal until he took up other employment on 19 October 1998.

A statutory declaration was produced (Appeal Book : Pages 39-40) and, that production being acknowledged by Mr Crossley in the course of the appeal (see Appeal Book : Page 41), there is no reason to suppose that it was kept from the appellant. No challenge was raised as to the document and it is apparent in a letter from Mr Crossley to the Commissioner's Associate that it was considered by the appellant in the conferring between the two parties required by the Commission at first instance for the purpose of the parties endeavouring to reach agreement on the sum of compensation to be awarded. (Appeal Book : Page 41). At no time was any issue taken or sought to be raised by the appellant as to the detail of the statutory declaration, or its adequacy, notwithstanding the Commission's express contemplation on 15 September 1999 that the parties may not reach agreement on the quantum.

As it turned out, agreement was reached between the parties that the sum to be awarded was to have regard for the 24 weeks from the dismissal to the taking up of the new employment position and the "earnings" of Backman in the interim. This was advised to the Commission by the appellant (Appeal Book : Page 41). The interim earnings of Backman identified in the statutory declaration amounted to $659.84. Clearly, applying this as a deduction from the sum calculated on the basis of the ordinary weekly wage for 24 weeks give rise to the figure (rounded to the nearest dollar) which appears in the order which issued.

No failure by the Commissioner with respect to the onus for mitigation is disclosed by any of this.

As to the complaint on appeal as to the inadequacy of the evidence on the matter of mitigation, it is clear on the record of the proceedings at first instant that, not only was the

evidence as to efforts to find work unchallenged and unrebutted, the issue was not raised by the appellant in submissions or at all. Accordingly, in my view, it is not properly an issue which can be canvassed on appeal.

Finally, and in any event, there is no cause in what was before the Commission at first instance, either in evidence or in submissions, to support the making of the order the appellant seeks from the Full Bench in lieu of the order made.

The appeal must be dismissed.

COMMISSIONER C B PARKS: I have read the reasons for decision of His Honour the President. I agree with those reasons and have nothing to add.

THE PRESIDENT: For those reasons, the appeal is dismissed.

Order accordingly.

APPEARANCES: Mr T C Crossley, as agent, on behalf of the appellant.

Mr C Chadd, as agent, on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Growers Market Butchers

(Appellant)

and

Stephen Backman.

(Respondent)

No 2220 of 1998.

BEFORE THE FULL BENCH.

.HIS HONOUR THE PRESIDENT P J SHARKEY
COMMISSIONER S A CAWLEY
COMMISSIONER C B PARKS

15 April 1999.

Order.

THIS matter having come on for hearing before the Full Bench on the 18th day of February 1999, and having heard Mr T C Crossley, as agent, on behalf of the appellant and Mr C Chadd, as agent on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 15th day of April 1999 wherein it was found that the appeal should be dismissed, it is this day, the 15th day of April 1999, ordered that appeal No 2220 of 1998 be and is hereby dismissed.

By the Full Bench.

(Sgd.) P. J. SHARKEY,
[L.S.] President.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John James Timms

(Appellant)

and

Phillips Engineering Pty Ltd

(Respondent)

No. 2027 of 1998.

BEFORE THE FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
COMMISSIONER A R BEECH.

19 April 1999.

Reasons for Decision.

INTRODUCTION

THE PRESIDENT: This is an appeal against the decision of the Commission, constituted by a single Commissioner, given on 29 October 1998 in matter No 2242 of 1997. The appeal is expressed to be against the whole of the decision of the Commission given on 23 October 1998, but the order of the Commission was not perfected until 29 October 1998. There is a copy Minute of Proposed Order inserted in the Appeal Book dated 23 October 1998 (see page 372 of the Appeal Book (hereinafter referred to as "AB"), and not a copy of the perfected order itself. I would order a substitution of a copy of the perfected order.

The appellant had made application to the Commission under s.29 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act"), alleging that he had been unfairly dismissed and also claiming contractual benefits, which he alleged were denied him when he was dismissed.

The Commission, formal parts omitted, made the following orders—

"1. That Phillips Engineering Pty Ltd pay John James Timms the sum of $14161.40 gross in compensation within 28 days of the 23rd day of October.

2. That the claim by John James Timms for denied contractual benefits be dismissed."

GROUNDS OF APPEAL

It is against that Decision that the appellant now appeals on the following grounds—

"1. The Commissioner erred in law in failing to have any regard to the proper principles to be applied in determining whether reinstatement was impracticable.

The Commissioner in determining whether reinstatement was impracticable should have had regard to the following principles, namely—

(i) that the Respondent carries the onus of proof to establish that re-instatement is impracticable;

(ii) that impracticable means more than inconvenient or difficult;

(iii) that reinstatement should be ordered if it can be done.

2. The Commissioner erred in law in failing to provide intelligible reasons as to <u>why</u> reinstatement was impracticable.

3. The Commissioner erred in law in finding that reinstatement was impracticable in that the findings of fact of the Commissioner in this regard are so perverse that a reasonable person could not have found as the Commissioner so did. In this regard the Commissioner's findings that there was a lack of trust by the Respondent in the Appellant's capabilities is inconsistent with the Commissioner's finding that the Appellant was unfairly dismissed and inconsistent with the consensus of evidence as to the Appellant's capabilities.

The Commissioner should have found that in the absence of any or any adequate evidence as to reinstatement being impracticable the Appellant was entitled to be reinstated.

4. The Commissioner erred in law in holding that the proper compensation to be awarded to the Appellant was 12 weeks in that the findings of fact relied upon by the Commissioner in arriving at her determination were so perverse that a reasonable person could not have found as the Commissioner so did.

   The Commissioner erred in making the following findings of fact because such findings were not supported by the evidence—

   4.1 that the Appellant's position was not as senior as its title suggests.

   4.3 that the Appellant had no right to hire or fire;

   4.4 that the Appellant appears to have deferred to Redmont on occasions;

   4.5 that the Appellant's tenure was always subject to performance

5. The Commissioner should have found on the evidence—

   5.1 that the Appellant as General Manager was the most senior executive in the employ of the Respondent company which was supported by the Respondent's advertisements for the job and the Respondent's letter of appointment;

   5.2 that the Appellant did hire and fire subordinate employees as found by the Commissioner and as appeared in the evidence;

   5.3 that the level of the Appellant's remuneration was such as to indicate that the Appellant was a senior employee;

   5.4 that the Appellant was given expectations by the Respondent that he would be with the company for a long time to come and that his employment was secure;

   5.5 that the varied terms and conditions of the Appellant's remuneration expressed an intent to terminate on the 1st of July 1998;

   5.6 that the Appellant was not offered and did not receive any payment in lieu of notice;

   5.7 that the Appellant was not provided with any form of counselling or assistance in locating an alternative job;

   5.8 that the Appellant was not provided with any references by the Respondent company;

   5.9 that the Appellant and his family had suffered financial loss as a result of his dismissal;

   5.10 that the Appellant had also suffered damage to his reputation and had suffered humiliation and stress as a result of the Respondent's actions;

   5.11 that the Appellant's age and manner of dismissal had adversely affected his opportunity of alternative employment;

   5.12 that the dismissal of the Appellant had caused the Appellant loss and damage which far exceeded the statutory compensation enabled by the Industrial Relations Act 1979.

   Had the Commissioner made the appropriate findings of fact the Commissioner would have found that within the statutory constraints the only compensation that could fairly and properly compensate the Appellant was the award of 6 months compensation.

6. The Commissioner erred in law in finding that section 26(l)(a) and/or 27(l)(a) of the Industrial Relations Act 1979 empowered the Commission to apply the equitable doctrine of unclean hands. The Commissioner should have found that—

   6.1 Section 26(l)(a) and/or 27(l)(a) of the Industrial Relations Act 1979 only provides the Commission with procedural powers and does not vest the Commission with substantive equitable jurisdiction.

   6.2 If section 26(l)(a) and/or 27(l)(a) does vest the Commission with substantive equitable Jurisdiction (which is denied) the Learned Commissioner erred in the application of the doctrine of unclean hands in that the Commissioner—

      6.2.1 failed to have regard to the fact that the Respondent had not raised the defence of unclean hands in opposition to the Appellant's claim;

      6.2.2 failed to have regard to the fact that there was no immediate and necessary relationship between the Appellant's alleged unclean hands and the equity sued for;

      6.2.3 failed to have regard to the fact that the Appellant's perceived unclean hands had ceased well before the suit and that in essence the Appellant had "washed his hands";

      6.2.4 failed to have regard to the fact that the doctrine of unclean hands does not apply to statutory remedies.

7. The Commissioner erred in holding that the Appellant's remuneration package was only comprised of $2,422 per week. The Commissioner should have found on the evidence and as admitted by the Respondent that the Appellant was also entitled to the use of a fully maintained motor vehicle.

8. The above grounds of appeal are matters of public interest in that they all concern questions of principle to be applied in unfair dismissal claims and as such are of paramount importance to the work of the Commission."

BACKGROUND

The background of the matter is as follows. At the material times, the respondent company carried on the business of fabrication, site erection and installation of structural steel plate work and pipe spooling. This occurred in Henderson in the State of Western Australia and involves the employment of about 70 tradespersons and another 12 management or administration employees.

At the material times, the Managing Director of the respondent's business was Mr James Phillips. At all material times prior to the termination of his employment, the appellant, Mr John James Timms, was the General Manager of the respondent, having taken up that position on 22 April 1996. (Mr Timms gave evidence on his own behalf in the proceedings at first instance.)

By virtue of the letter offering him employment, which was accepted by him, the appellant was to be responsible for the overall operation and management of the business, reporting to the Managing Director, Mr James Joseph Phillips.

There were other executive staff, including the Managing Director, the General Manager, the Operations Manager, the Financial Controller, the Marketing Manager and the Production Manager, who supervised the plant, but was not part of the executive decision making processes.

While the appellant was General Manager, he effectively answered to Mr James Phillips. The appellant's position was full-time and he was expected to work a minimum of 40 hours per week with additional work in accordance with requirements.

In February 1997, the appellant and Mr James Phillips reached an agreement whereby the appellant raised weekly invoices in the name of West Eng (WA) Pty Ltd for payment by the respondent for the appellant's work. There was also drafted a form of agreement between the respondent and West Eng (WA) Pty Ltd in which West Eng (WA) Pty Ltd provided the appellant's services to the respondent. Monies were paid to West Eng (WA) Pty Ltd in respect of those services.

There were complaints by Mr James Phillips, supported by the evidence of Mr Eric James Phillips and Mr Rodney Ernest Redmond, that the appellant was failing to lead, spent too much time at a computer, was slow in dealing with contracts so that tenders were lost, failed to adequately supervise production

and other criticisms. It was said also that this led to the respondent experiencing serious financial difficulties. That the appellant was at fault was denied by him.

There was evidence that on 10 September 1997, Mr James Phillips informed the appellant that he had three months within which to turn things around or he would be dismissed. The appellant denied having received such a warning.

Mr James Phillips effected the termination of the employment of the appellant by the respondent on 22 November 1997, a Saturday, when, after discussion between Mr James Phillips and the appellant, Mr Phillips told the appellant that the contract between the parties was ended and he should clear out his personal effects that day and leave. He did so. This was a purported summary dismissal.

About three days beforehand, an advertisement for a General Manager, the appellant's position, had been placed in the newspaper by Mr James Phillips without the appellant's knowledge.

The appellant was paid for his work to the date of dismissal, but was paid no further payments.

There was evidence at first instance from Ms Isobelle Thayne Elder Kay (his secretary) and Mr Leonard Leslie Winton, an estimator formerly employed by the respondent, on behalf of the appellant, and Mr Rodney Redmond, the Financial Controller, Mr James Phillips and Mr Eric Phillips, the Operations Manager, gave evidence on behalf of the respondent. Mr Redmond is the respondent's Accountant/Financial Controller. Mr Eric Phillips, a son of Mr James Phillips, became the Operations Manager of the respondent in May 1996, having previously held the post of General Manager.

FINDINGS

The dismissal was an instant dismissal, as I have observed, and the Commission made the following findings—

1. The appellant was employed by the respondent upon the basis that, in time, he would make Mr James Phillips' involvement in management unnecessary.
2. There was a fundamentally different management approach between Mr James Phillips and the appellant, based on different perceived needs of the respondent company at the time.
3. Mr James Phillips was a hands-on manager, but, at the time of the appellant's engagement, his plan was to withdraw from an active role.
4. Mr James Phillips only returned to a management role in the company after he perceived that the company's operations had become "somewhat precarious".
5. Nineteen months after the appellant's appointment, the company's return on its operations had not significantly improved and were of concern to Mr James Phillips.
6. A particular area of concern for Mr James Phillips was production, which was identified to the appellant as requiring his hands-on attention, but the appellant did not see his managerial priorities in quite the same light and did not follow through as Mr James Phillips directed.
7. It was not open, on the evidence, to construe the appellant's performance as amounting to serious misconduct justifying summary dismissal.
8. (a) The appellant misled the respondent at the outset by claiming that he had a qualification that he did not have and experience which he did not have, namely a Master of Business Administration Degree.
   (b) Whilst this perception went to undermine the appellant's credibility, the fact of the deception only became known after the dismissal.
9. The respondent had not discharged the onus of establishing that there was a level of serious misconduct or performance justifying summary dismissal.
10. The dismissal remains unlawful, but the question remained whether it was unfair.
11. Having regard to the circumstances of the termination of the appellant's employment, he was denied natural justice because—
    (a) Steps were taken to advertise his job without his knowledge;
    (b) The advertisement appeared in a newspaper on the day of his dismissal, but prior to his being dismissed;
    (c) He was given no notice of termination;
    (d) He was warned, but subsequent to his dismissal.
12. There should not be a reinstatement because it would be impracticable to expect a reasonable working relationship to be restored between the parties, given the lack of trust by the respondent in the appellant's capabilities.
13. The appellant remained unemployed as at the date of hearing, but was found to have attempted to mitigate his loss.
14. An award of compensation equal to six months' remuneration amounting to $62,972 would not be made for the following reasons—
    (a) The position was not as senior as its title suggested and this militated against the appellant's claim of loss;
    (b) The period of notice to terminate the contract was only one week;
    (c) The appellant had no right to hire or fire;
    (d) The appellant appeared to have deferred to Mr Redmond on occasions;
    (e) This was indicative of a lesser status and authority than the title of the position suggested;
    (f) The appellant's tenure was always subject to performance and by no means as secure as he asserted for the purposes of evaluating loss;
    (g) Having regard for all the circumstances, the Commissioner considered that an amount equivalent to 12 weeks' remuneration was a fair award for loss;
    (h) There was a further and unusual consideration, arising from the remuneration arrangements between the parties, but it was, on reflection, taken no further;
    (i) The Commission was not prepared to "endorse" the weekly rate of $2,422 as representing the appellant's remuneration;
    (j) Insofar as the parties agreed on payments relating to Mrs Joan Timms, these sums would not be considered and only one motor vehicle would be considered;
    (k) The reasons for the exclusion of the sums said to end as salary for Mrs Timms was obvious and workers' compensation and superannuation payments were matters for the employer;
    (l) The arrangement between the parties appears to have led to a salary of $55,016 per annum being designated for the appellant, with $6,530 per annum for a car, being $1,180.10 per week, resulting in a total award to the appellant of $14,161.40 "gross".
15. The onus of establishing the claimed entitlement of contractual benefits lay on the appellant and this was a claim dependent upon performance. Even if the contract provided for such a bonus, performance was not established and that claim would be dismissed.

ISSUES AND CONCLUSIONS

As the outlines of the submissions for the appellant show, there were three principal grounds of appeal. These were, as agreed—

First Principal Ground of Appeal

(a) The finding of the Commissioner at first instance that reinstatement was impracticable was in error. Further, the Commissioner failed to comply with her

duty by providing reasons which were not intelligible as to why reinstatement was impracticable. The finding that the reinstatement was impracticable was stated by the Commissioner in one paragraph—

> "Having considered the evidence I am satisfied that there should not be any order for reinstatement. It would be impracticable in my view to expect a reasonable working relationship to be restored between the parties given the lack of trust by the respondent in the applicant's abilities."

There is a statutory duty cast upon the Commission to provide reasons for decision (see s.35 of the Act). In Ruane v Woodside Offshore Petroleum Pty Ltd 71 WAIG 913 at 914, the Full Bench, in a unanimous decision following RRIA v AMWSU and Others 69 WAIG 990 (IAC), held that the obligation to give reasons in respect of a decision of the Commission, which is cast upon the Commission by s.35(1) of the Act, is a mandatory one. It was also held that a substantial failure to state reasons for decision in the circumstances that a statement of reasons is a requirement of the exercise under a statute of the decision making power, constitutes an error of law.

I quote from Ruane v Woodside Offshore Petroleum Pty Ltd (op cit) at page 914 as follows—

"(2) It is not necessary that a decision deal with every matter which might have been raised in the proceedings. It is enough that the findings and reasons deal with the substantial issues upon which the decision turned .....

(3) The decision must be such that a person understands why a decision went against him/her, and, in particular, whether it involved errors of fact or law.

(4) Thus, the decision should involve a setting out of the Commission's understanding of the relevant law, any findings of fact on which its conclusions depend (especially if those facts are in dispute), and the reasoning processes which led to those conclusions. This should be done in clear and unambiguous language.

(5) It should be possible to glean from those reasons what was the reasoning process that led to its determination."

It was the submission of the appellant that, given the onus of proof carried by the respondent to discharge this onus, the Commissioner, in her reasons, should have identified the evidence upon which her conclusion was based, and made specific findings in support of such conclusion. There are, it was submitted, no specific findings that the appellant was incompetent or that there was a lack of trust in his abilities.

Mr Sirett, for the respondent, on the other hand, conceded that the Commissioner did not make a finding that the appellant was incompetent. However, he submitted that it was implicit in her reasons that she did uphold certain of the allegations that the respondent was making, that he was not following directions of the Managing Director, that he had a different view about the management of the company.

Further, it was submitted that the Commissioner found that, in a feature of his curriculum vitae, namely that he had an MBA when he did not, the Commissioner found this would bear on his credibility.

Next, it was submitted by Mr Sirett (see pages 150-151(AB)) that the appellant's evidence was that there was no warning and the Messrs Phillips and Mr Redmond were lying when they said that on 10 September 1997 a warning had been given to the appellant. That is evidence, which goes to lack of trust.

The Commissioner's relevant findings were—

> That there was a fundamentally different management approach between Mr James Phillips and the appellant, based on different perceived needs of the respondent company at the time: Mr James Phillips only returned to a management role in the company after he perceived that the company's operations had become "somewhat precarious".
>
> That nineteen months after the appellant's appointment, the company's return on its operations had not significantly improved and were of concern to Mr James Phillips, and, in particular, there was a problem in the production area where the appellant did not see his managerial priorities in quite the same light and did not follow through as Mr James Phillips directed.

The Commissioner's primary conclusion in the excerpt quoted above was that it was impracticable, in her view, to expect a reasonable working relationship to be restored. This was attributed to the lack of trust by the respondent in the appellant's abilities. However, the Commissioner made findings as to the concerns of Mr James Phillips and to the obvious differences between the appellant and himself in managerial approach, as I have illustrated above.

Those findings as to the serious difficulties involved, read with the final finding as to impracticality of reinstatement, were quite sufficient to set out the Commissioner's findings sufficiently and in a sufficiently comprehensive and comprehensible way so as to satisfy her statutory duty under s.35(1) of the Act.

In particular, they constituted adequate exposition of those facts which supported the finding of impracticability of reinstatement.

Should the appellant have been reinstated?

I have already canvassed the final finding and the reasons expressed by the Commissioner on this point for so finding.

What the Commissioner found was that the appellant's performance was subject to criticism, and she made findings as to his performance. What she did find, too, was that his performance did not amount to serious misconduct justifying summary dismissal. That was a clear finding of substantial unfairness, although the Commissioner made a finding, too, of procedural unfairness. (Procedural unfairness requires a finding only that the process of dismissal was an unfair one.)

I agree that an applicant should not be reinstated merely because the Commission is told by the respondent that the respondent, in its subjective view, did not think that the applicant was sufficiently competent to perform the job for which he or she had been engaged.

A mere subjective lack of trust by an employer of an employee is not necessarily sufficient to justify a decision by the Commission not to order reinstatement. That is borne out by the dicta of Marshall J in Abbott-Etherington v Houghton Motors Pty Ltd (1995) 63 IR 394, where His Honour said—

> "It would be perverse, in my view, if an applicant was not reinstated merely because the Court was told by the respondent that it did not think, in its subjective view, that she or he was sufficiently adept to perform the role for which she or he had been engaged."

However, as has been explained (supra), the Commissioner held that it would be impracticable to expect a reasonable working relationship to be restored between the parties, given the lack of trust by the respondent in the appellant's capabilities.

However, the Commissioner found that there was a divergence in management approach between the Managing Director and the General Manager. That was not contested and there was evidence for both sides on which to base such a finding. At the heart of this were problems in the production area which the Commissioner found, and was entitled to find, existed.

Further, the appellant, in evidence on an important point, namely whether he was given a warning or not three months before dismissal, described the Messrs Phillips (James and Eric) and the Financial Controller, Mr Redmond, as liars.

In my opinion, the Commissioner expressed the finding more narrowly than it was open to her to do.

In Gilmore and Another v Cecil Bros and Others 76 WAIG 4434 at 4446 (FB), the Full Bench applied Liddell and Another v Lembke trading as Cheryl's Unisex Salon and Another 127 ALR 342 (IRC of Aust) per Wilcox CJ, Keely and Gray

JJ, and held that the word "impracticable" in s.23A of the Act does not mean "impossible", but means more than "inconvenient" or "difficult". The Full Bench, in Gilmore and Another v Cecil Bros and Others (op cit), also applied what Gray J said in the same case at page 368 and which I quote again now—

> "Reinstatement is therefore required if it can be done. If the employer is still employing or able to employ someone to perform the same or similar tasks, then reinstatement will be practicable. Its practicability does not depend on notions of loss of confidence in the employee. Nor does it depend on the existence of grounds which would have justified termination but which were not relied on, because unknown to the employer at the time of the termination."

The word "impracticable" requires and permits the court to take into account all the circumstances of the case relating to the employer and the employee and to evaluate the practicability of a reinstatement order in a commonsense way. "Reinstatement" should not be ordered if it would impose unacceptable problems or embarrassment or seriously affect productivity or harmony within the employer's business (see Nicolson v Heaven & Earth Gallery Pty Ltd 126 ALR 233 at 244 (IRC of Aust) per Wilcox CJ).

In this case, reinstatement was impracticable because of the lack of trust evident on both sides and the Commissioner's finding as to the appellant's performance and the divergence in management approaches made it quite impracticable that they could work together. Further, there were grounds, which were not subjective, for the lack of trust on the respondent's key managers' part, which had to do with problems in the financial performance of the company, as the evidence revealed and the irreconcilable difference in attitudes to management. Taking into account all of those circumstances, including the fact that there were irreconcilable differences between the Managing Director and the Director of the respondent and its General Manager, reinstatement was, evaluated in a commonsense way, impracticable. To order reinstatement would impose unacceptable problems, affect productivity and harmony, it was open to the Commissioner to find.

Further, given the circumstances of unfairness found by the Commissioner (including advertising his position unbeknown to him), it was unlikely that the appellant could trust or work with the respondent's officers, and it was open to the Commissioner to so find, particularly since the appellant regarded them as liars. There was, therefore, direct and inferential evidence quite sufficient to enable the Commissioner to find as she did. Further, there was ample evidence for her to find as she did for the additional reasons which I have canvassed. To order reinstatement was correctly found to be impracticable.

There was no error in that decision demonstrated either in the exercise of discretion or in the discharge of that discretion in accordance with s.23A of the Act.

QUANTUM OF COMPENSATION

Next, it was alleged that the finding of the Commission at first instance that a sum equal to twelve weeks' remuneration was fair and appropriate compensation for the appellant's loss was erroneous.

The Commissioner found that she should exercise her discretion pursuant to s.26 of the Act. That is correct. However, the Commissioner was required to go further. To so hold was in error because s.26 of the Act required her to apply the law. The law is, inter alia, prescribed in s.23A, and has been laid down and explained by this Commission in a number of cases (see Bogunovich v Bayside Western Australia Pty Ltd 79 WAIG 8 (FB) and the cases cited therein) (see also Gilmore and Another v Cecil Bros and Others (op cit) and Capewell v Cadbury Schweppes Australia Ltd 78 WAIG 299 (FB)) and not Smith v CDM Australia Pty Ltd 78 WAIG 307 (FB).

The Commissioner found that the appellant had sought to mitigate his loss, but remained unemployed. An amount of remuneration equal to six months' remuneration in his employment by the respondent calculated at $67,972.00 was claimed.

The Commissioner decided not to award that amount because—

(a) The position is not as senior as its title suggested and this mitigated against the claim of loss (see page 383 (AB)).

(b) The Commissioner then held, giving no further reasons, that an amount equivalent to twelve weeks' remuneration was a fair award for the loss. She made no findings as to the loss alleged to have been suffered.

(c) The Commissioner then made a finding as to remuneration arrangements, observing that there was some "irregularity" and referring to the appellant's conduct as a citizen as a matter for consideration. However, the Commissioner seems to have excluded that as a consideration. What the Commissioner did find was that, because of what she called "arrangements", she was not prepared to "endorse the weekly rate of $2,422.00 as representing the applicant's remuneration".

(d) The Commissioner observed that, insofar as the parties agreed on payments relating to Mrs Joan Timms, relating to superannuation and workers' compensation, these sums would not be considered and only one motor vehicle (the provision of) would be considered.

(e) The Commissioner, therefore, found that the appellant's salary per annum amounted to $55,016.00, together with $6,530.00 for a car. She then awarded $14,161.40 gross.

The appellant's complaint was as follows—

> The Commissioner failed to have regard to the principles laid down in Gilmore and Another v Cecil Bros and Others (op cit), Capewell v Cadbury Schweppes Australia Ltd (op cit) and Bogunovich v Bayside Western Australia Pty Ltd (op cit), and a number of cases referred to in Bogunovich v Bayside Western Australia Pty Ltd (op cit). That, of course, was so—

In particular, I find that—

(a) The Commissioner failed to make a finding as to any loss and/or injury established to have been incurred or suffered. (That is not, as observed in cases referred to above, an exercise of discretion but a finding of fact and sometimes of mixed fact and law.)

(b) The Commissioner then failed to assess the proper amount of compensation for loss and/or injury in the light of all of the relevant circumstances, but disregarding the cap prescribed by s.23A(4) of the Act.

(c) The Commissioner failed then to assess whether the amount of compensation to be awarded was in excess of the maximum amount allowable. If this is so, then there is a reduction to the permissible maximum. If not, then no reduction of the award is necessary.

The Commissioner obviously so erred.

In this case, the Commission correctly found that the appellant had mitigated his loss. That finding was not challenged by any cross-appeal and was not arguable on this appeal. Although Mr Sirett purported to raise the question of an offer of employment prior to the hearing at first instance, to do so was not possible, for those reasons.

That having been found, the Commissioner had accepted that the appellant was still unemployed as at the date of hearing.

The question then arises as to what the quantum of the loss is.

I wish to make some observations as to findings of loss and assessing compensation.

In making findings as to loss, one must consider the following, inter alia—

1. S.23A of the Act is a statutory provision which provides a remedy, and to some extent insofar as reinstatement is a practicable remedy, an indirect prohibition upon harsh, oppressive or unfair dismissal.
2. Some not insignificant security is therefore provided for employees by s.23A of the Act.
3. Accordingly, it will be necessary to consider some matters and make findings on the basis that the employment would have continued indefinitely.

4. In some cases, however, one might, in reaching a conclusion as to the term of any future employment for the purposes of making findings as to loss, weigh up the possibility that the employment might have come to an end as a result of a lawful dismissal which was not harsh, unjust or unreasonable, such as if an employer were to lose its factory or engage in a policy of retrenchment of some or all of its staff.
5. In some cases, where procedural fairness in dismissal is denied, the employee might still, because of his or her conduct, be held, and rightly so, to have been fairly dismissed (see the basis provided for such a decision by Shire of Esperance v Mouritz 71 WAIG 891 (IAC)).
6. In such a case, it may be appropriate to find a loss and award compensation only up to the time of the decision of the Commission or such other time as might have marked the completion of a fair process of dismissal.
7. In a case where a dismissal has been found to be harsh, oppressive and unfair for lack of procedural fairness only, it is appropriate to consider what would have been likely to have occurred if the breach had not occurred.
8. It should not be assumed that the employee would have been dismissed anyway, because such an assumption, in making findings as to loss, would ignore the rationale of procedural fairness, an every day experience that decision makers often change their minds when presented with another side of the case.
9. On the other hand, it would be unrealistic for a court to automatically assume that, if an employer had provided procedural fairness, the employee's employment would have continued indefinitely. I would observe, however, that, in some cases, that may well be a reasonable conclusion (see Bostik (Australia) Pty Ltd v Gorgevski (No 1)(1992) 36 FCR 20 (FCFC)).
10. Even so, non-personal contingencies, such as the closing of factories, should be taken into account.
11. In cases of procedural unfairness, it may be appropriate to assess compensation on the basis of a finding of the loss of a fair chance of retaining employment with its attendant security, mainly where there is a situation where, if proper enquiries had been made, the employer might have considered that conduct which appeared at first sight to justify dismissal did not do so when all of the relevant factors were considered.
12. I have derived assistance in formulating these principles from Byrne and Frew v Australian Airlines Ltd (1994) 120 ALR 274 at 285 (FCFC) per Black CJ, Bostik (Australia) Pty Ltd v Gorgevski (No 1) (op cit) and Nicolson v Heaven & Earth Gallery Pty Ltd (1990) 126 ALR 233 at 244-246 (IRC of Aust) per Wilcox CJ and the cases cited therein.
13. That the dicta which have assisted me, relating to questions of relief for breaches of conditions, and breaches of the then s.170DC of the Industrial Relations Act (Cth) 1988, do not detract from their appropriateness to findings of loss and/or assessment of compensation, pursuant to s.23A of the Act.
14. Suffice it to say, too, that questions as to the future of employment, had it not been harshly, oppressively and unfairly terminated, and the manner of their determination apply to findings as to loss and assessment of compensation in matters of substantively "unfair dismissal" (see Bogunovich v Bayside Western Australia Pty Ltd 79 WAIG 8 at 9-11 (FB)). I will return to matters of assessment later in these reasons.

I now turn to other matters. I am not persuaded, on this occasion, that a finding that remuneration paid was "irregular" or that it was paid to another person than the employee, whether natural or a corporation (see Southern Group Ltd v Smith (unreported) Supreme Court of WA (FC) Lib No. 970284), was a finding in relation to a relevant consideration. There was no evidence sufficient to establish that within the authority of Southern Group Ltd v Smith (op cit).

In any event, I did not understand the Commissioner to so find, and regard her remarks in that context as obiter. In any event, no quality of unlawfulness or "irregularity", insofar as the latter description might ever be relevant, was established on the evidence.

The question is whether, on the authority of Southern Group Ltd v Smith (op cit), at least so far as I am persuaded on the submissions made on this occasion, as a matter of fact, the appellant had established, on the balance of probabilities, that his loss was the loss of remuneration in the total amount which he claimed for the purposes of proving loss. However, it is unnecessary to decide the point. Since a measure of monies paid was directed to his wife, that was not established. There was a new contractual arrangement as at February 1997.

I would also refer to the finding of the Commissioner that the appellant's position was not as senior as his title suggests. This flies in the face of the Commissioner's own finding (see page 381(AB)) that the appellant was employed by the respondent on the basis that, in time, he would make Mr James Phillips' involvement in management unnecessary. He was engaged as a General Manager, with a General Manager's duties and powers. (See, for example, Mr Redmond's evidence at page 292(AB).) He was engaged to run the company in the absence of Mr Phillips. Indeed, there is also evidence of a right to hire and fire (see pages 121, 183 and 335 (AB)).

In any event, the evidence of Mr James Phillips, Mr Eric Phillips and Mr Redmond was that the appellant was the General Manager and was expected to act as such. One main complaint was that he did not lead, as a General Manager should. All of the evidence was that the appellant was the General Manager and expected to act as such. Further, his duties reflected this. Hence, the finding that the appellant's position was not as senior as its title suggested was erroneous (see, also the evidence at pages 137, 138, 198, 205, 206, 207, 220, 292, 312, 313(AB)).

In any event, in terms of House v the King [1936] 55 CLR 499 (HC) and Gromark Packaging v FMWU 73 WAIG 220 (IAC), this was an entirely irrelevant factor which was not relevant to making a finding as to loss and assessing compensation, except insofar as a finding as to implied reasonable notice might depend, in part, on the status of the position of General Manager.

The Commissioner found that, whilst there was evidence that the parties discussed terms and conditions, including remuneration, in addition to that agreed in April 1996, these were not concluded (see page 370(AB)). However, the Commissioner found, too, that the only changes to the terms and conditions of employment were "remuneration arrangements instituted in February 1997".

The Commissioner found (see pages 375 and 384 (AB)) that the agreement reached in February 1997 was as follows—

(a) The applicant was to raise and raised weekly invoices in the name of a company, West Eng (WA) Pty Ltd, for payment by the respondent.
(b) The agreement provided for payments for 44 weeks in each year in the sum of $2,422.00, the amount of each weekly invoice.
(c) There were holidays to be taken as found by the Commissioner and payments were made on invoice in respect of them.
(d) There were also components for workers' compensation and superannuation contributions.
(e) There was an agreement to pay Mrs Joan Timms, wife of the appellant, a salary.
(f) The salary payable to the appellant was, therefore, $55,016.00.
(g) The arrangement between the parties led to a salary of $55,016 per annum "being designated" for the appellant, with $6,530.00 per annum for a car, amounting to $1,810.00 per week.

Those findings are reflected by the unexecuted written draft agreements which were tendered as exhibits, at first instance.

The draft written agreement, which was not executed but seems to have been relied on, appears in a February 1997 version, and in an August 1997 version at pages 46-64(AB). (The interesting question as to whether the appellant was an employee, once the agreement was adopted, was not raised in these proceedings.)

There is evidence in hand written notes (at page 80(AB)) of remuneration to be paid to Mrs Joan Timms in the sum of $29,983.00 and to the appellant in the sum of $55,016.00. The Commissioner's finding as to the amount of remuneration payable to the appellant was not challenged in submissions, nor was her finding that there was an amount payable to Mrs Timms by way of remuneration.

Since it was for the appellant to establish his loss, on the balance of probabilities, one would have expected evidence and submissions that the payment to Mrs Joan Timms was a sham or was paid to her as a third party by direction of the appellant, the amount being, in the first place, his remuneration and his remuneration alone. There was no such evidence.

Accordingly, the Commissioner was entitled to find that any loss should be equated to a weekly salary of $1,410.00, which was the amount of remuneration available to and paid for the service of the appellant.

It is not entirely clear from her reasons why the Commissioner assessed compensation at an amount equivalent to three months' remuneration; and that raises other issues.

Next, there was evidence that the appellant suffered stress and humiliation. At page 126(AB), he gave evidence that he was personally devastated by his dismissal. (That it affected his wife and family was not relevant, although he gave evidence to that effect.) He gave further uncontradicted evidence that he did not have employment, although he had the part-time offer of work as an estimator.

He had applied for 15 or 16 jobs unsuccessfully and his distress, or at least the cause of it, in this regard was corroborated in evidence by Mr James Phillips, who admitted that he would not employ a person who had been dismissed from his management team unless there were special circumstances. That was the appellant's situation.

The Commissioner did not make any finding as to injury when there was credible evidence of stress and humiliation.

Next, of course, it was submitted that the assessment of compensation at an amount equal to three months' loss of remuneration was in error, because, had the employer (respondent) not abused his rights and had there been no unfair dismissal, the appellant would either have continued in his employment until the "perceived expiry date of his remuneration", namely 1 July 1998; or, if he had been provided with reasonable notice, then he would have been well placed to secure alternative employment and not had the impediment and stigma attached to his attempts, with which the unfair dismissal "saddled him".

Further, there were complaints upon appeal that no payment in lieu of notice was made upon dismissal. In addition, it was said that his age and manner of dismissal had adversely affected the appellant's opportunity of alternative employment.

In response, the submission went to whether there was mitigation, having regard to prove an offer of work three weeks before the hearing at first instance (see page 129(AB)). I have already commented on the effect of that submission.

It was also submitted by Mr Sirett, for the respondent, that a warning was made three months prior to the dismissal.

That the dismissal, on a summary basis, was not justified and was unfair because there had not been procedural fairness, then it was open to find that the appellant's future with the respondent was still "not bright and rosy" and that his employment could have been terminated at some later stage.

It was, therefore, submitted, that the three month period "for calculation of loss" was defensible in all the circumstances, and upon all of the evidence before the Commission. It should be noted, in that context, that the dismissal purported to be effected on 22 November 1997 and the hearing was completed on 24 July 1998. Accordingly, by then it was open to the Commissioner to find that there was a proven actual loss calculated at 35 weeks, at $1,180.10 per week, being a total amount of $41,303.50.

In my opinion, it was open to find that it was more probable than not that a person occupying the position, having the status of the position which the appellant occupied, namely that of General Manager, would experience the difficulty in finding a position which he experienced. That was foreseeable. It was also foreseeable and probable that a dismissal which was not substantially or procedurally unfair could have been effected soon after the unfair dismissal. There was evidence, as at the date of hearing at least, as at 24 July 1998, that there was a loss equal to 35 weeks' salary and, calculated at $1,180.10 per week, that would mean an amount of $41,303.50 was proved as actually having been lost.

Allowing for a month or two at most to effect a procedurally and substantively fair dismissal, which, having regard to the relationship between the parties, particularly the General Manager, the appellant and the dissatisfaction on both sides as well as the relationship between them, then it was more probable than not that a procedurally and substantively fair dismissal would have been effected. Having regard to the reasons which I set out hereinafter, a six months' notice period following that one or two months would be reasonable. I would, therefore, find a loss proven in the sum of $41,303.50, which is the amount equal to loss of remuneration including car allowance for thirty-five weeks.

If I am wrong in those conclusions, then I would take the course that I mention in the next several following paragraphs.

The matter is somewhat obscured by the provision in the draft agreements that those draft agreements, i.e. between West Eng (WA) Pty Ltd and the respondent, that the agreement between them could be terminated on five days' notice.

However, so long as it was accepted, as it was in the proceedings at first instance and on this appeal, that the appellant was an employee of the respondent, then the question of notice between them is a different one.

First, of course, given that the appellant was an engineer and manager and that no notice was agreed, it was open to the Commissioner to imply a term of reasonable notice on principles expressed in this Commission by the Full Bench in Tarozzi v WA Italian Club (Inc) 71 WAIG 2499 (FB) (and the cases cited therein).

Given that the appellant's was an important position as General Manager (who was meant to replace, in active management, the Managing Director), that the appellant was a manager and engineer, that his salary was quite high, that he was a mature man, that, on the evidence, it would not be easy to obtain alternative employment, that he had another eight months employment ahead of him (see Tarozzi v WA Italian Club (Inc) (op cit) and Macken McCarry & Sappideen "Employers' Right to Terminate" 4th Edition at pages 166-167), it was open to the Commissioner to have found that 6 months' notice was an appropriate term to imply.

The Commissioner could have, and should have, so implied, on the evidence available. That being so, and it not being clear that a degree of ineptitude justifying summary dismissal could be proven, but, given the obviously irreconcilable differences between the General Manager, the Managing Director and other management, it was open to the Commissioner to find that, on the balance of probabilities, 6 months' notice of termination could be fairly given almost immediately.

That would mean that it could not be found that it was more probable than not that the appellant would have continued until July 1998. I say that because it was probable that he would and might be fairly dismissed almost immediately, provided he was given reasonable notice. I would add that the dismissal was found to be unfair, both substantially and procedurally, not merely procedurally.

Accordingly, the Commissioner erred in not assessing the loss as the equivalent of six months' remuneration at $1,180.10 per week, being $28,322.40, after the statutorily required capping. A proper exercise of the discretion, in accordance with s.23A and s.26(1)(a) and 1(c), required an award of compensation for loss in that amount.

Further, the Commissioner found no evidence of injury by way of humiliation and stress and should have. Having so found, in the proper exercise of her discretion, having regard to the evidence of stress and humiliation, and found that the appellant suffered injury, it was open to the Commissioner to

then, on a proper exercise of her discretion, assess compensation at $4,000 for that injury and she should have done so.

I say that because it was foreseeable (and there was, therefore, a causal link) that an unfair dismissal of the summary type was likely to cause stress, humiliation over a lengthy period because of the likely adverse effect on attempts by the appellant to obtain employment. That was indisputably the case. (The distress to the family is not an injury to the appellant and was not required to be compensated under s.23A of the Act.)

There was no appeal against the refusal to award contractual benefits, nor, with respect could there be.

Ground 8 was misconceived since the Commissioner's decision was not a "finding", as that is defined in s.7 of the Act, and s.49(2a) does not apply.

However, for those reasons within the principles prescribed in House v The King (op cit) and Gromark Packaging v FMWU (op cit), I would find that the Commissioner's discretion miscarried.

I would, therefore, substitute the exercise of the Full Bench's discretion for the Commissioner's exercise of discretion, for the reasons and making the findings which I have expressed above had been made should have been made. I would find, for the reasons which I have expressed above, what I say the Commissioner should have found, namely—

(a)	Loss—compensation	$41,303.50
(b)	Injury—compensation	$4,000.00
		$45,303.50

Capped in accordance with s.23A of the Act, the amount to be ordered for compensation would be, and should have been, $28,322.40. (In the absence of submissions to the reduction of that amount to take account of tax liability on a PAYE basis, that amount is the amount which I would fix on a gross basis.)

Having considered all of the evidence and submissions, I would uphold the appeal and vary the decision of the Commission at first instance accordingly. I would issue a minute to reflect these reasons.

CHIEF COMMISSIONER: This is an appeal against the Commission's decision made pursuant to an application under section 29(1)(b)(i) of the Act. The appellant was found to have been unfairly dismissed from the position of general manager with the respondent company when his services were summarily terminated. The Commission at first instance declined to order reinstatement in employment given that, in her view, it would be impracticable to expect a reasonable working relationship to be restored because of the lack of trust by the respondent in the appellant's capabilities. Instead, compensation amounting to the equivalent of 12 weeks remuneration was assessed as being a fair award for loss. The payment was calculated on the basis of a salary of $55,016.00 per annum with an additional $6,530.00 per annum for a car. These rates discounted amounts received by the applicant's wife from the respondent and payments for superannuation and workers compensation made under a separate arrangement between the appellant and the respondent.

The appellant pursues this appeal on three principle grounds, all of which are claimed concern errors of law. They are—

"(i) the finding of the Commission at first instance that reinstatement was impracticable;

(ii) the finding of the Commission at first instance that 12 weeks remuneration was fair and appropriate compensation;

(iii) the finding of the Commission at first instance that the appellant's entitlement to remuneration should be reduced on the basis that the appellant had come to the Commission with unclean hands."

(Appellant's outline of submissions)

Subject to whether or not it is impracticable, reinstatement or re-employment is a primary relief under section 23 of the Act in cases of unfair dismissal. While the respondent bears the onus of establishing the impracticability of re-establishing the employment relationship, the Commission in accordance with section 26 of the Act should take into account all of the circumstances relating to both the employer and employee. The practicability of a reinstatement order is assessed in a commonsense way (Nicholson v Heaven and Earth Gallery Pty Ltd (1994) 126 ALR 233 at 244 and Gilmore v Cecil Bros. Pty Ltd (1996) 76 WAIG 4434 at 4446).

In the instant case, although briefly expressed, the Commission concluded that re-instatement was impractical given the lack of trust by the respondent in the appellant's capabilities. The findings made to support this conclusion went to an acceptance by the Commissioner of the respondent's managing director's perception that the company's operations were somewhat precarious. There was a fundamentally different management approach between the appellant and the managing director which nineteen months experience had failed to overcome. This, together with the finding that the appellant did not see his managerial priorities in quite the same light as those of the managing director and that he did not follow through on directions, lead inevitably to the conclusion that it would be impracticable to reinstate or re-employ the appellant.

The Commission's assessment of the respondent's lack of trust in the appellant's capabilities may also take into account the appellant's deception in holding himself out to be a Master of Business Administration. Although this only came to the respondent's attention after summary dismissal was effected, the appellant's capabilities with respect to the level of expertise that this degree recognises are not those he professed to hold when he was appointed to the position of general manager. This further compounds the lack of trust identified by the Commission.

The findings of the Commission at first instance were not made in a vacuum. The reasons for decision show the adequacy of evidence going to issues to be addressed in determining the practicability or otherwise of re-instatement or re-employment. Those reasons for decision do not disclose that the relevant principles were not applied or were misapplied. The conclusion reached by the Commissioner was open to her on the evidence. Grounds 1-3 of the appeal have not been made out.

In evaluating the loss arising from the finding of unfair dismissal the Commission at first instance identifies several factors going to the appellant's status and authority within the respondent's executive management structure and the period of notice under the contract. The Commissioner also noted that the appellant's tenure was always subject to performance and was by no means as secure as he had asserted. In this respect it is noted that the Commission at first instance found that the appellant was warned on 10 September 1997 that he had thee months to "turn the company around" but had been terminated prior to the expiry of that period. The unfairness recognised by the Commission arose from the manner of the dismissal.

The appellant submits that the proper outcome should have been an award of six months compensation. In support of this it is argued that the finding made by the Commissioner with respect to matters going to the appellant's status and level of responsibility were not reasonably open to her. Furthermore even if those findings could have been made, the appellant questions their significance in the task of assessing compensation. The appellant's position within the management structure, was such, it is submitted that he was in the situation that a replacement position at the same level and status was not readily available to him. This was the case it was submitted even if the appellant did not have authority to "hire and fire" and deferred to the respondent's accountant on occasions.

It is argued that the appellant should be put back in the situation that he would have been in had the dismissal not occurred and to recompensate the employee for loss and injury flowing from the dismissal. In this regard it is argued that the Commissioner at first instance failed to have regard to the effects of the dismissal upon the appellant. Had the respondent not abused its right and had there been no unfair dismissal it is submitted that the appellant would have either continued his employment until 1 July 1998 the perceived expiry date of his remuneration. Alternatively if he had been provided with reasonable notice within the terms of his contract and received references, then he would have been well placed to secure alternative employment and not had the impediment and stigma that attached to his attempts associated with the unfair dismissal.

The respondent cites evidence before the Commissioner that shows that the appellant was a member of the management

team and that while a collective approach to taken to discussing issues, the managing director had the final say (Appeal Book 170, & 210). With respect to the appellant's authority it was argued that the only instance where the right was exercised by the appellant to terminate an employee's services this attracted the managing director's disapproval. (Appeal Book 136 & 137).

The appellant's tenure was subject to performance. It was submitted by the respondent that this was more than an inference which attaches to a position of general manager. In the appellant's case the circumstances under which his continued employment were discussed on 10 September 1997 made it abundantly clear. His employment would be terminated if he did not perform. The managing director's evidence was that—

> "… I was giving him 3 months to turn the company around. My terminology in turning the company around means that we at least met our budgets. If we met the budgets and met the man hours in the shop, the company would be an upward trend, and all I asked for him to do that, which he was in fact employed to do from day one, and he had now had 15 months or 14 months, whatever it was, to do it and it wasn't happening, and I said You've got 3 months to turn it around."
>
> (Appeal Book 252)
>
> (Also see Statement of J J Phillips, Appeal Book 392 para 23 and Statement of E J Phillips, Appeal Book 386 para 9).

Against this is the evidence of the appellant that he was not told he had three months to turn the company around otherwise his services would be terminated. The appellant also refuted the evidence of the accountant, a participant at the September meeting, that he had expressed a comment that the appellant had been given more latitude to perform them anyone else could expect. (Appeal Book 150).

The respondent also submits that the appellant's credibility bears upon the issue of compensation to the extent that the Commission at first instance was entitled to be cautious in considering his evidence as to attempts to mitigate his loss. Reference was made to the availability of a position but the concern expressed by the appellant of the effect that his might have on his claim. (Appeal Book 163-164).

As to claims going to financial loss suffered by the appellant and his family and the damage to his reputation causing stress and humiliation, the respondent argues that the evidence goes no further than bare assertions.

In approaching the issue of calculating the amount of compensation the Commission has first identified the statutory limit which was claimed given the continuing period of the appellant's unemployment since termination. The Commissioner then cited factors which militate against granting such a payment. While it may appear that compensation was determined as an amount discounted from the statutory limit, this is not the case. In the exercise of discretion based on evidence before her the Commissioner has determined that the loss should take into account the appropriate level of the applicant's status and responsibility, his security of tenure given the explicit performance requirements and the fact that the contract of employment provided for only one weeks notice. These matters were considered within the context of the tenor of the employment relationship and what was effectively a period of probation covering the appellant's performance. It was open to the Commissioner given the evidence before her and the finding made about the security of appellant's position that an amount equal to 12 weeks pay reflected the extent of the appellant's loss.

As to the issue of injury arising from damage to reputation, humiliation and stress, it is to be recognised that there is an element of distress associated with almost all terminations of employment. Restraint is required to ensure that compensation for this is confined within reasonable limits. (Burazon v. Blacktown City Guardian Pty Ltd 142 ALR 144.) In most cases where loss of dignity, anxiety, humiliation or stress have been recognised as injury for the purpose of compensation, the physical and or emotional manifestations of injury have been attested to by professional experts (See Bogunovich v. Bayside Western Australia Pty Ltd (1998) 79 WAIG 8 and De Abreu v Renior Patisserie (1998) 78 WAIG 1395.) On the basis of these considerations Grounds 4 and 5 have not been made out.

In having recourse to section 26(1)(a) and 27(1)(a) of the Act on this occasion the Commission has done no more than determine the rate at which compensation is to be calculated by reference to the arrangements initiated by the appellant. These have been accepted and reflect the taxation arrangements entered into. It is not inconsistent with the dictates of the Act for the Commission in the circumstances of the case not to go behind the scheme whereby the appellant's wife was also employed. It was open to her to pursue a claim under the section 29b(1)(i) but that was not taken up.

Ground 6 of the appeal is dismissed and with it Ground 7.

On the foregoing the appeal should be dismissed.

COMMISSIONER A R BEECH: The appeal against the decision of the Commission at first instance can be conveniently categorised as falling into two main areas. The first of those areas concerns the conclusion of the Commission that reinstatement of the appellant is impracticable. The second is against the decision of the Commission to order compensation based upon twelve weeks' remuneration.

The starting point for the first area of appeal is that the Commission may reinstate a person whose dismissal was harsh oppressive or unfair (s.23A(1)(b)). In deciding whether it is impracticable to order an employer to reinstate a dismissed employee, the Commission should take into account all of the circumstances of the case and evaluate the practicability in a commonsense way, having regard to s.26(1)(a) and s.26(1)(c) of the Act in particular (*Gilmore v Cecil Bros* (1996) 76 WAIG 1184 at 1188; as confirmed on appeal *supra* page 4434 at 4446 (FB); (1998) 78 WAIG 1099 per Anderson J at 1101 (IAC)). The onus of proving impracticability rests upon the respondent. The Commission is required to decide whether reinstatement is impracticable on the evidence in the proceedings. There is certainly evidence from the Managing Director of the respondent that the respondent's financial position did not improve in any significant way between 10 September 1997 and the middle of November 1997 when the appellant's employment ceased (statement of J.J. Phillips at paragraph 25). There is evidence that the Managing Director had given the appellant 3 months "to improve the situation" and that the appellant's performance did not improve in any significant way either (*Ibid.*). The Managing Director did not think that the appellant had been able to improve the respondent's performance or to perform the job as General Manager for the benefit of the respondent. That evidence amply permits a conclusion that there was a lack of trust by the respondent in the applicant's capabilities. That was the conclusion of the Commission at first instance. It was clearly stated and there is no substance in the submission of the appellant that no evidence was adduced from any of the respondent's witnesses from which it could be inferred that the applicant's capabilities lead to a "breach" of trust. Furthermore, the words used by the Commission are entirely adequate to disclose the reasoning which led to the conclusion that it would be impracticable to expect a reasonable working relationship to be restored between the parties. That is the test as set down in *Ruane v Woodside Petroleum* (1990) 70 WAIG 913 at 915 and therefore the respondent's criticism of the Commission at first instance for failing to give adequate reasons for decision is not made out.

Once it is established that there was evidence in the material before the Commission which could allow that conclusion to be reached, then the appellant faces a formidable hurdle to overcome. It is one thing to argue on appeal that a conclusion was reached for which there was no supporting evidence. If the Commission at first instance made a mistake on a material fact, or failed to take into account a relevant consideration, then the appellant would be on stronger ground (*House v King* (1936) 55 CLR 499 at 505 as adopted many times in this jurisdiction). Where, however, as here, there is evidence that the respondent did lack confidence in the appellant's abilities then the Commission at first instance who has heard the witnesses and is in a position to make findings as to the evidence which is to be preferred, then the appellant faces a more formidable task. It is more difficult also for the Commission on appeal to find error on the part of the Commission at first instance when the appeal bench has not seen and heard the witnesses concerned. An inference properly open from facts which are undisputed or established by the findings of the Commission at first instance is only to be overturned if considered wrong

(*Gromark Packaging v FMWU* (1993) 73 WAIG 223 per Franklyn J). In this case, there is evidence that the respondent did have doubts regarding the appellant's capabilities. Although that evidence was opposed by evidence from the appellant, the conclusion reached by the Commission at first instance was one that was open to it on the evidence before it. It is, moreover, an entirely reasonable conclusion to have reached given the evidence that the respondent became aware subsequent to the dismissal that the appellant had misled it by stating in his *curriculum vitae* that he holds the qualification of Master of Business Administration when he did not in fact do so (AB128, Reasons for Decision AB382). Reinstatement should not be ordered if it would seriously affect productivity or harmony within the employer's business (see the decisions above re *Gilmore*; see too *Nicolson v Heaven & Earth Gallery* (1994) 126 ALR 233 at 244) and there is, in the evidence of Mr Phillips referred to above, ample evidence to conclude that reinstatement of the appellant would have that effect. It also significant, in my view, that the appellant's own Notice of Application to the Commission stated that reinstatement was not sought by him because he "did not believe that reinstatement would be possible". While the Commission is not a court of pleadings and the appellant is not bound by his statement, that fact that he was of that view when he completed the Notice of Application is not an irrelevant factor in the Commission's considerations. I would, therefore, not uphold the grounds of appeal which attack the finding of the Commission regarding the impracticability of re-instatement.

The second area of appeal goes to the assessment by the Commission of the compensation which was ordered to be paid following its finding that re-instatement was impracticable. In this regard the Commission's conclusions, which are only briefly stated, is that "an amount equivalent to twelve weeks' remuneration is a fair award for loss". In reaching that conclusion the Commission at first instance took into account her conclusions that the appellant's position was not as senior as its title suggests because the period of notice to terminate the contract of employment was only one week, that he had no right to hire or fire and that he appears to have deferred on occasions to the respondent's accountant/financial controller, Mr Redmond. Further, the Commission concluded that the appellant's tenure was always subject to performance and was by no means as secure as he asserts for the purpose of evaluating loss. The appellant attacks those conclusions on two broad bases. He challenges the factors stated by the Commission which lead her to conclude that the appellant's position was not as senior as its title suggests. The appellant then attacks the manner in which the Commission concluded that compensation would be assessed at twelve weeks' remuneration.

It was certainly open to the Commission to conclude that the period of notice to terminate the contract of employment was only one week. The original contract of employment provided for that period of notice (AB 39). There were subsequent negotiations regarding the terms of the contract of employment, however, they were in draft form only and not, on the evidence before the Commission, concluded (statements of J.J. Phillips paragraph 21; of Redmond at paragraph 12(c)). On that basis, the appellant was entitled to a notice period of one week in accordance with the contract of employment he had agreed to at the time of his engagement. The Commission did nor err in that conclusion.

The Commission did conclude that the appellant did not have the right to hire and fire and that is entirely consistent with the appellant's own evidence. Paragraph 7 of his Statement of Facts (AB 27) states, relevantly—

> Although I held the title of General Manager, I reported to Jim Phillips on a daily basis and was subject to his orders and directions. I did not have the authority to alter, for example, salary and/or wage rates, hire or dismiss staff or commit Phillips Engineering financially. On one occasion, when Jim was away I did authorise changes, after firstly checking with Rod Redmond, the company secretary and accountant, that it was within my authority, only to be corrected by Jim upon his return to the office…This situation continued substantially in the same manner from the time of my appointment until my termination in November 1997.

Further, in cross-examination, he denied any responsibility for the apparent dismissal of Mr Hughes (AB 136). The restriction on his right to hire and fire is confirmed in the statement of Mr Phillips (AB 14 paragraph 7(d)). It was imposed after the appellant had taken "these decisions" without first consulting the chairman. Although, on the evidence, the appellant employed his own secretary he did so after he was told to do so (AB 234; statement of J.J. Phillips at paragraph 18). In that context the evidence that the appellant employed the present production manager Mr Doyle (AB 335) cannot be seen in isolation. That evidence cannot itself establish that the appellant had the right to hire and fire in the face of the appellant's own admission that he did not have that right. The appellant has not demonstrated any error on the part of the Commission at first instance in her conclusion that the appellant had no right to hire or fire.

Similarly, the appellant faces a difficult task to persuade an appeal bench that the conclusion of the Commission at first instance that the appellant "appears to have deferred on occasions to Mr Redmond" was an error when his own statement, quoted above, admits that he checked with Mr Redmond about exercising his authority. Although Mr Redmond's evidence does not refer to the appellant deferring to him on any occasion there is evidence that J.J. Phillips told the appellant that Mr Redmond would "monitor" the appellant's performance (AB 255/6) and there is evidence that Mr Redmond knew the detail of the respondent's financial performance which the appellant did not know (statement of Redmond paragraph 10). The appellant's own evidence at AB 143, to which the respondent referred, that he did not make changes to the quality assurance system but that he made suggestions to Redmond for changes to the quality assurance system may well indicate a deferring to Redmond in that context. It was for the Commission at first instance to assess the weight of the evidence given and to find the facts. There was evidence before the Commission at first instance that the appellant appears to have deferred on occasions to Mr Redmond and it was therefore open to her to so find. The appellant has not shown that an error was made in the conclusion that was drawn.

The conclusion that the appellant's position was not as senior as its title suggests was open to the Commission also on the evidence of J.J. Phillips that he, as Managing Director, exercised "fairly tight control" over the appellant (AB 138) even on a daily basis (AB 138,9). He was answerable to Mr Phillips; Phillips had a right of veto; the appellant was not signatory to the cheque account and the ultimate decision-making authority rested with Phillips (AB 312, 313, 347). It was Phillips and not the appellant who approved the final price the respondent would quote for any job (appellant's Statement of Facts AB 27 paragraph 7; AB 170, cf. AB 210/211). In the last three to six months of the appellant's employment, Phillips was heavily involved in the running of the respondent (AB 328). Mr Phillips told the appellant not to use the computer but to utilise secretarial staff for that purpose (AB 162) and refused the appellant permission to have a computer on the appellant's desk (AB 239, statement of J.J. Phillips at paragraph 18). It was manifestly open to the Commission at first instance to conclude as she did and the appellant has not demonstrated any error on her part.

The appellant attacks the conclusion of the Commission to award twelve weeks' remuneration as compensation for the loss which occurred. It is trite to observe that the appeal before the Commission is against the decision of the Commission and not its Reasons for Decision. The decision was to award twelve weeks' remuneration. The Commission decided the matter having regard to s.26 of the Act as she was ultimately obliged to do (*Gilmore v Cecil Bros* op. cit. especially (1996) 76 WAIG at 4447; per Anderson J op. cit. 78 WAIG 1099 at 1102). The authorities relied upon by the appellant in this appeal do not compel a contrary conclusion. The decisions in *Capewell v Cadbury Schweppes* (1997) 78 WAIG 299 confirm the role of the proper exercise of the Commission's discretion in assessing compensation (per Sharkey P at 304; Coleman CC *ibid*; George C at 306). While her reasons for ordering the sum of twelve weeks' remuneration, as distinct from some other sum, are not clear and she did not set out findings as to loss, the ultimate focus must be upon the decision and not the Reasons (cf. *Simons v Ismail Holdings* (1998) 78 WAIG 2332). If the decision was open to the Commission

at first instance on the evidence before it and the circumstances of the case then there is no warrant for the Commission to intervene on appeal.

The Commission accepted (at AB 383) that the appellant had been warned on 10 September 1997 that he had three months to "turn the company around" and there was sufficient evidence for that conclusion to be reached (AB 252, 269, 302, statement of J.J. Phillips at paragraph 23). It was quite open to the Commission to conclude that the appellant's employment was unlikely to have continued for a long period and he was in fact dismissed on 22 November 1997. Such a conclusion is not inconsistent with her conclusion that twelve weeks' compensation is a fair award for loss particularly given that the ultimate assessment of compensation is not an exact science. It is quite important to note that the Commission's finding was that the unfairness in the dismissal which occurred resulted from the manner of the dismissal (AB 383) and this finding was not subject to appeal. Where the only reason for unfairness is procedural unfairness compensation is not likely to be a large sum (*Nicolson v Heaven & Earth Gallery* op. cit. per Wilcox J at 247). The circumstances of this case cannot attract the criticism that the compensation ordered was arbitrary given the finding by the Commission that the appellant had earlier been given effectively three months' notice. Nor am I persuaded that the lack of any specific finding as to loss has resulted in a demonstrable error in the decision eventually reached. For all of those reasons I have not been persuaded that the Commission at first instance has made an error which would warrant the Commission on appeal upholding any of the grounds put forward.

Whilst the appellant gave some evidence regarding the injury he felt he suffered arsing from the dismissal, the Commission should be cautious in awarding compensation for injury. As the Federal Court recently observed dismissal in virtually every case will cause the employee disappointment, distress and a host of unpleasant personal feelings (*Manuel v Pasminco Cockle Creek Smelter* (1998) 83 IR 135 at 162). Some employees will suffer a greater reaction than others. But in the ordinary run of cases no allowance for hurt feelings or distress is made. Whilst the appellant gave evidence (AB 126) that he was completely surprised by the dismissal and that "it had a bit of a devastating effect personally" I have not been persuaded that his evidence goes further than the "ordinary run of cases" and there is nothing in the submissions to suggest that it does such that it would permit a conclusion that the Commission at first instance erred in a manner which should be corrected upon appeal. It is not irrelevant that compensation for injury was not separately claimed in the Notice of Application. I would not uphold the grounds of appeal which attack the Commission's lack of reference to that evidence.

The final matter which requires some comment is the grounds of appeal which go to the manner of the appellant's remuneration. As I understand it, the appellant argues that the remuneration upon which the twelve weeks' compensation was assessed should take into account the total remuneration paid to the appellant's company by the respondent. As the evidence before the Commission at first instance showed, the appellant's remuneration was structured in such a way that his remuneration was paid to a company of which he is a director and which then divided the remuneration between himself and his wife. This arrangement no doubt conferred benefits upon the appellant for the purposes of taxation. Nevertheless, as a result of these arrangements, which were at the instigation of the appellant, the remuneration received by the appellant's company was by definition different from the remuneration received by him. The appellant cannot be heard to argue on the one hand that, whilst in employment, his remuneration was not the remuneration received by his company, and on the other to argue after his dismissal that his remuneration for the purposes of calculating compensation should now be seen as the remuneration received by his company. That is not to "reduce the amount of compensation" payable to the appellant. Rather, it is to correctly identify the remuneration received by the appellant as distinct from the remuneration paid by the respondent. Any compensation to be ordered by the Commission pursuant to s.23A is for the appellant's loss, not that of his company. In my view there is much to support the reference by the Commission to the equitable principle that people who come to the Commission should come with clean hands. Even if it can be argued that the Commission is not a court of equity in the strict legal sense, the command of the *Industrial Relations Act* that, ultimately, the Commission is to decide the matters that come before it according to equity, good conscience and the substantial merits of the case, without regard for technicalities and legal forms, leads to the conclusion that it was certainly open to the Commission at first instance to reach the conclusion that the remuneration of the appellant should be assessed in accordance with the remuneration received by him and not paid to his company.

Accordingly, I would dismiss the appeal.

THE PRESIDENT: For those reasons, the appeal is dismissed.

Order accordingly,

APPEARANCES: Mr R Cywicki (of Counsel), by leave, on behalf of the appellant.

Mr S Sirett (of Counsel), by leave, on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John James Timms

(Appellant)

and

Phillips Engineering Pty Ltd

(Respondent)

No. 2027 of 1998.

BEFORE THE FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
COMMISSIONER A R BEECH.

19 April 1999.

Order.

This matter having come on for hearing before the Full Bench on the 23rd day of February 1999, and having heard Mr R Cywicki (of Counsel), by leave, on behalf of the appellant and Mr S Sirett (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 19th day of April 1999 wherein it was found that the appeal should be dismissed, it is this day, the 19th day of April 1999, ordered that appeal No 2027 of 1998 be and is hereby dismissed.

By the Full Bench,

(Sgd.) P.J. SHARKEY,
[L.S.] President.

FULL BENCH—
Appeals against decision of Industrial Magistrate—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

ABB Installation & Service Pty Ltd
Appellant

and

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch
Respondent.

No 1836 of 1998.

BEFORE THE FULL BENCH.

HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
COMMISSIONER J F GREGOR.

19 April 1999.

Reasons for Decision.

INTRODUCTION

THE PRESIDENT: This is an appeal against the decision of the Industrial Magistrate, sitting in the Industrial Magistrate's Court at Perth on 17 September 1998 in complaint No CP 47 of 1998. The appeal is against the whole of the decision.

The complaint was a complaint by the respondent organisation of employees that the appellant employer, being bound by Award No R22 of 1978, "The Electrical Contracting Industry Award" (hereinafter referred to as "the Award") and Agreement No AG129 of 1996, "The ABB Installation and Service Pty Ltd (Western Region) Enterprise Bargaining Agreement" (hereinafter referred to as "the Agreement"), between 5 April 1997 and 25 April 1997, committed a breach thereof in that it failed to pay its employee, one Terry Ratcliffe, an entitlement to wages in accordance with Clause 14 – Payment of Wages of the Award and the underpayment was said to be $669.20.

The claim was denied in terms of the Particulars of Defence filed herein. The Industrial Magistrate found that the breach, as alleged, was proven, imposed no penalty, made no order as to costs, but ordered that the amount of $669.20 underpaid be payable to the complainant organisation. The case was described, at first instance, as a case which related to the situation of all of the employees involved.

GROUNDS OF APPEAL

The appellant appeals against His Worship's decision on the following grounds—

"1. The Industrial Magistrate erred in law in determining that the employer (appellant) had failed to pay an employee (Terry Ratcliffe) wages for the period 7th April 1997 to 11th April 1997 inclusive.

Particulars

The Industrial Magistrate was in error in finding, as a fact, that the employee, in turning to, during the relevant period, at the main gate of the Kwinana Power Station amounted to an attendance on site for the purposes of being ready and willing to work. The evidence demonstrates that the employee never went through the main gate and could not have been on site (refer transcript at pages 9, 11, 12, 13, 14 & 32).

2. The Industrial Magistrate erred in law in opining to the view that the employer could have invoked the provisions of clause 12(l0) of the Agreement given the circumstances that existed during the relevant period. His Worship's finding that the employer failed to give instructions lead him into error in the proper application of that clause.

3. The Industrial Magistrate, even if he were correct in his finding that the employee was on site during the relevant period, fell into error in ordering the employer to pay wages to the sum of $669.20.

Particulars

(a) The monies so ordered are based upon the daily rates contained in the schedule to the complaint.

(b) Whilst his Worship was correct in assuming, in the absence of evidence on the point, that the employer agreed that the employee had attended the main gate at the Kwinana Power Station each day, Monday through to Friday, at 7.00 am there is no evidence that the employee was in attendance at the main gain(sic) beyond 1.30pm on each day (refer to transcript at pages 10, 13 & 14).

(c) In the result his Worship's order miscalculates the employee's wages to the value of two hours pay each day."

BACKGROUND

There was a Minute of Agreed Facts (see page 66 of the Appeal Book (hereinafter referred to as "AB")) filed in this matter to the effect, inter alia, that the appellant company was engaged in electrical contracting and, in fact, was doing work at Kwinana Power Station, pursuant to a contract with Western Power. It was agreed that the respondent and its workforce were bound by the Award and the Agreement. All of this was during the material times, namely 5 to 11 April 1997.

Further, the appellant employed Mr Terry Ratcliffe, amongst others, as an electrical fitter, pursuant to the terms of the Award and of the Agreement, at the material times.

The usual practice, on the evidence, when starting the day's work, was for the employees to drive through the main gate for about 500 metres, park their cars in the contractors' car park, walk a further 500 metres to the main security gate, clock in with a magnetic card, then walk another 500 metres to the site office and crib huts. There, the supervisors would take the roll call and issue instructions. That was the usual process of reporting for work, being done within the boundaries of the Kwinana Power Station.

There was evidence given by an employee and the respondent organisation's shop steward, Mr Nolan Walter Westbrook, on behalf of the respondent, at first instance. He was, of course, an employee of the appellant at the material time. There was also evidence from Mr Leslie McLaughlan, an organiser with the respondent organisation.

For the respondent (defendant) at first instance, Mr Bruce Dennis Whiterod, the appellant's Project Manager in relation to the work being performed on the Kwinana Power Station site, gave evidence. There were no other witnesses.

What occurred was very little in dispute. At the material time, there was industrial disputation between employees of Western Power who were CFMEU members. As a result, there was a picket line put in place at the Kwinana Power Station on Saturday, 5 April 1998. The dispute did not involve the appellant or its employees, who were also CFMEU members.

Mr Westbrook arrived for work on 5 April 1998. There was a picket line and he could not get through the gate to the site, at about 8.30 am, because the picket line barred access. No other employee went through the picket line that day to report for work. The workforce did make an approach to the main gate. No-one went through the gate. Mr Westbrook went home.

From home, he rang the site office and spoke to Mr Bruce Whiterod. Whilst his recollection of this conversation was vague, he told Mr Whiterod that he had not been in this situation before and did not know what to do. According to him, Mr Whiterod said that the picket might be up for a day or two days, he did not really know and said "So we might see how it goes Monday". Monday was 8 April 1998. Mr Westbrook could not remember whether the question of a dispensation for the appellant's employees to cross the picket line was discussed that day.

On Sunday, 6 April 1998, Mr Westbrook spoke to Mr Whiterod but could not, in evidence, recall the conversation. On Monday, 7 April 1998, when Mr Westbrook attended at the gate of the Kwinana Power Station, the picket line was still in place. There were other employees of the appellant present, asking Mr Westbrook what to do.

The picket line was, of course, blocking entry to the Kwinana Power Station where the appellant's employees had been working until the picket line was put in place. Mr Westbrook rang the site office and spoke to Mr Peter Belczowski. He was the appellant's supervisor but was unable to give Mr Westbrook any clear direction as to what to do. Mr Westbrook then rang Mr Whiterod on the mobile phone.

According to Mr Westbrook, he said to Mr Whiterod—

> "It looks like the picket is going ahead during the week."

Mr Whiterod replied—

> "All you can do is be dressed ready for work and we're not too sure if it's going to last a day or whatever. Front up every day and see what happens with the picket."

Mr Westbrook informed Mr McLaughlan of this conversation and Mr McLaughlan confirmed that he should do what Mr Whiterod had told him to do.

On Monday, 7 April 1998, Mr Westbrook asked Mr McLaughlan if they could get a dispensation to go through. He also asked the appellant's shop steward on the Western Power site, Mr Rick Rodolfi, if they could get through because it was not their dispute. Both Mr McLaughlan and Mr Rodolfi told him that the appellant's employees could not get a dispensation to go through the gate. Mr Whiterod denied telling Mr Westbrook that if they went through the picket line, the employees would be paid or not paid (see pages 39-40(AB)).

No employees of the appellant tried to go through the picket line because they were outnumbered about three or four to one and were not brave enough (see page 24(AB)). Further, Mr Whiterod or Mr Belczowski asked if they would go through the picket and Mr Westbrook said "No." Mr Westbrook gave the reason that it was not safe (see page 24(AB)). This was early in the week. Mr Whiterod denied asking Mr Westbrook and his fellow employees to go through the picket line (see page 40(AB)).

On the Monday, Mr Westbrook rang Mr Whiterod, according to Mr Whiterod's evidence, and said that the picket line was there, that most of the work force were there, that he had a list of them and would be using that to request payment for them. Mr Whiterod said that he remained silent on that issue. There was no site to transfer the employees to (see page 51(AB)).

The employees all kept turning up fully dressed to commence work because the employer and the union had told them to; that was all of the employees. Mr Whiterod knew that a large number was turning up. He had an expectation that the work force would turn up and gave no directive to them not to. None went through the gate on any of those days to report to the site, for the purposes of working. None went through the picket line on the Wednesday, there were chains and padlocks on the gate.

Every day they waited outside from 7.00 am until about 1.30 pm (see page 25(AB)), until the CFMEU men on the picket met and decided to continue with the picket or not.

On Monday, Tuesday, Wednesday, Thursday, all went home after those meetings when the picket lines remained (see pages 28-29(AB)). On Friday, 11 April 1998, the picket was shifted. Once that was done, Mr Westbrook rang Mr Whiterod or Mr Belczowski and said that the picket was down and they were ready, willing and able to work.

On that day, Mr Westbrook spoke to Mr Belczowski, who was sitting down the road in his car. He was told that it was 2.00 pm and, by the time that they got started, it would be time to close the gate, namely at 3.30 pm.

There was work on site on the Friday, but there was only an hour and a half left until the end of the working day, so that they decided to leave the recommencement of work until next morning. On the next day, Saturday, 12 April 1998, they worked a normal shift.

Mr Whiterod said that, during the week, one of the supervisors was on the main gate at various times. Neither he or Mr Belczowski stood the employees down or told them to go home.

Not one of the employees, including Mr Westbrook, were paid for the period from 5 April 1998 to 11 April 1998 inclusive. There was no mention of money during this period. The appellant had refused to pay the wages of any employee for the relevant period.

THE AWARD

Clause 14 of the Award, in its relevant clauses, reads as follows—

"14.—PAYMENT OF WAGES

(1) (a) Each employee shall be paid, where the employer and employee agree, weekly or fortnightly, prior to the finishing time of work at the appropriate rate as shown in the First Schedule—Wages. Subject to subclause (2) of this clause payment shall be pro rata where less than a full week is worked.

(b) (i) The employee shall be paid in cash or, where an employer and employee agree, the employee may be paid his wages by cheque or electronic funds transfer.

(ii) Where an employee is paid in cash, the employee shall be paid during ordinary working hours prior to finishing time.

Unless an employee has been notified that payment will be delayed for reasons beyond the reasonable control of the employer, an employee kept waiting for his wages shall be paid at overtime rates up to the maximum of one hour.

(3) Absences from Duty—

(a) An employee whose ordinary hours are arranged in accordance with placitum (iii) or (iv) of subclause (2)(a) of Clause 11.—Hours and who is paid wages in accordance with paragraph (a) of subclause (2) hereof and is absent from duty (other than on annual leave, long service leave, holidays prescribed under this award, paid sick leave, workers' compensation or bereavement leave or trade union training leave) shall, for each day he is so absent, lose average pay for that day calculated by dividing his average weekly wage rate by 5.

An employee who is so absent from duty for part of a day shall lose average pay for each hour he is absent by dividing his average daily pay rate by 8.

(b) Provided when such an employee is absent from duty for a whole day he will not accrue a "credit" because he would not have worked ordinary hours that day in excess of 7 hours 36 minutes for which he would otherwise have been paid. Consequently, during the week of the work cycle he is to work less than 38 ordinary hours he will not be entitled to average pay for that week. In that week, the average pay will be reduced by the amount of the "credit" he does not accrue for each whole day during the work cycle he is absent.

The amount by which an employee's average weekly pay will be reduced when he is absent from duty (other than on annual leave, long service leave, holidays prescribed under this award, paid sick leave, workers' compensation or bereavement leave or trade union training leave) is to be calculated as follows—

$$\text{Total of "credits" not accrued during cycle} \times \frac{\text{average weekly pay}}{38}$$

Examples: .....

1. Employee takes one day off without authorisation in first week of cycle.

Week of Cycle	Payment
1st week	= average weekly pay less one day's pay (ie.1/5th)

2nd & 3rd weeks	= average weekly pay each week
Week of Cycle	Payment
4th Week	= average pay less credit not accrued on day of absence = average pay less 0.4 hours x average weekly pay / 38

2. Employee takes each of the 4 days off without authorisation in the 4th week.

Week of Cycle	Payment
1st, 2nd & 3rd weeks each week	= average pay
4th week	= average pay less 4/5ths of average pay for the four days absent less total of credits not accrued that week = 1/5th average pay less 4 x 0.4 hours x average weekly pay / 38 = 1/5th average pay less 1.6 hours x average weekly pay / 38

(4) Alternative Method of Payment—

An alternative method of paying wages to that prescribed by subclauses (2) and (3) of this clause may be agreed between the employer and the majority of the employees concerned.

(8) Calculation of Hourly Rate—

Except as provided in subclause (3) of this clause the ordinary rate per hour shall be calculated by dividing the appropriate weekly rate by 38.

(9) Subject to the provisions of this award no deduction shall be made from an employee's wages or from any money entitlement of the employee unless the employee has authorised such deduction in writing."

THE AGREEMENT

Clause 12(10) of the Agreement reads as follows—

"12.—MEASURES TO ACHIEVE GAINS IN PRODUCTIVITY, EFFICIENCY AND FLEXIBILITY

.....

(10) All Other Disputes

(a) Where an ABBIS employee is affected by any other dispute an employee will comply with ABBIS instructions to either—

(i) continue work when the area in which the employee is working is not affected by the condition, situation or grievance giving rise to the dispute; or

(ii) accept a transfer to work in an area of the site not affected by the condition, situation or grievance giving rise to the dispute; or

(iii) accept a transfer from one site to another site; or

(iv) leave the site without loss of pay.

(b) An employee who does not comply with ABBIS instructions agrees to forfeit wages for time not worked."

Clause 12(17) of the Agreement reads as follows—

"Unauthorised Absences

(a) ABBIS will—

(i) arrange an employee's ordinary hours of work which to average 38 hours per week; and

(ii) select the method of implementation of the 38 hour week.

(b) An employee will present himself or herself for duty and remain on duty during the ordinary hours of work.

(c) ABBIS is under no obligation to pay for any hours not worked during those ordinary hours unless it is an authorised absence in accordance with—

(i) the Award provisions; or

(ii) an instruction from ABBIS that the employee may leave site without loss of pay."

FINDINGS OF THE INDUSTRIAL MAGISTRATE

His Worship gave his reasons for decision on 17 September 1998 (see page 62 (AB)) therefor. These, summarised, were as follows—

1. That the dispute turned on whether or not the employees were in breach of the Agreement's Clause 12(10) or any other part of the Agreement.
2. That there were conversations between Mr Westbrook and Mr Whiterod, Mr Westbrook being an employee and Mr Whiterod, the Project Manager.
3. The conversations were in relation to a dispute.
4. Mr Westbrook, as soon as he became confronted with the situation in the picket line, made contact with his employer's representative, Mr Whiterod.
5. The matter was at the time before the Industrial Relations Commission and there was some expectation that the dispute could be resolved at any moment.
6. Mr Whiterod said that he had an expectation that the workforce would be there each day and did not tell them not to be there or use any provisions of the agreement. He did not transfer them to another site or to another area of the site because there was no other site to which they could be transferred.
7. There was an expectation almost hourly that the dispute would be concluded and Mr Whiterod wanted his employees there to start work as soon as that did happen.
8. There was no expectation by the employer that the employees would cross the picket line and there were no instructions given by the employer to the employees to cross the picket line.
9. Any work done by employees of the company on the site, even at the main gate, would fall within being on the site.
10. Mr Whiterod said that he knew that the employees were attending the site every morning.
11. There is an obligation on the employer and employee in a situation like this and, in those circumstances, if the employer wanted to invoke the provisions of the Agreement under Clause 12(10), he could have given some instructions to not do so.
12. He allowed and knew that every day the employees were turning up ready, willing and able to work and there was no evidence before the Industrial Magistrate that he was in touch with the supervisor at the site.
13. His Worship concluded that Mr Ratcliffe, on the agreement that he attended the site, did so. His Worship also made a finding that, under the Sentencing Act 1995, he could impose no penalty.

ISSUES AND CONCLUSIONS

The crux of this appeal was that His Worship had erred in finding, as a fact, that the employee, Mr Ratcliffe, in turning up during the relevant period at the main gate of the Kwinana Power Station, had attended on site for the purposes of being ready and willing to work, because, the evidence revealed, that Mr Ratcliffe did not go through the main gate.

Further, it is asserted that the Industrial Magistrate erred in law in concluding that the employer could have invoked the provisions of Clause 12(10) of the Agreement, given the circumstances that existed during the relevant period.

It was submitted that His Worship's finding that the employer failed to give him instructions led him into error in the proper application of the clause.

The Agreement should be interpreted in the same manner as an award to which it is related and with which it is to be read. The principles for such interpretation appear in Norwest Beef Industries Ltd and Derby Meat Processing Co Ltd *v* AMIEU 64 WAIG 2124 (IAC), (see, also AEEFEU *v* Minister for Health 71 WAIG 2253 (IAC)).

The subject clause or clauses are to be read in the context of the whole of the Agreement. Further, the words of the Agreement should be given their ordinary and natural meaning, unless to do so were to lead to absurdity or ambiguity or were to lead to a construction inconsistent with the purpose or the other provisions of the Agreement.

The essential question in this appeal was whether Clause 12(10) or 12(17) of the Agreement, or both, was/were applicable and, in any event, what the effect of such clause or clauses was or were.

Clause 12(10) does apply to "any other dispute" by which an employee of the appellant is "affected". Clause 12 is a clause which purports to prescribe measures to achieve gains in productivity, efficiency and flexibility. Clause 12(8) refers to "Safety Disputes". Clause 12(10) purports to refer to "all other disputes".

It seems to me that a fair reading of the phrase "any other dispute" means any other dispute, whether involving the appellant's employees or not which affects any employee of the appellant.

"Affect" means, read in the context of the Agreement, "affecting the ability of the appellant's employee to perform his/her contract as he/she is required to perform it". Hence, quite plainly, in this case, there was a dispute involving other employees of another employer with their employer, Western Power, resulting in picketing which prevent the appellant's employees entering onto the "site" to perform their work. Accordingly, in their capacities as employees of the appellant, the appellant's employees were affected by the dispute.

That being the case, the appellant's employees, including Mr Ratcliffe, were required by Clause 12(10) of the Agreement to comply with the appellant's instructions if they were the instructions capable of being given. There was no instruction to work in the area in which the employees were working, and that is understandable, because the area where they were working was, in fact, affected by the condition, situation or grievance giving rise to the dispute and was, in fact, picketed (see Clause 12(10)(a)(i)).

Further, for the same reason, a transfer to an unaffected area of the site could not be a relevant consideration (see Clause 12(10)(a)(ii)).

On Mr Whiterod's evidence, no directions were given to employees to transfer from the Kwinana Power Station site to another site because there was no other site to transfer to (see Clause 12(10)(a)(iii)).

Further, there was no direction given, although it might have been given, to employees to leave the site without loss of pay. What they were told to do on Mr Westbrook's evidence, and expected to do on Mr Westbrook's evidence, was to turn up daily, dressed and ready for work. This they did, even on the Wednesday when the gate was locked.

Accordingly, as a matter of fact and really quite indisputably, there were no instructions given in accordance with Clause 12(10) and no non-compliance with any Clause 12(10) instruction. Accordingly, there was no employee, required under Clause 12(10) to forfeit wages for time not worked.

In my opinion, Clause 12(10) was not applicable because, as a matter of fact, the employer did not invoke it. The question is whether there were absences of employees from work which were unauthorised.

Clause 12(17) requires the appellant to arrange an employee's ordinary hours of work so as to average 38 hours per week and select the method of implementation of the 38 hour week (Clause 12(17)(a)(i) and (ii)). Employees of the appellant are required to present themselves for duty and remain on duty during the ordinary hours of work (Clause 12(17)(b)).

Notably, the appellant is under no obligation to pay for any hours not worked during those ordinary hours, unless it is an authorised absence in accordance with—

(a) the Award provisions; or

(b) an instruction from the appellant that the employee may leave site without loss of pay.

The question is whether there was an authorised absence in accordance with Clause 12(17)(c).

First, there was, as a matter of fact, no instruction from the appellant that Mr Ratcliffe or any other employee might leave the site without any loss of pay. The remaining question, then, is whether there was an absence authorised under the Award provisions.

Under the award, there is no obligation to pay for any day not worked upon which the employee is required to present himself for duty, except when the absence from work is due to illness and comes within Clause 24, or such absence is on account of holidays to which the employee is entitled under the Award.

Clause 7(10) of the Award is inapplicable, except for Clause 7(10)(a), but it was not submitted that Clause 7(10)(a), which reads as follows—

"(10) (a) The employer is entitled to deduct payment for any day upon which an employee (including an apprentice) cannot be usefully employed because of a strike by the industrial union of employees party to this award or by any other association or union."

was applicable because it was not submitted that there was a strike by the industrial union of employees party to the Award, or any other association or organisation.

However, the facts in this matter were really not in dispute. The fact of the matter is that each morning, except Wednesday, the employees presented themselves for work in accordance with the instructions given them. There is no specific provision in the Award or the Agreement that they go on site, although normally they would. They are only required to present themselves for work and remain at work. This they did, dressed and ready for work. Where they presented themselves, there was, on the evidence, sometimes a supervisor present outside the picket line with them.

They were not able to work because they were unable to go through the picket line, and, quite sensibly, they received no direction to do so. They did not remain after 1.30 pm every day, but waited until it was obvious that they could not go through the picket line, which was decided by meetings. They even, unsuccessfully, attempted to obtain dispensations to go through the picket line.

His Worship correctly found that the matter depended on whether the employees were in breach of the Agreement, whether it was Clause 12(10) or any other part. There was, as His Worship found, an expectation, almost hourly, that the dispute would be resolved and Mr Whiterod wanted his employees present outside the Western Power premises to start work as soon as that did happen. There was no expectation by or direction that the employees would cross the picket line. Mr Whiterod, too, knew that the employees were attending every morning ready and able to work.

In this case, it was not material that the employees did not and were not able to, nor were they directed to do more than they did. The fact of the matter is that the employees, including Mr Ratcliffe, presented themselves for duty and remained on duty until it was clear that matters were not resolved in the Commission. On one day, Wednesday, they were locked out. They could do no more in order to present themselves without risking injury, which they were not instructed and, correctly, not instructed to do.

When they left on the Saturday, there was an authorised absence, but not without pay. They remained on duty, insofar as ordinary hours of work existed. There was no direction under Clause 12(10).

It is quite clear that Mr Ratcliffe had complied with the Agreement. The question of whether he went onto the site was not relevant because, insofar as he was able to and with the knowledge and approval of his employer, he presented himself for work, as alleged, and the employer invoked no provision of the Agreement which might deprive him of payment.

As the Industrial Magistrate found, and was entitled to find, Mr Ratcliffe attended the site, as he did. Mr Ratcliffe was required to present himself for work and he did.

For those reasons, the grounds of appeal are not made out. I would dismiss the appeal.

CHIEF COMMISSIONER W S COLEMAN: I have had the benefit of reading the reasons for decision of His Honour the President. I agree with those reasons and have nothing to add.

COMMISSIONER J F GREGOR: This is an appeal against the Decision of the Industrial Magistrate made on the 17 September 1998 in complaint No. CP 47 of 1998. That appeal arose from a complaint from the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, Western Australian Branch (the Union) that ABB Installation and Service Pty Ltd (the Respondent) being a party bound by both the Electrical Contracting Industry Award R22 of 1978 (the Award) and the ABB Installation and Service Pty Ltd (Western Region) Enterprise Bargaining Agreement No. 129 of 1996 (the agreement) failed to pay an employee, Terry Ratcliffe, an entitlement to wages payable in accordance with Clause 14.—Payment of Wages of the Award.

The parties submitted to His Worship a Minute of Agreed Facts. It is not necessary to summarise those facts for the purposes of these Reasons. His Worship issued his Reasons for Decision extempore. Amongst other things he found that the employee and employer are bound by the Award and the agreement. There is a provision in the Award which deals with dispute of the type before the Court. He found that the evidence of the employer was that it had an expectation that the workforce would present for work outside the Kwinana Power Station each day during the currency of industrial action by another union. The employer did not give any instructions to the employees not to be there, nor did it use other provisions of the agreement which were available to it. That is, it did not transfer them to another area of the site or another site. There was no other site to which they could be transferred but the underlying reason, so His Worship found, was that there was an expectation almost hourly that the dispute would be concluded and the employer wanted its employees to start work as soon as that happened.

As to an argument that by attending a picket line the employees were not attending at the site, His Worship observed he had not heard much evidence about the size of the Kwinana Power Station. He did not know from his own knowledge how large it was, but if there was a suggestion that the site was confined to the employers office or crib room then His Worship did not believe that would be a proper interpretation of site, although His Worship supposed any work done by the employees of the respondent, anyone on the site, even at the main gate, would fall within being on site.

His Worship observed that the prime witness for the respondent had an expectation that the employees would turn up. It did not tell them not to, in fact its evidence was it knew they were attending the site every morning. His Worship concluded that to be a proper interpretation of the facts. He then went on to conclude that he did not know what other industries worked close by the power station but he imagined it was a large area. He understood there was a car park, there was a roadway that led to the main gate, there was a car park beside the gate and it seemed to him on any 'application' of the word 'site' that attendance at the gate would put the employees on site. He did not think there was any merit in the argument that the employees were not on site. In short, His Worship dismissed the whole of those arguments that went to whether the workers were disentitled to wages by the fact that they did not attend on the site as it was described by the advocate for the respondent.

The respondent, the appellant in this matter, appealed the Decision of His Worship. The grounds of appeal are as follows—

1. *The Industrial Magistrate erred in law in determining that the employer (appellant) had failed to pay an employee (Terry Ratcliffe) wages for the period 7th April 1997 to 11th April 1997 inclusive.*

   Particulars

   The Industrial Magistrate was in error in finding, as a fact, that the employee, in turning to, during the relevant period, at the main gate of the Kwinana Power Station amounted to an attendance on site for the purposes of being ready and willing to work. The evidence demonstrates that the employee never went through the main gate and could not have been on site (refer transcript at pages 9, 11, 12, 13, 14 & 32).

2. *The Industrial Magistrate erred in law in opining to the view that the employer could have invoked the provisions of clause 12(10) of the Agreement given the circumstances that existed during the relevant period. His Worship's finding that the employer failed to give instructions led (sic) him into error in the proper application of that clause.*

3. *The Industrial Magistrate, even if he were correct in his finding that the employee was on site during the relevant period, fell into error in ordering the employer to pay wages to the sum of $669.20.*

   Particulars

   (a) The monies so ordered are based upon the daily rates contained in the schedule to the complaint.

   (b) Whilst his Worship was correct in assuming, in the absence of evidence on the point, that the employer agreed that the employee had attended the main gate at the Kwinana Power Station each day, Monday through to Friday, at 7.00 am there is no evidence that the employee was in attendance at the main gain beyond 1.30pm on each day (refer to transcript at pages 10, 13 & 14).

   (c) In the result his Worship's order miscalculates the employee's wages to the value of two hours pay each day.

4. *The appellant seeks to have the orders of the Industrial Magistrate quashed or, in the alternative, varied to reflect the matters raised in paragraph 3 of these grounds of appeal.*

The focus of Ground 1 of the appeal is that His Worship was in error in finding that the employee in turning to during the relevant period at the main gate of the Kwinana Power Station amounted to an attendance on site for the purposes of being ready and willing to work. The other major ground is set out in Ground 2 which asserts there is an error in law in that the Industrial Magistrate, in finding that the employer failed to give instructions to the employees, was led into error as the proper application of Clause 12(10) of the agreement.

I deal with each of the grounds in turn. The appellant in this matter, the respondent in the matter before His Worship, focused its argument on the proposition that the employee, the subject of the complaint, did not attend on site and because he did not he was not ready and willing to work. His Worship rejected the argument concerning the need to attend on site. In my view, the appeal is misconceived because the question to be asked is not whether the employee was on site but whether or not he was absent from duty in the terms that are described in Clause 14. – Payment of Wages in the Award. In general terms Clause 14. – Payment of Wages creates a right for payment and sets out the system under which payments are to be made. Subclause 3 is relevant to this appeal and I set it out hereunder—

(3) Absences from Duty—

(a) An employee whose ordinary hours are arranged in accordance with placitum (iii) or (iv) of subclause (2)(a) of Clause 11. – Hours and who is paid wages in accordance with paragraph (a) of subclause (2) hereof and is

absent from duty (other than on annual leave, long service leave, holidays prescribed under this award, paid sick leave, workers' compensation or bereavement leave or trade union training leave) shall, for each day he is so absent, lose average pay for that day calculated by dividing his average weekly wage rate by 5.

An employee who is so absent from duty for part of a day shall lose average pay for each hour he is absent by dividing his average daily pay rate by 8.

(b) Provided when such an employee is absent from duty for a whole day he will not accrue a "credit" because he would not have worked ordinary hours that day in excess of 7 hours 36 minutes for which he would otherwise have been paid. Consequently, during the week of the work cycle he is to work less than 38 ordinary hours he will not be entitled to average pay for that week. In that week, the average pay will be reduced by the amount of the "credit" he does not accrue for each whole day during the work cycle he is absent.

The amount by which an employee's average weekly pay will be reduced when he is absent from duty (other than on annual leave, long service leave, holidays prescribed under this award, paid sick leave, workers' compensation or bereavement leave or trade union training leave) is to be calculated as follows—

$$\text{Total of "credits" not accrued during cycle} \times \frac{\text{average weekly pay}}{38}$$

(Emphasis added)

Both the Award and the agreement are to be interpreted in the same way. The principles are set out in *Norwest Beef Industries Ltd v Derby Meat Processing Co. Ltd v AMIEU (1984) 64 WAIG 2124*. The relevant words are to be read and interpreted in the context of the whole document. The words are to be given their ordinary natural meaning, unless to do so would led to an absurdity or ambiguity or lead to a construction which is inconsistent with the purpose of other provisions of the document.

The words of subclause 3.—Absences from Duty are clear. An employee's ordinary hours are arranged in accordance with Clause 11.—Hours of the Award. An employee who is absent from duty, other than for reasons which are set out in Clause 14(3)(a), shall for each day he is absent loose average pay for that day calculated by dividing his average weekly wage by 5. Subclause (b) also refers to an employee who is absent from duty for a whole day and reduces the "credit" that employee may get for working longer than 38 hours. The clause sets out a formula by which the employee's weekly wage pay will be reduced where he is absent from duty. This clause is designed to provide for adjustments of pay when an employee is absent from duty other than for a reason to set out in the Award. For instance, in the case of annual leave, long service leave, holidays, paid sick leave, workers' compensation, bereavement leave or trade union training leave. The question to be decided in the instant appeal is whether the employee was absent from duty.

It is trite to say that an employee is obliged to present himself for duty and the employer has an obligation to direct the employee as to the duties to be performed for which consideration in the form of wages is paid. In my view it is a distraction to consider the influence upon these mutual obligations by reference to whether the worker is on site or not, rather the real question is, what direction has the employer given to the employee in respect of the duties to be performed. In this case, clearly the respondent first acquiesced then agreed that his employees should present each day during a dispute involving other workers at a particular place, in this case the gateway to Kwinana Power Station, dressed ready for work. The respondent kept the employees presenting for work in this situation for a number of days until the dispute was resolved. Whether those employees were held at the employer's direction at the gate or not in my view is immaterial. The respondent could just have easily have asked them to wait at its yard or at a place close to the site of more comfort than near a picket line. However, it opted not to tell them to wait at another place. The employees were nevertheless subject to the respondent's direction on each day in which they came to the gate during the dispute. It is clear from the findings of His Worship that the respondent had an expectation that the workplace would be available each day. The respondent did not tell its employees, including Mr Ratcliffe, not to be at the gate nor did it use any other provisions of the agreement such as Clause 12.—Measures to Achieve Gains in Productivity, Efficiency and Flexibility which could have been used to move them to other work places. His Worship found that the respondent did not do so because there was no other site to which they could be transferred, but fundamentally His Worship found that the underlying reason was that there was an expectation, almost hourly, that the dispute would be concluded and that the respondent wanted its employees ready to start work as soon as that happened. In my view it was unnecessary to make findings about whether the employees were on site or not. It is open to conclude that His Worship reached the same conclusion. He decided there was no merit in the argument relating to the word 'site'.

In any event there was very little evidence concerning the definition of 'site' before the Industrial Magistrate or on appeal. The site on which the respondent was working may not have encompassed the whole of the Kwinana Power Station. It is unknown whether there was a Project Manager or whether the respondent had been given possession of a particular part of site or not. In short there was insufficient argument as to what the site may consist of. Ultimately it is, in my view, irrelevant. The question to be answered is whether there was an absence from duty which would cause subclause (3) of Clause 14.—Payment of Wages of the Award to come into operation. There was not for the reasons I have set out above. Ground 1 of the appeal has not been made out.

I will deal with Ground 2 shortly. The appellant calls in aid Clause 12.—Measures to Achieve Gains in Productivity, Efficiency and Flexibility of the agreement and in particular subclause (10) of the clause. This clause requires an employee of the appellant effected by another other dispute to comply with any of a series of instructions which are set out in placitum (i) to (iv) of paragraph (a) of subclause (10). Paragraph (b) provides where the employee does not comply with instructions there is an agreement to forfeit wages for the time not worked. There is no comfort for the appellant in subclause (10). No instructions of the nature set out in Clause 12(10)(a)(i-v) of the agreement were given to the employee, the subject of the proceeding before His Worship. On the contrary. He was directed to report in a particular place at a particular time and remain ready for work. Under subclause 17—Unauthorised Absences of Clause 12 the appellant is under no obligation to pay for hours not worked during ordinary hours unless there is an absence authorised in accordance with the Award provisions or an instruction from the appellant that the employee may leave the site without loss of pay. In this case my finding as to the true interpretation of Clause 14 of the Award does not provide an escape for the appellant from the obligation to pay for hours not worked is set out in paragraph (c) of subclause 17 – Unauthorised Absences. There is an obligation on the appellant to pay the complainant because he was ready, willing and available to work at the direction of the employer. I would dismiss Ground 2 of the appeal.

As for Ground 3 the work of the employee, the subject of the complaint, presented for duty as directed and remained in readiness to work. While there was no direction under Clause 12(10) of the agreement the employee was entitled to pay. I would dismiss Ground 3.

The appeal should be dismissed.

THE PRESIDENT: For those reasons, the appeal is dismissed.

Order accordingly

APPEARANCES: Mr D M Jones, as agent, on behalf of the appellant

Mr C Young on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

ABB Installation & Service Pty Ltd
Appellant

and

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch
Respondent.

No 1836 of 1998.

BEFORE THE FULL BENCH.

HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
COMMISSIONER J F GREGOR.

19 April 1999.

Order.

THIS matter having come on for hearing before the Full Bench on the 8th day of March 1999, and having heard Mr D M Jones, as agent, on behalf of the appellant and Mr C Young on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 19th day of April 1999 wherein it was found that the appeal should be dismissed, it is this day, the 19th day of April 1999, ordered that appeal No 1836 of 1998 be and is hereby dismissed.

By the Full Bench.

(Sgd.) P. J. SHARKEY,
[L.S.] President.

FULL BENCH— Unions—Application for Alteration of Rules—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Western Australian Police Union of Workers

(Applicant)

No. 275 of 1999.

BEFORE THE FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
COMMISSIONER J F GREGOR.

29 April 1999.

Reasons for Decision.

THE PRESIDENT:

1. This is an application by the Western Australian Police Union of Workers.
2. That body is an organisation, as that is defined in s.7 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act"), which means that it is registered as an organisation under the Act.
3. The application is one made to alter the rules of the abovementioned organisation, and is made pursuant to s.62(2) of the Act, which gives jurisdiction to the Full Bench to authorise the Registrar to register any alteration of the rules of an organisation which relates to its name, qualification of persons for membership, or a matter referred to in s.71(2) or (5) of the Act. Otherwise, the Registrar is prohibited from registering such an alteration to the rules.
4. The application herein was filed on 26 February 1999 and bears the common seal of the applicant, "The Western Australian Police Union of Workers".
5. The application seeks the following—

   "… the registration or alteration to the name/rules of the organization/association particulars of which are attached hereto."

   The application also notes that—

   "The alterations were proposed by the organization/association in accordance with its rules and the Industrial Relations Act on the 29th day of June 1998."

   In fact, the power of the Full Bench under s.62(2) of the Act is to authorise the Registrar to alter the rules of an organisation if an applicant organisation so satisfies the Full Bench.
6. Particulars appear in the form of copies of the rules with proposed amendments in black print, which are in fact gazetted in 79 WAIG 884. For convenience, I reproduce hereunder the proposed new Rule 4 with proposed alterations underlined. There are no other parts of the application which are within the jurisdiction of the Full Bench. They are, in fact, within the jurisdiction of the Registrar.

   "(1) The following classes of employees <u>of the Western Australia Police Service</u> shall be eligible to be members of the Union—
   (a) <u>Sworn</u> Police Officers;
   (b) Police Cadet (Recruits); and
   (c) Aboriginal Police <u>Liaison Officers</u>

   (2) The Union shall be constituted of those classes of members specified <u>in sub rule (1) of this Rule</u> and persons upon whom Life Membership of the Union has been conferred in accordance with <u>these</u> Rules.

   (3) Any <u>sworn officer of the Police Service as defined by sub rule (1) of this Rule</u> may apply to the <u>Board</u> for membership of the Union, and the Union shall have the power to accept or reject such applications; provided that any applicant whose application for membership is rejected <u>by the Board</u> shall have the right of appeal to the next Annual Conference of Delegates whose decision shall be final."
7. There are no particulars, as those are prescribed in Regulation 8(2)(c) of the Industrial Relations Commission Regulations 1985 (as amended) (hereinafter referred to as "the Regulations"), which require that a Notice of Application shall, inter alia—

   "have attached a written statement of claim which clearly and concisely specifies the exact nature of the relief sought and the purpose of the application."
8. Pursuant to Regulation 98(1) of the Regulations, the application has been lodged in triplicate in accordance with Form 29.
9. Regulation 98(3) of the Regulations has been complied with in that—

   "(a) three printed or type-written copies of the registered rules of the organization or association incorporating and showing in distinctive characters, each alteration of the rules of which registration is sought;
   (b) three printed or type-written copies of each alteration;
   (c) three copies of the notice given to members in accordance with section 62(3)(b) of the Act including a statement as to how such notice was disseminated to members; and
   (d) three copies of the resolution authorizing the application."

   have been filed.
10. Rule 28 is the alteration of rules rule of the applicant organisation and requires the following to occur—

    (a) Should the Council or any Branch desire to alter, amend or rescind any existing rule, or desire to have any new rule inserted, they shall

forward same to the General Secretary not later than sixty (60) clear days before the Annual conference for insertion in the Agenda Paper.

(b) There is a prohibition upon any alteration, amendment or rescission of a rule or any adoption of a new rule unless the same appears upon the Agenda Paper for the Annual Conference.

(c) There is a prohibition upon an amendment, repeal, alteration or insertion of a new rule unless the amendment, repeal, alteration or addition, etc. has been passed and approved by a vote of the majority of the members of the union present in person at the Annual Conference.

(d) No such amendment, etc. is permitted to be made unless a notice of the proposed alteration and the reasons therefor is given to members of the union.

(e) Further, that notice must inform members that they may object to the proposed alteration, etc. by forwarding a written objection to the Registrar to reach him no later than fourteen days after the date of receipt of the notice.

11. By virtue of s.62(4) of the Act, ss.55, 56 and 58(3) apply, with such modifications as are necessary, to and in relation to an application by an organisation for alteration of a rule of a kind referred to in subsection 62(2) and referred to by me above.

12. The following requirements to s.55 apply, as modified—

(a) A notice of the application and a copy of the rules of the organisation, as they relate to the qualification of persons for membership, etc., and a notice that persons may object within the time and in the manner prescribed must be published in the Industrial Gazette. Such a notice was published in 79 WAIG 884 and dated 24 March 1999.

(b) The application was not listed before the Full Bench until after the expiration of thirty days from the date of issue of the Industrial Gazette, which date was 24 March 1999.

13. The Full Bench is required to refuse an application such as this, unless it is satisfied as to a number of matters (see s.55(4) of the Act). First of all, it is necessary to look at the evidence.

(i) There is a statutory declaration of the General Secretary of the applicant, Mr Kenneth John See, in which he declares—

(a) That the 1997 Annual Conference of the union directed the Council to arrange and prepare a redraft of the union's Constitution and Rules for presentation to the 1998 Annual Conference.

(b) The direction of the Annual Conference was compiled with and in accordance with Rule 28 – Alteration of Rules sub rule (a) and the proposed rule changes were forwarded to him prior to sixty days before the 1998 Annual Conference held on, in part, 29 June 1998. These were contained in the Agenda for the Annual Conference.

(c) The proposed changes were contained in a booklet dated 23 April 1998, containing the existing Constitution, the proposed Constitution and an explanation of the proposed changes, which was mailed by surface mail, according to the Statutory Declaration, to each member of the union to their address as it appears in the union's register of members.

(d) It is not clear that that is what occurred in relation to the Agenda.

(e) The Agenda was, however, forwarded in sufficient time for consideration by delegates to the 1998 Annual Conference held on 29 June 1998, in part. Delegates unanimously voted to accept the proposed varied Constitution.

(f) A quorum was present.

(g) On 5 August 1998, the Annual Conference directed him to make application to the Western Australian Industrial Relations Commission to amend the Constitution and there is exhibited a copy of the resolution.

(ii) There is exhibited the following—

(a) A copy of the 1998 Annual Conference Agenda Paper.

(b) A copy of the motion moved by the 1998 Annual Conference, including a roll call of delegates.

(c) A copy of the motion moved by the Council of the union to give effect to the motion of the Conference on 5 August 1998.

(d) There is also a copy of a letter and schedule of proposed amendments to Constitution and Rules contained within the booklet forwarded to members on 23 April 1998 before the discussion and motion moved at the 1998 Annual Conference.

(e) There is a statutory declaration by Mr Kenneth John See that, on 25 February 1999, a copy of notice of amendment to the Constitution and Rules, as included in this bundle of documents, was forwarded to each member by surface mail to their address, as that address appears in the union's register of members. That contains the requisite notice of amendment and the reasons therefor.

(f) The proposed amendments in the notice are referred to in a letter of 25 February 1999. They set out the proposed amendments and the explanations. They also advise that there may be objections made to the Registrar.

14. There were no objections to the alterations filed with the Commission or otherwise notified.

15. The Rules provide for the alteration of the Rules by reasonable notice, etc.

16. The Rules of the organisation relating to elections for office provide for election by secret ballot and conform with s.56(1) of the Act.

17. Reasonable steps have been taken to adequately inform the members of the intention of the organisation to apply for registration of the proposed alterations to the Rules of the organisation and that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar.

18. Having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection.

19. Because none have objected, less than 5% have certainly objected.

The Full Bench was informed by Mr R G Horton, the advocate for the applicant organisation, and I accept, that the alterations underlined reflect the views of members employed in the Western Australian Police Service that membership should extend only to persons who swore an oath of office pursuant to the Police Act 1892 (as amended). The Full Bench was informed, and I accept, that all of the four categories of member referred to in the new Rule 4(1), (2) and (3) are of persons who swear an oath.

Further, there is a deletion of the category of Police Cadet "Junior", which was contained in Rule 3(a)(iii), a category which, in fact, did not exist. Further, members required the term "Aboriginal Police Aides" to be deleted and the term "Aboriginal Police Liaison Officers", which is the term used, to be inserted.

Of course, the applicant's members wished to confine membership to "employees" of the Western Australian Police Service to identify where they are "employed". The question of whether police officers are employees was raised in these proceedings and remains an open one, as far as I am concerned.

I was satisfied that all of the relevant rules, statutory provisions and regulations had been complied with.

For those reasons, however, I was of opinion that the application should be granted.

CHIEF COMMISSIONER W S COLEMAN: I have had the opportunity to read the Hon President's reasons for decision in draft and agree that the relevant statutory provisions and regulations have been met. The rules of the applicant organisation should be varied pursuant to s62(2) of the Act in accordance with the published Notice.

COMMISSIONER J F GREGOR: I have read the reasons for decision of His Honour the President. I agree with those reasons and have nothing to add.

Order accordingly.

APPEARANCES: Mr Mr R G Horton, as agent, and with him, Mr K See on behalf of the applicant.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Western Australian Police Union of Workers

(Applicant)

No. 275 of 1999.

BEFORE THE FULL BENCH.

HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
COMMISSIONER J F GREGOR.

28 April 1999.

Order.

THIS matter having come on for hearing before the Full Bench on the 27th day of April 1999, and having heard Mr R G Horton, as agent, and with him Mr K See, on behalf of the applicant organisation, and the Full Bench having determined that its reasons for decision will issue at a future date, it is this day, the 28th day of April 1999, ordered that the Registrar be and is hereby authorised to register the alterations to the rules of the abovementioned organisation in the following terms—

By substituting a new Rule 4(1), (2) and (3) in the following terms for the relevant portion of the existing Rule 3—

"(1) The following classes of employees of the Western Australia Police Service shall be eligible to be members of the Union—

(a) Sworn Police Officers;

(b) Police Cadet (Recruits); and

(c) Aboriginal Police Liaison Officers

(2) The Union shall be constituted of those classes of members specified in sub rule (1) of this Rule and persons upon whom Life Membership of the Union has been conferred in accordance with these Rules.

(3) Any sworn officer of the Police Service as defined by sub rule (1) of this Rule may apply to the Board for membership of the Union, and the Union shall have the power to accept or reject such applications; provided that any applicant whose application for membership is rejected by the Board shall have the right of appeal to the next Annual Conference of Delegates whose decision shall be final."

By the Full Bench.

(Sgd.) P.J. SHARKEY,
[L.S.] President.

COMMISSION IN COURT SESSION— Awards/Agreements— Variation of—

PORCELAIN WORKERS AWARD 1970.
No. 1 of 1970.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Australian Fine China Pty Ltd

and

The Federated Brick, Tile and Pottery Industrial Union of Australia (Union of Workers) Western Australian Branch.

No. 1384 of 1998.

COMMISSION IN COURT SESSION

COMMISSIONER A.R. BEECH
COMMISSIONER P.E. SCOTT
COMMISSIONER S.J. KENNER.

22 April 1999.

Reasons for Decision.

COMMISSIONER A.R. BEECH: I have reached the same conclusion as Scott C in this matter and have nothing to add.

COMMISSIONER P.E. SCOTT: This is an application to amend the Porcelain Workers Award 1970 to delete subclause (4) of Clause 27 – Kiln Crews of the Award. This subclause provides—

"(4) Kiln crews will be rostered so that two continuous shifts per day are worked over any five days of the week. Day shift will commence at 7.00 a.m. Night shift will commence at 7.00 p.m."

The Applicant says that it seeks the removal of the compulsory requirement that it operate two 12 hour shifts. The matter was referred to the Commission in Court Session to be dealt with as a Special Case according the Wage Fixation Principles on the basis that the parties had unsuccessfully attempted to reach agreement regarding the matter.

A Statement of Agreed Facts, in the following terms was filed—

"1. THE APPLICATION

1.1 Application 1384/98 is made by Aust Fine China Pty Ltd [ACN 079 339 950] trading as Australian Fine China ('AFC') to vary the Porcelain Workers Award 1970 ("the Award") by deleting subclause (4) of Clause 27.- Kiln Crews. This application is limited in its effect to Kiln employees of which there are four (4) currently employed.

1.2 The effect of the application will be to allow AFC to roster its Kiln Crew employees on shifts of less than 12 hour duration. AFC intends to introduce roster of 8 hour shifts with payment of penalties currently prescribed by clause 7 Shift Work.

1.3 Kiln Crew members currently work a 12 hour shift and are paid double ordinary rate for 4 hours on each shift. See Annexure 1 (pay rates).

2. THE AWARD

2.1 AFC is bound by the Award. Clause 3.—Scope provides—

"This Award shall apply to all workers employed by the Respondent in the classifications described

in Clause 13 hereof engaged in the Porcelain Ware Manufacturing Industry."

2.2 The Award names AFC in the schedule of respondents. It is not a common rule award.

2.3 Kiln employees are classified in Clause 13 of the Award at Grade 4 and Grade 5.

2.5(sic) When the 1970 Award was first struck, H.L. Brisbane and Wunderlich Pty was the only named respondent to the award. Clause 27. Kiln Crew was first inserted in 1980 when AFC was not a respondent to the Award. 1547. See 60 WAIG 1547.

2.6 In 1992 AFC first appeared as a named Respondent as a result of a company restructure and trading name change. At this point in time AFC was a division of Bristile Limited. See 72 WAIG 2806. Further company reorganisation has resulted in a new proprietary company being formed on 14/06/97 (Aust Fine China Pty Ltd) which continues to operate the business at 546 Hay Street Subiaco.

2.7 AFC is situated in Subiaco which falls within the area described by the Award.

2.8 The Federated Brick, Tile and Pottery Industrial Union of Australia (Union of Workers) Western Australian Branch ("the Union") is a party to the Award.

3. AUSTRALIAN FINE CHINA PTY LTD

3.1 The factory, warehouse and administration facilities now operated by AFC is located at 576 Hay Street, Subiaco WA 6008 and has been operating since 1921.

3.2 AFC is currently the only Western Australian manufacturer of porcelain products including items such as, coffee cups, dinner sets and custom-made designs. AFC retails and wholesales its products extensively to national and international markets.

3.3 Product demand is largely dependent on successful tenders and incoming orders. In recent times AFC has experienced greater competitive pressure from international companies which have been able to tender at significantly lower prices. Two recent examples are the loss of the contract to provide products to the Western Australian Parliament and Defence Department.

3.4 Price competitiveness has forced the company to examine the viability of production based in WA compared to off shore manufacturing, a decision which would have a significant effect on local employment and Australia's capacity and reputation for manufacturing.

3.5 AFC currently employs a total of 145 people including 107 employees covered the Award.

3.6 Annexure 2 is the factory floor plan showing the changes in technology in 1993 including the new intermittent kilns and fully automated kiln transfer system, glazing machine and glost selection area. Annexure 3 is a simplified diagram depicting the manufacturing process.

3.7 AFC has the option of using a range of technology and techniques in it (sic) manufacturing process including whether to operate a continuous kiln or what is referred to as a shuttle kiln.

3.8 When the continuous kiln is in operation it remains working 24 hours a day, 7 days a week, regardless of whether its full operating to capacity.

3.9 Continuous kilns were operating at the time the Award became legally binding on AFC in 1992.

4. HISTORY OF THE KILN-CREW "HOURS OF WORK" DISPUTE

4.1 This application is made because of the perceived need by AFC to cease operating a continuous 12 hour shift arrangement prescribed by clause 27 and introduce 8 hour shifts or an alternative cost effective roster. The award does not allow for Kiln Workers to be rostered other than on a 12 hour continuous shift for 5 days per week, demanding of Kiln Crew a total of 60 hours work each week.

4.2 In the 1980s the firing process was performed using 2 continuous "tunnel kilns". One was used to do bisquet firing and the other the glost firing which required 2 shifts (1 x 10 hr day shift and 1 x 14 hr night shift) rotating after 5 days on each shift.

4.3 In 1993 AFC introduced new technology and, after discussions involving the Union, three eight (8) hour shifts were introduced. The shift pattern proposed by the Union (Annexure 4) was implemented.

4.4 The employees' pay was changed to an annualised salary due to the change in shift rosters. Employees acknowledged this payment was for a specified purpose and indicated their willingness to accept the change. This change occurred on 04/07/94.

4.5 In July 1995 the Kiln operators approached AFC to seek a change of the shift pattern back to the 12 hour shift working 4 days and having 4 days off in succession. AFC agreed to this request on the basis that the rates of pay did not alter from the 1994 agreement. The Kiln operators then entered into an unregistered agreement to reflect the new arrangements. (Annexure 5). The Union was not involved in this change.

4.6 The Union challenged this unregistered agreement in March 1998 as a result of an employee query which has resulted in employees now being paid an additional $51.17 per week. This amount is the shortfall between the unregistered agreement rate and the rate payable for 12 hour shift according to the roster at Annexure 5.

4.7 Attempts to secure a formal agreement with employees and the union regarding the arrangement of hours have failed.

4.8 Annexure 6 reflects the current agreement for the 12 hour roster but requires employees to work an average of 42 hours per week instead of requirement of 60 hours per week. Employees receive $35,282.52 pa for this roster."

There are five annexures to this Statement, however it is not necessary to recite those annexures here.

The matter was heard by the Commission in Court Session on 16 November 1998. When the hearing was almost concluded, it became clear that there was a strong possibility that the parties might be able to reach agreement on a compromise approach suggested by the Applicant. The Commission in Court Session adjourned briefly to enable the parties to explore that possibility. Following the adjournment, the Commission was advised by the Applicant that the parties could come to an agreement based on what was referred to as the "1995 agreement" which was reflected in annexure 5 to the Statement of Agreed Facts and also in Exhibit B. This would provide a compromise from the Applicant's desired position but it also involved the Respondent in compromise. The Applicant foreshadowed that, not withstanding the likelihood of agreement based on that compromise position, it may still pursue the award amendment and ask the Commission in Court Session to consider the case already put to it. The Respondent advised that there was an agreement to the compromise position, however it opposed any further moves to amend the Award.

The hearing was adjourned on the basis that the parties would finalise their agreement with a view to entering into an Enterprising Bargaining Agreement to be registered by the Commission.

On 29 January 1999, the Commission registered AG 281 of 1998 (79 WAIG 397) which dealt with, amongst other things, the issues before the Commission in Court Session.

On 5 March 1999, the Commission in Court Session received a written submission from the Applicant, maintaining its original position of seeking to delete Clause 27(4) of the Award. This submission summarised the evidence which had been presented to the Commission in Court Session in November 1998. The final part of the submission noted that—

> "An Enterprise Agreement (AG 281 of 1998) has been registered giving effect to the preference of the employees (12-hour shifts, 42 hours per week) as represented by Mr Bainbridge. This agreement does make some cost savings by rostering 42 hours rather than 60 hours per

employee per week. The Agreement merely reflects an informal agreement reached between the company and its employees in their attempt to defeat the award prescription. The agreement does not however allow for the flexibility for working kiln employees less than 24 hours per day to suit production demand. Maintaining the existing award provision will also create an artificial and irrelevant award safety net from which enterprise bargaining might be pursued in the future.

Regardless of the outcomes from this agreement the Commission has heard evidence of the inefficiencies and cost impact created by this outdated provision. The Commission is obliged by its own wage fixing principles to continue the application of the Structural Efficiency Principle. The Award and the Commission must be responsive to the need for industry to gain maximum efficiency."

On the 15 March 1999, the Respondent provided its written response to the Applicant's written submission. It says that the existing award wages and conditions form the safety net underpinning enterprise bargaining and that the integrity of this safety net ought to be maintained. Any changes at the workplace should be made through discussion according to the Wage Fixation Principles.

I have considered the evidence and the submissions made by the parties and the course that this matter has taken. In particular, I have considered those things in the context of the Wage Fixation Principles. The most recent Statement of Principles (78 WAIG 2579 @ 2584) identifies the central role of enterprise bargaining in the process. The objectives of the wage system are clear. They are—

- "to encourage and promote enterprise bargaining within the framework of the award system with existing wages and conditions in the relevant award/s providing a safety net of wages and conditions;
- to develop a system in which priority is on the parties at an enterprise level to take responsibility for their own industrial relations affairs and reach agreement appropriate to their enterprise;
- to promote enterprise bargaining by making award adjustments compatible with an incentive for bargaining; and
- to continue the application of structural efficiency considerations consistent with State Wage Cases since September 1988, including the Minimum Rates Adjustment, the implementation of measure to improve efficiency of industry and to provide employees with access to more varied, fulfilling and better paid jobs."

Section 2 – Enterprise Bargaining provides—

"Consistent with the provisions of the Industrial Relations Act, 1979 ("the Act"), the Commission will promote and facilitate enterprise bargaining by conciliation and where necessary by issuing orders pursuant to section 32 and section 44 of the Act.

The Commission will generally not arbitrate in favour of claims above and below the safety net of award wages and conditions. The Commission will arbitrate at the invitation of the parties engaged in enterprise bargaining, in which case the Commission's decision should be incorporated into an agreement. That position will be established before the arbitration is commenced.

Where parties to enterprise bargaining remain in disagreement and there is no prospect of agreement being reached then, where appropriate and consistent with the Act, the Commission will arbitrate. However, the Commission will have recourse to arbitration only as a last resort.

When a matter is to be determined by arbitration other than at the invitation of the parties, it shall be referred to the Chief Commissioner as a Special Case for him to decide whether it is to be dealt with by a Commission in Court Session or a single Commissioner."

Section 3 – Role of Arbitration and the Award System provides that the Commission will generally not arbitrate in favour of claims to vary award wages and conditions, and that the existing award conditions form the safety net underpinning enterprise bargaining.

All of these aspects of the Statement of Principles are significant in this case. As noted earlier, the background to this case involves the Applicant's desire and, indeed, need to increase productivity and reduce the cost of its operation. In today's climate of competitiveness, and bearing in the mind the evidence of the competitive forces bearing on the Applicant, this is not an extraordinary situation. It is a responsible approach for the Applicant to take, to attempt to reduce those costs and to increase its efficiency. The evidence indicates that the Applicant has previously entered into arrangements which, although contrary to the award, were acceptable to its employees. It also sought to make further changes in its employment arrangements and in the application of technology. Where the Applicant experiences difficulties in addressing its needs through enterprise bargaining then it is appropriate to bring those needs to the Commission for arbitration, as a last resort.

However, the situation before the Commission in Court Session is not one of last resort. During the course of the hearing, the parties were able to reach an agreement, albeit a compromise on the Applicant's ultimate goal but nonetheless, an agreement on a means of providing relief to the Applicant in the difficulties it is experiencing. Having entered into that agreement, it is no longer appropriate for the Applicant to seek to have this Commission arbitrate on a matter on which it has compromised and to have the Commission effectively override the agreement reached by the parties. To enter into an agreement at the same time as seeking to have the agreement overridden is contrary to the spirit and intent of the Statement of Principles, in that it seeks to supplant the parties' agreement with arbitration. What the Applicant now asks the Commission to do is the same as a union claiming increases in wages above the wages agreed during enterprise bargaining negotiations, after the EBA has been registered. Such a claim is hardly likely to be supported by the Commission. I could not endorse such an approach being taken by the Applicant in this case as it seeks to undermine the essence of the Wage Fixation Principles' focus on enterprise bargaining as the principal and desirable means of setting wages and conditions of employment at the workplace.

Accordingly the application should be dismissed.

COMMISSIONER S. J. KENNER: I have read the reasons for decision of Scott C in this matter. I agree with those reasons and that the application be dismissed.

The focus of the wage fixation system is on bargaining at the enterprise level. The June 1998 State Wage Case and the principles arising therefrom ((1998) 78 WAIG 2579)("the Principles") reaffirmed the focus of the system of wage fixation in this State on enterprise bargaining and the role of the Commission in promoting and facilitating enterprise bargaining, with the registration of enterprise agreements as industrial agreements pursuant to s.41 of the Industrial Relations Act, 1979 ("the Act"), being the appropriate manner of formal regulation contemplated by the Principles.

Furthermore, the Principles place a limitation upon the Commission's arbitral role in enterprise bargaining. The Commission will only arbitrate where invited to do so by the parties or alternatively, when there is no prospect of an agreement being reached in a case where it is appropriate and consistent with the Act, and only as a last resort. It is also a requirement of the Principles that the Commission will generally not arbitrate in favour of claims above and below the safety net of award wages and conditions. That being the focus, it is entirely consistent with that focus for the parties to these proceedings to have entered into an enterprise agreement, formally reflected as an industrial agreement, pursuant to s.41 of the Act. The applicant's need to introduce greater flexibility, to increase productivity and reduce costs, is ideally achieved through the enterprise bargaining process. Any further issues that the applicant has in relation to achieving greater flexibility, consistent with the present application, are matters properly the subject of further enterprise bargaining between the parties.

COMMISSIONER A.R. BEECH: The application is therefore dismissed.

Order accordingly.

Appearances: Ms C. Brown on behalf of the applicant.

Mr J. Bainbridge on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Australian Fine China Pty Ltd

and

The Federated Brick, Tile and Pottery Industrial Union of Australia (Union of Workers) Western Australian Branch.

No. 1384 of 1998.

COMMISSION IN COURT SESSION

COMMISSIONER A.R. BEECH
COMMISSIONER P.E. SCOTT
COMMISSIONER S.J. KENNER.

22 April 1999.

Order.

HAVING heard Ms C. Brown on behalf of the applicant and Mr J. Bainbridge 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 dismissed.

(Sgd.) A.R. BEECH,
[L.S.] Commission in Court Session.

PRESIDENT—
Matters dealt with—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Toscana WA Pty Ltd
Applicant

and

The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers
Respondent.

No 206 of 1999.

BEFORE HIS HONOUR THE PRESIDENT
P J SHARKEY.

15 March 1999.

Reasons for Decision.

INTRODUCTION

THE PRESIDENT: This is an application by the abovenamed applicant pursuant to s.49(11) of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act"), whereby the applicant sought a stay of the operation of a decision of the Industrial Magistrate's Court at Perth made on 17 December 1998.

By that decision, His Worship imposed a penalty for breaches of an award which he found proven. The penalty amounted to $950.00. He also ordered that the defendant employer pay costs of $76.30. Further, His Worship ordered payment of an amount which he found had been underpaid to the employee concerned, Mr John Sammut. The amount concerned was $5,440.29.

The Notice of Appeal was filed on 6 January 1999. The application for a stay was filed on 17 February 1999.

By the application, which was opposed, the applicant employer sought a stay of that part of the Industrial Court's decision which relates to amounts ordered to be paid in respect of—

"(a) Fines totalling $950.00

(b) Underpayment of wages totalling $2268.63 which were ordered to be paid for Rostered Days Off, Overtime, Pay in Lieu of Notice and waiting time."

The complaint contained in the grounds of appeal was on the basis that the Industrial Court erred in its interpretation of the award and the entitlements which it conferred. Further, it was alleged that the learned Magistrate erred in law and fact in misconstruing the rationale in the Centurion Industries Case (AFMEPKIU v Centurion Industries Ltd 77 WAIG 319 (FB)) to conclude that offsetting an over award payment cannot occur.

Finally, it was alleged that the Industrial Magistrate erred in not giving sufficient weight to the mitigating circumstances presented by the defendant in determining the level of fines imposed for each breach.

A warrant has been issued for the enforcement of the order. However, it has not yet been executed.

The appeal itself is listed for hearing on 16 March 1999 (next Tuesday). There were oral assertions from the bar table, on behalf of the applicant, but no evidence adduced. The allegations were to the effect that Mr Letari, a Director of the respondent, was of opinion that it would be hard to recover the proceeds of the order once the same were in the hands of Mr Sammut. Ms Harrison asserted that there was no evidence to this effect, and there was none other than the challenged assertion from the bar table. (Indeed, no evidence, oral or documentary, was adduced by either side.)

Ms Harrison undertook that the respondent organisation would refund the amount of the penalty ordered to be repaid to it in the event that the appeal was successful.

There were fifty-six allegations of breach of the award as alleged in the complaint proven. Ms Laferla also submitted that the amount so far unpaid could be paid into a trust account pending the hearing and determination of the appeal.

PRINCIPLES

The principles which apply to applications for the grant of a stay are well known, and I will not reiterate them in detail here. Suffice it to say, they were most recently expressed in Gawooleng Dawang Inc v Lupton and Others 72 WAIG 1310 at 1311.

It is for the applicant to establish, on the balance of probabilities, those facts on which it asserts that the order should be made.

First, let me observe that it has not been established that the balance of convenience lies with the applicant, because there is no evidence that the amount, if paid, is irrecoverable. In the case of penalty, there is an undertaking by the respondent organisation that the amount of the penalty will be returned. The amount conceded to be underpaid has now been paid. There was a delay in paying that amount, in relation to which an explanation has been made.

As to the remaining amount of the underpayment ordered to be made, it has not been established that that is practically irrecoverable or difficult to recover, and there was a significant delay in this application being brought and listed for hearing. The balance of convenience lies with the respondent and its member not being further deprived of the fruits of "litigation".

As to whether there is a serious issued to be tried, nothing was said, given that His Worship expressly referred to mitigating factors to support any submission that there was a serious issue to be tried as to the amount of the penalties imposed.

Further, nothing was submitted to me of sufficient cogency as a matter of law, to persuade me that there was a serious issue to be tried on the other grounds of appeal, and, in particular, that the principle in AFMEPKIU v Centurion Industries Ltd (op cit) should not apply.

Having regard to s.26(1)(a) and (c) of the Act and those factors and principles which I have mentioned, there is nothing established sufficiently, or at all, to persuade me that the respondent and, through it, Mr Sammut, should be deprived of the fruits of its "judgment", in the proper exercise of my discretion.

I would dismiss the application.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Toscana WA Pty Ltd
Applicant

and

The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers
Respondent.

No 206 of 1999.

BEFORE HIS HONOUR THE PRESIDENT
P J SHARKEY.

12 March 1999.

Order.

This matter having come on for hearing before me on the 12th day of March 1999, and having heard Ms S Laferla, as agent, on behalf of the applicant and Ms J Harrison on behalf of the respondent, and having reserved my decision on the matter, and, having determined that my reasons for decision will issue at a future date, it is this day, the 12th day of March 1999, ordered that application No 206 of 1999 be and is hereby dismissed.

(Sgd.) P. J. SHARKEY,
[L.S.] President.

AWARDS/AGREEMENTS— Application for—

ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA ENTERPRISE AGREEMENT 1999.

No. AG 62 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Association for the Blind of Western Australia Inc

and

Hospital Salaried Officers Association of Western Australia (Union of Workers).

No. AG 62 of 1999.

28 April 1999.

Order.

REGISTRATION OF AN INDUSTRIAL AGREEMENT

No. AG 62 OF 1999

HAVING heard Mr M. O'Connor on behalf of the first named party and Ms C. Thomas on behalf of the second named party; and

WHEREAS an agreement has been presented to the Commission for registration as an Industrial Agreement; and

WHEREAS the Commission is satisfied that the aforementioned agreement complies with the Industrial Relations Act, 1979;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the agreement titled the Association for the Blind of Western Australia Enterprise Agreement 1999, filed in the Commission on 1 April 1999 and as subsequently amended by the parties, by hand, and signed by me for identification, be and is hereby registered as an Industrial Agreement.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

Schedule.

1.—TITLE

This Agreement shall be referred to as the Association for the Blind of Western Australia Enterprise Agreement 1999.

2.—ARRANGEMENT

3.—APPLICATION OF AGREEMENT

This Agreement shall apply to the single bargaining unit comprising Association for the Blind of Western Australia Inc. and all employees who are engaged in any of the occupations or callings specified in the award referred to in Clause 4. hereof, and replaces AG 186 of 1996.

4.—RELATIONSHIP TO PARENT AWARD

This Agreement shall be read and interpreted in conjunction with the Salaried Officers (Association for the Blind of Western Australia) Award 1996, hereinafter referred to as "the Award", but where the terms of this Agreement are inconsistent with the Award, the terms of this Agreement shall prevail.

5.—OBJECTIVE

This Agreement is designed to provide an appropriate pay benefit for employees in recognition of their continuing contribution and agreement to the productivity efficiency measures outlined in the Agreement.

6.—PRODUCTIVITY AND EFFICIENCY MEASURES

6.1 **Hours of Work**

Flexibility for Employees and Employers—

Subject to the following, at the mutual consent of employer and employee, both parties may agree in writing to an employee working hours outside the spread of ordinary hours in which case the employer shall not be liable to pay any shift allowances, including weekend shift allowances, which, but for such agreement, would be payable.

(a) Such agreement may be initiated and for the convenience of either employee or employer and must not be either directly or indirectly reached as a result of any direction or pressure from either party.

(b) The agreement will clearly set out the hours arrangement to be worked.

(c) Any hours worked, at the request of the employer, outside the parameters set out in the agreement shall be deemed to be overtime.

(d) The employee may withdraw from the special arrangements at any time by advising the employer in writing.

(e) The employer may withdraw from the special arrangements at any time by advising the employee in writing.

(f) Where the arrangement is withdrawn by either party the employee will revert to the normal working hours and arrangements for their work area and shall be paid accordingly.

6.2 **Long Service Leave**

At the request of the employee and with the agreement of the employer an employee faced with pressing personal needs may be paid in lieu of taking a portion of accrued long service leave.

6.3 **Short Leave/Bereavement Leave**

(1) The employer may upon sufficient cause being shown, grant an employee leave of absence not exceeding two consecutive working days, but any leave of absence granted under the provisions of this clause shall not exceed, in the aggregate, three working days in any one calendar year.

(2) Notwithstanding the provisions of subclause (1), in accordance with the Minimum Conditions of Employment Act, 1993, on the death of an employee's—

(a) spouse or defacto spouse,

(b) child, step child, grandchild

(c) parent, step parent, parents-in-law, grandparent

(d) brother, sister, or

(e) any other person who, immediately before that person's death, lived with the employee as a member of the employee's family,

the employee is entitled to paid bereavement leave of up to three days. The three days need not be consecutive and shall not be granted during a period of any other kinds of leave.

(3) Reasonable additional bereavement leave may be granted where an employee has assumed significant responsibility for the arrangements to do with the ceremonies resulting from the death; or where cultural obligations necessitate a longer period of bereavement leave.

6.4 **Study Leave**

(1) Where an employee is engaged in a course of study which is relevant to his/her profession or work, time off without deduction of pay may be approved as follows—

(a) to attend classes, lectures, or tutorials
- up to 2 hours per week;

(b) to prepare for examinations
- up to 2 days per year

(c) to attend final examinations
- the day of the examination

(2) Approval may be given for additional time off during working hours provided a mutually acceptable arrangement is made between the employee and employer for that time to be made up.

6.5 **Family Leave**

(1) An employee with responsibilities in relation to either members of their immediate family or members of their household who need their care and support shall be entitled to use up to 5 days per year sick leave entitlement to provide care and support for such persons when they are ill or incapacitated.

(2) The employee shall, if required, establish by production of a medical certificate or statutory declaration, the illness or incapacitation of the person concerned.

(3) The entitlement to sick leave in accordance with this subclause is subject to—

(a) the employee being responsible for the care of the person concerned; and

(b) the person concerned being either—

(i) a member of the employee's immediate family; or

(ii) a member of the employee's household.

(iii) the term "immediate family" includes a spouse, defacto spouse, child, step child, parent, brother, sister, grandparent or grandchild of the employee or spouse of the employee.

(4) The employee shall, wherever practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee, the reasons for taking such leave and estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee shall notify the employer by telephone of such absence at the first opportunity on the day of absence.

(5) Family leave is not cumulative from year to year.

6.6 **Redundancy**

(1) In this clause "redundancy" means a situation where the employee's employment is liable to be terminated by the employer, the termination being attributable, wholly or mainly, to the fact the employee's position is, or will become superfluous to the needs of the employer.

(2) The employer is committed to utilising its employees, who are its major resource, to the best advantage and shall consider all reasonable alternatives to redundancy, eg reduced hours, appointment to a lower position, transfer to another type of position.

(3) In the event of redundancy an employee shall be given the following notice of termination of employment—

(a) Up to the completion of 3 years continuous service — 2 weeks

(b) 3 years and up to the completion of 5 years continuous service — 3 weeks

(c) 5 years and over continuous service — 5 weeks

(d) In addition, employees over forty-five years of age at the time of the giving of the notice, with no less than two years continuous service, shall be entitled to an additional week's notice.

(4) Payment in lieu of notice shall be made if the appropriate notice period is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

(5) In addition to the period of notice, the employee shall be entitled to the following redundancy payments—

Period of Continuous Service	Redundancy Pay
Less than 1 year	Nil
1 year but less than 2 years	1 week
2 years but less than 3 years	3 weeks
3 years but less than 4 years	5 weeks
4 years but less than 5 years	7 weeks
5 years but less than 6 years	9 weeks
6 years but less than 10 years	1 weeks additional pay for each additional year of service
Thereafter	2 weeks additional pay for each additional year of service.

Provided that the maximum redundancy payment under this clause shall not exceed 45 weeks salary.

(6) For the purpose of this clause continuity of service shall not be broken on account of—

(a) any absence from work on account of personal sickness or accident for which an employee is entitled to claim sick pay as prescribed by this Award, or on account of leave lawfully granted by the employer; or

(b) any absence on approved leave without pay.

Provided that in the calculation of continuous service under this subclause any time in respect of which an employee is absent from work except time for which an employee is entitled to claim annual leave, sick pay, long service leave and public holidays as prescribed by the Agreement shall not count as time worked.

(7) All compensation and other payments made pursuant to this clause shall be calculated at the employee's ordinary weekly hours (excluding overtime) as at the date notice or redundancy is given.

(8) If requested by the employee, the employer shall provide at the employer's expense, professional out placement advice.

(9) During the period of notice of termination of employment, an employee whose employment is to be terminated by reason of redundancy, shall, for the purpose of being interviewed for further employment, be entitled to be absent from work for a maximum of eight ordinary hours without deduction of pay. The employer is entitled to reasonable proof that the employee has sought the leave for this purpose.

(10) This clause shall not apply where employment is terminated as a consequence of conduct that justifies instant

dismissal, casual employees, or employees engaged for a specific period of time or for a specified task or tasks.

6.7 **Commitment**

Employees under this Agreement give an ongoing commitment to maintaining and promoting the culture and ethos of the Association for the Blind, and to pursuing the maintenance and continuous improvement of a high quality service to its customers/clients/patients/members.

7.—AVOIDANCE AND RESOLUTION OF INDUSTRIAL DISPUTES, QUESTIONS AND DIFFICULTIES

Any disputes, questions or difficulties arising under this Agreement shall be settled in accordance with the procedures outlined in Clause 34—Dispute Settlement Procedures of the Award.

8.—SALARY RATES

8.1 Subject to the provisions of this clause the following adjustments shall be made to the salaries of employees covered by this Agreement—

8.2 The salary rates set out in Schedule A hereof are to be adjusted in accordance with any award safety net adjustments effective after the date of registration and during the life of this Agreement.

8.3 An employee shall be appointed to a classification and subject to the performance appraisal requirements referred to in point 4. of Schedule C of the Award, shall continue to receive increments applicable to that classification.

9.—SUPERANNUATION

9.1 The employer shall contribute on behalf of the employee in accordance with the requirements of the Superannuation Guarantee (Administration) Act 1992 of the Commonwealth (the SGA Act).

9.2 The employee shall be entitled to nominate the complying superannuation fund or scheme to which contributions may be made by or in respect of the employee.

9.3 The employer shall notify the employee of his/ her entitlement to nominate a complying superannuation fund or scheme.

9.4 The employee and the employer shall be bound by the nomination of the employee unless the employee and the employer agree to change the complying superannuation fund or scheme to which contributions are to be made.

9.5 The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by an employee.

9.6 Contributions to the nominated fund shall be paid monthly.

9.7 Contributions shall continue to be paid on behalf of an employee in receipt of payments under the Workers Compensation and Assistance Act.

Salary Sacrifice

9.8 (a) An employee may elect in writing to receive a superannuation benefit in lieu of part of the salary to which he/she is otherwise entitled under this Agreement.

(b) The salary sacrifice arrangement shall remain in force until terminated by mutual agreement or by either the employer or the employee providing one calendar months notice of intention to terminate the arrangement.

10.—NO PRECEDENT

This Agreement is applicable only to the parties named herein and it shall not be used in any manner whatsoever to obtain similar arrangements or benefits in any other plant or enterprise.

11.—PERIOD OF OPERATION AND RENEWAL

11.1 This Agreement shall apply for 18 months from the date of registration of this Agreement by the Western Australian Industrial Relations Commission.

11.2 The parties agree that negotiations for a further Agreement shall commence at least three months prior to its expiry.

11.3 The Parties to this Agreement acknowledge that on the expiry of this Agreement, if a subsequent Agreement has not been reached or finalised at that date, the conditions herein shall remain in force for a further period of 3 months, at which time if an Agreement has not been achieved, either party has the right to retire from this Agreement.

12.—NO EXTRA CLAIMS

There shall be no extra salary claims for the life of this Agreement, except where consistent with decisions of the Western Australian Industrial Relations Commission that reflect State Wage Decisions requiring general application.

13.—NUMBER OF EMPLOYEES

There are an estimated 90 employees covered by the provisions of this Agreement as at the date of registration.

SIGNATORIES TO AGREEMENT

For and on Behalf of—

Association for the Blind of Western Australia Inc

(Signed Dr M. Crowley)	9/3/99 .
Chief Executive Officer	Date

Hospital Salaried Officers Association

(Signed D. Hill)	30/3/99 .
Secretary	Date
(Signed M. Hartland)	30/3/99 .
President	Date

SCHEDULE A—SALARY RATES

(1) **Salary Rates—**

Level	$
Level 1 under 17 years of age	11738
17 years of age	13708
18 years of age	16001
19 years of age	18521
20 years of age	20800
21 years of age 1st year of service	22847
22 years of age 2nd year of service	23501
23 years of age 3rd year of service	24151
24 years of age 4th year of service	24799
Level 2	25450
	26101
	26850
	27368
	28133
Level 3	29037
	29755
	30539
	31788
Level 4	32442
	33423
	34431
	35863
Level 5	36609
	37634
	38689
	39774
Level 6	41865
	43417
	45621
Level 7	46801
	48296
	49844
Level 8	52107
	53962
Level 9	56769
	58722
Level 10	60860
	64299
Level 11	67045
	69863
Level 12	73668
	76255
	79206

(a) An employee, who is 21 years of age or older on appointment to a classification equivalent to Level 1, may be appointed to the minimum rate of pay based on years of service, not on age.

(b) A Medical Typist or Medical Secretary shall be paid a medical terminology allowance of $1000.00 per annum.

For the purposes of this subclause "Medical Typist" and "Medical Secretary" shall mean those workers classified on a classification equivalent to Level 1, 2 or 3 who spend at least 50% of their time typing from tapes, shorthand and/or Doctor's notes of case histories, summaries, reports or similar material involving a broad range of medical terminology.

(2) **Salaries—Specified Callings and Other Professionals**

(a) Employees, who possess a relevant tertiary level qualifications, or equivalent as agreed between the Union and the employers, and who are employed in the callings of Architect, Audiologist, Bio Engineer, Chemist, Dietitian, Engineer, Medical Scientist, Librarian, Occupational Therapist, Orthoptist, Physiotherapist, Physicist, Pharmacist, Clinical Psychologist, Psychologist, Research Officer, Scientific Officer, Social Worker, Speech Pathologist, Podiatrist, Medical Imaging Technologist, Nuclear Medicine Technologist, Radiation Therapist, or any other professional calling as agreed between the Union and employers, shall be entitled to Annual Salaries as follows—

Level	$
Level 3/5	29037
	30539
	32442
	34431
	37634
	39774
Level 6	41865
	43417
	45621
Level 7	46801
	48296
	49844
Level 8	52107
	53962
Level 9	56769
	58722
Level 10	60860
	64299
Level 11	67045
	69863
Level 12	73668
	76255
	79206

(b) Subject to paragraph (d) of this subclause, on appointment or promotion to the Level 3/5 under this subclause—

(i) Employees, who have completed an approved three academic year tertiary qualification, relevant to their calling, shall commence at the first year increment;

(ii) Employees, who have completed an approved four academic year tertiary qualification, relevant to their calling, shall commence at the second year increment;

(iii) Employees, who have completed an approved Masters or PhD Degree relevant to their calling shall commence on the third year increment;

Provided that employees who attain a higher tertiary level qualification after appointment shall not be entitled to any advanced progression through the range.

(c) The employer and union shall be responsible for determining the relevant acceptable qualifications for appointment for the callings covered by this subclause and shall maintain a manual setting out such qualifications.

(d) The employer in allocating levels pursuant to Subclause (2) of this Schedule may determine a commencing salary above Level 3/5 for a particular calling/s.

(3) Annual salary increments shall be subject to the employee's satisfactory performance over the preceding twelve months which shall be assessed according to an agreed form of performance appraisal.

BLACKADDER FORMWORK INDUSTRIAL AGREEMENT.
No. AG 37 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Other

and

Hemlec Pty Ltd t/a Blackadder Formwork.

AG 37 of 1999.

Blackadder Formwork Industrial Agreement.

COMMISSIONER S J KENNER.

13 April 1999.

Order.

HAVING heard Mr G Giffard on behalf of the applicant and there being no appearance on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Blackadder Formwork Industrial Agreement as filed in the Commission on 9 March 1999 be and is hereby registered as an industrial agreement.

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

WAGE AGREEMENT

Schedule.

1.—TITLE

This Agreement will be known as the Blackadder Formwork Industrial Agreement.

2.—ARRANGEMENT

3.—AREA AND PARTIES BOUND

This is an Agreement between The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers and the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch (hereinafter referred to as the "Unions") and Hemlec Pty Ltd trading as Blackadder Formwork (hereinafter referred to as the "Company") in the State of Western Australia.

4.—APPLICATION

This Agreement shall be binding upon the Company, the Unions, its officers and members, and any person eligible to

be members of the Unions employed by the Company on work covered by the terms of the Building Trades (Construction) Award 1987, No. 14 of 1978 (the "Award"). There are approximately sixteen (16) employees covered by this agreement.

5.—DURATION

This Agreement shall commence from the first pay period on or after the date of signing and shall continue in effect until 31 October 1999.

The parties agree to commence discussion on the terms and conditions of any future agreement three calendar months prior to the expiration of this Agreement.

6.—DISPUTE SETTLEMENT PROCEDURE

In relation to any questions, disputes or difficulties arising out of the operation of this Agreement the dispute settlement procedure that shall apply shall be in the same terms as that outlined in the Award.

7.—SINGLE ENTERPRISE

It is agreed that this Agreement applies in respect of a single enterprise as defined in Clause 41A(2) of the WA Industrial Relations Act 1979, as amended (the "Act").

8.—RELATIONSHIP WITH AWARDS

This Agreement shall be read wholly in conjunction with the Award. Where this Agreement is silent on rates of pay and other matters pertaining to the employment relationship, the Award shall apply. Where there is conflict between the rates of pay, conditions, allowances and other matters in this Agreement and the Award the higher rate shall apply.

9.—ENTERPRISE AGREEMENT

It is agreed that in the event of the Unions and the Company agreeing on the terms of a comprehensive enterprise agreement, this Agreement may be terminated in accordance with the requirements of the Act.

10.—WAGE INCREASE

This Agreement provides for increases in the hourly rate and allowances resulting in the wage rates in Appendix A—Wage Rates.

11.—SITE ALLOWANCE

This Agreement provides for site allowances as per Appendix C—Site Allowance.

12.—INDUSTRY STANDARDS

1. Redundancy

It is a term of this Agreement that the Company will immediately increase its payments to $50 per week per employee.

2. Superannuation

The Company will immediately increase its level of payment to $60 per week per employee or 7% of Ordinary Time earnings, whichever is the greater.

The Company will advise all employees subject to the Agreement of their right to have payments made to a complying superannuation fund of their choice. The Company is bound by the employee's election. The aforementioned payment will then be made to that fund.

Until each employee nominates the fund of their choice the Company will make payments into the Construction + Building Unions Superannuation Scheme (the "C+BUSS").

In the event that any employee chooses a fund other than the C+BUSS the Company will, within seven days of the employee advising the Company of the fund of their choice, advise the Union in writing of the employee's decision.

In the event that the employee and the Company reach an agreement pursuant to section 49C(2)(d) of the Act to change the complying superannuation fund or scheme the Company will, within seven days of the employee and the Company reaching such an agreement, advise the Union in writing of the agreement. The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by the employee.

3. Apprentice Rates

The Company agrees to maintain a ratio of no more than six tradespeople to one apprentice employed.

13.—CLOTHING AND FOOTWEAR

1. The following items will be supplied to each employee by the Company, upon the completion of five working days.

(a) 1 pair safety boots, and will be replaced on a fair wear and tear basis.

(b) 2 T-shirts with collars, and will be replaced on a fair wear and tear basis.

(c) 1 bluey jacket for each employee employed during the period 1 April to 31 October. (One issued per year)

2. The Company will also make available to each employee, when requested by them, sun screen lotion and sun brims to fit over safety helmets.

14.—TRAINING ALLOWANCE, TRAINING LEAVE, RECOGNITION OF PRIOR LEARNING

1. A training allowance of $12.00 per week per worker shall be paid by the employer to the Union Education and Training Fund.

2. Subject to all qualifications in this clause, an employee shall, upon application in writing to and with approval of the employer, be granted leave with pay each calender year, pro-rata to attend courses conducted or approved by the NBCITC. The employer's approval shall not be unreasonably withheld.

The application for leave shall be given to the employer at least two weeks in advance of the date of commencement of the course.

The time of taking leave shall be arranged so as to minimise any adverse effect on the employer's operations. The onus shall rest with the employer to demonstrate an inability to grant leave where an employee is otherwise entitled.

An employer shall not be liable for any additional expenses associated with an employee's attendance at a course other than—

course fees
course books and materials
payment of ordinary time earnings for such absence.

For the purpose of this clause ordinary time earnings shall be defined as the agreement classification rate.

Leave of absence granted pursuant to this clause shall count as service for all purposes of this agreement.

3. The employer will actively encourage employees to seek formal recognition of their skills (recognition of prior learning), and will allow leave as per (2) above for such purposes including but not limited to securing Tradesmen's Rights Certificates.

15.—SENIORITY

1. The parties agree the continuity of employment is desirable wherever possible, and that where it is not possible, employees will be retrenched in order of seniority.

2. When applying the "first on last off" principle it is agreed subject to the caveat of "all things being equal", it is intended to apply on a state basis rather than a site by site basis.

3. It is recognised that from time to time instances may arise where the employee's individual skills may be subject to this caveat. Where there is any disagreement as to the application of this the matter will be processed in accordance with Clause 6—Dispute Settlement Procedure.

4. An employee who has been retrenched by the Company shall have absolute preference and priority for re-employment/re-engagement by the Company. Where an employee is re-engaged within a period of six months the employee shall maintain continuity of service and all accrued entitlements with the Company.

16.—SICK LEAVE

For sick leave accrued after the date of signing this agreement the following will apply—

(a) The Company's employees shall have the option of converting 100% of accrued sick leave entitlement to a cash payment on termination; or

(b) If an employee who has been terminated by the Company without exercising the above option is re-engaged within a period of six months, the unpaid balance of sick leave shall continue from the date of re-engagement.

17.—PYRAMID SUB-CONTRACTING

1. "Pyramid Sub-Contracting" is defined as the practice of a sub-contractor, to whom a sub-contract is originally awarded, sub-letting that contract or part thereof to another sub-contractor.

2. Provided that where a sub-contractor does not have the technical capacity to handle a specialist section of the contract and intends to engage a specialist sub-contractor to perform that work, that section may be re-let to a specialist sub-contractor.

3. Further provided that when a sub-contract is let for labour and material, a labour-only sub-contract may be let by the sub-contractor, but it is unacceptable as a principle for further labour-only sub-contracts to be re-let.

4. A bona fide sub-contractor is generally an employer of labour, save for a machine owner-operator.

5. Where a disagreement arises in relation to the definition or application of the term "Pyramid Sub-Contracting" the parties shall discuss and determine the issue in accordance with the agreement dispute resolution procedure. In any event of a disagreement, the matter shall be negotiated further between the parties or referred to the Western Australian Industrial Relations Commission. Whilst these procedures are undertaken no industrial action shall occur.

18.—FARES AND TRAVELLING

In addition to Clause 12A of the award a travel payment shall be made in the form of a daily payment (on days worked) of $6.15 per day per employee.

19.—DRUG AND ALCOHOL, SAFETY AND REHABILITATION PROGRAM

The parties are committed to the Drug and Alcohol, Safety and Rehabilitation program as outlined in Appendix B—Drug and Alcohol, Safety and Rehabilitation Program.

20.—INCOME PROTECTION

The Company agrees to insure employees covered by this Agreement for injury and sickness. The scheme is to be negotiated through the ACTU Insurance Broking Pty Limited (ACN. 069 795 875).

21.—NO EXTRA CLAIMS

The Union will make no further claims on the Company over conditions set out in this Agreement for the life of the Agreement.

Signed for and on behalf of—

The Unions:	BLPPU	(Signed)
	Common Seal	Date: 25/2/99
		(Signed)
		Witness
	CMETU	(Signed)
	Common Seal	Date: 25/2/99
		(Signed)
		Witness
The Company:	Hemlec Pty Ltd	(Signed)
Common Seal	ACN 085 537 015	Date: 23/2/99
	Trading as	G.HEARN
	Blackadder	(Signed)
	Formwork	Witness

APPENDIX A—WAGE RATES

	Date of Signing Hourly Rate $	1 February 1999 Hourly Rate $	1 August 1999 Hourly Rate $
Labourer Group 1	16.47	16.92	17.15
Labourer Group 2	15.90	16.34	16.56
Labourer Group 3	15.48	15.90	16.12
Plaster, Fixer	17.11	17.58	17.82
Painter, Glazier	16.73	17.19	17.42
Signwriter	17.09	17.56	17.80
Carpenter/Roofer	17.22	17.70	17.93
Bricklayer	17.05	17.52	17.75
Refractory Bricklayer	19.58	20.12	20.38
Stonemason	17.22	17.70	17.93
Rooftiler	16.92	17.38	17.62
Marker/Setter Out	17.72	18.21	18.46
Special Class T	17.95	18.45	18.69

APPRENTICE RATES

	Date of Signing Hourly Rate $	1 February 1999 Hourly Rate $	1 August 1999 Hourly Rate $
Plasterer, Fixer			
Year l	7.18	7.38	7.48
Year 2 (1/3)	9.42	9.68	9.81
Year 3 (2/3)	12.84	13.19	13.37
Year 4 (3/3)	15.06	15.48	15.69
Painter, Glazier			
Year l (.5/3/5)	7.03	7.22	7.32
Year 2 (1/3), (1.5/3.5)	9.20	9.45	9.58
Year 3 (2/3), (2.5/3.5)	12.55	12.89	13.06
Year 4 (3/3), (3.5/3.5)	14.73	15.13	15.33
Signwriter			
Year l (.5/3/5)	7.18	7.38	7.48
Year 2 (1/3), (1.5/3.5)	9.40	9.65	9.78
Year 3 (2/3), (2.5/3.5)	12.82	13.17	13.35
Year 4 (3/3), (3.5/3.5)	15.04	15.46	15.66
Carpenter			
Year l	7.24	7.44	7.54
Year 2 (1/3)	9.47	9.73	9.86
Year 3 (2/3)	12.92	13.27	13.45
Year 4 (3/3)	15.15	15.57	15.78
Bricklayer			
Year l	7.16	7.36	7.46
Year 2 (1/3)	9.37	9.63	9.76
Year 3 (2/3)	12.79	13.14	13.31
Year 4 (3/3)	15.00	15.41	15.62
Stonemason			
Year l	7.24	7.44	7.54
Year 2 (1/3)	9.47	9.73	9.86
Year 3 (2/3)	12.92	13.27	13.45
Year 4 (3/3)	15.15	15.57	15.78
Rooftiler			
6 months	9.65	9.91	10.04
2nd 6 months	10.61	10.90	11.04
Year 2	12.39	12.73	12.90
Year 3	14.54	14.94	15.14

APPENDIX B—DRUG AND ALCOHOL, SAFETY AND REHABILITATION PROGRAM

1. PRINCIPLE

People dangerously affected by alcohol, and/or drugs are a safety hazard to themselves and all other persons in the workplace.

2. FOCUS

- Site safety and the involvement of the site safety committee
- Peer intervention and support
- Rehabilitation

3. WORKPLACE POLICY

(a) A person who is dangerously affected by drugs or alcohol will not be allowed to work until that person can work in a safe manner.

(b) The decision on a person's ability to work in a safe manner will be made by the safety committee, or on projects with no safety committee, by a body of at least equal numbers of employee/employer representatives.

(c) There will be no payment of lost time to a person unable to work in a safe manner

(d) If this happens 3 times the worker shall be given a written warning and made aware of the availability of treatment/counselling. If the worker refuses help he/she may be transferred/dismissed the next time he/she is dangerously affected.

(e) For the purposes of disciplinary action a warning shall be effective for a period of 12 months from the date of issue.

(f) A worker having problems with alcohol and or other drugs—

- Will not be sacked if he/she is willing to get help.
- Must undertake and continue with the recommended treatment to maintain the protection of this program.
- Will be entitled to sick leave or leave without pay while attending treatment.

4. IMPLEMENTATION

To assist with the adoption and implementation with this policy the company will—

(a) Clearly state its endorsement of the BTG Drug and Alcohol program and comply with it.

(b) Provide access at an agreed time and venue for a representative of the BTG Drug and Alcohol Program to address a meeting of employees to discuss and endorse the program.

(c) Authorise the attendance of appropriate company personnel eg. Safety delegate/officer, safety committee members, union delegate, consultative committee members(s) at the two hour BTG Drug and Safety in the Workplace training course.

APPENDIX C—SITE ALLOWANCE

1. This agreement is between the parties to this agreement and shall apply to construction work undertaken by principal contractors who are engaged in the commercial/industrial sector of the building industry in the state of Western Australia within a 50km radius of the Perth General Post Office.

2. This agreement provides for a site allowance to be paid to employees engaged on particular building projects, and for such site allowance to be paid in addition to the wage rates and allowances prescribed by the award as well as any industrial or certified agreements made in conjunction with the award which does not prescribe a site allowance.

3. The site allowance payable under this agreement is to be paid at a flat rate per hour for all hours worked to compensate for all special factors/disabilities on the project and in lieu of all award special rates, with the exception of rates relating to the lifting of heavy blocks, cleaning down brickwork and the use of explosive powered tools which will be payable to an employee when he/she encounters that particular disability.

4. Site Allowance Formula

At the commencement of a project the particular site allowance to apply shall be determined in accordance with the following formula—

4.1 Projects Located Within Perth C.B.D. (as defined)

New Work

Project Contractual Value		Site Allowance
Up to	$510,000	NIL
Above	$510,000 to $2.13m	$1.85
Above	$2.13m to $4.47m	$2.20
Over	$4.47m	$2.80

Renovations, Restorations and/or Refurbishment Work

Project Contractual Value		Site Allowance
Up to	$510,000	NIL
Above	$510,000 to $2.13m	$1.65
Above	$2.13m to $4.47m	$1.85
Over	$4.47m	$2.40

4.2 Projects Located Within West Perth (as defined)

New Work

Project Contractual Value		Site Allowance
Up to	$510,000	NIL
Above	$510,000 to $2.13m	$1.65
Above	$2.13m to $4.47m	$1.85
Over	$4.47m	$2.20

Renovations, Restorations and/or Refurbishment Work

Project Contractual Value		Site Allowance
Up to	$510,000	NIL
Above	$510,000 to $2.13m	$1.55
Above	$2.13m to $4.47m	$1.75
Over	$4.47m	$2.00

The site allowance on projects which are a combination of new and renovation work shall be governed by the majority of work involved. For example, where the majority of work is new work then the site allowance appropriate to new work shall be paid for all employees on the project.

4.3 Projects within 50 km radius of Perth G.P.O. but not including the C.B.D. or West Perth (as defined)

Project Contractual Value	Site Allowance
Up to $1m	NIL
Above $1m to $2.13m	$1.25
Above $2.l3m to 5.89m	$1.55
Above $5.89m to $11.77m	$1.80
Above $11.77m to $24m	$2.00
Above $24m to $59.4m	$2.30
Over $59.4m	$2.50

"C.B.D."—Central Business District shall mean the area bounded by the Swan River South, Swan River East to Nile Street running into Wittenoom Street, Hill Street to Royal Street, Royal Street to Lord Street, Lord Street to Newcastle Street, along Newcastle Street to the Freeway, the Freeway South to the Perth-Fremantle railway line, along the Perth-Fremantle railway line to Dyer Street, Dyer Street through to Havelock Street, Havelock Street to Kings Park Road, Kings Park Road to Fraser Avenue, Fraser Avenue projected through to the Swan River.

'West Perth"—shall mean the area contained within the boundaries formed by Thomas Street, Kings Park Road, Havelock Street, Dyer Street and the Perth-Fremantle railway line back to Thomas Street.

Boundary roads: If a road borders between two regions in which site allowances are to be paid as per this agreement, the parties confirm that one side of such a boundary road will be deemed to fall in one region and the other side of the boundary road will be deemed to fall in the other region. For example, the eastem side of Havelock Street will be in the 'CBD" and the western side of Havelock Street shall be in "West Perth".

"Project Contractual Value"—shall be deemed to mean the value of all tendered work which falls under the scope of the principal contractor's contract.

5. The site/project allowance and project contractual value detailed in this agreement shall be adjusted on 1 October each year by the total C.P.I. movements for Perth during the preceding four quarters ending 30 June and accordingly, the site allowance amounts shall be adjusted up or down to the nearest five cents.

6. Project contractual values shall be subject to review at any renewal of this agreement, but in any event shall not be adjusted by a percentage less than the total CPI movements for Perth during the preceding four quarters ending 30 June. Such adjustment being to the nearest $10,000.

7. The agreed site allowance once set pursuant to this agreement -shall be recorded in a site agreement to which the applicable principal contractor and the Union will be signatories. The level of allowance once nominated at the commencement of the project will continue without change until completion of the project.

8. It is acknowledged that on certain projects a site agreement may be entered into between the principal contactor and the building trades group of unions for that project that may

include matters regularly addressed within the industry, such as, but not limited to, the following—

- Disputes Procedures
- Occupational Health and Safety Procedures
- Demarcation Procedure
- First Aid Provisions and On-Site Amenities

and the unions will not unreasonably refuse to continue to discuss such matters if raised by the principal contractor.

9. This agreement does not apply to resource development projects or civil and engineering projects.

10. Where a dispute arises as to the application of the terms of this agreement, if the issue cannot be resolved in discussions between the parties, it is agreed that the matter will be referred to the appropriate industrial tribunal for resolution without recourse to industrial action.

11. It is a term of this agreement that all site allowance agreements entered into prior to this date will be honoured by all parties and will continue to apply for the life of the particular project.

12. Where because of a condition of contract the principal contractor is required not to allow for a site allowance, before final application of this agreement, discussions will be held between the parties with a view to resolving any problems that may arise as a result of this situation.

13. Productivity Allowance

In return to increase productivity and/or timely completion of projects it is agreed that a productivity allowance of $1.00 per hour worked shall be paid toemployees engaged upon projects (new construction only) which exceed two stories in height or building where the structure exceeds 10 metres in height (excluding spires, flagpoles and the like).

14. Structural Frame Allowance

It is agreed that a structural frame allowance of $1.00 per hour all purpose shall be paid to all employees engaged upon projects (new construction only) which exceed two stories in height or building where the structure exceeds 10 metres in height (excluding spires, flagpoles and the like).

15. Provision of Canteen

It is agreed that a canteen accommodation shall be provided where a project exceeds $35 million in value and where the operation of the canteen is financially self supporting in respect of consumables. Canteen to come into operation when on site manning levels exceed 50 and to cease when manning levels reduce to below 50.

16. Provision of Nurse

It is agreed that a qualified nurse shall be engaged where the forecast long term staffing levels for a project exceed 100 (one hundred) or when actual numbers exceed 100 not withstanding that forecasts may have been below that level. The nurse shall commence duties when staffing levels reach (fifty) and shall terminate when levels reduce to 50 (fifty). The requirement for a provision of a nurse shall be waived if the project is adjacent to a hospital with a public emergency department.

17. This agreement shall only apply to building contracts entered into on or tendered for on or after 1 October 1997.

18. Application to Apprentices

The rates prescribed in this agreement shall apply to all apprentices commencing employment after 31 December 1997 in the same proportion as the percentage of a tradesperson's wage rate as prescribed by the appropriate award or Enterprise Bargaining Agreement, being—

1st year	42%
2nd year	55%
3rd year	75%
4th year	88%

CAPE MODERN WORKSHOP EMPLOYEES' AGREEMENT.

AG 254 of 1998.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

and

Cape Modern Pty Ltd.

AG 254 of 1998.

Cape Modern Workshop Employees' Agreement.

COMMISSIONER S J KENNER.

13 April 1999.

Order.

HAVING heard Mr M Anderton as agent on behalf of the applicant and there being no appearance on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Cape Modern Workshop Employees' Agreement as filed in the Commission on 20 November 1998 be and is hereby registered as an industrial agreement.

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

CAPE MODERN ENTERPRISE BARGAINING AGREEMENT 1998

CAPE MODERN WORKSHOP EMPLOYEES' AGREEMENT

1.—TITLE

This Agreement shall be known as the Cape Modern Workshop Employees' Agreement.

2.—ARRANGEMENT

3.—APPLICATION OF AGREEMENT

This agreement shall regulate the rates of pay and define conditions of employment of Cape Modern Employees employed in the Perth Workshop, engaged in Manufacture, Maintenance, Construction and modification shutdown work, as defined by the Metal Trades (General) Award.

4.—PARTIES BOUND

(a) Cape Modern Pty Ltd of 376 Victoria Road, Malaga, WA 6090; and

(b) Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch.

5—SCOPE OF COVERAGE

The Union party to this agreement has exclusive coverage of all mechanical tradespersons and non-tradespersons engaged in engineering construction, fabrication assembly and shut down work performed by Cape Modern workshop employees

6.—DATE AND PERIOD OF OPERATION

The operation of this agreement will commence on the first pay period 1 November, 1998 and will remain in force for a period of 2 years and the parties have agreed to renegotiate this agreement no later than the 1 August 2000.

7.—RELATIONSHIP TO PARENT AWARD

Parties to this agreement will abide by the Metal Trades (General) Award Part 2. *The parties acknowledge that all matters relating to Award Interpretation will read the Award as it stands at 1 November 1998*. Where there is any inconsistency between the Metal Trades (General) Award and this agreement the terms of this agreement shall apply.

8.—RESOLUTION OF DISPUTES

The parties to this agreement undertake to eliminate industrial disputation by strict adherence to the following procedure—

(a) Where a question, dispute or difficulty arises, the employee concerned or his/her Shop Steward shall initially discuss the matter with their immediate Supervisor.

(b) If the question, dispute or difficulty is still unresolved by the discussion referred to in subclause (a) hereof, the employee together with his/her Shop Steward and their Supervisor shall discuss and attempt to resolve the dispute with the Project Manager.

(c) Where the foregoing discussions fail to resolve the matter of concern, it shall be referred to a Senior Management representative and the relevant union organiser, at which stage the parties shall then initiate steps to resolve the grievance as soon as possible.

(d) While the steps in subclauses (a), (b) and (c) hereof are being followed, industrial action shall not be taken.

(e) If the question, dispute or difficulty remains unresolved, either party may refer the matter to the Western Australian Industrial Relations Commission, provided that any party reserves the right to refer an issue to the Commission at any time, subject to the parties making reasonable attempts to resolve the issue before referring the issue to the Commission.

(f) The parties will give each other the earliest possible advice of any problem which may give rise to a grievance or dispute.

(g) The employer will ensure that all practices applied during the operation of the procedure are in accordance with safe working principles and consistent with established project custom and practices.

(h) At all stages of this process, the emphasis shall be on a negotiated settlement at the project level.

9.—RATES OF PAY

In specific acknowledgement of the productivity and efficiency enhancements targeted with the successful operation of this Certified Agreement and a continued commitment from all parties, wage rates of employees covered by this agreement shall be increased by a total of 15% across the term of this agreement. Such increases will be granted in installments as detailed in subclause (a) of the clause. The parties agree that the employer will not engage any person on flat rates of pay or any form of sub contracting.

(a) WAGE STRUCTURE; All purpose rate per week (38 Ordinary Hours)

Column 1: Paid 5% increase effective from the first full pay period on or after 1 November, 1998.

Column 2: Paid 2.5% increase in the first full pay period on or after 6 months from the operative date.

Column 3: Paid 5% increase in the first full pay period on or after 12 months from the operative date.

Column 4: Paid 2.5% increase in the first full pay period on or after 18 months from the operative date.

(b) CLASSIFICATION INDENTIFICATION

Level 1: Workshop Trades Assistants and Laggers up to 6 months' experience.

Level 2: Experienced Laggers

Level 3A: 2nd Class Sheetmetal Workers

Level 3B: 2nd Class Multi-Skilled Employees

Level 4: Tradespersons

Level 5: Experienced Tradespersons

Level 6A: Multi Tradespersons

Level 6B: Supervisory Employees

10.—INCOME PROTECTION INSURANCE

The company shall have an insurance policy in place that provides all permanent employees covered under the maintenance agreement with twenty-four hour income protection insurance, effective from the date of ratification of this EBA by the State Industrial Commission.

This income protection insurance will include—

- Weekly Sickness: 100% of person's average income or $1500 whichever is the lesser for 104 weeks. Excess Period 7 days.
- Weekly Injury: 100% of person's average income or $1500 whichever is the lesser for 104 weeks. Excess Period 7 days.
- Personal Liability: Limit of Liability = $5,000,000.
- Top up Workers Compensation: Up to 90% of income.

11.—SICK LEAVE

Sick leave entitlements accrued as Metal Trades Award i.e. 10 days per year. When an employee has accrued a bank of 100 hours of sick leave entitlements Cape Modern will pay out on an annual basis sick leave entitlements according to the following table—

Sick days taken per year	Days paid out per year	Days accrued per year
0	5	5
1	4	5
2	3	5
3	2	5
4	1	5
5-10	0	5-0

12.—SUPERANNUATION

(1) Subject to the terms of this clause Cape Modern undertakes to make contributions to Construction and Building Superannuation Scheme at a minimum rate of forty (40) dollars per employee per week and in accordance with the Superannuation Guarantee Act.

(2) The employer shall notify employees of their right to choose as to which complying Fund their superannuation is contributed to.

(3) If an employee nominates a superannuation fund other than that in (1) the employer and the employee are bound by the employee's nominated choice unless they agree to a change which the employer shall not unreasonably refuse.

13.—ALLOWANCES

(a) Site: This provision provides for an allowance to be paid on all projects throughout the State at a flat rate per hour as negotiated. Where no site allowance is in place an interim allowance of $2.50 will be paid till the project agreement is finalised.

(b) Travel: Employees who on any day are required by Cape Modern to report directory to the job shall be paid in accordance with the Metal Trades (General) Award plus $6.15 daily allowance money.

14.—TERMINATION AND REDUNDANCY

This clause shall be read in conjunction with Clause 14 of the Metal Trades (General) Award, Part 2.

15.—BOOTS AND PROTECTIVE CLOTHING

All employees so entitled under this clause shall be issued with protective clothing and or/safety footwear as described hereunder. Employees' protective clothing and or/safety footwear are issued on a fair wear and tear basis. The Employer as

evidence must sight all worn items before replacement will be made.

All protective clothing and boots shall be of a standard acceptable to the Union and Cape Modern and manufactured in Australia where possible and practical. Protective clothing shall be cotton.

Under no circumstances will monies be paid in lieu of any issue.

(a) Issue To New Employees

(i) The employer shall provide after a one month probation period to the employees, free of charge, an initial issue of one (1) pair of safety boots/footwear and two (2) pairs of long trousers or other substituted protective clothing (overalls) as is agreed between the employer and their employees, that is suitable to their trade or discipline.

(ii) Further protective clothing will be issued to each employee on a fair wear and tear basis.

16.—RIGHT OF ENTRY

On notifying the employer or the employer's representative, the Secretary or any authorised officer of a Union party to this agreement shall have the right to visit any job at any time when work is being carried on by a Union member(s), whether during or outside the ordinary working hours and to interview the employees covered by this agreement, provided that the secretary or any authorised officer does not unduly interfere with the work in progress.

17.—TRADE UNION TRAINING LEAVE

Elected Shop Stewards shall be allowed 5 days' paid leave per annum to attend trade union training courses conducted or approved by Trade Union Training Australia Inc. or the Trade and Labor Council. Such leave shall be cumulative.

18.—UNION MEETING ON LOCAL ISSUES

(a) Meetings to report on in-house matters may be held at times convenient to the employer and employees, with the aim of maintaining a continuos non-disruptive work pattern. Meal breaks have been agreed by the parties as being the most convenient.

(b) Discussions with the employer are required before scheduling meetings outside of the employee's normal meal break.

19.—AIMS AND OBJECTIVES

Cape Modern aims to ensure the continued and long term viability of its contracts, thus providing job security for its employees. The parties to this agreement recognise that this aim requires a mutual commitment to developing and enacting a process of productivity and efficiency enhancement within Cape Modern.

(a) to have a well trained, dedicated, motivated and highly competent workforce and management team;

(b) to continually improve safety in the workplace and the personal awareness of safety and correct procedures such that lost time injuries are trending towards zero and medical treatment injuries are substantially reduced;

(c) to equal or better quality standards as required by client with substantive reductions in rework and repairs within each project;

(d) to foster an attitude of consensus and agreement based on consultation and negotiation at the workplace;

(e) to foster improvements in productivity and efficiency at the workplace for the benefit of the company and its employees; and

(f) to promote flexible and adaptive work practices by removing demarcation barriers, artificial manning levels, and encouraging self-supervision and the use of initiative by employees.

20.—TRAINING AND SKILLS DEVELOPMENT

(a) Skill development is an integral part of the philosophy adopted by the parties to the agreement. It will provide employees opportunities to develop and broaden their skills.

(b) Through the consultative process a Skills Training Programme will be developed. A skill needs analysis will be conducted to assist in the restructuring of classifications which will allow employees to be correctly allocated to tasks and to determine training requirements.

(c) The parties are committed to continuation of the existing co-operative approach to flexible work practices and multi-skilling.

(d) Training will be, wherever possible, recognised and accredited so that portability is achieved. However, the company reserves the right to arrange training that best suits the company's needs.

(e) The Consultative Committee will examine and make recommendations on matters concerning training of employees in the enterprise.

21.—NO EXTRA CLAIMS COMMITMENT

(a) The parties agree that there shall not be any extra claims made during the life of this agreement

(b) The parties shall be bound by the terms of the agreement for its duration.

(c) The terms of this agreement will not be used to progress or obtain similar arrangements or benefits in any other enterprise.

(d) The terms of this agreement shall not be used as a precedent elsewhere.

SIGNATORIES OF THE AGREEMENT

Signed for and on behalf of Cape Modern	..…Signed…..
Signed for and on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch	..…Signed….. 18/11/98

APPENDIX A

Trade Rates of Pay include Tool Allowance, where applicable.

	5% 01.11.98	2.5% 01.05.99	5% 01.11.99	2.5% 01.05.00
Level 1	$12.10			
Level 2	$13.65			
Level 3A	$14.70			
Level 3B	$15.45			
Level 4	$16.30			
Level 5	$17.35			
Level 6A	$18.40			
Level 6B	$19.45			

CONSTRUCTION WORKER LEVEL 2 (GENERAL CONSTRUCTION) CULLACABARDEE ABORIGINAL CORPORATION TRAINEESHIP AGREEMENT 1998.

No. AG 43 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers

and

Cullacabardee Aborginal Community.

AG 43 of 1999.

Construction Worker Level 2 (General Construction) Cullacabardee Aboriginal Corporation Traineeship Agreement 1998.

COMMISSIONER S J KENNER.

23 April 1999.

Order.

HAVING heard Mr G Giffard on behalf of the applicant and there being no appearance on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Construction Worker Level 2 (General Construction) Cullacabardee Aboriginal Corporation

Traineeship Agreement 1998 as filed in the Commission on 17 March 1999 be and is hereby registered as an industrial agreement.

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

———

1.—TITLE

This Agreement shall be known as the Construction Worker Level 2 (General Construction) Cullarcarbardee Aboriginal Corporation Traineeship Agreement 1998.

2.—ARRANGEMENT

This Agreement shall be arranged as follows—

3.—PARTIES BOUND

This Agreement shall be binding on—

(a) The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers (the Union).

(b) The Cullacarbardee Aboriginal Corporation (the Corporation) who is the signatory to this Agreement.

(c) All employees who are members or eligible to be members of the Union.

4.—APPLICATION

(a) Subject to subclause (b) this Agreement shall apply to persons—

(i) who are undertaking a Construction Worker Level 2 (General Construction) Traineeship (as defined); and

(ii) who are employed by the Corporation; and

(iii) whose employment is, or otherwise would be, covered by the Award.

(b) There will be approximately eight (8) employees covered by this Agreement.

(c) Notwithstanding the foregoing, this Agreement shall not apply to employees who were employed by the Corporation prior to the date of approval of a Traineeship scheme relevant the Corporation, except where agreed between the Corporation and the Union.

(d) This Agreement does not apply to the Apprenticeship system.

(e) Trainees under this Agreement will not undertake duties that have application to work ordinarily defined as work of a tradesperson or accredited apprentice.

(f) At the conclusion of the Traineeship, this Agreement ceases to apply to the employment of the Trainee and the Award shall thereafter apply to the former trainee.

(g) The sole provider of accredited training will be the Aboriginal Housing Board.

5.—OBJECTIVES

This Agreement is to assist in the establishment of a system of Traineeships which provides training in conjunction with employment in order to enhance the skill levels and future employment prospects of the Trainees. The Traineeship is neither designed nor intended for those who are already trained and job ready. Existing employees shall not be displaced from employment by Trainees.

The parties to the Agreement are committed to the creation of a healthy and safe working environment, to maximise efficiency and productivity, to work together in a spirit of co-operation and to reward employees fairly for their achievements.

6.—DEFINITIONS

"approved training" means training undertaken (both on and off the job) in a Traineeship and shall involve formal instruction, both theoretical and practical, and supervised practice in accordance with a Traineeship scheme approved by the State Training Authority or NETTFORCE. The training will be accredited and lead to qualifications as set out in Clause 11. – Training Conditions (at (f)).

"the Award" means the Building Trades (Construction) Award 1987, No. 14 of 1978

"Trainee" means an employee who is bound by the Traineeship Agreement made in accordance with this Agreement.

"Traineeship" means the General Construction Traineeship which has been approved by the State Training Authority, or which has been approved on an interim basis by NETTFORCE, until final approval is granted by the State Training Authority. The core competencies to be attained by the Trainee are detailed in the attached Appendix B to this Agreement.

"Traineeship Agreement" means an agreement made subject to the terms of this Agreement between the Corporation and the Trainee for a Traineeship and which is registered with the State Training Authority, NETTFORCE, or under the provisions of the appropriate State legislation. A Traineeship Agreement shall be made in accordance with the relevant approved Traineeship Scheme ancd shall not operate unless this condition is met.

"Traineeship Scheme" means an approved Traineeship applicable to a group or class of ernployees identified in Clause 5.—Objectives or to the building construction industry or a sector of the industry or an enterprise. A Traineeship Scheme shall not be given approval unless consultation and negotiation with the Union upon the terms of the proposed Traineeship Scheme and Traineeship Scheme and Traineeship have occurred. An application for approval of a Traineeship Scheme shall identify the Union and demonstrate to the satisfaction of the approving authority that the above-mentioned consultation and negotiation have occurred. A Traineeship Scheme shall include a standard format which may be used for a Traineeship Agreement.

"Parties to the Traineeship Scheme" means the Union and the Corporation who have been involved in the consultation and negotiation required for the approval of the Traineeship Scheme.

"NETTFORCE" means the National Employment and Training Task Force.

"State Training Authority" means the Western Australian State Training Board.

Reference in this Agreement to "the State Training Authority or NETTFORCE" shall be taken to be a reference to NETTFORCE in respect of a Traineeship that is the subject of an interim approval, but not a final approval by the State Training Authority.

"National Training Wage Interim Award" means the Award made in the Australian Industrial Relations Commission [Print No. L5189 of 1994].

"appropriate State legislation" means the State Employment and Skills Development Authority Act 1990 or any successor legislation.

7.—DURATION

This Agreement will commence from the date of signing and will expire 12 months from the date of registration unless otherwise agreed in writing between the parties prior to the expiration of the Agreement.

8.—SINGLE ENTERPRISE

It is agreed that this Agreement applies in respect of a single enterprise as defined in Clause 4A(2) of the Western Australian Industrial Relations Act 1979, as amended (the "Act").

9.—RELATIONSHIP WITH AWARDS

This Agreement shall be read wholly in conjunction with the Award. Where this Agreement is silent on rates of pay and

other matters pertaining to the employment relationship, the Award shall apply. Where there is conflict between the rates of pay, conditions, allowances and other matters in the Agreement and the Award the Agreement shall apply.

10.—DISPUTE SETTLEMENT PROCEDURE

The settlement of questions, disputes or difficulties arising out of the operation of this Agreement shall be the procedure outlined in the same terms of Clause 46—Settlement of Disputes and Appendix—Resolution of Disputes Requirements of the Award.

11.—TRAINING CONDITIONS

(a) The Trainee shall attend an approved Training course or training program prescribed in the Traineeship Agreement or as notified to the Trainee by the State Training Authority in accredited and relevant Traineeship Schemes; or NETTFORCE, if the Traineeship Scheme remains subject to interim approval.

(b) Each Trainee will spend 240 hours (nominal) engaged in approved training. This will include the appropriate combination of on-the-job and off-the-job training.

(c) A Traineeship shall not commence until the relevant Traineeship Agreement, made in accordance with a Traineeship Scheme, has been signed by the Corporation and the Trainee and lodged for registration with the State Training Authority or NETTFORCE, provided that if the Traineeship Agreement is not in a standard format a Traineeship shall not commence until the Traineeship Agreement has been registered with the State Training Authority or NETTFORCE. The Corporation shall ensure that the Trainee is permitted to attend the training course or program provided for in the Traineeship Agreement and shall ensure that the Trainee receives the appropriate on-the-job training.

(d) The Corporation shall provide a level of supervision in accordance with the Traineeship Agreement during the Traineeship period.

(e) The Corporation agrees that the overall training program will be monitored by officers of the State Training Authority or NETTFORCE and the Union and training records or work books may be utilised as part of this monitoring process.

(f) Training shall be directed at the achievement of key competencies required for successful participation in the workplace (where these have not been achieved) (eg. literacy, numeracy, problem solving, team work, using technology), and as are proposed to be included in the Australian Vocational Certificate Level 2 qualification. In addition, successful Trainees will be issued with certificates of attainment in the modules of the General Construction Traineeship upon the Trainees reaching that level of competency.

(g) The Union shall be afforded reasonable access to Trainees during normal work hours for the purpose of explaining the role and functions of the Union and enrolment of Trainees as members.

12.—EMPLOYMENT CONDITIONS

(a) A Trainee shall be engaged as a full-time employee for a maximum of one year's duration provided that a Trainee shall be subject to a satisfactory probation period of up to one month which may be reduced at the discretion of the Corporation. By agreement in writing, and with the consent of the State Training Authority or NETTFORCE and the Union, the Corporation and the Trainee may vary the duration of the Traineeship and the extent of approved training provided that any agreement to vary is in accordance with the relevant Traineeship Scheme.

(b) The Corporation shall not terminate the employment of a Trainee, except in cases of wilful misconduct, without firstly having provided proper written notice of termination to the Trainee concerned in accordance with the Traineeship Agreement and subsequently to the State Training Authority or NETTFORCE and the Union. The written notice to be provided to the State Training Authority or NETTFORCE and the Union shall be provided at least 5 working days prior to the termination.

(c) If the Corporation chooses not to continue the employment of a Trainee upon the completion of the Traineeship they shall notify, in writing, the State Training Authority or NETTFORCE and the Union of their decision and their reasons for decision. Nothing shall prevent the Trainee or their Union from disputing this decision in a Court or tribunal.

(d) The Trainee shall be permitted to be absent from work without loss of continuity of employment and/or wages to attend the training in accordance with the Traineeship Agreement.

(e) Where the employment of a Trainee by the Corporation is continued after the completion of the Traineeship period, such Traineeship period shall be counted as service for the purposes of the Award or any other legislative entitlements.

(f) (i) The Traineeship Agreement may restrict the circumstances under which the Trainee may work overtime and shift work in order to ensure the training program is successfully completed.

(ii) No Trainee shall work overtime or shiftwork on their own.

(iii) No Trainee shall work shiftwork unless the parties to a Traineeship Scheme agree that such shift work makes satisfactory provision for approved training. Such training may be applied over a cycle in excess of a week, but must average over the relevant period no less than the amount of training required for non-shift work Trainees.

(g) All other terms and conditions of the Award that are applicable to the Trainee or would be applicable to the Trainee but for this Agreement shall apply unless specifically varied by this Agreement.

(h) The right of entry provision contained in the Award shall apply to the parties bound by this Agreement.

(i) The parties agree that Trainees are "workers" for the purposes of the Workers' Compensation and Rehabilitation Act 1981.

13.—WAGES AND ALLOWANCES

(a) Rates of pay for Trainees shall be as follows—

	$
Base Rate	364.00 per week
Industry Allowance	17.40 per week
Special Allowance	7.70 per week
Fares Allowance	As per Award
Redundancy	Nil
Follow the job loading	Nil
Superannuation	As per Award
Annual Leave	As per Award
Site/Other Allowances	As per Award

(i) Site/Other Allowances will be payable whilst Trainees are engaged in on-site work including on-the-job training.

(ii) These wage rates will only apply to Trainees while they are undertaking an approved Traineeship which includes approved training as defined in this Agreement.

(iii) The wage rates prescribed by this clause do not apply to complete trade level training which is covered by the Apprenticeship system.

14.—CLOTHING AND FOOTWEAR

1. The following items will be supplied to each Trainee by the Corporation within 5 days of commencement.

(a) 1 pair safety boots, and will be replaced on a fair wear and tear basis.

(b) 2 T-shirts with collars, and will be replaced on a fair wear and tear basis.

(c) 1 bluey jacket for each Trainee (to be issued on or before 1 April).

2. The Corporation will also make available to each Trainee, when requested by them, sun screen lotion and sun brims to fit over safety helmets.

15.—SPECIAL ARRANGEMENTS

(a) The wage rates contained in this Agreement are minimum rates and shall apply in accordance with the application of the National Training Wage Interim Award, where the accredited training and worked performed are for the purpose of generating skills which have been defined for work at skill level B of the National Training Wage Interim Award, provided further however that the wage rates are struck at the same rate as those rates struck for workers currently engaged in the Traineeship (General Construction) that is to run concurrently with this Agreement.

(b) The provisions of this Agreement shall not be reduced.

(c) The provisions of this Agreement shall not cause a reduction of entitlements to any employee.

APPENDIX A—SIGNATORIES

SIGNATORIES

For and on behalf of the Corporation

…… 3/3/1999

For and on behalf of the
Western Australian Builders' Labourers,
Painters and Plasterers Union of Workers

SECRETARY…….. / /1999

APPENDIX B—TRAINING FRAMEWORK

Course Outcomes

The course aims to provide

- an accredited entry level training program for people wishing to pursue a career in the Building and Construction industry.
- an accredited training program that incorporates the following Key Competencies at Performance Level 2—collecting, analysing and organising information; communicating ideas and information; planning and organising; working with others; using mathematical ideas and techniques; solving problems; and using technology.
- training and skill development in areas such as: communications, occupational health and safety, work Organisation, plan reading and interpretation, the use of hand tools, plant and other equipment.

Outline of Course

The Traineeship program contains 4 compulsory modules and is designed to provide trainees with basic industry knowledge and skills applicable to all four skill streams within the Building and Construction industry. The traineeship is completed through a combination of off the job training and on the job training

Module Code	Module Title
GC201	Concrete Site Operations
GC202	Levelling
GC203	Materials Handling and Transporting
GC204	General Construction Co-operations
Duration:	240 Hours [nominal]

On the Job training

The Traineeship incorporates on and off the job delivery. It is envisaged that the off the job component will comprise the equivalent of one day per week of instruction over a twelve month period. During the remaining four days of the week the Trainee is expected to be engaged in productive work with his/her employer. Whilst at work, the Trainee should be provided with opportunities to reinforce the skills and knowledge obtained in the off the job training period.

It is expected that during the period at work the Trainee will complete an approved skills assessment undertaken by a registered CTA Skills Assessor in each of the units of competency incorporated in the program. The records of these skills assessments will be forwarded to the Trainee, the training provider and the BCITC.

Entry Requirements

Trainees need to be able to read, comprehend and discuss printed information in English, write simple statements, recognise numbers and perform basic numeric calculations.

Recognition of Prior Learning

Trainees are entitled to have their prior leaming recognised. The program incorporates a recognition of prior leaming procedure that acknowledges the skills and knowledge that Trainees have obtained through—

- formal training;
- work experience; and
- life experience.

Delivery Modes

The Traineeship is designed to be delivered to persons seeking employment in the building and construction industry.

EDUCATION DEPARTMENT OF WESTERN AUSTRALIA (CSA) ENTERPRISE BARGAINING AGREEMENT 1999.

No. PSA AG 103 of 1998.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Minister for Education

and

The Civil Service Association of Western Australia (Inc.).

No. PSA AG 103 of 1998.

PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT.

4 May 1999.

Order.

WHEREAS this is an application pursuant to the Industrial Relations Act 1979, filed on the 22nd day of December 1998, for the registration of an agreement; and

WHEREAS by facsimile dated the 25th day of March 1999 the Applicant sought leave to withdraw the application; and

WHEREAS by letter dated the 21st day of April 1999 the Respondent advised that it consented to the Applicant's request to have the application withdrawn.

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, by consent, hereby orders—

THAT this application be, and is hereby withdrawn by leave.

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

FLUOR DANIEL DIVERSIFIED PLANT SERVICES ARGYLE DIAMOND MINE MAINTENANCE AGREEMENT 1999.

No. AG 64 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Fluor Daniel Diversified Plant Services Pty Ltd

and

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch.

No. AG 64 of 1999.

Fluor Daniel Diversified Plant Services Argyle Diamond Mine Maintenance Agreement.

23 April 1999.

Order.

HAVING heard Mr D M Kleemann on behalf of the Applicant and Mr G C Sturman on behalf of Respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the agreement made between the parties as lodged in the Commission on the 8th day of April, 1999 entitled Fluor Daniel Diversified Plant Services Argyle Diamond Mine Maintenance Agreement 1999 and subsequently amended by direction of the Commission be registered in the terms of the following Schedule as an industrial agreement in replacement of the Argyle Diamond Mine (Fluor Daniel Power and Maintenance Services) Maintenance Agreement 1998 (AG 59 of 1998) which is hereby cancelled.

(Sgd.) G. L. FIELDING,
[L.S.] Senior Commissioner.

Schedule.

1.—TITLE

This agreement shall be known as the Fluor Daniel Diversified Plant Services Argyle Diamond Mine Enterprise Agreement 1999.

2.—PRELIMINARIES

2.1 Statement of Mutual Purpose and Intent

Fluor Daniel Diversified Plant Services (FDPPS) and the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, WA Branch share a mutual commitment to provide Argyle Diamond Mines with world- class, top quality maintenance services. The parties believe that the combination of a skilled and dedicated workforce, combined with a responsive management will allow the fulfilment of this commitment. This commitment to excellence is motivated by pride and self esteem as well as by the knowledge that making a significant contribution to the success of the efficient operations of Argyle Diamond Mines in the competitive market is a way to preserve job opportunities for the employees.

This Agreement is renegotiated in the spirit of achieving the co-operation and implementing the programs and procedures necessary to fulfil that commitment. Herein the parties establish and put into practice effective and binding methods for preserving the flexibility essential to meeting the needs of Argyle Diamond Mines and for resolving all misunderstandings, disputes or grievances that may arise. In addition, the parties fully commit themselves to successfully achieving the following goals:

Effective employee relations.

Clear guidelines to all employees and to any specialist subcontractors engaged in the Argyle Operations.

- Expeditious, impartial and fair processing of employee grievances.
- Effective communications with all employees.
- Maintenance of clean, safe and healthy workplaces.
- Reasonable rates of pay and fair conditions.
- Effective counselling and disciplinary procedures.
- Introduction of productivity benchmarks
- A commitment to excellence and quality
- Ongoing implementation of Continuous Performance Improvement.

2.2 Application and Scope

This Agreement shall apply to and be binding upon Fluor Daniel Diversified Plant Services in its Argyle maintenance operations; all employees of Fluor Daniel Diversified Plant Services employed in its Argyle maintenance operations under the classifications specified in Clause 4.2—Wages of this Agreement who are members or who are eligible for membership of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (WA Branch).

For the purposes of this Agreement, Fluor Daniel Diversified Plant Services' Argyle Area maintenance operations shall be deemed to be the enterprise and covers approximately 10 full time employees and additional casuals as required.

The parties to the Agreement shall be—

Fluor Daniel Diversified Plant Services

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, WA Branch

2.3 Date of Operation and Duration of Agreement

(a) This Agreement shall operate from the first pay period commencing on or after the expiry date of the Argyle Diamond Mine (Fluor Daniel Diversified Plant Services) Maintenance Agreement being the 5th March 1999 and shall continue in operation for a period of 24 months.

(b) The parties shall commence renegotiation of this Agreement three months prior to its expiry. If agreement cannot be finalised prior to expiry an additional period of up to a maximum of three months will be permitted for negotiations to continue.

Employees shall not enter into an industrial dispute during this negotiation period relative to the content or implementation of this Agreement, unless all provisions of the Industrial Relations Dispute Settlement Procedure contained herein are met.

2.4 Relationship to Parent Award(s)

(a) The foundation award underpinning the terms and provisions of this Agreement is the Metal Trades (General) Award No 13 of 1965, as amended, and the Metal and Electrical Trades (Argyle Diamond Mine) Maintenance Order No 1959 of 1990.

(b) This agreement applies to the extent of any inconsistency with the parent awards.

2.5 No Extra Claims Commitment

(a) The parties agree to undertake a commitment that there shall be no extra claims for any or all increases in the award rates and/or increases in safety net increases shall be absorbed during the life of items contained herein during the life of this Agreement.

(b) The parties to the Agreement shall be bound by the terms of the Agreement for its duration.

(c) Unless otherwise agreed the parties to this Agreement shall oppose any application by other parties to be joined to this Agreement.

The terms of this Agreement will not be used to progress or obtain similar arrangements or benefits in any other enterprise, whether involving Fluor Daniel Diversified Plant Services or not. The terms of this Agreement have resulted from extensive negotiations relating to productivity enhancements that specifically relate to Fluor Daniel Diversified Plant Services Argyle Area maintenance operations and thus cannot be used as a precedent elsewhere.

3.—TERMS AND CONDITIONS OF EMPLOYMENT

3.1 Casual Employees

(a) A loading of 20% of base hourly rates will be paid to casual employees under this Agreement. This revised rate will then be the basis of calculation of overtime.

(b) The 20% loading for all ordinary hours in lieu of annual leave, sick leave, public holidays or any other such leave related provisions.

(c) For the purposes of this Agreement, an employee is deemed to be casual if their expected term of employment is up to three months during any one tenure. An employee can be confirmed as a permanent employee at any time during that three months.

(d) The period of notice for a casual employee shall be one hour.

(e) After 3 months continuous employment with Fluor Daniel Diversified Plant Services, the employee will be entitled to become a weekly hire employee and be notified accordingly. After two months employment as a casual employee a formal review will be held involving the employee and his supervisor to inform the employee of his probable long term status.

(f) In all other respects the terms of casual employment shall be in accordance with provisions relating to the employment of casuals in the Metal Trades (General) Award No 13 of 1965, as amended.

3.2 Severance

(1) This clause shall apply where an employee terminates their service or is terminated, other than for reasons of misconduct

(2) Severance Pay—

(a) An employee, leaving his/her employer on account of a decision in accordance with subclause (1) hereof, shall be entitled to the following amount of severance pay in respect of continuous period of service—

Period of Continuous Service	Severance Pay
Less than one year	$25.00 for each completed week of service, to a maximum of two weeks' pay
One year but less than two years	Two weeks' pay plus $25.00 for each completed week of service, to a maximum of four weeks' pay
Two years but less than three years	Four weeks' pay plus $25.00 for each completed week of service, to a maximum of six weeks' pay.
After four years of service	Eight weeks' pay

(b) "Week's pay" shall mean the ordinary weekly rate of wage for the employee concerned, as set out in Clause 4.2— hereof, but shall not include site, disability or travel allowances.

(c) For the purposes of this clause, "service" shall mean employment with Fluor Daniel Diversified Plant Services under this agreement.

(d) An employee who terminates his/her employment before the completion of four weeks' continuous service with the employer shall not be entitled to the provisions of this clause.

(3) Employee Leaving During Notice—

An employee whose employment is to be terminated in accordance with this clause may terminate his/her employment during the period of notice and if this occurs, shall be entitled to the provisions of this clause as if the employee remains with the employer until expiry of such notice. Provided that in such circumstances the employee shall not be entitled to payment in lieu of notice.

3.3 Stand Down

(a) Payment may be deducted from an employee's wages for any day(s) or part day(s) on which an employee cannot usefully be employed because of industrial action by the union party to this Agreement.

If an employee is not able to be usefully employed on any day due to industrial action beyond Fluor Daniel Diversified Plant Services control, then the employee may be stood down with two hours of pay until normal work is able to be resumed. However, where an employee has commenced work, the employee shall be provided with four hours work or be paid in lieu thereof.

(b) Cyclone Stand-Down

(i) Subject to the provisions of this clause the following shall apply when because of a cyclone the employer stands down employees employed under this Agreement.

(ii) (a) Each employee who—

is on duty at the commencement of the cyclone period for and remains at work until otherwise directed by the employer, and

following the "all clear" resumes duty in accordance with the direction of the employer shall be paid for his/her normal rostered hours occurring during the stand-down.

(b) An employee shall not be entitled to be paid for his/her normal rostered hours occurring during the stand-down; if the employee—

is required for work and is requested to do so by his/her employer and refuses

OR

is not willing or available (except in the case of obvious hardship as a result of the cyclone) to work when so requested.

(a) An employee who is required to remain at work during a cyclone or who is recalled to work, shall be paid a call out payment in addition to his/her working hours.

(b) An employee who is not required to remain at work during a cyclone and who is recalled to work, shall be paid a call out payment in addition to his/her working hours.

(iv) Following a declaration of the "all clear" given in accordance with the local cyclone procedures, employees who would have normally been on duty are required to resume immediately and all others are required to resume on their next rostered shift unless the employer notifies them otherwise.

Where on the day following the resumption of normal operations or on any subsequent day an employee cannot, because of damage caused to the operations or work site by the cyclone be usefully employed, the employer may stand the employee down without pay.

4.—DEFINITIONS, WAGES, ALLOWANCES AND CONDITIONS

4.1 Classifications

During the first three months following the registration of this agreement the parties commit to develop a classification structure tailored to the specific needs of the project. Any disagreement in relation to this matter will be dealt with through the grievance procedure.

4.2 Wages

The following rates of pay apply to all full time employees. In addition to the rates set out below employees engaged as or deemed to be a casual employee will receive a loading of an additional 20 % which is in lieu of all entitlements to annual leave, sick leave, and public holidays. This loaded rate will form the casual employee's all purpose rate. The rates below reflect a 3% increase in the rates specified in AG59 of 1998.

Skill Level	Base Hourly Rate
Level 5	$17.39
Level 4	$16.69
Level 3	$16.00
Level 2	$14.59
Level 1	$13.43

NOTES

1. Base Hourly Pay Rate applicable to all approved paid absences. (Sick Leave, Public Holidays & Workers Compensation) and Superannuation and includes allowances contained in the order of the Western Australian Industrial Relations Commission applying to the Argyle area and the tool allowance for tradespersons.
2. Boot allowance is not applicable.

4.3 Escalation of Agreement

Effective from the first pay period on or after the 5 March 2000 the parties to this agreement reserve the right to amend this agreement, as required to facilitate the implementation of a system of annualised wages. It is an express condition of this agreement that this reserved right will only be exercisable, and therefore annualised wages will only be implemented, if the move to annualised wages and the consequential changes to the agreement result in cost increases of no greater than 3.5%. It is a further express condition of this agreement that this reserved right can only be exercised jointly by both parties to this agreement, it is not a right that can be exercised by one party alone.

In the event that this reserved right is not jointly exercised it will expire on 5 March 2000 and effective from the first pay period on or after 5 March 2000 the wages and relevant allowances prescribed by this agreement will be increased by 3.5%.

4.4 Allowances

These allowances will apply to the whole of Fluor Daniel Diversified Plant Services operations at Argyle.

In addition to the appropriate total wage prescribed in Clause 4.2 of this Agreement, a weekly allowance shall be paid to those persons designated by Fluor Daniel Diversified Plant Services to perform the duties as described in subclauses (i), (ii) and (iii). The allowances below reflect a 3% increase in the rates specified in AG59 of 1998.

(a) Leading Hand Allowance

In addition to the appropriate total wage prescribed in Clause 4.2 of this Agreement, a weekly allowance shall be paid to those persons designated by Fluor Daniel Diversified Plant Services to perform the duties as described in subclauses (i), (ii) and (iii).

(i) Charge Hand

if placed in charge of a group of 3 to 10 workers and required to manage their field activities $20.26

(ii) Leading Hand

if placed in charge of a group of 10 to 20 workers and required to manage their field activities, prepare timesheets, co-ordinate JSAs and co-ordinate plans, materials, supply and equipment $29.85

(iii) Team Leader

if placed in charge of a group of more than 20 workers and required to manage their field activities, prepare timesheets, prepare daily work plan, help prepare and maintain quality records, co-ordinates JSAs and co-ordinates the plant material/equipment required by his group $40.51

All the above would be expected to use computers as and when require to complete administrative tasks.

Charge Hands, Leading Hands and Team Leaders would not be expected to initiate or implement the formal disciplinary procedures contained in 7.1.

(c) Disability Allowance

Consistent with the order of the Western Australian Industrial Relations Commission relating to the Argyle area, an allowance of $2.98 (flat) for each hour worked shall be paid. This allowance shall be paid in full compensation for and recognition of all disability allowances, special rates and provisions prescribed by the Award, and specifically in lieu of all disabilities associated with the diamond industry and location.

(d) Travel & Transport

Employees will be paid 4 hours travel time at their base rate of pay for travel to and from the Argyle Diamond Mine site and Perth for all authorised travel, including R & R and mobilisation/demobilisation.

(e) Location Allowance

For the purpose of calculating location allowances for this Agreement, it is assumed that all employees are married and provided with board and lodging by his/her employee free of charge.

The calculation of Location Allowance will be as follows—

Location Allowance for Argyle x 2 x 0.666

4.5 Payment of Wages

Payment of wages shall be via electronic funds transfer into an employees nominated financial institution and shall be paid on a weekly basis.

5.—HOURS OF WORK

5.1 Ordinary Hours

(a) The ordinary hours of work under this Agreement will average 38 hours per week over a defined work cycle and are to be worked Monday to Friday between 6.00 am and 6.00 pm as required by the employer.

(b) The number of hours which will usually comprise the working week will be an average of 65 hours on the basis of a 10 hour day, 13 day fortnight which is inclusive of rostered overtime, subject to operational requirements. Calculation of payment for hours worked up to 10 hours per day will be —

time and a half for the first 2 hours (provided that each shift shall stand alone)

double time for all additional overtime

double time for all overtime performed on Sundays

double time and a half for work performed on the public holidays specified in clause 6.1

Alternatively, at no additional penalty than set out above, the employer may elect to operate 12 hour shifts.

(c) RDOs will be accrued at the rate of 0.4 hours/day (Monday to Friday) worked and paid out when R&R is taken. RDO's will be taken on a Sunday unless otherwise agreed by the parties.

5.2 Meal and Smoko Breaks

(a) An employee shall be entitled to ½ an hour unpaid meal break per 10 hours or longer shift in accordance with the provisions of this subclause, if an employee works 12 hours or longer continuous shift the ½ hour meal break is paid.

(b) An employee shall not be compelled to work more than five consecutive hours without a meal break except where an arrangement is entered into between an employee and Fluor Daniel Diversified Plant Services.

(c) Employees shall be entitled to one 15 minute paid smoko break between the time of commencement and the employee's meal break. However, this entitlement is contingent upon employees recognising the 15 minute time period on smoko breaks and reserves the right to limit this entitlement for employees found consistently exceeding the 15 minute limit. Where convenient, employees shall have their smoko in the nearest available ADM smoko facility rather than returning to the Fluor Daniel Diversified Plant Services smoko facility.

(d) The scheduled time for meal or smoko breaks may be altered by management in respect of one or more employees if it is necessary to do so to meet a requirement for the continuity of operations.

(e) Meal and smoko breaks may be staggered in order to meet operational requirements. If a meal break commencement is delayed by more than one half hour after the arranged time in accordance with paragraphs (b) and (e) of this subclause then overtime rates will be applied from the arranged scheduled commencement time for the break and continue until the meal break is taken.

5.3 Requirement to Work Overtime

(a) General

Fluor Daniel Diversified Plant Services may require an employee to work additional overtime in addition to the normal working week and the employee will not unreasonably refuse to work such overtime.

Payment for overtime hours will be calculated on the applicable rate as described in Clause 4. For the purposes of calculating overtime payments, each day shall stand alone. Provided that when an employee works overtime that continues beyond midnight, the time after midnight shall be deemed to be part of the previous days work for the purposes of calculating overtime. Payment for overtime worked during shift work shall be based on the rate payable for that shift.

(b) Rest Period

(i) Where overtime work is necessary, employees, where possible, shall be given ten consecutive hours off duty between successive shifts, provided that—

if the employee has not had ten consecutive hours off duty between the end of overtime work and the time that

he/she is due to begin their next shift, the employee shall not be required to attend work until ten consecutive hours off duty have been completed, but shall not lose any pay for scheduled working time occurring during this period.

if, on management's instructions, the employee resumes work prior to the completion of ten hours off duty, the employee shall be paid at overtime rates as described in Clause 4 until released from duty and shall then be entitled to ten hours off duty.

(ii) Employees required to work overtime (after their usual ceasing time for the day or shift) for 1½ hours or more shall be allowed to take an overtime meal break of twenty (20) minutes duration immediately after the usual ceasing time paid at ordinary rates. After each subsequent four hours of continuous work the employee shall be allowed to take an overtime meal break of twenty (20) minutes duration provided work continues after the taking of overtime meal break, without loss of pay

Whereby agreement between the employer and the employee, an employee continues to work past his usual finishing time for in excess of one and half hours without taking his overtime meal break, he shall be regarded as having worked twenty (20) minutes more than the time worked and shall be paid accordingly.

(c) Recalls/Call Outs

When an employee is recalled to work after leaving the job, the employee shall be paid for at least four hours at overtime rates.

(d) Notification

There is a requirement for flexibility with respect to notification of a request to work overtime due to the nature of Fluor Daniel Diversified Plant Services' business as a service provider. Fluor Daniel Diversified Plant Services should as a principle give as much notice of overtime as possible. As a guideline Fluor Daniel Diversified Plant Services should give—

(i) A minimum of 24 hours notice for planned overtime.

(ii) As much notice as possible for unplanned overtime, with no minimum notice required.

A request for an employee to work planned overtime shall not be unreasonably refused.

The inability of an employee to work unplanned overtime will not prejudice their employment.

(e) Call Out Roster (Cranage)

When an employee is rostered on as call out crane driver, the employee shall be paid 1 hour at overtime rate. Should the employee be called out or recalled to work, the employee shall also be paid pursuant to paragraph 5.3(c) of this subclause.

5.4 Shift Work

(a) Definitions—

Day Shift: shall be a shift worked from 6.00 am to 6.00 pm.

Night Shift: shall be a shift worked from 6.00 pm to 6.00 am.

The above may be modified by mutual agreement between both parties.

(b) Shift Loadings

Employees working on afternoon or night shift shall be paid a loading of 25% calculated on the employee's base rate of pay for ordinary hours only. Shift hours in excess of 8 hours will be paid for at the rate of time and a half for the first two hours and thereafter double time, unless otherwise agreed.

Further, all parties have given their commitment that this issue will not be used as a precedent for application outside this Agreement, whether those other sites involve Fluor Daniel.

(c) Broken Shifts

(i) Where any particular process is carried out on shifts other than day shift, and less than five consecutive afternoon or five consecutive night shifts are worked on that process, then employees employed on such afternoon or night shifts shall be paid at overtime rates.

Provided that where the ordinary hours of work normally worked in an establishment are worked on less than five days, then the provisions of paragraph (i) shall be as if four consecutive shifts where substituted for five consecutive shifts.

(ii) The sequence of work shall not be deemed to be broken under the preceding paragraph by reason of the fact that work on the process is not carried out on a Saturday or Sunday, or any other day that the employer observes a shutdown for the purpose of allowing an RDO, or on any holiday.

5.5 R & R Leave Provision

At the commencement of their employment, employees may elect to be on either a 6 & 1 or 6 & 2 week R & R cycle. Employees may subsequently change this cycle at the beginning of the R & R cycle to a 4 and 1 or a 4 and 2 cycle subject to prior agreement with FDDPS.

6.—LEAVE

6.1 Public Holidays—

(a) The following days shall be allowed as holidays to be taken without loss of pay—

New Years Day, Good Friday, Anzac Day, Labour Day and Christmas Day.

(b) Provided that another day may be taken as a holiday by agreement between the parties in lieu of any of the days names in this subclause.

(c) Any employee who is not required to work on a particular day for the sole reason that the day is a public holiday, is entitled to be paid for 7.6 hours at the employee's base hourly wage rate as per Clauses 4.2.

(d) Any employee who is required to work on one of the days specified in subclause 8.1(a) of this Clause shall be paid a penalty rate of 2½ times their base hourly rate of pay.

(e) For the purposes of this subclause, the day of observance for any of the holidays mentioned in subclause 6.1(a) above, shall be the day that is Gazetted in respect of that holiday in the Western Australian Government Gazette.

6.2 Annual Leave

(a) An employee shall become entitled to five weeks leave with pay at the completion of each twelve month period of continuous service. Annual leave may be taken on a pro rata basis.

(b) For the purposes of this subclause, the amount of pay to be received by an employee for annual leave shall be equal to the wage the employee would have received for 38 ordinary hours per week (38 hrs x base hourly rate as per Clauses 4.2).

(c) In addition to the payment prescribed in paragraph (b) of this subclause an employee shall receive a loading of 17.5% calculated on the amount prescribed in paragraph (b).

(d) The employee and the employer shall, where practical and possible, endeavour to agree to a time that is mutually suitable to both parties for the taking of the employee's annual leave. The employer should not unreasonably refuse leave if 4 weeks notice has been given of commencement date.

(e) If a holiday, as prescribed in subclause 1(a) of Clause 6.1 falls during an employee's period of annual leave, then one extra working day shall be added to the period of leave in respect of that holiday.

(f) An employee whose employment terminates after completion of a twelve month qualifying period but before the employee has taken annual leave in respect of that period, shall be entitled to payment in lieu of that leave as prescribed by subclause (2)(b) and (c) of this clause, unless the employee has justifiably been dismissed for serious misconduct, and that serious misconduct occurred prior to the completion of the qualifying period.

If after one week's continuous service into any qualifying period, an employee lawfully leaves their employment, or if the employment is terminated by the employer through no fault of the employee, then the employee shall be paid 3.656 hours pay at the rate prescribed by subclause (2)(b) of this Clause divided by 38 for each week of completed service.

Continuous service shall include any time spent off work for which the employee is entitled to claim sick leave, periods of annual leave, workers compensation and public holidays, but shall not include any time spent on leave without pay, including parental leave.

Employees may be required to take annual leave (or leave without pay if sufficient accruals are not available) to allow the Argyle maintenance operations to shutdown over the Christmas/New year period. The length of this shutdown is to be defined by Fluor Daniel Diversified Plant Services at least one month before the period of shutdown.

In cases where an employee is requested to be called back from annual leave due to unforeseen or emergency circumstances, that employee shall be paid in accordance with the terms of this Agreement for that day or days and shall also receive an extra day or days annual leave, even if only part of a day is worked.

6.3 Long Service Leave

The provisions of the Act 1958 and the Construction Industry portable paid Long Service Leave Act 1988 (WA) are hereby incorporated into and shall be deemed to be part of this Agreement.

6.4 Income Protection

The company will provide income protection insurance through an agreed insurance provider with a 7 calendar day waiting period. At the commencement of this agreement the agreed insurance provider is ACTU Insurance.

7.—GENERAL

7.1 Disciplinary Procedures

(a) Disciplinary action against employees of Fluor Daniel Diversified Plant Services shall take the following form—

Formal Verbal Warning

Normally carried out by the Site Manager in the presence of a supervisor and union delegate or other employee representative (if requested by the employee), if behaviour/ actions of an employee requires improvement. Employee is to be given an opportunity to explain and/or respond. All discussions are to be recorded and included, with a record of a formal verbal warning, in the employee's file.

Written Warning

Normally carried out by Site Manager in the presence of a supervisor with union delegate or other employee representative (if requested by the employee). The employee is advised that his/her actions/behaviour have not improved sufficiently. Employees once again given an opportunity to respond to the allegations. Consequences of first written warning are outlined to the employee and they will be advised that the warning will be included in their file.

Final Written Warning

Normally carried out by the site manager and supervisor concerned in presence of union delegate or other employee representative (if requested by the employee). Employee is told that behaviour/actions have still not improved and any further re-occurrence will result in dismissal. Again, the employee is given an opportunity to respond to the allegations, and the warning, with record of discussions is placed in the employee's file. This final written warning is to clearly identify areas of allegation and employee's response, and signed by all present.

(b) Any issues arising from the application of this procedure shall be resolved in accordance with clause 7.2 Grievance Procedure.

7.2 Grievance Procedure

(a) Where a question, dispute or difficulty arises the matter shall initially be discussed between the employee concerned and the employee's immediate supervisor as soon as reasonably practicable.

(b) If the matter is still unresolved by the discussions referred to in (1) hereof the employee and/or the appropriate shop steward will raise the concern, and attempt to resolve the concern, with Fluor Daniel Power and Maintenance Services project management representative.

(c) Where the above discussions fail to resolve the matter of concern it shall be referred to the Fluor Daniel's senior management representative and/or nominee and the appropriate full-time union official. The parties shall then initiate step to resolve the question, dispute or difficulty as soon as possible.

(d) The parties agree that normal work shall continue without industrial action while these procedures are being allowed.

(e) If the question, dispute or difficulty is still not resolved, either party may refer the matter to the Western Australian Industrial Relations Commission provided that any party reserves the right to refer an issue to the Western Australian Industrial Relations Commission at any time. the parties to the dispute shall confer among themselves and make reasonable attempts to resolve the issues of the dispute before taking the matter to the Commission.

7.3 Demarcation

(a) The parties agree that, as a step toward achieving the productivity and flexibility aims and objectives of this Agreement, demarcation disputes of all kinds must be prevented.

(b) In the interests of developing a more highly skilled and flexible workforce and removing restrictive demarcation barriers from the workplace, employees shall carry out all directions and duties that are within the scope of their skill, competence, training and certification ensuring the safety and quality requirements of the job are maintained.

(c) Engineering, commissioning and supervisory staff may use tools when carrying out inspections, testing equipment or instructing/training employees provided that this action does not attempt to replace the jobs of employees covered by this Agreement and the staff member is qualified and competent to carry out the works.

7.4 Self-Supervision

(a) In keeping with the overall aims and objective of this Agreement, and as a reflection of Fluor Daniel Diversified Plant Services faith in the ability and dedication of its employees, it is a fundamental aim of this Agreement to promote the concept of self-supervision within its workforce.

(b) Employees are to be encouraged to use their initiative and self-discipline to ensure that their work is completed with as little supervision as possible. Employees shall also be encouraged to contribute ideas for productivity and efficiency enhancements and participate in decision making processes via the consultative committee and direct communications.

Employees shall be encouraged to form teams and administer and manage their own activities to a greater degree.

(c) Fluor Daniel Diversified Plant Services undertakes to provide the required training to employees, supervision and management to facilitate this cultural change which is so vital to the long term prosperity o the company.

7.5 Seconded Employees

A Seconded Employee is a person engaged to fulfil a specific task or assignment. The task must have a work scope and a duration, eg a secondment to a Client Organisation where the Client requests the services of a particular skill to work on their premises (generally under the Client's supervision) for some determined time.

A Seconded Employee will be under the overall management of Fluor Daniel Diversified Plant Services and will be engaged on the clear understanding that their employment conditions are—

(a) They are employed by Fluor Daniel Diversified Plant Services, are subject to all applicable Fluor Daniel Diversified Plant Services conditions of employment, as set out in this Agreement and are subject to overall supervision and management of Fluor Daniel.

(b) Their term of employment will be for the duration of the assignment or secondment only.

(c) At the completion of the assignment their employment with Fluor Daniel Diversified Plant Services may be terminated and all outstanding entitlements paid out.

(d) Transfer from casual to permanent status will be in accordance with the condition for permanent employment described in Clause 3.1 of this Agreement. However, even though the employee may be transferred to permanent status the employee will still

remain a Seconded Employee and employment conditions shall remain as described in (a), (b) and (c) above.

7.6 Safety Committee

(a) In the interests of promoting and sustaining safe and practical systems of work, the parties agree to form a committee consisting of equal numbers of Fluor Daniel Diversified Plant Services management and employee representatives to consider issues and disputes relating specifically to health and safety at Fluor Daniel Diversified Plant Services Argyle Area maintenance operations.

(b) The Safety Committee shall have the following aims and responsibilities consistent with Fluor Daniel Diversified Plant Services Policies and Procedures—

(i) to ensure that methods, materials and tools used on site are safe and used in a safe and practical manner.

(ii) to ensure that employees are appropriately trained in the safe use of equipment, tools, materials and that systems of work are structured in a safe manner.

(iii) to develop initiatives that enhance health and safety on site in an efficient and practical manner.

(iv) to liaise with the Consultative Committee (see subclause 7.11) in relation to the development of initiatives as described in paragraph (iii) of this subclause.

(v) to facilitate the resolution of disputes relating specifically to occupational health and safety at Fluor Daniel Diversified Plant Services Argyle operations in accordance with the Argyle Region Safety Management Plan.

7.7 Amenities

Amenities are to be provided in accordance with requirements of site specific appendices attached. However, as a minimum the following will be provided—

(i) Air conditioned smoko rooms (where possible).

(ii) All requirements for coffee, tea, sugar, milk and cool drinking water.

(iii) Fridge or ice box (complete with regular supply of ice) suitable for smoko room size.

7.8 Inductions

Inductions to be conducted either before or as soon as possible after an employee commences work on a site. Inductions shall include an introduction to union delegate, safety officer and Consultative Committee member. Argyle induction procedure is attached to this Agreement.

7.9 Protective Clothing

All new full time employees are entitled to receive five sets of clothes (long sleeved cotton shirts and long cotton trousers) or overalls, one set of boots (and a welder cap for coded welders or boilermakers) on commencement. All further issues to be on a fair wear and tear basis with no issue unless worn out items are presented for exchange. Company to maintain records of usage and counsel for excessive replacements. Safety equipment will be supplied by the company. T-shirts are not standard issue. Overalls will be issued to those employees who are required to do dirty work and returned at the completion of the job.

In the case of casual employees Fluor Daniel will provide 2 x sets of clothing consisting of long sleeve cotton shirt/s and trouser/s or overalls at the companies discretion. It is the employees responsibility to provide safety footwear that is in good condition and complies with the relevant Australian Standards, to cover the length of their contract. Where an employee fails to provide adequate footwear the cost to Fluor Daniel of providing such footwear will be deducted from the employee's wages in the first period of your engagement. If an employee fails to return or maliciously damages company issued clothing the cost of this will be deducted from their wages.

7.10 Alcohol and Non-Prescription Drugs

Employees will, under no circumstances, be allowed to work on an Fluor Daniel Diversified Plant Services site under the influence of alcohol or any other drug. Employees who are required to take prescription medication shall inform their immediate supervisor before the beginning of any shift, and management reserves the right to prohibit any employee under the influence of a prescription drug which is deemed to affect their performance from commencing or completing a shift.

Alcohol shall not be permitted on site without the express permission of Fluor Daniel Diversified Plant Services.

Any employee found in unauthorised possession of alcohol and/or non-prescription drugs will be summarily dismissed for misconduct.

7.11 Consultative Mechanism

Commitment

As part of their strategy for achieving the aims of this Agreement, the parties recognise the importance of structured and amicable workplace relations. In keeping with this philosophy, the parties agree that the establishment of consultative and participative relations is highly desirable.

Training

The parties agree that employee training and personal development is important to the long term future of Fluor Daniel Diversified Plant Services' operations and as such will be a permanent topic on the Consultative Committee's agenda for their regular meetings.

Continuous Improvement

The parties agree that in order to remain viable and profitable, thus affording employees the maximum possible job and income security, continuous improvements must be made in the areas of productivity, flexibility, efficiency and safety. There are no limits to improvements in these areas, and there are no fixed targets. Improvements should be viewed as ongoing and never ending. Various mechanisms will be examined with a view to maintaining continuous productivity improvement. These include, but are not limited to—

(a) Pay Queries

(b) Consumable Usage

(c) Quality of Tools/Consumables

(d) Skill Matrix

(e) Safety

(f) Sick Leave Usage

(g) Levels of Overtime

(h) Quality Rework Rate

Recognition and Feedback

Consistent with achieving the objectives of improving safety, efficiency, productivity and quality of work the Company will implement a system of evaluating the work performance of each employee, so that the Company's and employees goals are achieved and both will benefit by participating in a system which provides regular and written recognition and feedback. The evaluation system will address issues related to work performance, which includes—

Safety Performance

Safe Working Practices

Identification with employer's goals

Positive work approach

Quality of work

Productivity

Co-operation with others

Teamwork

Attendance and timekeeping etc

Compliance with issue resolution arrangements

A record of each evaluation will be maintained by the Company.

7.12 Consultative Committee

(a) The parties recognise the importance of following an agreed and practical strategy such that the achievement of the aims specified in this Agreement is facilitated.

(b) The parties agree to establish or maintain a Consultative Committee consisting of equal numbers of employee and employer representatives (with a minimum of two from each). The Committee would be charged with the following aims and responsibilities—

(i) To monitor the progress of productivity and efficiency initiatives resulting from the application of this Agreement, and to evaluate any proposals (from any party/s) which offer potential productivity, flexibility and/or safety enhancements, especially as referenced in subclause 7.11 above.

(ii) To conduct ongoing discussions on a monthly basis, or as required, regarding productivity, work practices, management/employee relations and other general proposals aimed at improving the viability and/or stability of Fluor Daniel Diversified Plant Services' Argyle operations.

(iii) To assist the amicable and swift resolution of disputes arising at any of Fluor Daniel Diversified Plant Services' Argyle operations in relation to the operation of this Agreement.

(iv) To encourage and facilitate the effective utilisation of the intellectual resources, skills and experience of members of Fluor Daniel Diversified Plant Services workforce.

(v) To represent and consider the interests of both employees and management in rational discussions relating to employment relations at Fluor Daniel Diversified Plant Services Argyle operations.

(vi) To liaise with the Safety Committee (see Clause 7.6—Occupational Health and Safety of this Agreement) and any other consultative mechanisms that are set up by the parties to ensure that initiatives that are introduced do not in any way compromise the aims and objectives of other areas.

(vii) To review training needs of the employees and the proposed training plan put forward by Fluor Daniel Diversified Plant Services for its workforce employed at Argyle Diamond Mine.

(b) It is recognised that from time to time the management of Argyle Diamond Mines may impose various contract conditions upon Fluor Daniel Diversified Plant Services which must be implemented by Fluor Daniel Diversified Plant Services. The implications and method of compliance with such changed conditions will only be implemented following discussions between the parties, any disagreement will be dealt with in accordance with the grievance procedure of this agreement.

Signed for and on behalf of Fluor Daniel Diversified Plant Services

Signed	David B Thomson
Company Signature	26 March 1999

Signed for and on behalf of the Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

Signed	G. T. Bucknall
Union Signature	Name of Person Signing
	7/4/99
(Common Seal)	Date

HOSPITAL SALARIED OFFICERS KUNUNOPPIN & DISTRICTS HEALTH SERVICE ENTERPRISE BARGAINING AGREEMENT 1997.

No. PSA AG 31 of 1997.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Kununoppin & Districts Health Service

and

Hospital Salaried Officers Association of Western Australia (Union of Workers).

No. PSA AG 31 of 1997.

Hospital Salaried Officers Kununoppin & Districts Health Service Enterprise Bargaining Agreement 1997.

COMMISSIONER P E SCOTT.

23 January 1998.

Order.

HAVING heard Ms T Wilson on behalf of the Applicant and Mr D Hill on behalf of the Respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Hospital Salaried Officers Kununoppin & Districts Health Service Enterprise Bargaining Agreement 1997 in the terms of the following schedule be registeredon the 30th day of December 1997.

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

Schedule.

1.—TITLE

This Agreement shall be titled the Hospital Salaried Officers Kununoppin & Districts Health Service Enterprise Bargaining Agreement 1997.

2.—ARRANGEMENT

3.—PURPOSE OF AGREEMENT

(1) This Agreement aims to achieve improvements in productivity and efficiency and the enhanced performance of Kununoppin & Districts Health Service along with allowing the benefits from those improvements to be shared by employees, Kununoppin & Districts Health Service and the Government on behalf of the Community.

(2) This Agreement places priority on the parties at Kununoppin & Districts Health Service taking responsibility for their own labour relations affairs and reaching agreement on issues appropriate to Kununoppin & Districts Health Service.

(3) This Agreement is entered into in accordance with the Hospital Salaried Officers—Western Australian Government Health Industry Enterprise Bargaining Framework Agreement 1996.

4.—APPLICATION AND PARTIES BOUND

(1) This agreement applies to the Hospital Salaried Officers Association of Western Australia (Union of Workers) (HSOA), the Employees covered by the HSOA's Public Sector Awards employed by the Board of Management of Kununoppin & Districts Health Service, (hereinafter referred to as Kununoppin & Districts Health Service) subject to the extent to which it employs employees covered by the Hospital Salaried Officers Award No. 39 of 1968.

(2) The estimated number of employees bound by this Agreement at the time of registration is 3 employees.

(3) This Agreement shall be read in conjunction with the Hospital Salaried Officers Award No. 39 of 1968 (hereafter referred to as the Award) and shall replace the provisions of that Award where expressly stated herein.

(4) This Agreement replaces the Hospital Salaried Officers Kununoppin and District Hospital Enterprise Bargaining Agreement PSA AG57 of 1996.

5.—TERM OF AGREEMENT

(1) This Agreement shall operate from the date of Registration until 31 March 1998, provided that this Agreement, including allowances and salaries, may be varied or replaced prior to its expiry in order to implement any agreement arising out of this Agreement or the Hospital Salaried Officers—Western Australian Government Health Industry Enterprise Bargaining Framework Agreement 1996.

(2) The parties to this Agreement agree to re-open negotiations forthwith.

6.—NO EXTRA CLAIMS

(1) Subject to the agreed award consolidation and the mandatory core items for the first salary increase as outlined in Clause 13(1) of the Hospital Salaried Officers—Western Australian Government Health Industry Enterprise Bargaining Framework Agreement 1996, this Agreement is in settlement of Application Number P59/94.

(2) (i) For the life of this Agreement or any agreement replacing this Agreement, the Hospital Salaried Officers Association shall make no further claims at Industry or Health Service level for productivity improvements which occurred prior to 1 January 1997.

(ii) For the life of this Agreement or any agreement replacing this Agreement, the Hospital Salaried Officers Association shall make no further claims at Health Service level for productivity improvements which occurred between 1 January 1997 and 1 July 1997 and which have been documented as being identified in justifying wage increases under this Agreement.

7.—OBJECTIVES, PRINCIPLES AND COMMITMENTS

(1) The parties agree that the objectives of this Agreement are to—

(a) improve the productivity and efficiency of Kununoppin & Districts Health Service;

(b) facilitate greater decentralisation and flexibility in negotiating employment conditions and work arrangements at Kununoppin & Districts Health Service;

(c) ensure high quality patient services in a safe, healthy and equitable work environment;

(d) ensure high quality of employment and jobs; and

(e) provide a pathway to providing a wage increase to employees based upon the achievement of improved productivity and efficiency.

(2) By—

(a) ensuring that gains achieved through agreed improved productivity and changes in workplace culture are shared by employees, Kununoppin & Districts Health Service and its clients and the Government on behalf of the community;

(b) ensuring that Kununoppin & Districts Health Service operates in a manner consistent with the principles outlined in Section 7 of the Public Sector Management Act;

(c) developing and pursuing changes on a co-operative basis; and

(d) ensuring that Kununoppin & Districts Health Service operates as effectively, efficiently and competitively as possible.

(3) The Hospital Salaried Officers Association and Kununoppin & Districts Health Service, Management and Employees bound by this Agreement are committed to—

(a) Support and actively contribute to health service continuous quality improvement, including best practice, where best practice—

(i) is simply the best way of doing things;

(ii) is a continuous improvement process which involves constantly changing, adapting and integrating related approaches to health service issues;

(iii) practices are not fixed and not restricted to an examination of costs, but also include quality and delivery issues;

(iv) is outcome rather than simply activity based;

(v) provides the processes, structures, rights and obligations which are essential to ensure that the full capacity for innovation of employees is fully and effectively used;

(vi) depends on effective training, empowerment and participation of both management and employees to acquire and utilise the skills which are necessary to effectively develop, implement and evaluate the change process; and

(vii) are to be based on the following principles—

- customer/patient focus
- management commitment
- employee participation
- leadership
- information analysis
- policies and plans
- appropriate standards
- hospital/health service performance
- cost effectiveness
- working smarter

(b) Support the clinical, teaching, research and organisation goals of the health service and contribute to the achievement of those goals as active members of the health service community.

(c) Support and actively contribute to the achievement and/or maintenance of ACHS Accreditation.

(d) Actively contribute to the achievement of health service budgets.

(e) Assist with achieving Health department defined waiting list priorities and day surgery targets.

(f) Co-operate with the development and implementation of strategies to achieve length of stay targets.

(g) Participate in a Multidisciplinary approach to patient care.

(h) The principles of public sector administration, in particular to the principles contained in Sections 7., 8. and 9. of the Public Sector Management Act 1994.

In addition, Kununoppin & Districts Health Service is committed to facilitating and encouraging the participation and commitment of employees.

8.—FRAMEWORK AND PRINCIPLES FOR FURTHER PRODUCTIVITY BARGAINING

(1) (a) Following the receipt of a request from the HSOA to negotiate an amendment to this Agreement with Kununoppin & Districts Health Service, a representative from Kununoppin & Districts Health Service will meet with a representative from the HSOA to discuss the request as soon as practicable but in any event within five working days of the receipt of the request.

These discussions should include process issues such as what sort of bargaining mechanism will be established, what consultative process can be used or needs to be put in place, possible initiatives to be considered and the time frame.

Negotiations will be conducted in a manner and time frame agreed by the parties to this Agreement.

(b) The negotiations should occur on the basis of a broad agenda of initiatives designed to improve efficiency, effectiveness, productivity, patient care and flexibility within Kununoppin & Districts Health Service.

(c) The agenda should include but not be limited to—

(i) changes in work organisation, job design and working patterns and arrangements;

(ii) examination of terms and conditions of employment to ensure they are suited to Kununoppin & Districts Health Service's operational requirements;

(iii) identification and implementation of best practice across all areas of service delivery;

(iv) (i), (ii) and (iii) can be achieved by means including but not limited to;

(aa) new training and skills development programs as and where required;

(bb) the optimum use of human and capital resources including new technology;

(cc) quality assurance and continuous improvement programs;

(dd) having due regard to operational requirements, allowing sufficient flexibility to enable employees to meet their family responsibilities; and

(ee) active occupational health and safety risk reduction, training and rehabilitation programs.

(2) In negotiating further salary increases in return for productivity improvements, the parties should ensure that the following issues have been addressed and/or applied—

(a) Productivity Improvements

Productivity improvements are changes which increase the efficiency and effectiveness of Kununoppin & Districts Health Service in meeting its agreed and contracted service programs and outcomes. Productivity improvements may be related to work practices or arrangements. They may be things which go to minimise the cost of what is done, to the way things are done, to when they are done, to the quality of what is done or to improve the ability of the provider to meet patient and customer needs. They may or may not require changes from Award conditions.

Without limiting any of the above, in practice, the primary focus of Enterprise Bargaining in the workplace is likely to be on best practice, efficiency, effectiveness, competitiveness, cost savings, and quality of employment.

(b) Sharing Gains from Productivity Improvement

The parties accept that there is no precise formula for the sharing of gains from productivity improvements, but in any agreement, in addition to employee benefits, there must be a clear and specific return to Kununoppin & Districts Health Service and/or the Government. Productivity improvements may be related to work practices or arrangements, subject to acceptance that where capital expenditure requires changes in work methods and/or the number of employees and the changes are of a nature that enhances the investment, it shall qualify as a productivity improvement, provided that there is a net quantifiable benefit to Kununoppin & Districts Health Service.

Any agreement reached should not rely primarily on improvements which are merely the result of new technology or financial reforms or other such initiatives. For example; in the case of capital investment (technology), changes arising from capital expenditure for which Kununoppin & Districts Health Service takes the risk and which require a reasonable return on the funds invested, do not necessarily count as a productivity improvement.

The treatment of improved efficiency arising from major capital expenditure is to be agreed by Kununoppin & Districts Health Service and the HSOA and shall take into account factors such as the cost of capital.

Where employees repackage or exchange employment conditions, all or most of the saving or productivity improvement made by Kununoppin & Districts Health Service can be returned to the employees.

(c) Identifying Productivity Increases

To assist in such a review a model for identifying productivity increases is contained in Attachment 5 of the Hospital Salaried Officers—Western Australian Government Health Industry Enterprise Bargaining Framework Agreement 1996. The model is included as a guide only and it is expected that it will be modified to meet the needs of Kununoppin & Districts Health Service as required.

(d) Quantum and Timing of Increases

The aggregate productivity gains negotiated at Kununoppin & Districts Health Service could result in increases greater than the targeted amount, however there are practical limits on how much can be paid and when the increases can be paid for specific operational improvements.

9.—AWARDS, AGREEMENTS AND WORKPLACE AGREEMENTS

(1) Relationship Between Agreements and Awards

Consistent with the Industrial Relations Act 1979 and the State Wage Principles, this Agreement shall provide the whole of the employees' wage increases for the life of the Agreement.

(2) Subject to the Industrial Relations Act 1979 and the State Wage Principles, the parties reserve their rights to seek to amend this Agreement to provide for further salary increases in return for productivity improvements at the Health Service.

(3) Choice between this Agreement and Workplace Agreements

(a) The parties accept that Employees will be given an informed and free choice between this Agreement and Workplace Agreements;

(b) To facilitate the making of an informed and free choice—

(i) Employees who are to be offered a choice between this Agreement and a workplace agreement may only be required to indicate their choice after the employee has been offered the position.

(ii) Where an employee has been offered a choice the employee shall have a minimum of seven days in which to decide which alternative to take, provided that where it is necessary to fill a position within a period of less than seven days or where an employer agrees to an employee commencing within a period of less than seven days, the employee shall have up to the date of formal acceptance.

(iii) The employee shall be provided with—

(aa) a copy of an agreed summary of this Agreement; and

(bb) a copy of a summary of the Workplace Agreement.

(iv) At the request of an employee, the employee shall be provided with—

(aa) access to a copy of this Agreement and the Workplace Agreement;

(bb) any other relevant documentation, such as information on salary packaging; and

(cc) information on where they can obtain further advice and on how to contact the Union.

For its part, the Union undertakes to advise all employees on the matter of choice whether or not they are members of the Union.

(c) If agreement on any aspect of this clause is not able to be reached the dispute settlement procedure set out in Clause 12 of this Agreement is to be followed.

(4) By agreement between the employer and the employee, an employee who has signed a Workplace Agreement prior to the registration of this S.41 Industrial Agreement can revisit the Workplace Agreement in light of this Agreement.

(5) All staff transferred or redeployed to Kununoppin & Districts Health Service from within the Public Sector or within the Government Health Industry may be offered the choice of a Workplace Agreement or this Agreement subject to the discretion of Kununoppin & Districts Health Service.

(6) All promotional positions and new staff recruited by Kununoppin & Districts Health Service from outside the Public Sector may be provided with the choice of a Workplace Agreement or S41 Industrial Agreement, subject to the discretion of Kununoppin & Districts Health Service.

(7) In the exercising of the discretion to only offer a Workplace Agreement under subclauses (5) and (6) of this clause, Kununoppin & Districts Health Service shall ensure that the decision to only offer a Workplace Agreement is made for legitimate operational reasons. In exercising their discretion to only offer a Workplace Agreement, Kununoppin & Districts Health Service is to liaise with the HSOA to ensure it is not done to circumvent the option of choice.

10.—RATES OF PAY AND THEIR ADJUSTMENT

Pursuant to the replacement of agreement no PSA AG57 of 1996, this agreement provides for a 5% salary increase effective from the date of registration of the agreement.

11.—RESOURCES FOR PRODUCTIVITY NEGOTIATIONS

(1) It is recognised that enterprise bargaining places considerable obligations upon the parties at Kununoppin & Districts Health Service.

(2) (a) To assist in meeting these obligations, Kununoppin & Districts Health Service will assist by providing appropriate resources having regard to the operational requirements of Kununoppin & Districts Health Service and resource requirements associated with developing amendments to this Agreement aimed at achieving further salary increases in return for productivity improvements;

(b) It is accepted that employees of Kununoppin & Districts Health Service who are involved in the enterprise bargaining process will be allowed reasonable paid time to fulfil their responsibilities in this process;

(c) Access to resources shall be negotiated with Kununoppin & Districts Health Service and shall not unreasonably affect the operation of Kununoppin & Districts Health Service;

(d) Any paid time or resources shall be provided in a manner suitable to both parties and to enable negotiations to occur and to assist in the achievement of agreement.

(e) The parties accept that the process of bargaining in good faith includes disclosing relevant information, as appropriate for the purposes of the negotiations and confidentiality and privacy in the negotiation process will be respected at all times.

(f) The parties accept that on occasions the nature of certain information may prejudice a party's position or not assist in the resolution of the matter. Subject to the rights of the parties to invoke Clause 12.—Dispute Avoidance and Settlement Procedures of this Agreement, a decision on whether or not to exchange or divulge information will be a matter for the relevant party to decide, provided that information shall not be unreasonably withheld;

(g) Where information of a commercial or sensitive nature is exchanged, the parties agree not to use or divulge that information outside of the negotiating forums.

(3) No officer or employee will be discriminated against as a result of activities conducted in accordance with this clause.

12.—DISPUTE AVOIDANCE AND SETTLEMENT PROCEDURES

(1) The objective of this Clause is to provide a set of procedures for dealing with any questions disputes or difficulties arising under this Agreement and for dealing with any questions, dispute or difficulty between the parties during negotiations for amendments to this Agreement.

(2) Subject to the Public Sector Management Act 1994, in the event of any question, dispute or difficulty between the parties as to the application of Government policy and the Wage Principles and/or their effect upon this Agreement, the Health Department and/or the Department of Productivity and Labour Relations (DOPLAR) are to provide advice to Kununoppin & Districts Health Service in an attempt to resolve the matter.

(3) Subject to the Public Sector Management Act 1994, in the event of any question, dispute or difficulty arising under this Agreement, the following procedures shall apply, provided that nothing in these procedures shall prevent the Secretary of the HSOA (or his/her nominee) from intervening to assist in the process—

(a) The matter is to be discussed between the HSOA employee representative and the employer representative and an attempt made to resolve the matter;

(b) If the matter is unable to be resolved through discussions between the HSOA employee representative and the Kununoppin & Districts Health Service representative, the matter is to be discussed between the employee representative and the Chief Executive Officer of Kununoppin & Districts Health Service or his/her nominee, as soon as practicable but within five working days. Notification of any question, dispute or difficulty may be made verbally and/or in writing;

(c) The parties may individually or collectively seek advice from any appropriate organisation or person in an attempt to resolve the matter;

(d) If the matter is not resolved within five working days of the date of notification in (b) hereof, either party may notify the Secretary of the HSOA (or his/her nominee), or the Chief Executive Officer of Kununoppin & Districts Health Service (or his/her nominee) of the existence of a dispute or disagreement;

(e) The Secretary of the HSOA (or his/her nominee) and the Chief Executive Officer of Kununoppin & Districts Health Service (or his/her nominee) shall confer on the matters notified by the parties within five working days and—

(i) where there is agreement on the matters in dispute the parties shall be advised within two working days;

(ii) where there is disagreement on any matter it may be submitted to the Western Australian Industrial Relation Commission.

(4) Where any matter is referred to the Western Australian Industrial Relations Commission and the matter is not resolved by conciliation, then the matter remaining in dispute may be resolved by arbitration in accordance with the provisions of the Industrial Relations Act 1979 and the State Wage Principles.

13.—HOURS

This clause replaces Clause 13.—Hours of the Hospital Salaried Officers Award No. 39 of 1968.

(1) (a) The ordinary hours of work shall be an average of thirty eight per week and shall be worked by one of the following arrangements—

(i) Ordinary hours of work of thirty eight per week;

(ii) Flexitime roster covering a settlement period of four weeks;

(iii) Actual hours of seventy six over nine days with the tenth day to be taken as a paid rostered day off;

(iv) Such other arrangements as are agreed between the employer and employee. Provided that proposed hours of duty where set outside the terms of this Agreement shall be subject to ratification of the WA Industrial Commission.

(v) In addition to the above arrangements, where the employee and the employer so agree in writing, shifts of not more than 12 hours may be worked.

(b) Subject to the following, where the employer and an employee or group of employees agree in writing, shifts of up to 12 hours may be worked provided the average normal hours worked in a shift cycle or settlement period does not exceed 76 per fortnight.

(i) While recognising that in the course of an averaging process there may be some individual variances, the terms and conditions of the shift agreement shall on balance be no less favourable than those prescribed by this Agreement;

(ii) The period of the shift cycle or settlement period over which the arrangement may extend shall be clearly defined;

(iii) The arrangement shall allow for a minimum of one clear day off in each 7 days;

(iv) The arrangement may allow for additional time off in lieu of penalty rates;

(v) The arrangement may allow for salary averaging of regular penalties and allowances including penalties for working on a public holiday;

(vi) Any proposed arrangement or agreement which extends beyond these parameters must be referred to the Industrial Relations Commission for ratification.

(c) Where the employer has made a definite decision to introduce changes to shift rosters or employees' ordinary hours, the employer shall notify the employees who may be affected by the proposed changes and the Union as soon as the decision has been made and before the changes are to be introduced.

Discussion with the employees and union shall occur consistent with the Introduction of Change clause of the Hospital Salaried Officers Award No. 39 of 1968.

(d) The operation of working arrangements prescribed in paragraph (a) above, shall be consistent with the working arrangements prescribed in this clause.

(2) Ordinary Hours

Subject to the Award clauses other than those expressly replaced by this Agreement, the spread of ordinary hours will be from 6.00am to 6.00pm Monday to Friday inclusive with a meal break of not less than 30 minutes nor more than 60 minutes to be taken between 12.00noon and 2.00pm, provided that an employee may with prior approval of their supervisor be allowed to extend the meal break beyond 60 minutes to a maximum of 90 minutes.

(3) Other Working Arrangements

(a) The ordinary hours of duty observed may be varied in accordance with subclause (1)(a)(iv) so as to make provisions for—

(i) the attendance of employees for duty on a Saturday, Sunday, or Public Holidays.

(ii) the performance of shift work including work on Saturdays, Sundays or Public Holidays; and

(iii) the nature of the duties of an employee or class of employees in fulfilling the responsibilities of their office.

provided that where the hours of duty are so varied an employee shall not be required to work more than five hours continuously without a break unless agreed in writing between the employee and the employer.

(b) Notwithstanding the above, where it is considered necessary to provide a more economic operation, the employer may authorise the operation of alternative working arrangements in the hospital/health service, or any branch or section thereof.

The continuing operation of any alternative working arrangements, so approved, will depend on the employer being satisfied that the efficient functioning of the hospital/health service is being enhanced by its operation.

Such alternative working arrangements shall be in accordance with subclause (1)(a)and (d).

(4) Flexitime Arrangements

(a) Flexitime Roster

(i) The authorisation of a flexitime roster shall be the responsibility of the employer. The roster will indicate the minimum staffing and any other requirements in respect to starting and finishing times, lunch break coverage and flexileave.

(ii) The roster shall cover a settlement period of four weeks and shall be made available to all affected employees no later than three days prior to the settlement period commencing.

(iii) The roster shall be prepared in consultation with the affected employees, subject to the employer retaining the right to determine arrangements to suit the operational needs of the department.

(iv) Subject to four weeks notice being given to affected employees, the employer may withdraw authorisation of a flexitime roster.

(b) Hours of Duty

(i) The ordinary hours of duty may be an average of 7 hours 36 minutes per day which may be worked with flexible commencement and finishing times in accordance with the provisions of this subclause, provided that the required hours of duty for each four week settlement period shall be 152 hours.

(ii) For the purpose of leave and Public Holidays, a day shall be credited as 7 hours 36 minutes.

(c) Flexitime Periods

Within the constraints of the prepared roster and subject to the concurrence of the supervisor, employees may select their own starting and finishing times within the following periods—

6.00 am to 9.30 am
11.00 am to 2.30 pm (Minimum half an hour break)
3.30 pm to 6.00 pm

(d) Core Periods

Core periods may be set by agreement between the employer and the employee.

(e) Lunch Break

(i) An employee shall be allowed to extend the meal break between 11 am and 2.30 pm of not less than 30 minutes but not exceeding 60 minutes except as provided below.

(ii) An employee may be allowed to extend the meal break beyond 60 minutes to a maximum of 90 minutes. Such an extension is subject to prior approval of the employee's supervisor.

(f) Flexileave

(i) Within the constraints of the prepared roster and subject to the prior approval of the supervisor, an employee may be allowed a maximum of two full days or any combination of half days and full days that does not in total exceed two days in any one settlement period.

(ii) Approval to take flexileave is subject to the employee having accrued sufficient credit hours to cover the absence prior to taking the leave. In exceptional circumstances and with the approval of the employer, flexileave may be taken before accrual subject to such conditions as the employer may impose.

(g) Settlement Period

(i) For recording time worked, there shall be a settlement period which shall consist of four weeks.

(ii) The settlement period shall commence at the beginning of a pay period.

(iii) The required hours of duty for a settlement period shall be 152 hours.

(h) Credit Hours

(i) Credit hours in excess of the required 152 hours to a maximum of 7 hours 36 minutes are permitted at the end of each settlement period. Such credit hours shall be carried forward to the next settlement period.

(ii) Credit hours in excess of 7 hours 36 minutes at the end of a settlement period shall be lost.

(iii) Credit hours at any point within the settlement period shall not exceed 20 hours.

(i) Debit Hours

(i) Debit hours below the required 152 hours to a maximum of 4 hours are permitted at the end of each settlement period.

Such debit hours shall be carried forward to the next settlement period.

(ii) For debit hours in excess of 4 hours, an employee shall be required to take leave without pay for the period necessary to reduce debit hours to those specified in subparagraph (i) of this subclause.

(iii) Employees having excessive debit hours may be required to work standard working hours in addition to not being paid for the number of hours in excess of the debit hours permitted at the end of each settlement period.

(j) Maximum Daily Working Hours

Subject to subclause (1)(b), a maximum of 10 hours may be worked in any one day.

(k) Study Leave

Where study leave has been approved by the employer, credits will be given for education commitments falling within the ordinary hours of duty and for which "time off" is necessary to allow for attendance at formal classes.

(l) Overtime

(i) Employees receiving at least one day's prior notice of overtime shall be required to work the ordinary hours of duty determined by the employer under subclause (1) of this clause.

(ii) Where an employee is required to work overtime at the conclusion of a day with less than one day's notice, and

(aa) where the employee has at the commencement of that day 2 hours or more flexitime credits,

the employee shall be paid overtime after 5 hours work on that day, or for time worked after 3.30 pm, whichever is the later, or

(bb) where that employee has commenced duty prior to 8.30 am and has, at the commencement of that day, less than 2 hours flexitime credits, the employee shall be paid overtime, for time worked after the completion of ordinary hours of duty or after working 7 hours 36 minutes on that day, whichever is the earlier, or

(cc) where that employee has commenced work after 8.30 am and has, at the commencement of that day, less than 2 hours flexitime credits, the employee shall be paid overtime for time worked after 5.30 pm or after working 7 hours 36 minutes, on that day whichever is the earlier.

(iii) Where an employee is required to work overtime at the beginning of a day with less than one day's notice, that employee shall be paid overtime for any time worked prior to the commencing time for ordinary hours of duty determined by the employer under subclause (1) of this clause.

(5) Nine Day Fortnight

(a) Hours of Duty

(i) The employer may authorise the operation of a nine day fortnight where the ordinary hours of duty of 76 hours a fortnight are worked over nine days of the fortnight, exclusive of work performed on Saturday, Sunday and the special rostered day off, with each day consisting of 8 hours and 27 minutes.

(ii) The employer shall determine employees' commencing and finishing times between the spread of 6.00 am and 6.00 pm, in order to ensure that departmental requirements are met on each day.

(b) Lunch Break

A meal break shall be allowed and taken in accordance with the standard provisions of this clause.

(c) Special Rostered Day Off

Each employee shall be allowed one special rostered day off each fortnight in accordance with a roster prepared by management showing days and hours of duty and special rostered days off for each employee.

(d) Leave and Public Holidays.

For the purposes of leave and Public Holidays, a day shall be credited as 8 hours 27 minutes notwithstanding the following—

(i) When a Public Holiday falls on an employee's special rostered day off the employee shall be granted a day in lieu of the holiday prior to the conclusion of the current fortnight.

(ii) For a Public Holiday occurring during a period of annual leave, an additional day will be added to the period of leave irrespective of whether it falls on a rostered work day or special rostered day off.

(iii) A four week annual leave entitlement is equivalent to 152 hours, the equivalent to eighteen rostered working days of 8 hours 27 minutes, and two special rostered days off.

(iv) An employee who is sick on a special rostered day off will not be granted sick leave for that day, and will not be credited with an additional day off in lieu.

(e) Overtime

The provisions of the relevant overtime clause, shall apply for work performed prior to an employee's nominated starting time and after an employee's nominated ceasing time in accordance with subparagraph (a)(ii) and on an employee's special rostered day off.

(f) Study Leave

Credits for Study Leave will be given for educational commitments falling due between and employee's nominated starting and finishing times.

14.—PART-TIME EMPLOYEES

To be read in conjunction with Clause 34.—Part-time Employees of the Hospital Salaried Officers Award No. 39 of 1968.

(1) Part-time workers aged 21 years or more shall be paid at a rate pro-rata to the rate prescribed for the class of work for which they are engaged in the proportion to which their fortnightly hours bear to 76 hours per fortnight.

(2) When a part-time worker as defined by the Hospital Salaried Officers Award No. 39 of 1968, commences employment on or after the 1 July 1996, he/she shall accrue service towards progression onto subsequent salary increments within a salary level, on a pro-rata basis of the number of hours worked to full time hours.

(3) Provided that relevant prior service and experience shall be taken into account when determining at what increment within a specified salary level a part-time employee is appointed.

15.—MEDICAL IMAGING TECHNOLOGISTS

This provision replaces Clause 12. of the Hospital Salaried Officers Award No. 39 of 1968.

Notwithstanding anything contained elsewhere in this Agreement or in the Hospital Salaried Officers Award No. 39 of 1968, Medical Imaging Technologists who were prior to this Agreement employed on a thirty-five hour and four week annual leave basis shall as a result of the registration of this Agreement, be employed on a thirty-five and a half (35.5) hour week and four week annual leave basis.

16.—PUBLIC HOLIDAYS

This provision replaces subclause 16(1)(a) of the Hospital Salaried Officers Award No. 39 of 1968.

(1) The following days or the days observed in lieu thereof shall subject as hereinafter provided, be allowed as holidays without deduction of pay, namely New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day. Provided that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in this subclause.

(2) With effect from 1 April 1996 employees covered by this Agreement shall not be eligible to receive the two floating holidays otherwise provided for by Operational Instruction 657/95 and Circular to Ministers No. 1 of 1994 issued by the Office of The Premier. Provided that the holiday employees become eligible to receive on 2 January 1996 may be taken in accordance with the above mentioned Circular before 1 January 1997.

17.—LONG SERVICE LEAVE

This clause replaces Clause 19. Long Service Leave of the Hospital Salaried Officers Award No. 39 of 1968 with effect from 1st April 1996.

(1) An employee shall be entitled to thirteen weeks paid long service leave on the completion of ten years of continuous service and an additional thirteen weeks paid long service leave for each subsequent period of ten years of continuous service completed by the employee.

(2) Notwithstanding subclause (1), an employee in employment with an employer respondent to the Hospital Salaried Officers Award N0. 39 of 1968 at the time of the inception of this agreement shall retain the proportion of long service leave accrued at the rate provided by the Award at that time and accrue the balance at the ten year rate.

(3) Upon application by an employee, the employer may (subject to subclause (4) of this Agreement), approve of the taking by the employee—

(a) of double the period of long service leave on half pay, in lieu of the period of long service leave entitlement on full pay; or

(b) of half the period of long service leave on double pay, in lieu of the period of long service leave entitlement on full pay; or

(c) of any portion of his/her long service leave entitlement on full pay or double such period on half pay; or half such period on double pay

(d) A full time employee who, during a qualifying period towards an entitlement of long service leave was employed continuously on both a full time and part time basis may elect to take a lesser period of long service leave calculated by converting the part time service to equivalent full time service.

(4) Long service leave may be taken in weekly multiples on full, half or compacted pay provided that where an employees remaining portion of accrued untaken leave entitlement is less than a week such portion may be taken.

(5) Any holiday occurring during the period in which an employee is on long service leave will be treated as part of the long service leave, and extra days in lieu thereof shall not be granted.

(6) Long service leave shall be taken as it falls due at the convenience of the employer but within three years next after becoming entitled thereto: Provided that the employer may approve the accumulation of long service leave not exceeding twenty six weeks.

(7) (a) An employee who—

(i) at or before the 1st April 1996 was employed by Kununoppin & Districts Health Service, and has completed at least 15 years continuous service within the Western Australian Public Sector; or

(ii) commenced employment with Kununoppin & Districts Health Service after the 1st April 1996, and has completed at least 15 years continuous service within the Western Australian Public Sector Health Industry;

may, by agreement with the employer, take pro-rata long service leave provided that the employee has completed at least three years continuous service with Kununoppin & Districts Health Service immediately prior to taking this leave.

(b) An employee who resigns from their employment with Kununoppin & Districts Health Service and who—

(i) at or before the 1st April 1996 was employed by Kununoppin & Districts Health Service, and has completed at least 15 years continuous service within the Western Australian Public Sector; or

(ii) commenced employment with Kununoppin & Districts Health Service after the 1st April 1996, and has completed at least 15 years continuous service within the Western Australian Public Sector Health Industry;

shall, in addition to any accrued long service leave be paid pro-rata long service leave, provided that the employee has completed at least three years continuous service with Kununoppin & Districts Health Service immediately prior to his/her resignation.

(8) For the purposes of subclause (7), the Western Australian Public Sector Health Industry shall mean the Minister for Health, the Commissioner of Health and all Public Sector Hospitals, Health Services and Agencies constituted under the Hospitals and Health Services Act 1927.

(9) Where an Employee has been redeployed at the direction of a Western Australian Public Sector Employer, 3 years continuous service for the purposes of subclauses (7) of this Clause shall be calculated including the service with such previous employer or employers.

(10) An employee who resigns having not qualified to be paid pro-rata long service leave in accordance with subclause (8) shall, subject to subclause (12), be entitled to payment for accrued long service leave only.

(11) An employee who is dismissed, shall not be entitled to long service leave or payment for long service leave other than leave that had accrued to the employee prior to the date of the offence for which the employee is dismissed provided that an employee who is dismissed through no fault of his/her own and who having completed at least 15 years continuous service, calculated in accordance with the provisions of this Clause, and having completed at least three years continuous service, calculated in accordance with the provisions of this Clause, with Kununoppin & Districts Health Service immediately prior to dismissal shall, in addition to any accrued long service leave be paid pro-rata long service leave.

(12) A lump sum payment for long service leave accrued in accordance with this clause and for pro-rata long service leave shall be made in the following cases—

(a) To an employee who retires at or over the age of fifty-five years or who has retired on the grounds of ill health, provided that no payment shall be made for pro-rata long service leave unless the employee has completed not less than twelve months' continuous service.

(b) To an employee who has retired for any other cause: Provided that no payment shall be made for pro-rata long service leave unless the employee had completed not less than three years' continuous service before the date of his/her retirement.

(c) To the widow or widower of an employee or such other person as may be approved by the employer in the event of the death of an employee: Provided that no payment shall be made for pro-rata long service leave unless the employee had completed not less than twelve months' continuous service prior to the date of his/her death.

(13) A calculation of the amount due for long service leave accrued and for pro-rata long service leave shall be made at the rate of salary of an employee at the date of retirement, resignation or death, whichever applies and no such payment shall exceed the equivalent of twelve months' salary.

(14) Long service leave accrued prior to the issue of the Hospital Salaried Officers Award No. 39 of 1968 shall remain to the credit of each employee.

(15) Subject to the provisions of subclauses (6), (10), (11), (12) and (16) of this clause, the service of an employee shall not be deemed to have been broken—

(a) by resignation, where he/she resigned from the employment of an employer a party to the Award and commenced with another employer a party to the Award within one working week of the expiration of any period for which payment in lieu of annual leave or holidays has been made by an employer party to the Award from whom he/she resigned or, if no such payment has been made, within one working week of the day on which his/her resignation became effective;

(b) if his/her employment was ended by his/her employer who is party to the Award, for any reason other than misconduct or unsatisfactory service but only if—

(i) the employee resumed employment with an employer party to the Award not later than six months from the day on which his/her employment ended; and

(ii) payment pursuant to subclause (11) of this clause has not been made; or

(c) by any absence approved by the employer as leave whether with or without pay.

(16) The expression "continuous service" in this clause includes any period during which an employee is absent on full pay or part pay, from his/her duties with any employer party to the Award, but does not include—

(a) any cumulative period exceeding two weeks in any one anniversary year during which the employee is absent on leave without pay;

(b) Any service of the employee who resigns or is dismissed, other than service prior to such resignation or to the date of any offence in respect of which the employee is dismissed when such prior service has actually entitled the employee to long service leave, including pro-rata long service leave, under this clause.

(17) Portability

(a) Where an employee was, immediately prior to being employed by Kununoppin & Districts Health Service, employed in the service of—

- The Commonwealth of Australia, or
- Any other State Government of Australia, or
- Any Western Australian State public sector or state government employer,

and the period between the date when the employee ceased previous employment and the date of commencing employment by a respondent to this Agreement does not exceed one week, that employee shall be entitled to long service leave determined in the following manner—

(i) the pro rata portion of long service leave to which the employee would have been entitled up to the date of appointment under the Public Sector Management Act, shall be calculated in accordance with the provisions that applied to the previous employment referred to, but in calculating that period of pro rata long service leave, any long service leave taken or any benefit granted in lieu of any such long service leave during that employment shall be deducted from any long service leave to which the employee may become entitled under this clause; and

(ii) the balance of the long service leave entitlement of the employee shall be calculated upon appointment by a respondent to this Agreement in accordance with the provisions of this clause.

(b) Nothing in this clause confers or shall be deemed to confer on any employee previously employed by the Commonwealth or by any other State of Australia any entitlement to a complete period of long service leave that accrued in the employee's favour prior to the date on which the employee commenced with Kununoppin & Districts Health Service.

(18) At the request of the employee and with the agreement of the employer, an employee faced with pressing personal needs, may be paid in lieu of taking a portion of long service leave.

18.—SICK LEAVE

This provision replaces subclause (7) of Clause 18.—Sick Leave of the Hospital Salaried Officers Award No. 39 of 1968.

The basis for the cumulative accrual of sick leave shall be—

		Leave On Full Pay Working Days
(a)	On date of employment of the employee	5
(b)	On completion by the employee of six months' service	5
(c)	On completion by the employee of twelve months' service	10
(d)	On completion of each additional twelve months' service by the employee	10

Provided that where an employee has accrued sick leave on half days pay prior to the date upon which this Agreement comes into effect those accrued half days shall be converted to the equivalent of full days sick leave and shall remain to the employee's credit until such time as they may be taken.

19.—FAMILY, BEREAVEMENT AND PERSONAL LEAVE

This clause replaces Clause 17.—Short Leave of the Hospital Salaried Officers Award No. 39 of 1968.

(1) Family Leave

(a) In this subclause "family member" means the employee's spouse, defacto spouse, child, step child, parent, step parent. This entitlement will also apply to another person who lives with the employee as a member of the employee's family.

(b) The employee is entitled to use up to 38 hours of his/her personal accrued sick leave to care for an ill family member each year, providing the employee must maintain a minimum of 10 days of sick leave available for personal use in each year. Subject to subclause (e), all family leave taken is deducted from the employee's sick leave entitlement.

(c) Family leave is not cumulative from year to year.

(d) Medical certificate requirements are as per those for Sick Leave under the Award.

(e) Where an employee has insufficient accrued sick leave, by mutual agreement, up to five days of annual leave may be used for the purpose of family leave.

(2) Bereavement Leave

(a) An employee shall on the death of—

(i) the spouse of the employee;

(ii) the child or step-child of the employee;

(iii) the parent or step-parent of the employee;

(iv) the brother, sister, step brother or step sister; or

(v) any other person, who immediately before that person's death, lived with the employee as a member of the employee's family,

be eligible for up to two (2) days bereavement leave, provided that at the request of an employee the employer may exercise a discretion to grant bereavement leave to an employee in respect of some other person with whom the employee has a special relationship.

(b) The 2 days need not be consecutive.

(c) Bereavement leave is not to be taken during any other period of leave.

(d) An employee who claims to be entitled to paid leave under paragraph (a) of this subclause is to provide to the employer, if so requested, evidence that would satisfy a reasonable person as to—

(i) the death that is the subject of the leave sought; and

(ii) the relationship of the employee to the deceased person.

(e) An employee requiring more than two days bereavement leave in order to travel overseas in the event of the death overseas of a member of the employees immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the employee is eligible, have immediate access to annual leave and/or accrued long service leave in weekly multiples and/or leave without pay provided all accrued leave is exhausted.

(3) Special Personal Leave

(a) Without Pay

The employer may upon the request of an employee, grant that employee special leave without pay for any special or personal reason.

(b) Use of Annual Leave

The employer may, upon the request of an employee and with sufficient cause being shown, which may in the circumstances be with little notice, grant that employee single days of annual leave for pressing personal emergencies.

20.—ALLOWANCES

(1) Where an employee subject to this Agreement is paid an allowance as provided under the Hospital Salaried Officers Award No. 39 of 1968, which is calculated as a percentage of a salary rate prescribed by that Award, the allowance shall for the life of this Agreement, now be calculated using the salary rates as prescribed at Clause 22.—Salaries of this Agreement.

21.—OVERPAYMENTS

(1) Where an employee is paid for work not subsequently performed or is overpaid in any other manner, the employer is entitled to make adjustment to the subsequent wages or salaries of the employee.

(2) One-off Overpayments

Subject to subclauses (4) and (5), one-off overpayments may be recovered by the employer in the pay period immediately following the pay period in which the overpayment was made, or in the period immediately following the pay period in which it was discovered that overpayment has occurred.

(3) Cumulative Overpayments

Subject to subclauses (4) and (5), cumulative overpayments may be recovered by the employer at a rate agreed between the employer and the employee, provided that the rate at which the overpayment is recovered is not at a lesser rate than the rate at which it was overpaid or $50 per week, depending on which is the lesser amount per pay period.

(4) In exceptional circumstances, other arrangements for the recovery of overpayments may be agreed between the employer and the employee.

(5) the employer is required to notify the employee of their intention to recoup overpayment and to consult with the employee as to the appropriate recovery rate.

22.—SALARIES

This clause replaces Schedule A—Minimum Salaries of the Hospital Salaried Officers Award No. 39 of 1968.

(1) Subject to the provision of Clause 9.—Salaries of the Award and to the provisions of this Clause the minimum annual salaries for employees bound by this Agreement are set in this Clause and shall apply from date of registration until the expiry of this Agreement.

(2) Minimum Salaries are detailed as follows. The rates of pay have been adjusted to reflect the increase in Clause 10 of the Agreement and represent full and final settlement of wage adjustments provided for in this Agreement.

LEVELS	Award Rate + 2 ASNA + 5% + 2% effective prior to date of registration Salary P/Annum	Award Rate + 2 ASNA +5% + 2% + 5% effective from date of registration Salary P/Annum
LEVEL 1		
under 17 years of age	11,654	12,237
17 years of age	13,609	14,289
18 years of age	15,886	16,680
19 years of age	18,387	19,306
20 years of age	20,649	21,681
1st year of full-time equivalent adult service	22,682	23,816
2nd year of full-time equivalent adult service	23,382	24,551
3rd year of full-time equivalent adult service	24,078	25,282
4th year of full-time equivalent adult service	24,772	26,011
LEVEL 2	25,469	26,742
	26,167	27,475
	26,969	28,317
	27,524	28,900
	28,343	29,760
LEVEL 3	29,311	30,777
	30,064	31,567
	30,856	32,399
	32,118	33,724
LEVEL 4	32,779	34,418
	33,770	35,459
	34,788	36,527
	36,235	38,047
LEVEL 5	36,989	38,838
	38,025	39,926
	39,090	41,045
	40,187	42,196
LEVEL 6	42,299	44,414
	43,867	46,060
	46,095	48,400
LEVEL 7	47,287	49,651
	48,797	51,237
	50,362	52,880
LEVEL 8	52,648	55,280
	54,522	57,248
LEVEL 9	57,358	60,226
	59,331	62,298
LEVEL 10	61,491	64,566
	64,966	68,214
LEVEL 11	67,741	71,128
	70,563	74,091
LEVEL 12	74,432	78,154
	77,047	80,899
	80,028	84,029
CLASS 1	84,537	88,764
CLASS 2	89,046	93,498
CLASS 3	93,553	98,231
CLASS 4	98,062	102,965

(a) An employee, who is 21 years of age or older on appointment to a classification equivalent to Level 1, may be appointed to the minimum rate of pay based on years of service, not on age.

(b) A Medical Typist or Medical Secretary shall be paid a medical terminology allowance of $1000 per annum.

For the purposes of this subclause 'Medical Typist' and 'Medical Secretary' shall mean those workers classified on a classification equivalent to Level 1,2, or 3 who spend at least 50% of their time typing from tapes, shorthand, and/or Doctor's notes of case histories, summaries, reports or similar material involving a broad range of medical terminology.

(3) Salaries.—Specified Callings and Other Professionals are detailed as follows. The rates of pay have been adjusted to reflect the increases in Clause 10 of the Agreement, and represent full and final settlement of wage adjustments provided for in this Agreement.

(a) Employees, who possess a relevant tertiary level qualification, or equivalent as agreed between the union and the employers, and who are employed in the callings of Architect, Audiologist, Bio Engineer, Chemist, Dietitian, Engineer, Medical Scientist, Librarian, Occupational Therapist, Physiotherapist, Physicist, Pharmacist, Clinical Psychologist, Psychologist, Research Officer, Scientific Officer, Social Worker, Speech Pathologist, Podiatrist, Medical Imaging Technologist, Nuclear Medicine Technologist, Radiation Therapist, Orthotist, or any other professional calling as agreed between the Union and employers, shall be entitled to Annual Salaries as follows—

LEVELS	Award Rate + 2 ASNA + 5% + 2% effective prior to date of registration Salary P/Annum	Award Rate + 2 ASNA +5% + 2% + 5% effective date of registration Salary P/Annum
LEVEL 3/5	29,311	30,777
	30,856	32,399
	32,779	34,418
	34,788	36,527
	38,025	39,926
	40,187	42,196
LEVEL 6	42,299	44,414
	43,867	46,060
	46,095	48,400
LEVEL 7	47,287	49,651
	48,797	51,237
	50,362	52,880
LEVEL 8	52,648	55,280
	54,522	57,248
LEVEL 9	57,358	60,226
	59,331	62,298
LEVEL 10	61,491	64,566
	64,966	68,214
LEVEL 11	67,741	71,128
	70,563	74,091
LEVEL 12	74,432	78,154
	77,047	80,899
	80,028	84,029
CLASS 1	84,537	88,764
CLASS 2	89,046	93,498
CLASS 3	93,553	98,231
CLASS 4	98,062	102,965

(b) Subject to paragraph (d) of this sub clause, on appointment or promotion to the Level 3/5 under this sub clause—

(i) Employees, who have completed an approved three academic year tertiary qualification, relevant to their calling, shall commence at the first year increment;

(ii) Employees, who have completed an approved four academic year tertiary qualification, relevant to their calling, shall commence at the second year increment;

(iii) Employees, who have completed an approved Masters or PhD Degree relevant to their calling shall commence on the third year increment;

Provided that employees who attain a higher tertiary level qualification after appointment shall not be entitled to any advanced progression through the range.

(c) The employer and union shall be responsible for determining the relevant acceptable qualifications for appointment for the callings covered by this sub clause and shall maintain a manual setting out such qualifications.

(d) The employer in allocating levels pursuant to paragraph (b) of this sub clause may determine a commencing salary above Level 3/5 for a particular calling/s.

(4) The following conditions shall apply to employees in the callings detailed below—

Engineers—

Employees employed in the calling of Engineer and who are classified Level 3/5 under this Agreement shall be paid a minimum salary at the rate prescribed for the maximum of Level 3/5 where the employee is an "experienced engineer" as defined.

For the purposes of this paragraph "experienced engineer" shall mean—

(a) An engineer appointed to perform professional engineering duties and who is a Corporate Member of The Institution of Engineers, Australia, or who attains that status during service.

(b) An engineer appointed to perform professional duties who is not a Corporate Member of the Institution of Engineers, Australia but who possesses a degree or diploma from a University, College, or Institution acceptable to the employer on the recommendation of the Institution of Engineers, Australia, and who—

(i) having graduated in a four or five academic year course at a University or Institution recognised by the employer, has had four years experience on professional engineering duties acceptable to the employer since becoming a qualified engineer, or

(ii) not having a University degree but possessing a diploma recognised by the employer, has had five year's experience on professional engineering duties, recognised by the employer since becoming a qualified engineer.

(5) The rates of pay in this Agreement include the first $8.00 per week arbitrated safety net adjustment payable under the December, 1994 State Wage Decision. This first $8.00 per week arbitrated safety net adjustment may be offset to the extent of any wage increase as a result of agreements reached at enterprise level since 1 November, 1991. Increases made under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

(6) The rates of pay in this Agreement include the second $8.00 per week arbitrated safety net adjustment payable under the December 1994 State Wage Decision. This second $8.00 per week arbitrated safety net adjustment may be offset to the extent of any wage increase payable since 1 November, 1991, pursuant to enterprise agreements in so far as that wage increase has not previously been used to offset an arbitrated safety net adjustment. Increases made under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from Enterprise Agreements, are not to be used to offset arbitrated safety net adjustments.

The first and second arbitrated safety net increases have, for the purposes of this agreement been offered against past productivity improvements.

The third arbitrated safety net adjustment has been absorbed.

23.—RATIFICATION

The signatories that follow testify to the fact that this Agreement shall come into effect as of the date of registration.

Michael Hartland

Signed *Union Seal* 12/12/97
(Signature) (Date)

President, for and on behalf of the Hospital Salaried Officers Association of Western Australia (Union of Workers)

Daniel P Hill

Signed *Union Seal* 11/12/97
(Signature) (Date)

Secretary, for and on behalf of the Hospital Salaried Officers Association of Western Australia (Union of Workers)

Peter Lisacek

Signed 10 Dec 97
(Signature) (Date)

General Manager for and on behalf of the Board of Management of Kununoppin & Districts Health Service Board.

ATTACHMENT 1—MODEL FOR IDENTIFYING PRODUCTIVITY INCREASES

The following model is to be used as a guide only and it is expected that it will be modified to meet the needs of Kununoppin & Districts Health Service as required.

A Model for Identifying Productivity Increases

The primary focus of Enterprise Bargaining in the workplace will be on best practice, efficiency, effectiveness, competitiveness and cost saving.

Employees to focus on the following areas—

- Productivity Improvements which can be made: Identification of all possibilities for improving productivity through looking at possible changes in what work is done, how the work is done, who does the work, who could better do the work, when the work is done, whether the work should be done (ie. whether a particular task can be performed less often and still achieve a satisfactory output) possibilities for multi-skilling and opportunities to reduce costs (including financial costs) and reduce waste.
- Barriers to Productivity Improvements: Identification of any significant barriers to improving productivity, such as, need for training, need for equipment, problems with computer programs, demarcation problems and arguments about who should do what, award constraints, information or guidelines problems, problems in regard to supervision, whether too much or not enough, or of poor quality, opportunities and barriers to self management, physical barriers such as the location of various functions which interact with each other and barriers to communication.

Employers, in consultation with their Employees, to focus on all of the above plus macro issues impacting on productivity—

- Structural Matters: Management may need to look at the structures within which the work is done and how they can be improved upon.
- Management Style: Management style and its appropriateness may need to be examined at both an organisational and departmental level.
- Best Practice, Benchmarking, Continuous Improvement and New Opportunities: Initiatives in these areas will in general need to be initiated by management. This is an important area given that one of its outcomes should be improved competitiveness.

  Where barriers to competitiveness beyond the control of the employer/health service are identified, these should be drawn to the attention of the Health Department so that they can be addressed on an industry basis.
- Culture and Environment: Management culture and organisational culture may need to be examined in light of the overall direction of health management and where appropriate programs and training be introduced to address any identified problems.

Quality of Employment—Issues to be Examined by Both Employees and Employers—

This area does not necessarily impact on productivity, as such, but may have a positive impact financially and/or an improvement in the non-wage rewards of employment and is therefore a very valuable, win-win, area for both employees and employers. Matters to be examined under this heading include, but are not confined to—

- Occupational Health and Safety

- Unplanned Absences
- Health and Welfare of the Workforce
- Family needs and other demands on workers: better ways to accommodate and acknowledge these without losing focus on the main objectives in regard to responsibility for service to the employer.
- Use of Leave
- Equal Opportunity
- Career paths, including access to special project work, providing opportunities for development and recognition
- Employee Recognition, through feedback, support, acknowledgment, enablement, empowerment, consultation and non-financial rewards
- Training and Development
- Equity Issues

MACORNA INDUSTRIAL AGREEMENT.
No. AG 36 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Other

and

Macorna Pty Ltd.

AG 36 of 1999.

Macorna Industrial Agreement.

COMMISSIONER S J KENNER.

13 April 1999.

Order.

HAVING heard Mr G Giffard on behalf of the applicant and there being no appearance on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Macorna Industrial Agreement as filed in the Commission on 9 March 1999 be and is hereby registered as an industrial agreement.

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

WAGE AGREEMENT

Schedule.

1.—TITLE

This Agreement will be known as the Macorna Industrial Agreement.

2.—ARRANGEMENT

3.—AREA AND PARTIES BOUND

This is an Agreement between The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers and the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch (hereinafter referred to as the "Unions") and Macorna Pty Ltd (hereinafter referred to as the "Company") in the State of Western Australia.

4.—APPLICATION

This Agreement shall be binding upon the Company, the Unions, its officers and members, and any person eligible to be members of the Unions employed by the Company on work covered by the terms of the Building Trades (Construction) Award 1987, No. 14 of 1978 (the "Award"). There are approximately five (5) employees covered by this agreement.

5.—DURATION

This Agreement shall commence from the first pay period on or after the date of signing and shall continue in effect until 31 October 1999.

The parties agree to commence discussion on the terms and conditions of any future agreement three calendar months prior to the expiration of this Agreement.

6.—DISPUTE SETTLEMENT PROCEDURE

In relation to any questions, disputes or difficulties arising out of the operation of this Agreement the dispute settlement procedure that shall apply shall be in the same terms as that outlined in the Clause 46 Settlement of Disputes and Appendix – Resolution of Disputes Requirements of the Award.

7.—SINGLE ENTERPRISE

It is agreed that this Agreement applies in respect of a single enterprise as defined in Clause 41A(2) of the WA Industrial Relations Act 1979, as amended (the "Act").

8.—RELATIONSHIP WITH AWARDS

This Agreement shall be read wholly in conjunction with the Award. Where this Agreement is silent on rates of pay and other matters pertaining to the employment relationship, the Award shall apply. Where there is conflict between the rates of pay, conditions, allowances and other matters in this Agreement and the Award the higher rate shall apply.

9.—ENTERPRISE AGREEMENT

It is agreed that in the event of the Unions and the Company agreeing on the terms of a comprehensive enterprise agreement, this Agreement may be terminated in accordance with the requirements of the Act.

10.—WAGE INCREASE

This Agreement provides for increases in the hourly rate and allowances resulting in the wage rates in Appendix A—Wage Rates.

11.—SITE ALLOWANCE

This Agreement provides for site allowances as per Appendix C—Site Allowance.

12.—INDUSTRY STANDARDS

1. **Redundancy**

It is a term of this Agreement that the Company will immediately increase its payments to $50 per week per employee into the Western Australian Construction Industry Redundancy Fund.

2. **Superannuation**

(i) The Company will immediately increase its level of payment to $60 per week per employee or 7% of Ordinary Time earnings, whichever is the greater.

The Company will advise all employees subject to the Agreement of their right to have payments made to a complying superannuation fund of their choice. The Company is bound by the employee's election. The aforementioned payment will then be made to that fund.

Until each employee nominates the fund of their choice the Company will make payments into the Construction + Building Unions Superannuation Scheme (the "C+BUSS").

In the event that any employee chooses a fund other than the C+BUSS the Company will, within seven days of the employee advising the Company of the fund of their choice, advise the Union in writing of the employee's decision.

In the event that the employee and the Company reach an agreement pursuant to section 49C(2)(d) of the Act to change the complying superannuation fund or scheme the Company will, within seven days of the employee and the Company reaching such an agreement, advise the Union in writing of the agreement. The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by the employee.

(ii) "Ordinary Time Earnings" (which for the purposes of the Superannuation Guarantee (Administration) Act 1992 will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, industry allowance, trade allowances, shift loading, special rates, qualification allowances (eg. First aid, laser safety officer), multi-storey allowance, site allowance, asbestos eradication allowance, leading hand alowances, in chargeof plant allowance and supervisory allowances where applicable. The term includes any regular over-award pay as well as casual rates received and any additional rates and allowances paid for work undertaken during ordinary hours of work, excluding fares and travel and other reimbursement allowances.

3. **Apprentice Rates**

The Company agrees to maintain a ratio of no more than six tradespeople to one apprentice employed.

13.—CLOTHING AND FOOTWEAR

1. The following items will be supplied to each employee by the Company, upon the completion of five working days.

(a) 1 pair safety boots, and will be replaced on a fair wear and tear basis.

(b) 2 T-shirts with collars, and will be replaced on a fair wear and tear basis.

(c) 1 bluey jacket for each employee employed during the period 1 April to 31 October. (One issued per year)

2. The Company will also make available to each employee, when requested by them, sun screen lotion and sun brims to fit over safety helmets.

14.—TRAINING ALLOWANCE, TRAINING LEAVE, RECOGNITION OF PRIOR LEARNING

1. A training allowance of $12.00 per week per worker shall be paid by the employer to the Union Education and Training Fund.

2. Subject to all qualifications in this clause, an employee shall, upon application in writing to and with approval of the employer, be granted leave with pay each calender year, pro-rata to attend courses conducted or approved by the NBCITC. The employer's approval shall not be unreasonably withheld.

The application for leave shall be given to the employer at least two weeks in advance of the date of commencement of the course.

The time of taking leave shall be arranged so as to minimise any adverse effect on the employer's operations. The onus shall rest with the employer to demonstrate an inability to grant leave where an employee is otherwise entitled.

An employer shall not be liable for any additional expenses associated with an employee's attendance at a course other than—

course fees
course books and materials
payment of ordinary time earnings for such absence.

For the purpose of this clause ordinary time earnings shall be defined as the agreement classification rate.

Leave of absence granted pursuant to this clause shall count as service for all purposes of this agreement.

3. The employer will actively encourage employees to seek formal recognition of their skills (recognition of prior learning), and will allow leave as per (2) above for such purposes including but not limited to securing Tradesmen's Rights Certificates.

15.—SENIORITY

1. The parties agree the continuity of employment is desirable wherever possible, and that where it is not possible, employees will be retrenched in order of seniority.

2. When applying the "first on last off" principle it is agreed subject to the caveat of "all things being equal", it is intended to apply on a state basis rather than a site by site basis.

3. It is recognised that from time to time instances may arise where the employee's individual skills may be subject to this caveat. Where there is any disagreement as to the application of this the matter will be processed in accordance with Clause 6—Dispute Settlement Procedure.

4. An employee who has been retrenched by the Company shall have absolute preference and priority for re-employment/re-engagement by the Company. Where an employee is re-engaged within a period of six months the employee shall maintain continuity of service and all accrued entitlements with the Company.

16.—SICK LEAVE

For sick leave accrued after the date of signing this agreement the following will apply—

(a) The Company's employees shall have the option of converting 100% of accrued sick leave entitlement to a cash payment on termination; or

(b) If an employee who has been terminated by the Company without exercising the above option is re-engaged within a period of six months, the unpaid balance of sick leave shall continue from the date of re-engagement.

17.—PYRAMID SUB-CONTRACTING

1. "Pyramid Sub-Contracting" is defined as the practice of a sub-contractor, to whom a sub-contract is originally awarded, sub-letting that contract or part thereof to another sub-contractor.

2. Provided that where a sub-contractor does not have the technical capacity to handle a specialist section of the contract and intends to engage a specialist sub-contractor to perform that work, that section may be re-let to a specialist sub-contractor.

3. Further provided that when a sub-contract is let for labour and material, a labour-only sub-contract may be let by the sub-contractor, but it is unacceptable as a principle for further labour-only sub-contracts to be re-let.

4. A bona fide sub-contractor is generally an employer of labour, save for a machine owner-operator.

5. Where a disagreement arises in relation to the definition or application of the term "Pyramid Sub-Contracting" the parties shall discuss and determine the issue in accordance with the agreement dispute resolution procedure. In any event of a disagreement, the matter shall be negotiated further between the parties or referred to the Western Australian Industrial Relations Commission. Whilst these procedures are undertaken no industrial action shall occur.

18.—FARES AND TRAVELLING

In addition to Clause 12A of the award a travel payment shall be made in the form of a daily payment (on days worked) of $6.15 per day per employee.

19.—DRUG AND ALCOHOL, SAFETY AND REHABILITATION PROGRAM

The parties are committed to the Drug and Alcohol, Safety and Rehabilitation program as outlined in Appendix B—Drug and Alcohol, Safety and Rehabilitation Program.

20.—INCOME PROTECTION

The Company agrees to insure employees covered by this Agreement for injury and sickness. The scheme is to be negotiated through the ACTU Insurance Broking Pty Limited (ACN. 069 795 875).

21.—NO EXTRA CLAIMS

The Union will make no further claims on the Company over conditions set out in this Agreement for the life of the Agreement.

Signed for and on behalf of—

The Unions: BLPPU

(Signed)

Date: 4/2/99

(Signed)

WITNESS

CMETU

(Signed)

Date: 4/2/99

(Signed)

WITNESS

The Company: *Company Seal*

(Signed)

SIGNATURE

Date: 18/12/98

PETER TESTER

PRINT NAME

(Signed)

WITNESS

APPENDIX A—WAGE RATES

	Date of Signing Hourly Rate $	1 February 1999 Hourly Rate $	1 August 1999 Hourly Rate $
Labourer Group 1	16.47	16.92	17.15
Labourer Group 2	15.90	16.34	16.56
Labourer Group 3	15.48	15.90	16.12
Plaster, Fixer	17.11	17.58	17.82
Painter, Glazier	16.73	17.19	17.42
Signwriter	17.09	17.56	17.80
Carpenter/Roofer	17.22	17.70	17.93
Bricklayer	17.05	17.52	17.75
Refractory Bricklayer	19.58	20.12	20.38
Stonemason	17.22	17.70	17.93
Rooftiler	16.92	17.38	17.62
Marker/Setter Out	17.72	18.21	18.46
Special Class T	17.95	18.45	18.69

APPRENTICE RATES

	Date of Signing Hourly Rate $	1 February 1999 Hourly Rate $	1 August 1999 Hourly Rate $
Plasterer, Fixer			
Year l	7.18	7.38	7.48
Year 2 (1/3)	9.42	9.68	9.81
Year 3 (2/3)	12.84	13.19	13.37
Year 4 (3/3)	15.06	15.48	15.69
Painter. Glazier			
Year l (.5/3/5)	7.03	7.22	7.32
Year 2 (1/3), (1.5/3.5)	9.20	9.45	9.58
Year 3 (2/3), (2.5/3.5)	12.55	12.89	13.06
Year 4 (3/3), (3.5/3.5)	14.73	15.13	15.33
Signwriter			
Year l (.5/3/5)	7.18	7.38	7.48
Year 2 (1/3), (1.5/3.5)	9.40	9.65	9.78
Year 3 (2/3), (2.5/3.5)	12.82	13.17	13.35
Year 4 (3/3), (3.5/3.5)	15.04	15.46	15.66
Carpenter			
Year l	7.24	7.44	7.54
Year 2 (1/3)	9.47	9.73	9.86
Year 3 (2/3)	12.92	13.27	13.45
Year 4 (3/3)	15.15	15.57	15.78
Bricklayer			
Year l	7.16	7.36	7.46
Year 2 (1/3)	9.37	9.63	9.76
Year 3 (2/3)	12.79	13.14	13.31
Year 4 (3/3)	15.00	15.41	15.62
Stonemason			
Year l	7.24	7.44	7.54
Year 2 (1/3)	9.47	9.73	9.86
Year 3 (2/3)	12.92	13.27	13.45
Year 4 (3/3)	15.15	15.57	15.78
Rooftiler			
6 months	9.65	9.91	10.04
2nd 6 months	10.61	10.90	11.04
Year 2	12.39	12.73	12.90
Year 3	14.54	14.94	15.14

APPENDIX B—DRUG AND ALCOHOL, SAFETY AND REHABILITATION PROGRAM

1. PRINCIPLE

People dangerously affected by alcohol, and/or drugs are a safety hazard to themselves and all other persons in the workplace.

2. FOCUS

- Site safety and the involvement of the site safety committee
- Peer intervention and support
- Rehabilitation

3. WORKPLACE POLICY

a) A person who is dangerously affected by drugs or alcohol will not be allowed to work until that person can work in a safe manner.

b) The decision on a person's ability to work in a safe manner will be made by the safety committee, or on projects with no safety committee, by a body of at least equal numbers of employee/employer representatives.

c) There will be no payment of lost time to a person unable to work in a safe manner

d) If this happens 3 times the worker shall be given a written warning and made aware of the availability of treatment/counselling. If the worker refuses help he/she may be transferred/dismissed the next time he/she is dangerously affected.

e) For the purposes of disciplinary action a warning shall be effective for a period of 12 months from the date of issue.

f) A worker having problems with alcohol and or other drugs—

- Will not be sacked if he/she is willing to get help.
- Must undertake and continue with the recommended treatment to maintain the protection of this program.
- Will be entitled to sick leave or leave without pay while attending treatment.

4. IMPLEMENTATION

To assist with the adoption and implementation with this policy the company will—

a) Clearly state its endorsement of the BTG Drug and Alcohol program and comply with it.

b) Provide access at an agreed time and venue for a representative of the BTG Drug and Alcohol Program to address a meeting of employees to discuss and endorse the program.

c) Authorise the attendance of appropriate company personnel eg. Safety delegate/officer, safety committee members, union delegate, consultative committee members(s) at the two hour BTG Drug and Safety in the Workplace training course.

APPENDIX C—SITE ALLOWANCE

1. This agreement is between the parties to this agreement and shall apply to construction work undertaken by principal contractors who are engaged in the commercial/industrial sector of the building industry in the state of Western Australia within a 50km radius of the Perth General Post Office.

2. This agreement provides for a site allowance to be paid to employees engaged on particular building projects, and for such site allowance to be paid in addition to the wage rates and allowances prescribed by the award as well as any industrial or certified agreements made in conjunction with the award which does not prescribe a site allowance.

3. The site allowance payable under this agreement is to be paid at a flat rate per hour for all hours worked to compensate for all special factors/disabilities on the project and in lieu of all award special rates, with the exception of rates relating to the lifting of heavy blocks, cleaning down brickwork and the use of explosive powered tools which will be payable to an employee when he/she encounters that particular disability.

4. Site Allowance Formula

At the commencement of a project the particular site allowance to apply shall be determined in accordance with the following formula—

4.1 Projects Located Within Perth C.B.D. (as defined)

New Work

Project Contractual Value		Site Allowance
Up to	$510,000	NIL
Above	$510,000 to $2.13m	$1.85
Above	$2.13m to $4.47m	$2.20
Over	$4.47m	$2.80

Renovations, Restorations and/or Refurbishment Work

Project Contractual Value		Site Allowance
Up to	$510,000	NIL
Above	$510,000 to $2.13m	$1.65
Above	$2.13m to $4.47m	$1.85
Over	$4.47m	$2.40

4.2 Projects Located Within West Perth (as defined)

New Work

Project Contractual Value		Site Allowance
Up to	$510,000	NIL
Above	$510,000 to $2.13m	$1.65
Above	$2.13m to $4.47m	$1.85
Over	$4.47m	$2.20

Renovations, Restorations and/or Refurbishment Work

Project Contractual Value		Site Allowance
Up to	$510,000	NIL
Above	$510,000 to $2.13m	$1.55
Above	$2.13m to $4.47m	$1.75
Over	$4.47m	$2.00

The site allowance on projects which are a combination of new and renovation work shall be governed by the majority of work involved. For example, where the majority of work is new work then the site allowance appropriate to new work shall be paid for all employees on the project.

4.3 Projects within 50 km radius of Perth G.P.O. but not including the C.B.D. or West Perth (as defined)

Project Contractual Value		Site Allowance
Up to	$1m	NIL
Above	$1m to $2.13m	$1.25
Above	$2.l3m to 5.89m	$1.55
Above	$5.89m to $11.77m	$1.80
Above	$11.77m to $24m	$2.00
Above	$24m to $59.4m	$2.30
Over	$59.4m	$2.50

"C.B.D.'—Central Business District shall mean the area bounded by the Swan River South, Swan River East to Nile Street running into Wittenoom Street, Hill Street to Royal Street, Royal Street to Lord Street, Lord Street to Newcastle Street, along Newcastle Street to the Freeway, the Freeway South to the Perth-Fremantle railway line, along the Perth-Fremantle railway line to Dyer Street, Dyer Street through to Havelock Street, Havelock Street to Kings Park Road, Kings Park Road to Fraser Avenue, Fraser Avenue projected through to the Swan River.

'West Perth"—shall mean the area contained within the boundaries formed by Thomas Street, Kings Park Road, Havelock Street, Dyer Street and the Perth-Fremantle railway line back to Thomas Street.

Boundary roads: If a road borders between two regions in which site allowances are to be paid as per this agreement, the parties confirm that one side of such a boundary road will be deemed to fall in one region and the other side of the boundary road will be deemed to fall in the other region. For example, the eastem side of Havelock Street will be in the 'CBD" and the western side of Havelock Street shall be in "West Perth".

"Project Contractual Value"—shall be deemed to mean the value of all tendered work which falls under the scope of the principal contractor's contract.

5. The site/project allowance and project contractual value detailed in this agreement shall be adjusted on 1 October each year by the total C.P.I. movements for Perth during the preceding four quarters ending 30 June and accordingly, the site allowance amounts shall be adjusted up or down to the nearest five cents.

6. Project contractual values shall be subject to review at any renewal of this agreement, but in any event shall not be adjusted by a percentage less than the total CPI movements for Perth during the preceding four quarters ending 30 June. Such adjustment being to the nearest $10,000.

7. The agreed site allowance once set pursuant to this agreement -shall be recorded in a site agreement to which the applicable principal contractor and the Union will be signatories. The level of allowance once nominated at the commencement of the project will continue without change until completion of the project.

8. It is acknowledged that on certain projects a site agreement may be entered into between the principal contactor and the building trades group of unions for that project that may include matters regularly addressed within the industry, such as, but not limited to, the following—

- Disputes Procedures
- Occupational Health and Safety Procedures
- Demarcation Procedure
- First Aid Provisions and On-Site Amenities

and the unions will not unreasonably refuse to continue to discuss such matters if raised by the principal contractor.

9. This agreement does not apply to resource development projects or civil and engineering projects.

10. Where a dispute arises as to the application of the terms of this agreement, if the issue cannot be resolved in discussions between the parties, it is agreed that the matter will be referred to the appropriate industrial tribunal for resolution without recourse to industrial action.

11. It is a term of this agreement that all site allowance agreements entered into prior to this date will be honoured by all parties and will continue to apply for the life of the particular project.

12. Where because of a condition of contract the principal contractor is required not to allow for a site allowance, before final application of this agreement, discussions will be held between the parties with a view to resolving any problems that may arise as a result of this situation.

13. Productivity Allowance

In return to increase productivity and/or timely completion of projects it is agreed that a productivity allowance of $1.00 per hour worked shall be paid toemployees engaged upon projects (new construction only) which exceed two stories in height or building where the structure exceeds 10 metres in height (excluding spires, flagpoles and the like).

14. Structural Frame Allowance

It is agreed that a structural frame allowance of $1.00 per hour all purpose shall be paid to all employees engaged upon projects (new construction only) which exceed two stories in height or building where the structure exceeds 10 metres in height (excluding spires, flagpoles and the like).

15. Provision of Canteen

It is agreed that a canteen accommodation shall be provided where a project exceeds $35 million in value and where the operation of the canteen is financially self supporting in respect of consumables. Canteen to come into operation when on site manning levels exceed 50 and to cease when manning levels reduce to below 50.

16. Provision of Nurse

It is agreed that a qualified nurse shall be engaged where the forecast long term staffing levels for a project exceed 100 (one hundred) or when actual numbers exceed 100 not withstanding that forecasts may have been below that level. The nurse shall commence duties when staffing levels reach (fifty) and shall terminate when levels reduce to 50 (fifty). The requirement for a provision of a nurse shall be waived if the project is adjacent to a hospital with a public emergency department.

17. This agreement shall only apply to building contracts entered into on or tendered for on or after 1 October 1997.

18. Application to Apprentices

The rates prescribed in this agreement shall apply to all apprentices commencing employment after 31 December 1997 in the same proportion as the percentage of a tradesperson's wage rate as prescribed by the appropriate award or Enterprise Bargaining Agreement, being

1st year	42%
2nd year	55%
3rd year	75%
4th year	88%

NEW FORCE CONSTRUCTION INDUSTRIAL AGREEMENT.

AG 44 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Other

and

New Force Construction Pty Ltd.

AG 44 of 1999.

New Force Construction Industrial Agreement.

COMMISSIONER S J KENNER.

23 April 1999.

Order.

HAVING heard Mr G Giffard on behalf of the applicant and there being no appearance on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the New Force Construction Industrial Agreement as filed in the Commission on 17 March 1999 be and is hereby registered as an industrial agreement.

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

WAGE AGREEMENT

Schedule.

1.—TITLE

This Agreement will be known as the New Force Construction Industrial Agreement.

2.—ARRANGEMENT

3.—AREA AND PARTIES BOUND

This is an Agreement between The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers and the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch (hereinafter referred to as the "Unions") and New Force Construction Pty Ltd (hereinafter referred to as the "Company") in the State of Western Australia.

4.—APPLICATION

This Agreement shall be binding upon the Company, the Unions, its officers and members, and any person eligible to be members of the Unions employed by the Company on work covered by the terms of the Building Trades (Construction) Award 1987, No. 14 of 1978 (the "Award"). There are approximately twelve (12) employees covered by this agreement.

5.—DURATION

This Agreement shall commence from the first pay period on or after the date of signing and shall continue in effect until 31 October 1999.

The parties agree to commence discussion on the terms and conditions of any future agreement three calendar months prior to the expiration of this Agreement.

6.—DISPUTE SETTLEMENT PROCEDURE

In relation to any questions, disputes or difficulties arising out of the operation of this Agreement the dispute settlement procedure that shall apply shall be in the same terms as that outlined in Clause 46 – Settlement of Disputes and Appendix – Resolution of Disputes Requirements of the Award.

7.—SINGLE ENTERPRISE

It is agreed that this Agreement applies in respect of a single enterprise as defined in Clause 41A(2) of the WA Industrial Relations Act 1979, as amended (the "Act").

8.—RELATIONSHIP WITH AWARDS

This Agreement shall be read wholly in conjunction with the Award. Where this Agreement is silent on rates of pay and other matters pertaining to the employment relationship, the Award shall apply. Where there is conflict between the rates of pay, conditions, allowances and other matters in this Agreement and the Award the higher rate shall apply.

9.—ENTERPRISE AGREEMENT

It is agreed that in the event of the Unions and the Company agreeing on the terms of a comprehensive enterprise agreement, this Agreement may be terminated in accordance with the requirements of the Act.

10.—WAGE INCREASE

This Agreement provides for increases in the hourly rate and allowances resulting in the wage rates in Appendix A—Wage Rates.

11.—SITE ALLOWANCE

This Agreement provides for site allowances as per Appendix C—Site Allowance.

12.—INDUSTRY STANDARDS

1. **Redundancy**

It is a term of this Agreement that the Company will immediately increase its payments to $50 per week per employee.

2. **Superannuation**

(i) The Company will immediately increase its level of payment to $60 per week per employee or 7% of Ordinary Time earnings, whichever is the greater.

The Company will advise all employees subject to the Agreement of their right to have payments made to a complying superannuation fund of their choice. The Company is bound by the employee's election. The aforementioned payment will then be made to that fund.

Until each employee nominates the fund of their choice the Company will make payments into the Construction + Building Unions Superannuation Scheme (the "C+BUSS").

In the event that any employee chooses a fund other than the C+BUSS the Company will, within seven days of the employee advising the Company of the fund of their choice, advise the Union in writing of the employee's decision.

In the event that the employee and the Company reach an agreement pursuant to section 49C(2)(d) of the Act to change the complying superannuation fund or scheme the Company will, within seven days of the employee and the Company reaching such an agreement, advise the Union in writing of the agreement. The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by the employee.

(ii) "Ordinary Time Earnings" (which for the purposes of the Superannuation Guarantee (Administration) Act 1992 will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, industry allowance, trade allowances, shift loading, special rates, qualification allowances (eg. First aid, laser safety officer), multistorey allowance, site allowance, asbestos eradication allowance, leading hand alowances, in chargeof plant allowance and supervisory allowances where applicable. The term includes any regular over-award pay as well as casual rates received and any additional rates and allowances paid for work undertaken during ordinary hours of work, excluding fares and travel and other reimbursement allowances.

3. **Apprentice Rates**

The Company agrees to maintain a ratio of no more than four tradespeople to one apprentice employed.

13.—CLOTHING AND FOOTWEAR

1. The following items will be supplied to each employee by the Company, upon the completion of five working days.

(a) 1 pair safety boots, and will be replaced on a fair wear and tear basis.

(b) 2 T-shirts with collars, and will be replaced on a fair wear and tear basis.

(c) 1 bluey jacket for each employee employed during the period 1 April to 31 October. (One issued per year)

2. The Company will also make available to each employee, when requested by them, sun screen lotion and sun brims to fit over safety helmets.

14.—TRAINING ALLOWANCE, TRAINING LEAVE, RECOGNITION OF PRIOR LEARNING

1. A training allowance of $12.00 per week per worker shall be paid by the employer to the Union Education and Training Fund.

2. Subject to all qualifications in this clause, an employee shall, upon application in writing to and with approval of the employer, be granted leave with pay each calender year, prorata to attend courses conducted or approved by the NBCITC. The employer's approval shall not be unreasonably withheld.

The application for leave shall be given to the employer at least two weeks in advance of the date of commencement of the course.

The time of taking leave shall be arranged so as to minimise any adverse effect on the employer's operations. The onus shall rest with the employer to demonstrate an inability to grant leave where an employee is otherwise entitled.

An employer shall not be liable for any additional expenses associated with an employee's attendance at a course other than—

course fees
course books and materials
payment of ordinary time earnings for such absence.

For the purpose of this clause ordinary time earnings shall be defined as the agreement classification rate.

Leave of absence granted pursuant to this clause shall count as service for all purposes of this agreement.

3. The employer will actively encourage employees to seek formal recognition of their skills (recognition of prior learning), and will allow leave as per (2) above for such purposes including but not limited to securing Tradesmen's Rights Certificates.

15.—SENIORITY

1. The parties agree the continuity of employment is desirable wherever possible, and that where it is not possible, employees will be retrenched in order of seniority.

2. When applying the "first on last off" principle it is agreed subject to the caveat of "all things being equal", it is intended to apply on a state basis rather than a site by site basis.

3. It is recognised that from time to time instances may arise where the employee's individual skills may be subject to this caveat. Where there is any disagreement as to the application of this the matter will be processed in accordance with Clause 6—Dispute Settlement Procedure.

4. An employee who has been retrenched by the Company shall have absolute preference and priority for re-employment/re-engagement by the Company. Where an employee is re-engaged within a period of six months the employee shall maintain continuity of service and all accrued entitlements with the Company.

16.—SICK LEAVE

For sick leave accrued after the date of signing this agreement the following will apply—

(a) The Company's employees shall have the option of converting 100% of accrued sick leave entitlement to a cash payment on termination; or

(b) If an employee who has been terminated by the Company without exercising the above option is re-engaged within a period of six months, the unpaid balance of sick leave shall continue from the date of re-engagement.

17.—PYRAMID SUB-CONTRACTING

1. "Pyramid Sub-Contracting" is defined as the practice of a sub-contractor, to whom a sub-contract is originally awarded, sub-letting that contract or part thereof to another sub-contractor.

2. Provided that where a sub-contractor does not have the technical capacity to handle a specialist section of the contract and intends to engage a specialist sub-contractor to perform that work, that section may be re-let to a specialist sub-contractor.

3. Further provided that when a sub-contract is let for labour and material, a labour-only sub-contract may be let by the sub-contractor, but it is unacceptable as a principle for further labour-only sub-contracts to be re-let.

4. A bona fide sub-contractor is generally an employer of labour, save for a machine owner-operator.

5. Where a disagreement arises in relation to the definition or application of the term "Pyramid Sub-Contracting" the parties shall discuss and determine the issue in accordance with the agreement dispute resolution procedure. In any event of a disagreement, the matter shall be negotiated further between the parties or referred to the Western Australian Industrial Relations Commission. Whilst these procedures are undertaken no industrial action shall occur.

18.—FARES AND TRAVELLING

In addition to Clause 12A of the award a travel payment shall be made in the form of a daily payment (on days worked) of $6.15 per day per employee.

19.—DRUG AND ALCOHOL, SAFETY AND REHABILITATION PROGRAM

The parties are committed to the Drug and Alcohol, Safety and Rehabilitation program as outlined in Appendix B—Drug and Alcohol, Safety and Rehabilitation Program.

20.—INCOME PROTECTION

The Company agrees to insure employees covered by this Agreement for injury and sickness. The scheme is to be negotiated through the ACTU Insurance Broking Pty Limited (ACN. 069 795 875).

21.—NO EXTRA CLAIMS

The Union will make no further claims on the Company over conditions set out in this Agreement for the life of the Agreement.

Signed for and on behalf of—

The Unions:

BLPPU .....

Date: / /

.....
WITNESS

CMETU .....

Date: / /

.....
WITNESS

The Company:

.....
SIGNATURE

Date: / /

Company Seal

.....
PRINT NAME

.....
WITNESS

APPENDIX A—WAGE RATES

	Date of Signing Hourly Rate $	1 August 1999 Hourly Rate $
Labourer Group 1	16.92	17.15
Labourer Group 2	16.34	16.56
Labourer Group 3	15.90	16.12
Plaster, Fixer	17.58	17.82
Painter, Glazier	17.19	17.42
Signwriter	17.56	17.80
Carpenter/Roofer	17.70	17.93
Bricklayer	17.52	17.75
Refractory Bricklayer	20.12	20.38
Stonemason	17.70	17.93
Rooftiler	17.38	17.62
Marker/Setter Out	18.21	18.46
Special Class T	18.45	18.69

APPRENTICE RATES

	Date of Signing Hourly Rate $	1 August 1999 Hourly Rate $
Plasterer, Fixer		
Year l	7.38	7.48
Year 2 (1/3)	9.68	9.81
Year 3 (2/3)	13.19	13.37
Year 4 (3/3)	15.48	15.69
Painter. Glazier		
Year l (.5/3/5)	7.22	7.32
Year 2 (1/3), (1.5/3.5)	9.45	9.58
Year 3 (2/3), (2.5/3.5)	12.89	13.06
Year 4 (3/3), (3.5/3.5)	15.13	15.33
Signwriter		
Year l (.5/3/5)	7.38	7.48
Year 2 (1/3), (1.5/3.5)	9.65	9.78
Year 3 (2/3), (2.5/3.5)	13.17	13.35
Year 4 (3/3), (3.5/3.5)	15.46	15.66
Carpenter		
Year l	7.44	7.54
Year 2 (1/3)	9.73	9.86
Year 3 (2/3)	13.27	13.45
Year 4 (3/3)	15.57	15.78
Bricklayer		
Year l	7.36	7.46
Year 2 (1/3)	9.63	9.76
Year 3 (2/3)	13.14	13.31
Year 4 (3/3)	15.41	15.62
Stonemason		
Year l	7.44	7.54
Year 2 (1/3)	9.73	9.86
Year 3 (2/3)	13.27	13.45
Year 4 (3/3)	15.57	15.78
Rooftiler		
6 months	9.91	10.04
2nd 6 months	10.90	11.04
Year 2	12.73	12.90
Year 3	14.94	15.14

APPENDIX B—DRUG AND ALCOHOL, SAFETY AND REHABILITATION PROGRAM

1. PRINCIPLE

People dangerously affected by alcohol, and/or drugs are a safety hazard to themselves and all other persons in the workplace.

2. FOCUS

- Site safety and the involvement of the site safety committee
- Peer intervention and support
- Rehabilitation

3. WORKPLACE POLICY

a) A person who is dangerously affected by drugs or alcohol will not be allowed to work until that person can work in a safe manner.

b) The decision on a person's ability to work in a safe manner will be made by the safety committee, or on projects with no safety committee, by a body of at least equal numbers of employee/employer representatives.

c) There will be no payment of lost time to a person unable to work in a safe manner

d) If this happens 3 times the worker shall be given a written warning and made aware of the availability of treatment/counselling. If the worker refuses help he/she may be transferred/dismissed the next time he/she is dangerously affected.

e) For the purposes of disciplinary action a warning shall be effective for a period of 12 months from the date of issue.

f) A worker having problems with alcohol and or other drugs—

- Will not be sacked if he/she is willing to get help.
- Must undertake and continue with the recommended treatment to maintain the protection of this program.
- Will be entitled to sick leave or leave without pay while attending treatment.

4. IMPLEMENTATION

To assist with the adoption and implementation with this policy the company will—

a) Clearly state its endorsement of the BTG Drug and Alcohol program and comply with it.

b) Provide access at an agreed time and venue for a representative of the BTG Drug and Alcohol Program to address a meeting of employees to discuss and endorse the program.

c) Authorise the attendance of appropriate company personnel eg. Safety delegate/officer, safety committee members, union delegate, consultative committee members(s) at the two hour BTG Drug and Safety in the Workplace training course.

APPENDIX C—SITE ALLOWANCE

1. This agreement is between the parties to this agreement and shall apply to construction work undertaken by principal contractors who are engaged in the commercial/industrial sector of the building industry in the state of Western Australia within a 50km radius of the Perth General Post Office.

2. This agreement provides for a site allowance to be paid to employees engaged on particular building projects, and for such site allowance to be paid in addition to the wage rates and allowances prescribed by the award as well as any industrial or certified agreements made in conjunction with the award which does not prescribe a site allowance.

3. The site allowance payable under this agreement is to be paid at a flat rate per hour for all hours worked to compensate for all special factors/disabilities on the project and in lieu of all award special rates, with the exception of rates relating to the lifting of heavy blocks, cleaning down brickwork and the use of explosive powered tools which will be payable to an employee when he/she encounters that particular disability.

4. Site Allowance Formula

At the commencement of a project the particular site allowance to apply shall be determined in accordance with the following formula—

4.1 Projects Located Within Perth C.B.D. (as defined)

New Work

Project Contractual Value		Site Allowance
Up to	$520,000	NIL
Above	$520,000 to $2.17m	$1.90
Above	$2.17m to $4.55m	$2.25
Over	$4.55m	$2.85

Renovations, Restorations and/or Refurbishment Work

Project Contractual Value		Site Allowance
Up to	$520,000	NIL
Above	$520,000 to $2.17m	$1.70
Above	$2.17m to $4.55m	$1.90
Over	$4.55m	$2.45

4.2 Projects Located Within West Perth (as defined)

New Work

Project Contractual Value		Site Allowance
Up to	$520,000	NIL
Above	$520,000 to $2.17m	$1.70
Above	$2.17m to $4.55m	$1.90
Over	$4.55m	$2.45

Renovations, Restorations and/or Refurbishment Work

Project Contractual Value		Site Allowance
Up to	$520,000	NIL
Above	$520,000 to $2.17m	$1.60
Above	$2.17m to $4.55m	$1.80
Over	$4.55m	$2.05

The site allowance on projects which are a combination of new and renovation work shall be governed by the majority of work involved. For example, where the majority of work is new work then the site allowance appropriate to new work shall be paid for all employees on the project.

4.3 Projects within 50 km radius of Perth G.P.O.

but not including the C.B.D. or West Perth (as defined)

Project Contractual Value		Site Allowance
Up to	$1m	NIL
Above	$1m to $2.17m	$1.30
Above	$2.l7m to 6m	$1.60
Above	$6m to $11.98m	$1.85
Above	$11.98m to $24.43m	$2.05
Above	$24.43m to $60.5m	$2.35
Over	$60.5m	$2.55

"C.B.D.'—Central Business District shall mean the area bounded by the Swan River South, Swan River East to Nile Street running into Wittenoom Street, Hill Street to Royal Street, Royal Street to Lord Street, Lord Street to Newcastle Street, along Newcastle Street to the Freeway, the Freeway South to the Perth-Fremantle railway line, along the Perth-Fremantle railway line to Dyer Street, Dyer Street through to Havelock Street, Havelock Street to Kings Park Road, Kings Park Road to Fraser Avenue, Fraser Avenue projected through to the Swan River.

"West Perth"—shall mean the area contained within the boundaries formed by Thomas Street, Kings Park Road, Havelock Street, Dyer Street and the Perth-Fremantle railway line back to Thomas Street.

Boundary roads: If a road borders between two regions in which site allowances are to be paid as per this agreement, the parties confirm that one side of such a boundary road will be deemed to fall in one region and the other side of the boundary road will be deemed to fall in the other region. For example, the eastem side of Havelock Street will be in the 'CBD" and the western side of Havelock Street shall be in "West Perth".

"Project Contractual Value"—shall be deemed to mean the value of all tendered work which falls under the scope of the principal contractor's contract.

5. The site/project allowance and project contractual value detailed in this agreement shall be adjusted on 1 October each year by the total C.P.I. movements for Perth during the preceding four quarters ending 30 June and accordingly, the site allowance amounts shall be adjusted up or down to the nearest five cents.

6. Project contractual values shall be subject to review at any renewal of this agreement, but in any event shall not be adjusted by a percentage less than the total CPI movements for Perth during the preceding four quarters ending 30 June. Such adjustment being to the nearest $10,000.

7. The agreed site allowance once set pursuant to this agreement -shall be recorded in a site agreement to which the applicable principal contractor and the Union will be signatories. The level of allowance once nominated at the commencement of the project will continue without change until completion of the project.

8. It is acknowledged that on certain projects a site agreement may be entered into between the principal contactor and the building trades group of unions for that project that may include matters regularly addressed within the industry, such as, but not limited to, the following—

- Disputes Procedures
- Occupational Health and Safety Procedures
- Demarcation Procedure
- First Aid Provisions and On-Site Amenities

and the unions will not unreasonably refuse to continue to discuss such matters if raised by the principal contractor.

9. This agreement does not apply to resource development projects or civil and engineering projects.

10. Where a dispute arises as to the application of the terms of this agreement, if the issue cannot be resolved in discussions between the parties, it is agreed that the matter will be referred to the appropriate industrial tribunal for resolution without recourse to industrial action.

11. It is a term of this agreement that all site allowance agreements entered into prior to this date will be honoured by all parties and will continue to apply for the life of the particular project.

12. Where because of a condition of contract the principal contractor is required not to allow for a site allowance, before final application of this agreement, discussions will be held between the parties with a view to resolving any problems that may arise as a result of this situation.

13. Productivity Allowance

In return to increase productivity and/or timely completion of projects it is agreed that a productivity allowance of $1.00 per hour worked shall be paid toemployees engaged upon projects (new construction only) which exceed two stories in height or building where the structure exceeds 10 metres in height (excluding spires, flagpoles and the like).

14. Structural Frame Allowance

It is agreed that a structural frame allowance of $1.00 per hour all purpose shall be paid to all employees engaged upon projects (new construction only) which exceed two stories in height or building where the structure exceeds 10 metres in height (excluding spires, flagpoles and the like).

15. Provision of Canteen

It is agreed that a canteen accommodation shall be provided where a project exceeds $35 million in value and where the operation of the canteen is financially self supporting in respect of consumables. Canteen to come into operation when on site manning levels exceed 50 and to cease when manning levels reduce to below 50.

16. Provision of Nurse

It is agreed that a qualified nurse shall be engaged where the forecast long term staffing levels for a project exceed 100 (one hundred) or when actual numbers exceed 100 not withstanding that forecasts may have been below that level. The nurse shall commence duties when staffing levels reach (fifty) and shall terminate when levels reduce to 50 (fifty). The requirement for a provision of a nurse shall be waived if the project is adjacent to a hospital with a public emergency department.

17. This agreement shall only apply to building contracts entered into on or tendered for on or after 1 January 1999.

18. Application to Apprentices

The rates prescribed in this agreement shall apply to all apprentices commencing employment after 31 December 1997 in the same proportion as the percentage of a tradesperson's wage rate as prescribed by the appropriate award or Enterprise Bargaining Agreement, being

1st year	42%
2nd year	55%
3rd year	75%
4th year	88%

OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS ENTERPRISE BARGAINING AGREEMENT 1999.

No. PSAAG 13 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer Office of Director of Public Prosecutions.

No. PSAAG 13 of 1999.

Office of Director of Public Prosecutions Enterprise Bargaining Agreement 1999.

15 April 1999.

Order.

HAVING heard Ms K F Franz for the Applicant and Mr J A Lange on behalf of Respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the agreement made between the parties as lodged in the Commission on the 29th day of March, 1999 entitled Office of Director of Public Prosecutions Enterprise Bargaining Agreement 1999 and as subsequently amended by direction of the Commission in the terms of the following Schedule be registered as an industrial agreement in replacement of the Office of Director of Public Prosecutions Enterprise Agreement 1996 (PSAAG 9 of 1996) which is hereby cancelled.

(Sgd.) G. L. FIELDING,
[L.S.] Senior Commissioner.

Schedule.

1.—TITLE

This Agreement shall be known as the Office of Director of Public Prosecutions Enterprise Bargaining Agreement 1999 and shall replace the Office of Director of Public Prosecutions Enterprise Agreement 1996.

2.—ARRANGEMENT

3.—SCOPE

This Enterprise Bargaining Agreement shall apply to all Office of Director of Public Prosecutions employees (including employees who may be appointed to the Senior Executive Service) working in the Office of Director of Public Prosecutions who are members of or eligible to be members of the Union party to this Agreement.

4.—PARTIES TO THE AGREEMENT

This Agreement is made between the Office of Director of Public Prosecutions and the Civil Service Association of Western Australia Inc.

5.—NUMBER OF EMPLOYEES COVERED

As at the date of registration the approximate number of employees covered by this Agreement is 103.

6.—DEFINITIONS

In this Agreement, the following terms shall have the following meanings.

"Agreement" means The Office of Director of Public Prosecutions Enterprise Bargaining Agreement 1999.

"Chief Executive Officer" means the Director of Public Prosecutions.

"DPP" means Office of Director of Public Prosecutions

"Employee" means for the purposes of this Agreement, someone who is referred to at Clause 3—Scope.

"Employer" means the Director of Public Prosecutions

"Government" means the State Government of Western Australia

"PSA" means Public Service Award 1992

"Union" means Civil Service Association of Western Australia Inc.

"WAIRC" means The Western Australian Industrial Relations Commission

7.—DATE AND OPERATION OF AGREEMENT

1. This Agreement shall operate from the date of registration and shall remain in force for 2 years.

2. During the life of the Agreement the parties will continue to address a range of issues and reforms specifically aimed at increasing productivity. The parties agree that these issues will form the basis of future negotiations.

3. The pay quantum achieved as a result of this Agreement will remain and form the new base pay rates for future Agreements or continue to apply in the absence of a further Agreement, except where the Award salary rate is higher in which case the Award salary rate shall apply.

4. The Agreement will continue in force after the expiry of the term until such time as any of the parties withdraws from the Agreement by notification in writing to the other party and to the WAIRC or replaces this Agreement with a subsequent Agreement.

8.—NO FURTHER CLAIMS

The parties to this Agreement undertake that for the duration of the Agreement there shall be no further salary or wage increases sought or granted except for those provided under the terms or this Agreement or provided for in National or State Wage Case Decisions.

This Agreement shall not operate so as to cause an employee to suffer a reduction in ordinary time earnings.

9.—SINGLE BARGAINING UNIT

This Agreement has been negotiated through a Single Bargaining Unit comprised of the Union and the employer.

10.—RELATIONSHIP TO PARENT AWARDS

This Agreement shall be read wholly in conjunction with the Public Service Award 1992. In the case of any inconsistencies, this Agreement shall have precedence to the extent of any inconsistencies. Where this Agreement is silent the Award shall apply.

11.—RE-OPEN NEGOTIATIONS

The parties agree to commence negotiations at least 6 months prior to the expiration of the period of this Agreement to negotiate a replacement Agreement.

12.—AVAILABILITY OF AGREEMENT

Every employee will be entitled to a copy of this Agreement. In addition, a copy or copies of this Agreement will be kept in an easily accessible place or places within the DPP, and the location of the copies will be communicated to all employees.

13.—DISPUTE RESOLUTION PROCEDURE

This dispute settlement procedure will apply to any questions, dispute or difficulties that arise under this Agreement—

1. The Union representative and /or the employee/s concerned shall discuss the matters with the immediate supervisor in the first instance. An employee may be accompanied by a Union representative.
2. If the matter is not resolved within 5 working days following the discussion in accordance with paragraph (1) the matter shall be referred by the Union representative or employee to the employer for resolution.
3. If the matter is not resolved within 5 working days of the Union representative's or employee's notification of the dispute to the employer, it may be referred by the Union or the employer to the WAIRC.

14.—OBJECTIVES AND PRINCIPLES

The shared objectives of the parties are—

1. To satisfy the requirements of clients and customers through the provision of a reliable, efficient and effective prosecution service.
2. To achieve the DPP's mission and improve productivity and efficiency in the DPP through ongoing improvements.
3. To promote the development of trust and motivation and to continue to foster enhanced employee relations.
4. To promote participative decision making processes and practices.
5. To promote increased satisfaction from jobs and secure employment opportunities.
6. To develop and pursue changes on a co-operative basis by using participative practices.

15.—PRODUCTIVITY MEASUREMENT

1. The parties agree that the measurement and monitoring of productivity improvements provides critical feedback on the performance of the DPP to management, employees and other relevant stakeholders.

2. The parties agree to assess organisational performance according to the extent to which the objectives of the DPP are being met. The parties agree that performance indicators assist in the attainment of corporate goals in the interests of clients, employees, the DPP and the government on behalf of the community.

16.—PRODUCTIVITY INITIATIVES

1. Since the expiration of the existing Agreement, the DPP has absorbed without additional resources a 9% net increase in the DPP's core work of new committals.

The first payment recognises the absorption of that net increase in core work since the expiration of the existing agreement to the settlement of the terms of this Agreement.

In addition, all full time employees engaged continuously since 27 October 1998 will be paid the sum of $400 on registration of the Agreement in recognition of productivity improvements which have been made since the settlement of the terms of the agreement.

The sum of $400 will be pro rata for part time employees and those employees who have commenced with the DPP after 27 October 1998.

2. The second payment will recognise the absorption of that net increase in core work for the 12 months from October 1998 and for the life of this Agreement

The second payment will also recognise the DPP's adoption of a policy reflecting the substance of the Policy "Jury Trials for Level 4/5 Prosecutors" dated 20 October 1998, contained at Schedule "C" to this Agreement.

3. The Employer will in consultation with the Union and employees maintain the continuous improvement process, the parties being committed to improving productivity by the most efficient use of existing resources, by way of reviewing management, and legal and clerical team structures.

17.—IMPLEMENTATION OF EBA INITIATIVES

1. The parties will develop an agreed process for the implementation of the initiatives outlined in this Agreement.

2. The parties agree to establish a Peak Forum to—

(a) monitor;

(b) review;

(c) have input into the progress of the implementation of the Agreement; and

(d) actively share information and consult on corporate strategic issues affecting the DPP's business operations.

3. The parties to the Peak Forum will consist of senior management and union representatives.

4. The employer will ensure that adequate resources are allocated to support the implementation of the initiatives as outlined in this Agreement in order to achieve the milestones.

5. Employees will not be disadvantaged by Government decisions or policies which impact directly on the achievement of milestones outlined in the Agreement.

18.—CONSULTATION

The parties are committed to working together to improve the business performance and working environment in the DPP. Whilst it is acknowledged by the parties that decisions will continue to be made by the employer, which is responsible and accountable to Government by statute for the effective and efficient operation of its business, the parties are committed to effective communication and agree, in particular, that—

1. Where the employer proposes to make changes likely to affect existing practices, working conditions or employment prospects of employees, the Union and employees affected shall be notified by the employer as early as possible.
2. Consultation with employees and the Union party to this Agreement on proposed changes to work organisation shall occur prior to final decisions being made.
3. Employees will be involved in contributing to the efficiency and effectiveness of their workplace.
4. In the context of this clause consultation shall mean information sharing and discussion on matters relevant to the decision making processes which shall be conducted in such a way as to enable the union and employees to contribute to the decision making process.
5. Failure to consult in the above manner will constitute a breach of the Agreement.

19.—SALARY INCREASES

1. Employees will receive the salary as contained in Schedule A of this Agreement.

2. Employees will receive a salary increase of 7% during the life of this Agreement paid as follows—

(a) The first payment of 3.5% from the date of registration of this Agreement, in recognition of productivity achieved since the expiration of the existing agreement to the present;

(b) The second payment of 3.5% 12 months from 27 October 1998, based upon the achievement of productivity initiatives as contained in Clause 16—Productivity Initiatives.

Employees will not be disadvantaged if targets are not achieved due to factors outside of their control.

20.—LEVEL 1 CLASSIFICATION

1. The parties agree that the adult Level one increment range will be reduced from 9 to 7 increment levels, as provided for in Schedule B, from the operative date of this Agreement.

2. All employees currently employed at Level 1 will progress to the nearest salary point in the new range that is not less than the salary that applied immediately prior to the registration of this Agreement.

21.—EMPLOYEE FUNDED EXTRA LEAVE

1. This clause entitles an employee to an additional 4 weeks leave per annum.

2. Upon application, an employee shall be entitled to receive 48 weeks salary spread over the full 52 weeks of the year. The employee will be entitled to take 4 weeks extra leave in addition to their normal leave entitlements.

3. The additional 4 weeks per year will not be able to be accrued. In the event that the employee cannot take the leave, his/her salary will be adjusted at the completion of the 12 month period to take account of the time worked during the year that was not included in salary.

4. The additional 4 weeks per year will not attract leave loading.

5. The employer will ensure that superannuation arrangements and taxation effects are fully explained to the employee by the relevant Authority and will put into place any necessary arrangements.

22—LONG SERVICE LEAVE

Long service leave entitlements will be as per the Award with the exception that long service leave may be accessed by employees in periods of not less than the equivalent of one week on full pay.

23—ANNUAL LEAVE

Annual leave entitlements are as per the Award with the exception that the Director may, subject to the DPP's operational requirements, approve an application for annual leave to be taken at half the normal rate of pay and hence for double the period of time.

24.—PAY-OUT OF ACCRUED LEAVE

An employee may apply to receive payment rather than taking periods of accrued annual leave or accrued long service leave. Any such application may be approved, subject to the following criteria—

1. Availability of funds.
2. Ten days annual or long service leave must be taken in the calendar year for an application to be approved.
3. Payment in lieu of leave will not exceed the equivalent of 4 weeks annual leave and 13 weeks long service leave in any one calendar year. However, applications to have greater amounts of leave paid out will be considered where special circumstances exist.
4. The payment will be at the salary rate which would have been paid if the leave had been taken.
5. Applications are processed in order of receipt.

25.—HOURS OF DUTY

1. It is agreed that the provision of flexible working hours will take account of the requirement of the DPP to provide an effective prosecution service; the needs of clients and stakeholders and the preferences of employees.

2. The hours of work will be the same as per the Award with the following exceptions—

(a) Full-time employees will work an average of 37½ hours per week over a 4 week cycle of 150 hours. Part-time employees will work a pro rata amount of hours over a 4 week cycle.

(b) Flexi-leave will be available on an hourly basis up to a maximum of the number of credit hours available. With the Chief Executive Officer's approval an employee may, in exceptional circumstances, go into debit in taking flexi-leave.

(c) Flexi-leave can be taken in blocks of up to 4 days at a time subject to organisational convenience. Flexi-leave in blocks in excess of 2 days will require the Chief Executive Officer's approval.

(d) Flex-time and flexi-leave will be used in preference to overtime. Overtime will require the Chief Executive Officer's prior approval and such approval will only be given where flex-time is not practicable.

(e) At the end of the four week cycle the employee will have the option to clear any hours accrued in excess of 150 by receiving either—

(i) payment of excess hours at overtime rates; or

(ii) time-off in lieu of payment.

26.—CHILD CARE ARRANGEMENTS

1. The employer recognises the needs of employees with family responsibilities and the right to address those responsibilities without conflict between work and home.

2. The parties are committed to the introduction of conditions of work that assist employees with family responsibilities effectively discharge both responsibilities.

3. In consultation with the union, a needs analysis will be conducted during the term of this Agreement on the issue of

child care to ascertain the requirements of employees and make recommendations on the best way the DPP can assist employees access to high quality child care. The issues to be examined shall include but not be limited to—

(a) Provision of child care referral and information service.

(b) Reserved places in established child care centres and Family Day Care programmes.

(c) Assistance with care for sick dependants, work from home arrangements, provision of pagers, lap tops.

(d) Provision of family room on site for emergency child care, breastfeeding mothers etc.

(e) School holiday programmes, provision of or reserved places on programmes.

(f) Provision of before and after school care.

(g) Access to nanny service for urgent meetings conferences etc.

(h) After hours dependent care ie. reimbursement of child care costs.

27.—CEREMONIAL AND CULTURAL LEAVE

1. An employee covered by this agreement is entitled to time off without loss of pay for tribal, ceremonial or cultural purposes.

2. Such leave shall include leave to meet the employees' customs, traditional law and to participate in ceremonial and cultural activities.

3. Ceremonial and cultural leave may be taken as whole or part days off. Each day or part thereof, shall be deducted from short leave and/or annual leave entitlements.

4. The employer may request reasonable evidence of the legitimate need for the employee to be allowed time off.

5. Time off without pay may be granted by arrangement between the employer and employee for tribal, ceremonial or cultural purposes.

6. Ceremonial or cultural leave shall be available, but not limited to Aboriginal and Torres Strait Islanders.

28.—FAMILY LEAVE

1. For the purposes of this clause, the definition of family shall be the definition contained in the Equal Opportunity Act 1986, as amended from time to time, which presently includes a person who is related to the employee by blood, marriage, affinity, adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the employee.

2. An employee with responsibilities in relation to members of their household or immediate family shall be entitled to 5 days per annum family leave without loss of pay to provide care and support for such persons when they are ill or otherwise attend to urgent family responsibilities.

3. The employee shall elect family leave entitlements to be deducted from annual leave , accrued sick leave or short leave entitlements.

4. Family Leave may be taken as single day absences or part of a single day.

5. The employee shall, wherever practical, give the employer notice of the intention to take family leave and the estimated length of absence. If it is not practicable to give prior notice of absence the employee shall notify the employer as soon as possible on the day of absence.

6. The employee shall provide, where required by the employer, evidence to establish the requirement to take family leave.

29.—BEREAVEMENT LEAVE

An employee shall be entitled to up to 2 days paid bereavement leave in the event of the death of a family member. The 2 days need not be consecutive but cannot be taken during a period of any other kind of leave. A request for such leave must be made as soon as possible and include the expected time away from work. If requested, reasonable proof must be provided by the employee of the death and the relationship between the employee and the deceased.

30.—SHORT LEAVE

1. An employer may, upon sufficient cause being shown, grant an officer short leave on full pay not exceeding two consecutive working days, but any leave granted under the provisions of this clause shall not exceed, in the aggregate, 3 days in any one calendar year.

2. This leave may be used by an employee in order to attend to urgent personal business.

3. Short leave will be available on an hourly basis and all or part of the available leave may be taken for any one event.

4. Part-time employees are eligible for short leave in accordance with this clause, on a pro rata basis calculated in accordance with the following formula—

$$\frac{\text{hours worked per fortnight}}{75} \quad X \quad \frac{\text{hours worked for three days}}{1}$$

5. An employee employed on a fixed term contract of more than twelve months shall be eligible for short leave in accordance with this clause, and an officer employed on a fixed term contract of less than twelve months shall be eligible for pro rata short leave in accordance with this clause.

31.—SALARY PACKAGING

1. An employee may, by agreement with the employer, enter into a salary packaging arrangement in accordance with the salary packaging arrangement offered by the employer.

2. Salary packaging is an arrangement whereby the entitlements under this agreement, contributing toward the Total Employment Cost (as defined) of an employee, can be reduced by and substituted with another, or other benefits.

3. For the purpose of this clause, Total Employment Cost (TEC) is defined as the cost of salary and other benefits aggregated to a total figure or TEC less the cost of Compulsory Employer Superannuation Guarantee contributions.

The TEC for the purposes of salary packaging, is calculated by adding—

- The base salary;
- Other cash allowances eg: annual leave loading, shift allowance, commuted overtime allowance;
- Non cash benefits, eg: superannuation, motor vehicles etc;
- Any Fringe Benefit Tax liabilities currently paid; and
- Any variable components, eg: performance based incentives where they exist.

4. Where an employee enters into a salary packaging arrangement they will be required to enter into a separate written agreement with the employer that sets out the terms and conditions of the arrangement.

5. The salary packaging arrangement must be cost neutral in relation to the total cost to the employer.

6. The salary packaging arrangement must also comply with relevant taxation laws and the employer will not be liable for additional tax, penalties or other costs payable or which may become payable by the employee.

7. In the event of any increase or additional payments of tax or penalties under the salary packaging arrangement associated with the employment of the employee or the provision of employer benefits under the salary packaging arrangement, such tax, penalties and any other costs shall be borne by the employee.

8. In the event of significant increases in Fringe Benefit Tax liability on administrative costs relating to salary packaging arrangements under this clause, the employee may vary or cancel a salary packaging arrangement.

9. The cancellation of salary packaging will not cancel or otherwise affect the operation of this Agreement.

10. An employer shall not unreasonably withhold agreement to salary packaging on request from an employee.

11. The Dispute Settlement Procedures contained in this Agreement shall be used to resolve any dispute arising from the operations of this clause. Where such a dispute is not resolved, the matter may be referred by either party to the Western Australian Industrial Relations Commission.

32.—SIGNATURES OF PARTIES TO THE AGREEMENT

Signatories

Signed on behalf of the
OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS

…….*signed*……. Date 25/3/99

Robert Cock QC
acting Director of Public Prosecutions

Signed for and on behalf of the

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

…….*signed*……. Date 29/3/99

Dave Robinson
General Secretary

SCHEDULE "A"—LEGAL SCALE

	Salary Rate as at 01-07-96			3.5% Increase at registration			3.5% Increase as at 27.10.99		
	Annual Rate	Fortnightly Rate	Hourly Rate	Annual Rate	Fortnightly Rate	Hourly Rate	Annual Rate	Fortnightly Rate	Hourly Rate
Level 1									
Under 17 y	11743	450.21	6.00	12154	465.97	6.21	12579	482.28	6.43
17 years	13724	526.14	7.02	14204	544.58	7.26	14701	563.64	7.52
18 years	16008	613.72	8.18	16568	635.21	8.47	17148	657.44	8.77
19 years	18530	710.4	9.47	19179	735.28	9.80	19850	761.02	10.15
20 years	20808	797.76	10.64	21536	825.67	11.01	22290	854.57	11.39
21 years or 1st year				22858	23658	907.02	12.09	24486	938.76	12.52
22 years or 2nd year	Revised Due To			23809	24642	944.75	12.60	25505	977.82	13.04
23 years or 3rd year	Compaction.			24760	25627	982.49	13.10	26524	1016.88	13.56
24 years or 4th year				25711	26611	1020.23	13.60	27542	1055.94	14.08
25 years or 5th year				26662	27595	1057.96	14.11	28561	1094.99	14.60
26 years or 6th year				27613	28579	1095.70	14.61	29580	1134.05	15.12
27 years or 7th year				28566	29566	1133.52	15.11	30601	1173.19	15.64
Level 2									
1st year	29556	1133.15	15.11	30590	1172.80	15.64	31661	1213.85	16.18
2nd year	30316	1162.26	15.50	31377	1202.96	16.04	32475	1243.62	16.58
3rd year	31114	1192.86	15.90	32203	1234.62	16.46	33330	1276.36	17.02
4th year	31957	1225.2	16.34	33075	1268.07	16.91	34233	1310.96	17.48
5th year	32840	1259.02	16.79	33989	1303.11	17.37	35179	1347.15	17.96
Level 3									
1st year	34052	1305.53	17.41	35244	1351.20	18.02	36477	1398.50	18.65
2nd year	34997	1341.75	17.89	36222	1388.70	18.52	37490	1437.31	19.16
3rd year	35972	1379.11	18.39	37231	1427.39	19.03	38534	1477.35	19.70
4th year	36972	1417.45	18.90	38266	1467.07	19.56	39605	1518.42	20.25
Level 4									
1st year	38343	1470.03	19.60	39685	1521.47	20.29	41074	1574.72	21.00
2nd year	39418	1511.22	20.15	40798	1564.13	20.86	42226	1618.87	21.58
3rd year	40524	1553.62	20.71	41942	1608.02	21.44	43410	1664.30	22.19
Level 2/4 (Clause II)									
1st year	29556	1133.15	15.11	30590	1172.80	15.64	31661	1213.85	16.18
2nd year	31114	1192.86	15.90	32203	1234.62	16.46	33330	1277.83	17.04
3rd year	32840	1259.02	16.79	33989	1303.11	17.37	35179	1348.72	17.98
4th year	34997	1342.39	17.90	36222	1388.70	18.52	37490	1437.31	19.16
5th year	38343	1511.22	20.15	39685	1521.47	20.29	41074	1574.72	21.00
6th year	40524	1553.62	20.71	41942	1608.02	21.44	43410	1664.30	22.19
Level 5									
1st year	42654	1635.28	21.80	44147	1692.54	22.57	45692	1751.77	23.36
2nd year	44093	1690.47	22.54	45636	1749.64	23.33	47234	1810.87	24.14
3rd year	45589	1747.82	23.30	47185	1809.00	24.12	48836	1872.31	24.96
4th year	47141	1807.32	24.10	48791	1870.58	24.94	50499	1936.05	25.81
Level 6									
1st year	49637	1903	25.37	51374	1969.62	26.26	53172	2038.56	27.18
2nd year	51333	1968.05	26.24	53130	2036.92	27.16	54989	2108.22	28.11
3rd year	53090	2035.38	27.14	54948	2106.64	28.09	56871	2180.37	29.07
4th year	54964	2107.26	28.10	56888	2181.00	29.08	58879	2257.34	30.10
Level 7									
1st year	57839	2217.49	29.57	59863	2295.09	30.60	61959	2375.41	31.67
2nd year	59829	2293.76	30.58	61923	2374.05	31.65	64090	2457.14	32.76
3rd year	61993	2376.73	31.69	64163	2459.92	32.80	66408	2546.02	33.95
Level 8									
1st year	65511	2511.59	33.49	67804	2599.51	34.66	70177	2690.50	35.87
2nd year	68030	2608.19	34.78	70411	2699.47	35.99	72875	2793.95	37.25
3rd year	71155	2727.97	36.37	73645	2823.47	37.65	76223	2922.29	38.96
Level 9									
1st year	75057	2877.57	38.37	77684	2978.31	39.71	80403	3082.55	41.10
2nd year	77693	2978.65	39.72	80412	3082.90	41.11	83227	3190.80	42.54
3rd year	80700	3093.92	41.25	83525	3202.22	42.70	86448	3314.30	44.19
Class 1	85247	3268.24	43.58	88231	3382.65	45.10	91319	3501.04	46.68
Class 2	89793	3442.55	45.90	92936	3563.04	47.51	96189	3687.74	49.17
Class 3	94338	3616.79	48.22	97640	3743.39	49.91	101057	3874.41	51.66
Class 4	98885	3791.11	50.55	102346	3923.81	52.32	105928	4061.15	54.15

	Salary Rate as at 01/07/96			3.5% Increase on registation			3.5% Increase as at 27.10.99		
	Annual Rate	Fortnightly Rate	Hourly Rate	Annual Rate	Fortnightly Rate	Hourly Rate	Annual Rate	Fortnightly Rate	Hourly Rate
Level 4/5									
1st year	42654	1635.28	21.80	44146	1692.52	22.57	45692	1751.75	23.36
2nd year	44093	1690.47	22.54	45636	1749.64	23.33	47234	1810.88	24.15
3rd year	45589	1747.82	23.30	47185	1809.00	24.12	48836	1872.31	24.96
4th year	47141	1807.32	24.10	48791	1870.58	24.94	50499	1936.05	25.81
5th year	49637	1903.00	25.37	51374	1969.62	26.26	53172	2038.55	27.18
6th year	51333	1968.05	26.24	53130	2036.94	27.16	54990	2108.24	28.11
Level 6/7									
1st year	57839	2217.49	29.57	59864	2295.10	30.60	61959	2375.43	31.67
2nd year	59829	2293.76	30.58	61923	2374.04	31.65	64090	2457.13	32.76
3rd year	61993	2376.73	31.69	64163	2459.92	32.80	66409	2546.02	33.95
Level 7/8									
1st year	65511	2511.59	33.49	67804	2599.50	34.66	70177	2690.48	35.87
2nd year	68030	2608.19	34.78	70411	2699.48	35.99	72876	2793.96	37.25
3rd year	71155	2727.97	36.37	73645	2823.46	37.65	76223	2922.28	38.96
4th year	75057	2877.57	38.37	77684	2978.30	39.71	80403	3082.54	41.10
5th year	77693	2978.65	39.72	80412	3082.90	41.11	83227	3190.81	42.54
Class 1	85247	3268.24	43.58	88230	3382.63	45.10	91318	3501.03	46.68
Class 3									
1st year	94338	3616.79	48.22	97640	3743.39	49.91	101057	3874.41	51.66
2nd year	99978	3833.02	51.11	103477	3967.18	52.90	107099	4106.03	54.75
3rd year	106066	4066.42	54.22	109778	4208.75	56.12	113620	4356.06	58.08
Class 4	111601	4278.63	57.05	115507	4428.38	59.05	119549	4583.37	61.11

SCHEDULE B

LEVEL 1 CLASSIFICATION

In accordance with Clause 20 of this agreement, the adult Level 1 increment range is reduced from 9 to 7 incremental levels. This has been achieved by retaining the existing lower and uppermost Level 1 salary points and by equally apportioning the difference over five new incremental salary points.

The correlation on salaries payable to employees immediately prior to the payment of any increases awarded under this Agreement are as follows—

CURRENT POINT	NEW INCREMENT
Level 1, year 1 ($22,858)	Level 1, year 1 ($22,858)
Level 1, year 2 ($23,562)	Level 1, year 2 ($23,809)
Level 1, year 3 ($24,265)	Level 1, year 3 ($24,760)
Level 1, year 4 ($24,964)	Level 1, year 4 ($25,711)
Level 1, year 5 ($25,667)	Level 1, year 4 ($25,711)
Level 1, year 6 ($26,370)	Level 1, year 5 ($26,662)
Level 1, year 7 ($27,179)	Level 1, year 6 ($27,613)
Level 1, year 8 ($27,739)	Level 1, year 7 ($28,566)
Level 1, year 9 ($28,566)	Level 1, year 7 ($28,566)

In accordance with Clause 20, employees will progress to the nearest salary point within the new range and will not be financially disadvantaged as is illustrated in the above table. There will be no "classification" change for employees currently at Level 1, 1st, 2nd, 3rd or 4th year. Employees currently classified at Level 1 5th year will transfer to Level 1, 4th year under the new scale. Likewise, Level 1, 6th year will become Level 1, 5th year; Level 1, 7th year will become Level 1, 6th year and both Level 1, 8th and 9th year will transpose to the new Level 1, 7th year incremental point.

In practical terms, the transposition from the existing Level 1 structure to the new structure will be made on the effective date of this Agreement. The increases awarded under this Agreement have been factored into the revised salary scales included in Schedule "A".

SCHEDULE C

POLICY ON JURY TRIALS FOR CROWN PROSECUTORS LEVEL 4/5

Level 4/5 prosecutors be given the opportunity, from time to time, to prosecute jury trials in the District Court appropriate to their level of professional experience and ability.

PARAMETERS & GUIDELINES

This Policy is in substitution for any existing policy on this subject.

This Policy does not create an entitlement in Level 4/5 officers, individually or collectively, to prosecute such briefs, or state a requirement of their position.

The opportunity to undertake trial work is not intended to be a duty beyond those an officer is required to perform, but as an opportunity for training and professional development.

The offer of a brief will be the prerogative of the Allocations Committee and at its discretion, based upon Committee's assessment of the availability of trials at the appropriate level, an individual officer's stage of professional development, and the most effective use of the office's professional resources.

The prosecution of trials is not, of itself, to be regarded as a basis for reclassification to Level 6/7.

An officer will be entitled to decline a trial brief if, in his or her professional judgment, the officer does not feel ready to undertake such a brief. Declining a brief on this basis will not disadvantage the officer, be a basis for any criticism, or affect his or her prospects of reclassification.

The operation of this Policy will reviewed by a Committee appointed by the Director or the Principal Crown Prosecutor from time to time, the first review to occur within 6 months of its implementation.

PIONEER CONCRETE (WA) PTY LTD BYFORD QUARRY (ENTERPRISE BARGAINING) AGREEMENT 1998.
No. AG 31 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Pioneer Concrete (WA) Pty Ltd

and

Transport Workers' Union of Australia Industrial Union of Workers, Western Australian Branch.

No. AG 31 of 1999.

Pioneer Concrete (WA) Pty Ltd Byford Quarry (Enterprise Bargaining) Agreement 1998.

14 April 1999.

Order.

HAVING heard Ms C Brown on behalf of the Applicant and Mr G Ferguson on behalf of the Respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the agreement made between the parties as lodged in the Commission on the 3rd day of March, 1999 entitled Pioneer Concrete (WA) Pty Ltd Byford Quarry (Enterprise Bargaining) Agreement 1998 in the terms of the following Schedule be registered as an industrial agreement. The Pioneer Concrete (WA) Pty Ltd Byford Quarry (Enterprises Bargaining) Agreement 1996 (AG 17 of 1997) is hereby cancelled.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

———

Schedule.

1.—TITLE

This Enterprise Agreement shall be referred to as the Pioneer Concrete (WA) Pty Ltd Byford Quarry (Enterprise Bargaining) Agreement 1998.

2.—ARRANGEMENT

3.—SCOPE AND PARTIES TO THIS AGREEMENT

(1) This Agreement shall apply to and be binding on Pioneer Concrete (WA) Pty Ltd ("*the Company*") and the employees identified in clause 7 of this agreement who are engaged in or in connection with the Company's Byford Quarry operations. Upon registration, the terms of the Agreement shall be binding upon an estimated seven (7) employees.

(2) This Agreement shall also be binding upon the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (TWU).

4.—RELATIONSHIP TO PARENT AWARDS

This agreement shall be used and interpreted wholly in connection with the following Awards;

(1) Quarry Workers Award No 13 of 1968

(2) Transport Workers (General) Award No. 10 of 1961

Where there is any inconsistency between this Agreement and the Awards, this Agreement shall prevail to the extent of any inconsistency.

5.—SINGLE BARGAINING UNIT

(1) In accordance with the State Wage Decision in January 1992 (72 WAIG 191) the employees and the Company have formed a Single Bargaining Unit in respect to the Byford Quarry operation.

(2) The Single Bargaining Unit will ensure that the framework of this Enterprise Agreement is adhered to by regularly conferring with management through the meeting of the Consultative Committee.

(3) The Single Bargaining Unit will assist in the implementation of measures that are designed to improve the efficiency and productivity of the Enterprise that have been agreed to by the parties.

6.—AIMS AND OBJECTIVES OF THE AGREEMENT

(1) The purpose of entering into an Enterprise Bargaining Agreement is to increase the productivity, efficiency and flexibility of the Byford Quarry to ensure Pioneer Concrete remains competitive within the quarrying industry.

(2) Pioneer Concrete remains committed to the continual training of all quarry personnel so that their skills base can be enhanced, and to provide an environment in which these new skills can be utilised and recognised to the satisfaction of individual employees.

(3) Furthermore, the Company recognises the need to improve occupational health and safety for all employees and is therefore committed to the development and implementation of health and safety initiatives. This Agreement provides for the participation of all employees in these initiatives in order that the quarry becomes a safer working environment.

7.—WAGES

The wage rates to apply pursuant to this Agreement are as follows:

	Level	Current Base Rate	Rate @ 14.10.98	Rate 12 months after Rate @ 13.10.99
Quarry Workers	Commencement	n/a	493.77	513.52
	Level 1	527.53	548.63	570.58
	Level 2	533.87	555.22	577.43
	Leading Hand / Driller	550.07	571.42	593.63

Note: Other than the meal, shift and agreed allowances specified in this Agreement, the above wage rates are inclusive of all other industry and work related allowances and special rates and provisions which would have otherwise been payable under the awards relevant to work under this Agreement. This clause is subject to the Leave Reserved identified in Clause 16 of this Agreement.

Note: Casuals shall be paid 20% in addition to the ordinary rate

Agreed allowances

(a) Crane—for holders of recognised Certificate of Competence—$12.30/week

(b) First Aid—for holders of recognised Senior 1st Aid certificate—$6.35/week

Quarry Workers

(i) Commencement—Up to one (1) months permanent employment

(ii) Level 1—Greater than one (1) months employment and carry out work such as mobile plant operation, assist quarry workers at higher levels and train quarry workers up to Level 1

(iii) Level 2—Level 1 plus recognition of skills attained. Shall include at least 2 of —

Face loader operation competency

Sales loader operation competency

Fixed Plant competency (Including computer/PLC control operation)

Train workers up to Level 2

(iv) Leading Hand—Level 2 plus leading hand responsibilities and/or Drill Operation competency

8.—AGREED PRODUCTIVITY IMPROVEMENTS

(1) Electronic Funds Transfer

It is agreed that all wages for all employees will be paid weekly by the electronic funds transfer into the employee's nominated financial institution account.

(2) Use of Staff Personnel

(a) Staff personnel will be used to operate any plant or machinery for the purpose of optimising productivity and efficiency. This will only apply in situations of employee absenteeism, up to one (1) shift, or to relieve employees during rest periods and meal breaks.

(b) It is not the intention of the Company to reduce ordinary or overtime earnings for employees, however the parties acknowledge the importance of keeping plant and machinery working within the scope of operating hours.

(3) Immediate Starts

(a) Employees will ensure that they are on their machines or at their place of work by their designated start times.

(b) The Company may require up to two employees to start work half an hour earlier to ensure the preparations of machines and plant for a prompt start.

(4) Staggered Rest Periods

Meal breaks may be staggered to ensure the continued use of plant and machinery. No employee will be required to commence a meal break before 11.30am or after 1.30pm.

(5) Annual Leave

All employees will reduce total accrued annual leave entitlements to ten days or less by each anniversary date of this Agreement.

Notwithstanding this, on the occasion of a written leave application submitted prior to 1st November in any year the total accrual of ten days may be extended.

(6) Absence Through Sickness

(a) The parties agree that the Consultative Committee and management work together to achieve a significant reduction in absenteeism through sickness.

(b) A target of 8 days (per single/double sickness days) has been agreed whereby employees commit to achieving this target.

(c) Normal award provisions will apply in that any employee will be required to produce a doctor's certificate after having had 2 days off in a 12 month period with no certificate. Genuine sickness (e.g. broken arm) would not be included in this annual target of 8 days.

(7) Occupational Health and Safety

The parties to this Agreement recognise the need to continue occupational health and safety of the workplace by targeting zero lost time injuries through the implementation of health and safety improvement programs.

A consultative pro active approach to health and safety initiatives shall continue to the benefit of all whom work on the site and to assist in the development of work place best practices.

(8) Work Distribution and Contactors

The Company will offer to employees the opportunity to perform work which is ordinarily and able to be performed by Pioneer employees, before offering such work to contractors. The Company will consult with delegates on site prior to the use of any contractor so that employees are aware of what the contractor is doing and what the duration is.

9.—RECOGNITION OF IMPROVEMENTS

(1) For a minimum of 1% improvement on Budgeted variable costs a payment of 1.0% of normal time earnings for the assessed period.

(2) For a minimum of 20% improvement in NCR's (total of quality and environmental) over the previously assessed period, a payment of 1.0% of normal time earnings for the assessed period.

The preceding payments shall be paid to each permanent employee (not casual), on a pro rata basis of completed weeks of service within the assessed period, whom has qualified for the recognition payment by achieving at least our (4) full weeks of continuous service within the 26 week period of measurement.

Payment shall be in the first full pay period immediately after the completion of financial accounts for the assessed period (6 monthly)

10.—MEAL ALLOWANCE

(1) All permanent employees will receive a weekly meal allowance of $42.00 in lieu of all other meal allowances, providing a full week has been worked.

A full week is deemed to include time off on paid Public Holidays and certified sick leave.

Upon compliance, this payment shall be paid in the following manner—

(a) $20.00 shall be added to the Base Rate for all permanent full time employees and

(b) $22.00 shall be a lump sum payment.

(2) This payment will not be made during periods of annual leave or workers compensation.

11.—COMMITMENTS

The Company recognises that employee contribution is essential to improve performance and therefore accepts those commitments by employees to work towards agreed targets as sincere and in the overall interest of increasing productivity and efficiency for the collective benefit of the Company and its workforce.

Furthermore, the Company maintains a commitment to multi-skilling and training so that employees can improve their skills base, develop a career within the mining industry and have greater job satisfaction.

All employees agree to carry out any tasks which may or may not involve use of tools, plant and equipment, within their skills, competency or training as directed by the Company.

12.—TERMS OF AGREEMENT

This Agreement shall remain in force until 1 November 2000.

At least three (3) months prior to 1 November 2000, the parties to this Agreement shall meet to negotiate a new Agreement.

13.—DISPUTE RESOLUTION PROCEDURE

The following procedure is to be followed by the parties at Byford Quarry in connection with questions, disputes or difficulties arising under this Agreement—

(a) The matter shall first be discussed by the employee or shop steward with his foreman or supervisor.

(b) If not settled, the matter shall be discussed between the accredited union representative and the other appropriate officer of the employer.

(c) If not settled, the entire dispute shall be documented, and then further discussions between the Union Secretary or other appropriate official of the Union, and the appropriate representative of the employer.

(d) The parties shall make all reasonable attempts to resolve the questions, disputes or difficulties before referring it to the Western Australian Industrial Relations Commission.

(e) Throughout the above procedures, work shall continue normally and the status quo remains, on the understanding that there is to be no other action, including strikes, work bans, nor variations to work practices.

(f) It is understood that reasonable time be given for each of stages (a) to (d) to be finalised.

14.—CONSULTATIVE COMMITTEE

A Consultative Committee shall be established for the purpose of reviewing the operation of this Agreement and to assist in the implementation of measures that are designed to improve the efficiency and productivity of the enterprise.

The Consultative Committee shall consist of representatives from the work group covered by this Agreement and relevant management personnel.

15.—MEETING PROCEDURES

To ensure all employees are kept informed of progress and to maintain levels of productivity and service to our clients during negotiations of this Agreement, replacement Agreements and matters arising from this Agreement, the parties agreed to adopt the following procedure for conducting "Report Back Meetings".

A report back meeting shall mean a meeting of all, or the majority of available employees covered by this Agreement including the duly elected union delegate which is authorised by the Quarry Manager for purpose of discussing progress of the Enterprise Agreement.

(a) Report back meetings will usually be scheduled after lunch;

(b) All report back meetings shall be authorised by the Quarry Manager and such authorisation shall not be unreasonably withheld;

(c) The duration of the meeting will be determined by the Quarry Manager before the meeting is convened. Any subsequent extension may be approved by the Quarry Manager before the authorised time of the initial meeting expires.

(d) An employee who fails to return to work within 15 minutes of any authorised report back meeting will not be paid beyond the authorised duration.

16.—NO FURTHER CLAIMS

(1) Subject to subclause (2) hereof, it is a condition of this Agreement that the parties will not seek any further claims, with respect to wages and working conditions, unless they are consistent with the State Wage Case Principles.

(2) The parties remain in dispute over the entitlement to allowances for Quarry workers and have agreed to resolve this matter during the life of this Agreement. Any decision arising from arbitration over allowances for the Red Hill Quarry shall be applied to the circumstances and pattern of work at the Byford Quarry and incorporated into this Agreement with effect from the first pay period on or after 1 December 1998. Whilst this issue is being resolved and for the duration of this Agreement, normal work practices will continue.

17.—NOT TO BE USED AS A PRECEDENT

It is a condition of this Agreement that the parties will not seek to use the terms contained herein as an example or precedent for other Enterprise Agreements whether they involve Pioneer Concrete (WA) Pty Ltd or not.

18.—SIGNATORIES TO THE AGREEMENT

.....
On behalf of Pioneer Concrete (WA) Pty Ltd

.....
On behalf of The Transport Workers Union, Industrial Union of Workers, Western Australian Branch

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PROK GROUP ENTERPRISE BARGAINING INDUSTRIAL AGREEMENT 1998.

No. AG 40 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

and

Prok Group Limited.

AG 40 of 1999.

Prok Group Enterprise Bargaining Industrial Agreement 1998.

COMMISSIONER S J KENNER.

3 May 1999.

Order.

HAVING heard Mr M Golesworthy on behalf of the applicant and there being no appearance on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

(1) THAT the Prok Group Enterprise Bargaining Industrial Agreement 1998 as filed in the Commission on 16 March 1999 be and is hereby registered as an industrial agreement.

(2) THAT the Prok Group Enterprise Bargaining Industrial Agreement 1997, No. AG 201 of 1997 be and is hereby cancelled.

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

1.—TITLE

This Agreement shall be known as the Prok Group Enterprise Bargaining Industrial Agreement 1998 replacing the Prok Group Enterprise Bargaining Industrial Agreement No. AG 201 of 1997.

2.—ARRANGEMENT

3.—AREA AND PARTIES BOUND

(a) This Agreement shall apply to the operation of Prok Group Limited at its Bayswater manufacturing facility located at 285 Collier Road Bayswater, Western Australia 6053.

(b) The Parties to this Agreement shall be—

(i) Prok Group Limited (the company);

(ii) Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers', (WA Branch) (the Union).

4.—APPLICATION

The terms of this Agreement shall be binding upon the company, the union and the employees (totaling approximately one hundred and forty (140) employees (as at the end of June 1998), of the company whose terms of employment are covered by the parent award.

5.—TERM

The term of this Agreement shall be for a period of thirteen (13) months from the 27th August 1998 to 30 September 1999.

6.—PARENT AWARD

(a) The parent award to this Agreement shall be the Metal Trades (General) Award Number 13 of 1965.

(b) Where there is an inconsistency between the parent award and this Agreement, the provisions of this Agreement shall prevail to that inconsistency.

7.—BACKGROUND

This Agreement has been negotiated between the parties taking into account the needs of both the company and its employees. Of particular importance in this Agreement is the increasing pressure both domestically and internationally on the market the company operates in. This changing environment requires the company to be in a position of absolute low cost manufacture. To meet this objective, a series of Key Performance Indicators (KPI's) have been identified to help drive the business in the right direction.

The two (2) cornerstones of the Agreement are—

1. For the company to become the most cost effective manufacturing facility within Australia through the continuous achievement of—
   (i) Real productivity rate in excess of 90%;
   (ii) An on-time delivery accuracy target of 98%; and
   (iii) A 50% reduction on current manufacturing cycle times;
   (iv) A 15% reduction in raw material waste.
2. For the company inclusive of all employees to implement the agreed Occupational Health and Safety programs to place the company in a position towards becoming the safest benchmarked manufacturing facility within Australia. The emphasis on this program is to ensure that the quality of life is improved and all employees at the company contribute towards the process.

8. (A)—WORK TEAMS

The parties are fully committed to implementing the use of cellular work-teams in all sections of the manufacturing facility. This commitment will be reflected in the following work ethics—

- The adoption of a formalised agenda, established goals and objectives and an acceptable code of conduct at all work-team meetings;
- Be more actively involved in problem-solving and decision making in relation to daily work;
- Work-team meetings to provide the forum for the exchange of ideas, information and the enhancement of co-operation within the work-team and with other work-teams;
- Work-teams actively develop and implement visual performance measures, based on the KPI's outlined in this document by the first week in September 1998;
- An agreed document "Prok Manufacturing Team Structure" has been developed, and is to be implemented, without prejudice on signature of agreement;
- To take staggered tea and meal breaks as required to enable continuous production.

(B)—MAINTENANCE

The company and employees commit to the ongoing development, and participation of preventative maintenance practices, culture and system of work aimed primarily at increased machine availability. The measures that have been identified to achieve this are—

- Maintenance analysis and measurement.
- Benchmarking of other similar plants.
- Development of a maintenance management system.
- Development of an inventory management system for spares.
- Implementation of a preventative maintenance system.
- Identify and manage areas of process viability.
- Improve planning, communication and information sharing in regards to maintenance activities.
- Include more preventative maintenance focus in daily production meetings.
- Link development maintenance procedures with KPI's.
- Manufacturing personnel to carry out and participate in, inspection, lubrication and greasing of machinery to support the maintenance focus.

To attain the desired objectives, it is recognised that involvement and input is imperative from the teams and employees when carrying out not only planned maintenance but also reactive maintenance.

(C)—QUALITY

To remain a viable and low cost manufacturer it is also essential not to lose focus on the quality of the process and product that is manufactured at Prok. The following issues have been identified as critical in maintaining current quality standards and establishing a mechanism for continuous improvements in this area—

- Compliance to the procedure established in the management system which is covered within the Certification of Company to ISO 9001.
- Continuous feedback on customer issues.
- Reports on quality issues at daily production meetings.
- Review of plant layouts and work designs with a view to eliminate serious customer complaints.
- Improved utilisation of quality tools such as Statistical Process Control techniques and other problem solving techniques including Pareto Charts, Fishbone Charts, Brainstorming and other techniques which is found to be appropriate.
- All employees commit to the development, establishment and implementation of standard operating procedures in all areas of the process and plant by December 1998.

9.—OCCUPATIONAL HEALTH AND SAFETY

The parties to this agreement acknowledge that the current culture at Prok in relation to Occupational Health and Safety is recogonised as a reactive system rather than a pro-active system.

The parties are totally committed towards achieving the successful implementation of all phases of the Worksafe WA Safety Program initiative, culminating with accreditation to Silver Status by November 1998.

The recently re-vamped Health and Safety Committee will be empowered to develop strategies and implement agreed initiatives that will achieve the desired Key Performance Indicators (KPI's) that are set out below—

- LTI severity rates below 69 (number of hours lost per million hours worked).
- LTI frequency rates below 29 (number of lost time incidents per million man hours worked).
- Absenteeism rates below 2% (number of hours absent/total of hours worked).
- Successful implementation of Worksafe WA during the term of this agreement.
- Successful programme of risk analysis of machinery within Prok plant.
- During the course of this Agreement the parties agree and commit to the full establishment of non-smoking premises. The company commits to assist any employee who wishes to participate in a Quit Program.

- All employees commit to the involvement and participation of a vigorous house-keeping program, endorsed by the OHS Committee, with the aim being to have a spotless plant, which all employees can be proud of.

10.—FLEXIBILITY

It is recognised that certain machines and process areas of the plant are critical to productivity and improved output, ie the Prok welder, and that continued production is required to support the aim of the organisation to maximise output and improve productivity. The teams will develop initiatives which will be utilised for quick response to meet production requirements. It is also recognised that both the forklift and overhead crane are a part of the normal duties of all employees at Prok, and to permit flexibility, will be used by all employees.

11.—EMPLOYEE.PAY

During the course of this agreement, the parties agree to discuss the method of payment to all employees.

12.—REMUNERATION

A 2% base rate increase will be applied to all Prok employees on the 1st September 1998, a further 1% base rate increase applied on lst April 1999, and a further 1% on the lst July 1999 to all Prok employees.

13.—GAINSHARING

Both the company and employees agree to develop and implement a Gainsharing system based on the following KPI'S—

- Quality
- Value
- Delivery Performance
- Manufacturing Cycle Time
- Occupational Health and Safety

The basis of the system will be to drive the performance indicators of the business, which will benefit both the company and employees. It is envisaged the system will be introduced by January 1999. It is agreed that the 2% base rate increase will be funded directly from the Gainsharing system.

The following points will represent guidelines to the implemented Gainsharing systems—

- The Gainsharing scheme must encourage team work.
- Productivity measures must be understood and meaningful.
- Targets have to be achievable.
- Measures and the system will be developed jointly.

14.—FUTURE BASE RATE INCREASES

In order to have a fair and equitable wage increase principle, both the employees and the company agree to develop and implement an indicator system which takes into account business performance and cost of living. The aim and objective being to have a system that is fair to all at Prok.

15.—INCOME PROTECTION

The company undertakes to continue the ACTU Trust Income Protection Scheme for all employees covered by this Enterprise Agreement.

16.—CONSULTATIVE MECHANISM

The Consultative Mechanism is vested with the Joint Consultative Committee. All issues, initiatives, agreed positions and general matters pertaining to the Terms and Conditions of this Enterprise Bargaining Agreement will be negotiated and monitored by the Joint Consultative Committee in office.

17.—EMPLOYEE RELATIONS PRACTICE

(a) Principles

(i) The parties accept and acknowledge each others structures and responsibilities which exist with the company.

(ii) Parties commit to create a safer and more competitive company in an international market place.

(iii) The parties will promote the development of trust and motivation within the company.

(iv) Honesty, mutual respect and a business-like behaviour will prevail at all times. Issues are to be resolved through consultation and communication.

(v) Every employee will be treated fairly and equitably in an environment that fosters communication, involvement and teamwork.

(vi) Counselling and discipline procedures will be followed by both parties, as outlined below.

(b) Counselling and Disciplinary Practice

Where in the opinion of the management, an employee's conduct, behavior or work performance is unacceptable, the following procedure will be followed—

At all stages of this procedure, the employee may request the presence and assistance of another employee, Shop Steward or Union official.

(i) First Warning

Informal verbal discussion will occur between the employee and the immediate Supervisor/Coach. The Supervisor/Coach may keep a personal diary note.

(ii) Second Warning

If the employee's behavior or performance does not improve, then further counselling and a formal verbal warning will be given.

(iii) Third Warning

If the employee's behavior or performance still remains unacceptable, his or her manager will counsel the employee and a formal written warning will be issued to the employee.

The written warning will clearly state the unacceptable conduct and define what is required by the employee to remedy the problem.

(iv) Fourth Warning

If the employee's performance/behaviour is still unacceptable, the employee will be counselled further and issued with a final written warning. The written warning will state clearly that if the employee's performance/behaviour and conduct does not improve, then demotion or termination may occur.

(v) Written warning will remain in force for a six month duration.

(vi) Dismissal

For continued unacceptable performance/behaviour, the employee will be terminated or demoted.

(vii) Resignation/Termination

Nothing in this procedure precludes an employee from resigning in preference to termination of employment or demotion.

(viii) Company Discretion

This procedure does not affect the employer's right to terminate an employee's services without notice for conduct that justifies instant dismissal, including malingering, inefficiency, neglect of duty or theft.

(ix) Nothing in this procedure precludes the implementation of the Disputes Settlement Procedure (Clause 34—Metal Trades (General) Award).

(c) Counselling and Disciplinary Procedure

(i) The parties agree that open communication is fundamental to sound employee relations. The disputes procedure has been agreed by the parties to enable potential disputes to be resolved amicably, without loss of wages or production. It is the desire of the parties to make strikes unnecessary and to limit stop work meetings.

In the interest of sound employee relations, the most effective way to resolve problems including questions, disputes or difficulties arising under this agreement, is to communicate and seek solutions at the level at which problems occur.

(ii) It is agreed that no industrial action will occur until the following procedure has been followed in all stages.

The status quo will be maintained whilst the procedure is being followed—

(iii) Stage 1

Employee(s) will discuss the question, dispute or difficulties with their supervisor who will attempt to resolve the issue(s) expeditiously and within a mutually agreed time frame.

Stage 2

If the matter is not resolved, the supervisor or employee(s) will refer it to their manager who will endeavour to resolve the matter expeditiously in an agreed time frame.

Stage 3

If the matter still remains unresolved then either party will refer the matter to the General Manager who will endeavour to resolve the issue expeditiously and in an agreed time frame.

Stage 4

At the conclusion of Stage 3, if the matter still remains unresolved, then either party may refer the matter to the Western Australian Industrial Relations Commission for resolution or determination.

(iv) At any or all stages of the above procedure, the employee(s) may request the assistance of a fellow employee, Shop Steward or full time Union Official to represent them.

18.—REVIEW OF AGREEMENT

The parties will review the content of this Agreement three (3) months prior to the cessation of this Agreement. Such a review is expected to result in a renegotiation, renewal or replacement of this Agreeement.

It is further agreed between the Parties that no additional claims will be made during the term of this Agreement.

19.—SIGNATURE OF THE PARTIES

Signed for and on behalf of
PROK GROUP LIMITED

Signature—

ROGER MEREDITH
Name

MANAGING DIRECTOR
Position

Signed for and on behalf of Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers' (Western Australian Branch) (the union).

Signature— *Seal of the Union*

JOHN SHARP-COLLETT
Name

STATE SECRETARY
Position

ROTTNEST ISLAND AUTHORITY ENTERPRISE AGREEMENT 1998 (CSA).

No. PSAAG 4 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer Rottnest Island Authority.

No. PSAAG 4 of 1999.

13 April 1999.

Order.

REGISTRATION OF AN INDUSTRIAL AGREEMENT

No. PSAAG 4 OF 1999

HAVING heard Ms J. van den Herik on behalf of the first named party and Mr J. Lange and with him Ms C. Shannon on behalf of the second named party; and

WHEREAS an agreement has been presented to the Commission for registration as an Industrial Agreement; and

WHEREAS the Commission is satisfied that the aforementioned agreement complies with the Industrial Relations Act, 1979;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the agreement titled the Rottnest Island Authority Enterprise Agreement 1998 (CSA) filed in the Commission on 15 January 1999 and as subsequently amended by the parties, signed by me for identification, be and is hereby registered as an Industrial Agreement.

(Sgd.) C. B. PARKS,
[L.S.] Public Service Arbitrator.

Schedule.

1—TITLE

This Agreement shall be known as the Rottnest Island Authority Enterprise Agreement 1998 (CSA).

2—ARRANGEMENT

3—DEFINITIONS

The following definitions shall apply for the purposes of this agreement—

"Aggregate Annual Ordinary Hours" (AAOH) means the total number of hours which each full time employee is required to work over a year, being 1980 hours inclusive of public holidays and annual leave.

"Act" means the Western Australian Industrial Relations Act 1979.

"Award" means the Public Service Award 1992.

"CSA" means Civil Service Association of Western Australia Inc.

The "Authority" means the Rottnest Island Authority.

"Chief Executive Officer" (CEO) means any officer employed by the Authority being the person immediately responsible for the general management of the Authority to the Board of the Rottnest Island Authority.

"Employer" means the Chief Executive Officer.

"Ordinary Hours" means 38 hours per week.

"The Island" means Rottnest Island.

"Periods of High Demand" mean those times of the year where demand for the services provided by a particular branch of the Authority is greatest. These Periods are to be determined by the supervisor of the branch in consultation with his/her employees, and may include public holidays.

"Periods of Low Demand" mean those times of the year where demand for the services provided by a particular branch of the Authority is least. These periods are to be determined by the supervisor of the branch in consultation with his/her employees.

"Shift" means a period of work rostered by the Authority.

"Union" means Civil Service Association of Western Australia Inc.

4—OBJECTIVES AND PRINCIPLES

This Agreement has been established between the parties in order to achieve the shared objectives of the parties which are—

4.1 To satisfy the requirements of clients and customers through the provision of reliable, efficient and competitive services.

4.2 To achieve the Authority's mission and improve the productivity and efficiency of the Rottnest Island Authority through ongoing improvement.

4.3 To promote the development of trust and motivation and to continue to foster enhanced employee relations.

4.4 To facilitate greater flexibility in decision making and allocation of human and other resources.

4.5 To promote increased satisfaction from jobs and secure employment opportunities.

4.6 To develop and pursue changes on a cooperative continuing basis by using participative practices.

4.7 To promote health, safety, welfare and equal opportunity for all employees.

5—APPLICATION AND PARTIES BOUND

5.1 This enterprise bargaining agreement shall apply to all Rottnest Island Authority employees, including Senior Executive Service employees working in the Rottnest Island Authority who are members or eligible to be members of the CSA.

5.2 This agreement is made between the Rottnest Island Authority and the CSA.

5.3 The number of employees bound by this agreement is approximately sixty five (65).

6—PARENT AWARD

6.1 This Agreement shall be read and interpreted wholly in conjunction with the Public Service Award 1992.

6.2 Where there is any inconsistency between this Agreement and the parent award, this Agreement applies. Where the agreement is silent the Award applies.

7—DATE AND PERIOD OF OPERATION

7.1 This Agreement shall operate from the beginning of the first pay period commencing on or after the date of registration of the Agreement in the Western Australian Industrial Relations Commission and shall remain in force for a period of two years from that date.

7.2 The parties agree to review this Agreement six months prior to its expiry, and to commence negotiations for a new Agreement.

8—SINGLE ENTERPRISE

It is agreed that this Agreements applies in respect of a single enterprise as defined in Section 41A(2) of the Western Australian Industrial Relations Act, 1979 as amended (the "Act").

This agreement has been negotiated through a single bargaining unit. The single bargaining unit comprised of the Union party to this agreement and the employer.

9—NO FURTHER CLAIMS

The parties undertake that, for the duration of this Agreement, there shall be no further salary or wage increases claimed or granted except in accordance with this Agreement or in accordance with any decision of the Western Australian Industrial Relations Commission arising from a State Wage Case.

This agreement shall not operate so as to cause an employee a reduction in ordinary time earnings.

PART 2—TERMS AND CONDITIONS

10—CONTRACT OF SERVICE

10.1 An employee may be engaged under a contract of service that may be—

(i) Permanent Full-time

(ii) Permanent Part-time

(iii) Fixed Term

(iv) Casual.

10.2 An employee other than a permanent full-time or permanent part time employee may be engaged for a period of time that reflects the Authority's need for that employee's services, subject to the following—

(a) The Authority will make every effort to provide a reasonable estimate of the term of such engagement;

(b) The provisions of this Clause will not be used for employment to replace existing permanent positions, except in accordance with the Public Sector Management Act 1994.

10.3 The employee shall be required to carry out any duties and use any equipment that is reasonably within the employee's skill, competence, training, accreditation and licensing.

10.4 Probationary Employment

(a) Other than casual employees every new employee appointed to the Authority will be on probation for a period not exceeding six months, unless otherwise determined by the employer.

(b) During the probationary period, the contract of service may terminated by one week's notice on either side or by the payment or forfeiture, as the case may be, of one week's rate of pay. However, a lesser period of notice may apply where the employer and employee mutually agree.

(c) Prior to the expiry of the period of probation, the Authority shall have an appraisal completed in respect of the employee's level of performance, efficiency and conduct, and confirm the permanent appointment, or extend the period of probation by up to six months, to a maximum of twelve months, or terminate the employee's services.

10.5 Notice of Inability to Attend

(a) It is a term of this agreement that if an employee is unable to attend work for any reason, the Authority must be given reasonable notice of absence. Where possible this is to be before the commencement of the shift.

(b) Employees shall endeavour to notify the Authority of the reason and the estimated duration of such absence.

10.6 Abandonment of Employment

If an employee fails to report to work and fails to notify the authority for seven (7) consecutive days, the employee shall be deemed to have abandoned employment.

11—COMMUTING

An employee who commutes to and from the island shall be subject to the following arrangements in relation to his/her employment—

(a) The point of embarkation shall be the point designated by the Authority.

(b) Hours of work shall start and finish on the job.

(c) An employee who, on any day travels to the Island by ferry to attend work and returns from the Island to the mainland after having completed such work at the direction of the Authority, shall be paid for

30 minutes at the ordinary hour pay rate for that day. An employee to whom this provision applies but who only travels one way shall be paid for 15 minutes at the ordinary hour pay rate.

(d) Where the ferry or other transport operating at the designated departure time for an employee to travel to the Island for work is cancelled due to bad weather or for reasons outside the control of the Authority, the employee shall be provided with suitable alternative work at the head office of the Authority for that day.

Where the ferry or other transport operating at the designated departure time for an employee to leave the Island at the conclusion of a shift is cancelled due to bad weather or for reasons outside the control of the Authority, with the result that the employee is unable to return to his/her ordinary place of residence that day, the employee shall be provided with accommodation and necessary meals in the period up to the start of his/her next shift. The employee shall be entitled to payment in accordance with Schedule 2—Allowance Claim When Staying Over, of this Agreement.

(e) Where an employee travels to the Island by ferry on any day to attend work and the arrival time of that ferry is delayed, the employee shall be entitled to payment for the period of the delay up to a maximum of thirty minutes at ordinary time rates of pay.

(f) An employee required to work additional hours on the Island on any day, with the result that the employee is unable to return to his/her ordinary place of residence on that day, shall be provided with accommodation and necessary meals in the period up to his/her next commute away from the Island. The employee shall be entitled to payment in accordance with Schedule 2 – Allowance Claim When Staying Over, of this agreement.

Where the additional hours worked are in excess of the rostered hours, equivalent time off shall be added to the AAOH and allowed at a mutually agreed time or paid at overtime rates.

(g) Journey cover insurance shall be provided by the Authority to comprehensively cover employees whilst commuting.

(h) Where a vacancy occurs in any position, it shall be filled according to whether it is deemed by the Authority to be a residential or commute position.

(i) An employee who for medical reasons is unable to commute, and is able to provide proof satisfactory to the Authority, shall be eligible for redundancy in accordance with government policy.

12—FLEXIBLE HOURS OF WORK

12.1 The implementation of flexible working hours will recognise the strongly seasonal nature of the tourist industry on the Island, and the need to operate efficiently and effectively and provide superior service in a strongly competitive international market.

12.2 (a) The ordinary hours of employees subject to this Agreement shall be an average of thirty eight hours per week.

(b) (i) An unpaid meal break period of not less than thirty minutes, between 11:30am and 2:00pm shall be allowed on each day worked.

(ii) An employee may be required to take a meal break on the job.

(iii) A meal break will be taken no more than five (5) hours after the commencement of a shift.

(iv) Where an employee is directed to work through the lunch break, the employee shall be entitled to an allowance equivalent to 30 minutes at ordinary time rates and an additional credit of 30 minutes to his/her AAOH.

(v) Where an employee is subsequently directed to take a meal break after 2:00pm, the employee shall instead be paid at the rate of double time for the period elapsed between 2:00pm and the time the break is taken.

12.3 Each employee, according to the nature of services being provided by different branches—

(a) May be rostered to work on any day of the week, Monday to Sunday, including public holidays, and on any shift during these days.

(b) In the organisation of the roster, single days off will be kept to a minimum, and used in the rostering system only when necessary. The roster will allow each employee two consecutive days off at least twice every three weeks, although other arrangements may be requested by an employee and agreed by management if these other arrangements can be accommodated in the roster.

(c) May be rostered to work within a spread of hours from 6.30am to 8.30pm.

(d) Where the Authority decides to change a roster then in operation, the Authority shall give the employees concerned as much notice as is reasonably practicable prior to the introduction of that new roster.

(d) Shall work a total number of hours per year equal to the Aggregate Annual Ordinary Hours (ie AAOH). The AAOH for each employee is calculated by multiplying the ordinary hours of work per week by 52.

12.4 In order to recognise the Periods of High Demand for employees' services and the corresponding Periods of Low Demand (normally, but not necessarily corresponding with the tourist season) the Authority, in consultation with its employees, shall organise the roster system to recognise the level of demand required as follows—

(a) Period of High Demand—a shift roster where the shift length is not more than twelve (12) hours.

(b) Period of Low Demand—a shift roster where the shift length is not less than five and a half hours (5.5) hours, provided that by mutual agreement the minimum shift length may be varied.

(c) The hours worked by an employee on his rostered shift will be credited against his/her Aggregate Annual Ordinary Hours (AAOH).

(d) Where aggregate rostered actual hours exceed Aggregate Annual Ordinary Hours (AAOH) in a period of one year, time off shall be taken at a time mutually agreed or paid in cash at overtime rates.

12.5 (a) Annualised hours will commence as soon as practicable after registration of this Agreement.

(b) At the commencement of annualised hours all existing credits will be preserved.

(See Schedule 3—Annualised Hours)

13—SATURDAY AND SUNDAY WORK—ROSTERED EMPLOYEES

All time worked on a Saturday or Sunday shall be paid at the rate of time and one half the ordinary rate, provided that the time worked will be credited to the employee's AAOH at ordinary time rates.

14—OVERTIME

This clause shall be read in conjunction with Clause 18—Overtime Allowance of the Award.

14.1 Subject to the provisions of this Clause, an employee shall be paid overtime at the appropriate rate or will be allowed time off in lieu to be taken at a mutually agreed time. The employer will not unreasonably withhold approval for time off in lieu.

14.2 Overtime shall only be recognised when authorised by the employer—

(a) when the employee's AAOH have been exceeded for that year

(b) where the hours worked are outside the agreed spread of hours.

15—PART TIME EMPLOYMENT

15.1 All conditions contained in this Agreement will apply equally to part time employees employed on a permanent and fixed term basis who work less than full time hours, ie an average of 38 hours per week.

15.2 A part-time employee will be paid a proportion of the appropriate full-time rate of pay dependent on time worked.

15.3 The AAOH for a part time employee will be calculated as a proportion of a full time employee's AAOH and all the arrangements associated with annualised hours will apply to part time employees.

15.4 A part-time employee shall be entitled to the same leave and conditions prescribed in this Agreement as for full-time employees, with payments proportionate to the appropriate full-time rate of pay, dependent upon time worked. Such payments in respect of annual leave and long service leave will be averaged where the employee's ordinary working hours have varied during the accrual period. Sick leave and any other paid leave shall be paid at the current salary, but only for those hours or days that would normally have been worked had the employee not been on such leave.

15.5 A part-time employee's regular days may be varied by mutual consent. If agreement cannot be reached, four weeks notice of the change will be given by the employer.

16— ANNUAL LEAVE

This clause shall be read in conjunction with Clause 19— Annual Leave of the Award.

16.1 In addition to the employee's entitlement to four weeks annual leave after twelve months continuous service, a rostered employee who is regularly rostered to work shifts on Sundays and/or public holidays shall be entitled to a further one week's annual leave after each such twelve months service as a rostered employee.

16.2 Subject to operational requirements, annual leave may be taken at a time mutually agreed between the Authority and the employee.

16.3 Except with the written authority of the Chief Executive Officer, an employee may not accumulate a period of annual leave in excess of the leave to which that employee is due after a period of twelve months continuous service.

16.4 An employee proceeding on annual leave shall be paid leave loading in accordance with the rate as per this Agreement—

Shift workers—20%

Day workers—17.5%

16.5 An employee who, at the date of this Agreement, has accrued annual leave in excess of four weeks shall be entitled to convert that excess leave into cash.

Approval of such an arrangement will be subject to—

(i) The employee making such application within six months of registration of this agreement;

(ii) The Authority's capacity to pay.

17— PUBLIC HOLIDAYS

17.1 The following days only shall be recognised as holidays with pay—

New Year's Day, Australia Day, Labour Day, Good Friday, Easter Monday, Anzac Day, Foundation Day, Sovereign's Birthday, Christmas Day, Boxing Day.

A paid day's leave may be taken in lieu of public holidays formally gazetted on Easter Tuesday and 2 January. These "special paid leave" days are subject to the following conditions—

(i) they cannot be taken before they accrue;

(ii) they must be taken in the year they fall due;

(iii) they are not cumulative; and

(iv) they are subject to departmental convenience.

17.2 Where the Authority requires that a public holiday be worked by a rostered or non rostered employee as an ordinary working day, the hours worked shall be added to the employee's bank of AAOH and the employee shall be paid at ordinary time rate for the day.

17.3 For each public holiday worked an additional 3.8 hours shall be credited to the employee's bank of Annual Average Ordinary Hours.

18—PARENTAL LEAVE

18.1. Definitions

'employee' includes full time, part time, permanent and fixed term contract employees.

'replacement employee' is an employee specifically engaged to replace an employee proceeding on parental leave.

18.2. Eligibility for Parental Leave

(a) An employee is entitled to a period of up to 52 weeks parental leave in respect of the birth of a child to the employee or the employee's spouse/partner.

(b) Where the employee applying for the leave is the partner of a pregnant spouse one weeks leave may be taken at the birth of the child concurrently with parental leave taken by the pregnant employee.

(c) Subject to subclause (b) of this clause where both partners are employed by the Rottnest Island Authority the leave shall not be taken concurrently except under special circumstances and with the approval of the employer.

(d) An employee seeking to adopt a child under the age of five years shall be entitled to three weeks parental leave at the placement of the child and a further period of parental leave up to a maximum of 52 weeks. Where both partners are employed by the Authority, the three week period may be taken concurrently.

(e) An employee seeking to adopt a child shall be entitled to two days unpaid leave for the employee to attend interviews or examination required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional days leave. The employee may take any paid leave entitlement in lieu of this leave.

18.3. Other Leave Entitlements

(a) An employee proceeding on parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of parental leave.

(b) (i) Subject to all other leave entitlements being exhausted employees shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two years.

(ii) Upon return to work employees will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skills and abilities as the one held immediately prior to commencement of leave.

(iii) Any period of leave without pay must be applied for and approved in advance and will be granted on a year by year basis. Where both parents work for the agency the total period of leave without pay following parental leave will not exceed two years.

(c) An employee on parental leave is not entitled to paid sick leave.

(d) Should the birth or adoption result in other than the arrival of a child, the person concerned shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner.

(e) Where a pregnant employee not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the employee may take any paid sick leave to which the employee is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.

18.4. Notice and Variation

(a) The employee shall give not less than four week's notice in writing to the Authority of the date the employee proposes to commence parental leave stating the period of leave to be taken.

(b) An employee seeking to adopt a child shall not be in breach of subclause (a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.

(c) An employee proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period of leave elect to reduce or extend the period stated in the original application provided four weeks written notice is provided.

18.5. Transfer to a Safe Job

Where illness or risks arising out of pregnancy or hazards connected with the work assigned to the employee make it

inadvisable for the employee to continue in her present duties, the duties shall be modified or the employee may be transferred to a safe position at the same classification level until the commencement of parental leave.

18.6. Replacement Employee

Prior to engaging a replacement employee the Authority shall inform the person of the temporary nature of the employment and the entitlements relating to the return to work of the employee on parental leave.

18.7. Return to Work

(a) An employee shall confirm the intention to return to work by notice in writing to the employer not less than four weeks prior to the expiration of parental leave.

(b) An employee on return to work from parental leave shall be entitled to the position which the employee occupied immediately prior to proceeding on parental leave. Where the employee was transferred to a safe job the employee is entitled to return to the position occupied immediately prior to transfer.

(c) Where the position occupied by the employee no longer exists the employee shall be entitled to a position at the same classification level with duties similar to that of the abolished position.

(d) An employee may return on a part time basis to the same position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with the part time provisions of the Agreement.

(e) An employee who has returned on a part time basis may revert to full time work at the same classification level within two years of the recommencement of work.

18.8. Effect of Leave on the Employment Contract

(a) An employee employed for a fixed term contract shall have the same entitlement to parental leave, however the period of leave granted shall not extend beyond the term of that contract.

(b) Absence on parental leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose under the relevant award or agreement.

(c) An employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with the relevant award or agreement.

(d) An employer shall not terminate the employment of an employee on the grounds of the employee's application for parental leave or absence on leave but otherwise the rights of the employer in respect of termination of employment are not affected.

19—LONG SERVICE LEAVE

This clause shall be read in conjunction with Clause 21—Long Service Leave of the Award.

19.1 Subject to operational requirements, long service leave can be taken at a time mutually agreed between the Authority and the employee.

19.2 An employee who, at the date of registration of this Agreement, has accrued in excess of one entitlement of long service leave shall be entitled to convert that excess leave to cash, (subject to the approval process outlined in 16.5 (i) and (ii)).

20—FAMILY LEAVE

20.1 Employees are entitled to use 38 hours of their sick leave entitlement per year to care for an ill family member, provided the days used are sick leave entitlements accrued from previous years of service with the employer and are not the employee's entitlements for the current year. These days are not cumulative.

20.2 In this clause "family member" means the employee's spouse, de facto spouse, child, stepchild, parent, step parent, sibling or other person who lives with the employee as a member of the employee's family.

20.3 The employee shall, wherever practicable, give the employer prior notice of the intention to take leave, the name of the person requiring care, the relationship to the employee (where applicable), the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence the employee shall notify the employer by telephone at the first opportunity on the day of such absence.

20.4 The employee shall, if required by the employer, establish by production of medical certificate or statutory declaration, the illness of the person concerned and that the illness is such as to require care by another.

21—CULTURAL AND CEREMONIAL LEAVE

21.1 An employee covered by this agreement is entitled to time off without loss of pay for tribal/ceremonial/cultural purposes.

21.2 Such leave shall include leave to meet the employee's customs, traditional law and to participate in ceremonial and cultural activities.

21.3. Ceremonial/cultural leave may be taken as whole or part days off. Each day or part thereof, shall be deducted from short leave and/or annual leave entitlements.

21.4. The employer may request reasonable evidence of the legitimate need for the employee to be allowed time off.

21.5. Time off without pay may be granted by arrangement between the employer and employee for tribal/ceremonial/cultural purposes.

22—RATES OF PAY

Employees covered by this Agreement shall be entitled to an increase—

(a) of 4% of ordinary rates of pay as per Column B of Schedule A—Salaries of this agreement from the date of registration of this agreement.

(b) an additional payment of 3% as per Column C of Schedule A—Salaries of this agreement, twelve months from the date of registration of the agreement, subject to employees' cooperation and participation in the implementation of the annualised hours system, as outlined in Clause 25—Productivity Improvement of this agreement.

23—DISPUTE SETTLEMENT PROCEDURE

23.1 Subject to the provisions of the Act, any question, grievance, complaint, difficulty or dispute or any matter, such as interpretation and implementation of this agreement, raised by the union or employee/s of the Authority shall be settled in accordance with the procedures set out in subclause 23.4. During the timeframe of the procedure, the existing status quo shall remain and work shall continue normally.

23.2 The principle of conciliation and direct negotiation shall be adopted for the purpose of prevention and settlement of any industrial dispute that may arise.

23.3 The parties recognise the benefits of the speedy and effective resolution of any issues that may arise under this Agreement. Issues should be resolved as informally and quickly as possible by the parties involved at the lowest possible level.

23.4 For resolution of issues outlined in subclause 23.1, the following procedures shall apply—

(1) The employee/s concerned and/or the relevant union representative shall discuss matters with the immediate supervisor in the first instance. An employee may be accompanied by a union representative.

(2) If the matter is not resolved within five (5) working days following discussion in accordance with clause 23.4(1), the matter shall be referred by the union representative to the Chief Executive Officer or his/her nominee for resolution.

(3) If the matter is not resolved within five (5) working days of the union representative's notification to the Chief Executive Officer, the matter may be referred by either party to the Western Australian Industrial Relations Commission.

23.5 The period for resolving a dispute at any stage may be extended by agreement between the parties if it proves to be impractical or unreasonable in the circumstances.

PART 3—ORGANISATIONAL IMPROVEMENT

24— PRODUCTIVITY MEASUREMENT

24.1 The parties agree that the measurement and monitoring of productivity improvement provides critical feedback on the performance of the Authority to the Board, management, employees and other relevant stakeholders.

24.2 The parties agree to assess organisational performance according to the extent to which the objectives of the Authority are achieved. The parties agree that performance indicators have a primary role to assist in the attainment of corporate goals in the interests of clients, employees, the Authority and the Government on behalf of the community.

24.3 It is agreed that the employees' understanding of productivity measurement concepts is vital for performance monitoring arrangements to be successful on an ongoing basis.

24.4 A performance measurement system will be developed during the life of this agreement to measure current and future initiatives.

24.5 The value of productivity improvements will be shared between the Authority and its employees.

24.6 The performance management system and performance indicators will be used to calculate the value of productivity improvements listed in Clause 25—Productivity Improvement, of this Agreement.

25—PRODUCTIVITY IMPROVEMENT

The Authority has adopted the following mission statement—

Rottnest Island is conserved and enhanced as a unique Island destination, rich in environment, culture and heritage, offering a relaxed holiday experience for Western Australian families and other local, interstate and overseas visitors.

The Authority's overall mission is—

To provide a quality service to the community, long and short term visitors and tourists. The Rottnest Island Authority and its employees will cooperatively manage each and every activity on the Island in an effective, efficient and environmentally sensitive manner.

The parties agree that a broad range of initiatives have already been implemented that have resulted in a more productive, effective and efficient delivery and range of services with the existing resources. These initiatives are ongoing and are included in this Agreement as part of the continuing productivity initiatives within the agency.

25.1 Current and Future Productivity Improvements

The parties agree to develop and implement further productivity improvements by way of—

(a) Continuous Improvement

To support the development of quality systems and improved processes, the parties will implement processes to support continuous improvement throughout the Authority. For the term of this Agreement these will involve the following—

(i) Continual Application and Improvement of Past and Current Productivity Initiatives

Productivity improvements implemented prior to the registration of this Agreement will continue to operate throughout the life of this Agreement. The major initiatives are—

- Commuting
- Changes to the Visitor Centre, Accommodation Services and Operations branches; and
- Flexible working hours.

As a result of the continual application of these initiatives, greater productivity and efficiency, skills development and delivery of quality services will be achieved.

(b) Increased Flexibility

The continuous improvement of the Authority's internal and external service delivery is dependent on the Authority having flexibility in the utilisation and development of its resources. This will include—

(i) Flexible Working Conditions

It is agreed that employees' employment satisfaction and commitment is essential for the Authority to achieve its objectives. In order to achieve these objectives, it is recognised that working conditions should be flexible in order to meet the needs of the employee as well as the operational needs of the Authority. The working conditions of Part 2 of this agreement have been established to achieve this aim.

(c) Customer Focus

To ensure customers are aware of, have access to, and are provided with a full range of the Authority's services, the parties agree to address a wide range of initiatives which will achieve this objective, whilst improving the quality, delivery and range of services provided.

As part of the parties' commitment, an employee working committee has been established in order to identify areas requiring development or improvement and to foster a customer focus workplace philosophy. Through consultation between management, employees, the focus committee and feedback from customer groups, a wide range of initiatives have been identified. The improvement initiatives which are to be implemented are—

(i) Service Delivery

The parties agree to continuously strive to improve direct communication with customers to ensure service delivery is efficient and professional. In order to achieve this, standards will be established, customer and client feedback will be sought and improvements made to internal information dissemination.

(d) Staff Training and Development

Critical to the success of the Authority's mission is a capable workforce with the skills and knowledge that not only match the operations of the agency but also allows for the attainment of customer needs.

It is recognised by all parties that staff development is an integral component of producing and maintaining a capable workforce. In order to achieve this commitment a programme of staff training and development is required. As part of the parties' commitment, discussions will occur between the parties in order to identify areas requiring development or improvement with an aim to—

Aim: Improve the effectiveness and efficiency of employees through training and development, enabling them to increase the agency's productivity and provide quality customer service.

(e) Implementation of Annualised Hours

The introduction of the concept of annualised hours, together with requiring the working hours to start on arrival at the job and finish on departure from the job (not the Island) will further contribute to the Authority's ability to be flexible in response to customer needs.

One of the major problems faced by the Authority is the limitation created by reliance on the commercial ferry operation which transports employees to the Island and back.

To overcome this the Authority proposes to go to annualised hours, an expanded span of hours and work starting and finishing hours at the job.

In addition to providing for an increase in productivity, this will allow for the rostering of staff for longer hours in periods of high demand to compensate for shorter hours during periods of low demand.

The operation of annualised hours will be monitored and reviewed by the employee working committee during the first twelve months of this Agreement. The payment of the second instalment of the pay increase provided by this Agreement will be linked

to employees' cooperation and participation in the implementation and monitoring of the annualised hours system. Policies for implementation and monitoring of the annualised hours system will be reviewed by the employee working committee. Issues arising from the annualised hours system will be addressed by the employee working committee and strategies developed for the consideration of management.

25.2 It is also agreed that the parties will continue to address a range of other issues and reforms specifically aimed at increasing productivity during the life of this agreement. The parties agree that these issues will also form the basis of future Agreements.

These issues include—

Staff training and development

Customer focus

Improving and increasing the Authority's public awareness roles

Information systems and facilities

Split shifts.

Further, employees will participate in a monitoring and review of productivity improvement.

SIGNATURES OF PARTIES TO THE AGREEMENT

Signatories

Signed on behalf of the Rottnest Island Authority

(Signed B. Easton) Date 4 / 1 / 99

Signed for and on behalf of the
THE CIVIL SERVICE ASSOCIATION OF
WESTERN AUSTRALIA INCORPORATED

Dave Robinson
General Secretary

(Signed D. Robinson) Date 15 / 1 /99

SCHEDULE 1: SALARIES

SCHEDULE 1 Annual Salaries—Administrative, Technical & Clerical Employees

The annual salaries applicable to employees covered by this Agreement.

Level	Total Salary Per Annum $	4% on registration	3% 12 months from registration
Level 1			
Under 17 years	11,730	12199	12565
17 years	13,710	14258	14686
18 years	15,990	16630	17128
19 years	18,609	19249	19827
20 years	20,785	21616	22265
1.1	22,834	23747	24460
1.2	23,486	24425	25158
1.3	24,137	25102	25856
1.4	24,784	25775	26549
1.5	25,435	26452	27246
1.6	26,086	27129	27943
1.7	26,835	27908	28746
1.8	27,353	28447	29301
1.9	28,119	29244	30121
Level 2			
2.1	29,036	30197	31103
2.2	29,635	30820	31745
2.3	30,374	31589	32537
2.4	31,155	32401	33373
2.5	31,972	33251	34248
Level 3			
3.1	33,095	34419	35451
3.2	33,970	35329	36389
3.3	34,872	36267	37355
3.4	35,800	37232	38349
Level 4			
4.1	37,068	38551	39707
4.2	37,959	39477	40662
4.3	38,983	40542	41759
Level 5			
5.1	40,955	42593	43871
5.2	42,288	43980	45299
5.3	43,673	45420	46783
5.4	45,110	46914	48322
Level 6			
6.1	47,421	49318	50797
6.2	48,992	50952	52480
6.3	50,618	52643	54222
6.4	52,354	54448	56082
Level 7			
7.1	55,016	57217	58933
7.2	56,858	59132	60906
7.3	58,862	61216	63053
Level 8			
8.1	62,119	64604	66542
8.2	64,452	67030	69041
8.3	67,345	70039	72140
Level 9			
9.1	70,958	73796	76010
9.2	73,399	76335	78625
9.3	76,183	79230	81607
Class 1	80,393	83609	86117
Class 2	84,603	87987	90627
Class 3	88,811	92363	95134
Class 4	93,021	96742	99644

Specified Callings

Level	Total Salary Per Annum $	4% on registration	3% 12 months from registration
Level 2/4			
1st year	29,036	30197	31103
2nd year	30,374	31589	32537
3rd year	31,972	33251	34248
4th year	33,970	35329	36389
5th year	37,068	38551	39707
6th year	38,983	40542	41759
Level 5			
1st year	40,955	42593	43871
2nd year	42,288	43980	45299
3rd year	43,673	45420	46786
4th year	45,110	46914	48322
Level 6			
1st year	47,421	49318	50797
2nd year	48,992	50952	52480
3rd year	50,618	52643	54222
4th year	52,354	54448	56082
Level 7			
1st year	55,016	57217	58933
2nd year	56,858	59132	60906
3rd year	58,862	61216	63053
Level 8			
1st year	62,119	64604	66542
2nd year	64,452	67030	69041
3rd year	67,345	70039	72140
Level 9			
1st year	70,958	73797	76010
2nd year	73,399	76335	78625
3rd year	76,183	79230	81607

SCHEDULE 2: ALLOWANCE CLAIM FOR STAYING OVER ON ROTTNEST ISLAND

This policy relates only to situations where non-resident staff, who travel from the mainland are required to stay overnight on the Island.

The Authority will pay an allowance when the conditions described below require an employee to stay overnight on the Island.

The allowance will be paid in the following circumstances—

- When officers are required by their job to stay over, and/or
- When they are unable to leave the Island because the weather is so severe as to disrupt ferry or other transport services.

In each case, the following also applies—

- The specific prior approval of the Branch Manager or delegated Supervisor must have been obtained (or retrospective approval in special circumstances where prior approval could not be obtained);
- The Authority will provide accommodation for the period required;
- A claim for reimbursement, endorsed by the Branch Manager or CEO must be made on
- Form PS 10—Public Service Allowance Claim for Payment.

The allowance is—

Breakfast	$10.15
Dinner	$24.40
Incidental expenses	$8.40
	$42.95

and will apply to all staff required to stay over.

SCHEDULE 3: ANNUALISED HOURS

Annualised hours will operate as follows—

- Each individual will be required to work an average of thirty eight (38) hours per week. Thus, some weeks an employee may be required to work more, some weeks an employee may work less than 38 hours. However, the salary for that employee remains constant at the 38 hours per week level.
- The target number of hours for a twelve month period is 1980 hours. This figure includes annual leave entitlements and public holidays.
- The Aggregate Annual Ordinary Hours (AAOH) will therefore be 1980 per year for full time employees (pro rata for part time employees).
- The daily spread of hours will be from 6:30am to 8:30pm. A rostered employee may be rostered to work on any day from Monday to Sunday.
- In the Period of High Demand, rostered shifts may be up to twelve (12) hours in length. In the Period of Low Demand, the rostered shifts may not be less than five and a half (5.5) hours.
- Hours worked will go into a "bank" for each employee. Credit hours accumulated in the Period of High Demand can be utilised in the Period of Low Demand to "top up" shorter working weeks. This means that some of the excess hours accumulated by an employee over the Period of High Demand can be added to the hours worked over a shorter working week to make the total up to thirty eight.
- Another option with excess hours worked is to take time off in lieu. This time would be paid time off, and the employee would maintain the thirty eight hour rate (as when taking several RDOs together).
- If the employee's position does not allow that employee to accumulate many additional hours, the employee needs to ensure that an average of thirty eight hours per week is worked. Employees should consult with their supervisor to work out a solution, if this proves to be a problem.
- For all staff, implementation of annualised hours means greater flexibility. Although regular rostered days off disappear, it will still be possible to take a day off occasionally (by agreement with the supervisor). If there are sufficient credit hours in the "bank", these would be used, if not, no working hours for that day would be recorded and the time would need to be made up to meet the AAOH requirement.

Commuting

Arrangements relating to commuting are directly linked to annualised hours.

- If a ferry is cancelled, the employee will be allocated suitable alternative work, and the time worked will be credited to the AAOH as normal.
- Commuters may not be able to work the required number of hours during the Period of Low Demand. However, it is expected that any shortfall will not be great and can be made up without significant additional effort during the Period of High Demand.

Salaries and Wages

- Salary and Wage levels will remain constant with the introduction of annualised hours. A base level (exclusive of penalties and allowances) based on a thirty eight hour week salary rate will be established for each employee, and will not change for the period of the Agreement, unless an increment or payment of salary increase under this agreement is made. If hours are not worked they only show as a debit in the "bank", and an employee's salary or wage is not affected.
- When an employee ceases his/her employment with the Authority, there will be a reconciliation of hours worked based on the pro rata AAOH and the actual hours worked. In cases involving a credit of hours, the employee will be paid for the extra hours at the ordinary time rate. Where there is a debit, an equivalent amount will be deducted from the termination pay.

Recording Attendance

- Employees will be required to maintain a record of daily hours worked to be submitted fortnightly to the supervisor for verification. Progressive totals of hours worked will be carefully monitored to ensure that there are not excessive credits or debits, and if required, appropriate remedial action will be taken.
- Branch managers will institute reviews at least once each three months for this purpose.
- At the end of the settlement period, when actual hours worked exceed AAOH, the employee will be paid for the excess hours, or the employee will take time in lieu at a time mutually agreed. In each case the amount due will be calculated at ordinary time rates.
- When actual hours worked are less than AAOH, arrangements will be made to make the time up.

Credit for Leave Purposes

- For time taken for long service, annual and sick leave, 7.6 hours will be credited to the AAOH of that employee, for each day taken.

THE ROYAL AUTOMOBILE CLUB OF WA (INCORPORATED) ENTERPRISE BARGAINING AGREEMENT (1999-2000).

No. AG 284 of 1998.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

and

Royal Automobile Club of WA (Inc).

AG 284 of 1998.

The Royal Automobile Club of WA (Incorporated) Enterprise Bargaining Agreement (1999-2000).

COMMISSIONER S J KENNER.

13 April 1999.

Order.

HAVING heard Mr G Sturman as agent on behalf of the applicant and Mr M Beros as agent on behalf of the respondent

and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

(1) THAT the Royal Automobile Club of WA (Incorporated) Enterprise Bargaining Agreement (1999-2000) as filed in the Commission on the 24 December 1998 be and is hereby registered as an industrial agreement.

(2) THAT the Royal Automobile Club of WA (Incorporated) Enterprise Bargaining Agreement (1996-1998) No. AG 318 of 1996 be and is hereby cancelled.

(Sgd.) S. J. KENNER,

[L.S.] Commissioner.

———

1.—TITLE

This Agreement shall be known as The Royal Automobile Club of WA (Incorporated) Enterprise Bargaining Agreement (1999—2000), No AG 284 of 1998.

2.—ARRANGEMENT

3.—INCIDENCE AND PARTIES BOUND

(1) This Agreement shall have effect throughout the Perth metropolitan area.

(2) This Agreement shall apply to and be binding upon the Royal Automobile Club of WA (Incorporated), the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch and all persons employed by the Royal Automobile Club of WA (Incorporated) pursuant to the RAC Patrol, Mechanical and Fleet Services Award 1998.

(3) The parties accept they are bound by the terms of this Agreement for its period of operation and will oppose any applications by other parties to be joined to this Agreement.

(4) The parties to this Agreement will comply with its terms, notwithstanding the provisions of any Award, Order or Industrial Agreement by which they are covered.

(5) This Agreement applies to approximately 220 employees.

4.—DATE AND PERIOD OF OPERATION

(1) This Agreement replaces agreements AG 26 of 1994 and AG 318 of 1996 which are hereby cancelled.

(2) This Agreement shall operate from the commencement of the first pay period beginning on or after I January 1999 and shall remain in operation until 31 December 2000 at which time it shall continue to operate unless replaced following its review pursuant to Clause 19—Renewal of Agreement, hereof or either party withdraws.

5.—RELATIONSHIP TO PARENT AWARD

(1) This Agreement shall be read and interpreted wholly in conjunction with the RAC Road Services Employees Mechanical Services Award 1993 ("the Award") as amended or replaced.

(2) Where there is any inconsistency between this Agreement and the Award, this Agreement shall prevail to the extent of the inconsistency.

6.—BACKGROUND

(1) The parties bound by this Enterprise Bargaining Agreement regard it as a continuing program of restructuring and consolidation of Structural Efficiency Principles introduced as a result of the 1987 State Wage Case Decision.

(2) The parties recognise that this and previous enterprise bargaining agreements, along with amendments to the parent award and initiatives which will take effect during the term of this Agreement, shall lead to the achievement and implementation of the Structural Efficiency principles introduced in 1987.

(3) Fundamental to maintaining results already gained and to further commit the parties to continuing Structural Efficiency reform, the following initiatives have been put in place—

(a) A Consultative Committee has been established to facilitate consultation between the employer and employees with a view to maintaining and developing a skilled and flexible workforce and to provide employees with career opportunities within the requirements of the award.

(b) A procedure has been developed to allow for the resolution of any grievance or industrial dispute that may arise.

(c) Regular meetings of the Consultative Committee have resulted in information sharing and problem solving instrumental to greater understanding and the promotion of harmonious relations between the RAC and its employees.

7.—CONTINUOUS IMPROVEMENT ACTIVITIES 1999-2000

(1) The parties are committed to the on-going process of continuous improvement. During the term of this Agreement, the parties agree to continue a commitment to Structural Efficiency and to implement the following short-term issues—

(a) Road Service Employees—

(i) Continuous improvements in plotting and job allocation procedures will be implemented designed to increase patrol productivity by way of reduced non-productive travel, time and stand-by time.

This includes but is not limited to subparagraphs (ii) through (vii) below, which have been or will be implemented on ratification of this Agreement by the Commission.

(ii) To ensure an even spread of patrols over the metropolitan area at commencement of each shift by way of increased flexibility of work arrangement, columns on the established roster shall be redefined as designated geographical zones, via North, South and East plus a Temporary column.

(iii) "Base starts" as designated in the established roster will be replaced by designated geographical point starts in all instances, unless advised otherwise by management, prior to shift start.

The designated geographical point starts will be in accordance with the zones stipulated in subparagraph 7(l)(a)(ii) as follows—

North Zone:	Floreat, Jersey Street parking area, Henderson Park
South Zone:	East Fremantle, Riverside Road parking under Stirling Bridge
East Zone:	East Perth, Number 4 car park.

(iv) These arrangements do not in any way affect the agreement entitled, "Pre-shift Call on" recorded in the minutes of the 22nd meeting of the RAC Joint Committee.

(v) Unproductive time will be reduced by the elimination of unnecessary attendance of patrols at headquarters for administration

purposes, specifically by the use of prepaid envelopes for accounting and information transfer purposes and the strategic placing of equipment and spares.

(vi) The relocation of the Assistance Centre to Maddington will be recognised as the new base for training and administration purposes.

(vii) Recalls

A normal recall shall be of four (4) hours duration. However, the Assistance Centre may contact a Patrol on recall approximately 1 hour after the commencement of a recall upon which the Patrol may elect to change the recall duration to three (3) hours.

(b) Automotive Technical Services (ATS)

(i) ATS Training Meal Allowance

The current practice of providing a meal and the taking of a meal break shall be replaced by the payment of a meal allowance at the same rate as provided for in the Metal Trades (General) Award 1966, No 13 of 1965. A paid 15 minute tea break shall be provided at times to suit the requirement of the training program.

(ii) Work at Adjacent Branches

Branch vehicle inspectors agree to work from an adjacent branch to cover short-term demand, subject to the following conditions—

- A minimum of two days' notice shall be given, or a lesser period by agreement;
- The maximum period of temporary transfer shall be four weeks, although this may be extended by agreement;
- Vehicle inspectors may register their interest in temporary transfer and will be given first option to transfer. Otherwise, branch inspectors agree to temporary transfer on a rotational basis;
- Parking facilities will be made available at the branch of transfer;
- Where the time to travel to the branch to which the inspector has been transferred is greater than the employee's usual travel from their place of residence, the difference will be paid at single rates.

(iii) Vehicle Inspection Procedures

Vehicle inspection procedures have been revised, including workshop and on-site procedures, to ensure the inspection services meet RAC members' requirements and that productivity is improved.

A review involving consultation between Vehicle Inspectors and RAC management resulted in the following new inspection procedures being implemented on 1 July 1993—

- a "mechanical inspection" which emphasises the major mechanical components of a vehicle and which will be completed in approximately 1.5 inspection periods;
- a "master inspection" which is based on the existing full inspection but encompassing changes which may add value to the inspection or reduce inspection time (particularly with respect to current 3 and 4 inspection period vehicles);
- an "on-site inspection" which increases emphasis on the major mechanical components and decreases emphasis on cosmetic components.

(iv) Automotive Information System

To improve productivity by improving access to technical information by employees and also to add value to the Technical Advisory Service to members, the established Automotive Inspection System operating in Perth was expanded and is to be introduced at all metropolitan branches.

(v) Vehicle Inspection Ventures

Vehicle inspectors agree to the introduction of new vehicle inspection ventures, subject to discussion and agreement between the parties on the type of inspections to be undertaken and the facilities available. For the purposes of this paragraph, facilities include those for inspection purposes as well as amenities.

(2) The parties agree to implement improvements in efficiency of operation over the longer term—

Electronic Vehicle Location

The introduction of Electronic Vehicles Location technology for both patrol vehicles and member vehicles will be an aid to effective dispatch of jobs. This will be introduced as soon as the RAC establishes its cost effectiveness.

(3) The parties have agreed to allow for vehicle inspections on weekends as part of ordinary working hours.

(4) Uniform Issue

The uniform issue list shall be as agreed between the parties.

(5) Equal Employment Opportunity

(i) There will be established a working party of the Joint Consultative Committee to examine the RAC policy on equal employment opportunity and to ensure its implementation in the areas covered by this Agreement. The working party will consist of nominees from the union and from management.

(ii) The working party will develop a strategy to increase the number of women working in the trade areas. This strategy will actively encourage females for work experience, traineeships and apprenticeships in the trade areas.

(iii) Where necessary education forums will be held to increase the awareness of equal opportunity in the workplace. The working party will report to the Joint Consultative Committee on its progress.

8.—WAGES

(1)

	Classification Relativities %	Rate as at 31 July 1998	Rate as at 1 PP on or after *1 Aug 1998 2%	Rate as at 1 PP on or after 1 Jan 1999 5%	Rate as at 1 PP on or after 1 Jan 2000 4%
RAC Level 1	99.90	523.29	533.75	560.44	581.79
RAC Level 2	100.00	523.34	533.80	560.49	581.84
RAC Level 3	106.10	555.26	566.36	594.68	617.33
RAC Level 3(i)	109.10	570.96	582.38	611.50	634.80
RAC Level 4	115.00	601.84	613.88	644.57	669.13
RAC Level 4(i)	118.00	617.54	629.89	661.38	686.58
RAC Level 5	125.10	654.10	667.78	701.17	727.88
RAC Level 5(i)	128.10	670.39	683.80	717.99	745.34
RAC Level 5A	125.10	654.39	667.78	701.17	727.88
RAC Level 5A(i)	128.10	670.39	683.80	717.99	745.34
RAC Level 6	131.00	685.57	699.28	734.24	762.21
RAC Level 6(i)	134.00	701.27	715.30	751.06	779.68

NB: *denotes base rate inclusive of a 2% payment operative from first pay period commencing 1 August 1998.

(2) An increase in wages of nine (9%) percent shall be payable over the life of this Agreement calculated in the following manner and as set out in subclause (1) hereof—

(a) An increase of five (5) percent calculated on the rate effective from the first pay period commencing on or after 1 August 1998 shall be paid from the first pay period commencing on or after 1 January 1999.

(b) An increase of nine (9) percent calculated on the rate effective from the first pay period commencing on or after 1 August 1998 shall be paid from the first pay period commencing on or after 1 January 2000.

(3) (a) Service Pay prescribed by the Award shall be frozen at the rates applicable on 1 August 1996. Employees engaged after 1 August 1996 shall not be entitled to service pay.

(b) The Award will be amended to reflect the freezing of service pay.

9.—INTRODUCTION OF CHANGE

(1) Where the RAC has made a definite decision to introduce major changes in production, program, Organisation, structure or technology that are likely to have significant effects on employees, the RAC shall notify the employees who may be affected by the proposed changes and their union.

(2) For the purposes of this clause significant effects include termination of employment, major changes in the composition, operation of size of the employers workforce or in the skills required; the elimination of diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work, the need for retraining or transfer of employees to other work or locations and the restructuring of jobs. Provided that where the Agreement makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

(3) RAC shall give to the union not less than 4 weeks notice of the decision referred to in this clause before implementing changes resulting from that decision. The RAC shall discuss with the employees affected and their union, inter alia, the introduction of the changes referred to above, the effects the changes are likely to have on employees, measures to avert or mitigate the adverse effects on such changes on employees and shall give prompt consideration to matters raised by the employees and/or their union in relation to the changes.

(4) The discussions shall commence as early as practicable after a definite decision has been made by the RAC to make the changes referred to above.

(5) For the purpose of such discussion, the RAC shall provide, in writing, to the employees concerned and the union all relevant information about the changes including the nature of the changes proposed; the expected effects of the changes on employees and any other matters likely to affect employees provided that RAC shall not be required to disclose confidential information the disclosure of which would be inimical to its interests.

10.—CARER'S LEAVE

(1) An employee with responsibilities in relation to either members of their immediate family or household who need their care and support is entitled to use up to 5 days per annum of their sick and personal leave entitlement to provide care and support for such persons when they are ill. Leave may be taken for part of a single day.

(2) The entitlement to use sick and personal leave is subject to the employee being responsible for the care of the person concerned.

(3) The employee must, if required by the employer, establish by production of a medical certificate or statutory declaration, the illness of the person concerned and that the illness is such as to require care by another.

(4) In normal circumstances an employee must not take leave under this clause where another person has taken leave to care for the same person.

(5) The employee must, where practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee must notify the employer by telephone of such absence at the first opportunity on the day of absence.

(6) Each day or part of a day of leave taken under this clause is to be deducted from the quantum of sick and personal leave provided in this document up to a maximum of 5 days per annum.

(7) An employee is entitled to use accumulated sick leave as paid carer's leave if the employee has used the current year's personal leave entitlement. An exception to this is where an employee has already taken 5 days carer's leave in the current year.

(8) An employee may elect, with consent of the employer, to take unpaid leave for the purpose of providing care to a family or household member who is ill.

11.—BEREAVEMENT/COMPASSIONATE LEAVE

(1) An employee shall be entitled to 4 days paid bereavement leave in the event of the death of a family member.

(2) An employee shall be entitled to 4 days compassionate leave per annum in the event of the serious illness of a family member.

(3) For the purposes of this clause, family members shall mean wife, husband, father, mother, brother, sister, child, stepchild or grandparent.

(4) The employee may be required to produce documentary evidence relating to the death and/or serious illness of the family member.

(5) This leave is not cumulative.

12.—JOURNEY ACCIDENT INSURANCE

(1) The RAC undertakes to take out journey accident cover insurance for employees covered by this Agreement and who are not covered by Workers' Compensation entitlements for their journey to work.

(2) The benefits provided shall be payable only when an injury solely and directly occurs to the employee whilst engaged in direct travel between the bounds of his normal abode and place of work for the purposes of starting or ending his day's work.

(3) Benefits payable include up to 100% of earnings to a maximum of $1,000 per week (benefit period 104 weeks) and death and capital benefits up to $100,000.

13.—SALARY CONTINUANCE INSURANCE

Insurance is available to employees who elect to ensure salary continuance in the event of either personal accident or sickness. An employee who requests RAC to obtain salary maintenance insurance on his or her behalf shall have deducted from their wages an amount equal to the cost for RAC to provide the cover.

14.—DISPUTE SETTLEMENT PROCEDURE

(1) The Dispute Settlement Procedure shall be that as prescribed in Clause 20 Avoidance of Industrial Disputes in the Award.

(2) The parties involved in a question, dispute or difficulty shall confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission.

15.—COMMITMENTS

(1) All parties undertake that the terms of this Agreement will not be used to progress or obtain similar arrangements or benefits in any other enterprise.

(2) This Agreement shall not operate to cause any employee to suffer a reduction in ordinary time earnings, or to depart from the standards of the Western Australian Industrial Relations Commission in regard to hours of work, annual leave with pay or long service leave with pay.

(3) This Agreement prescribes that further wage and salary increases shall not be made during its life.

(4) During the period of this Agreement the RAC agrees not to introduce Workplace Agreements or individual contracts of employment of any kind in respect of employees covered by this Agreement. The RAC reserves the right to discuss all matters relating to contracts of employment with its employees.

16.—EMPLOYEE MEETINGS

The parties agree that there may be up to four "report back" meetings convened by the union in any 12 month period provided—

- all employees covered by the Award will be invited to attend; and
- the meetings will be held any time after 7.30pm, the first 30 minutes of which will coincide with crib break; and

- RAC will continue to pay those employees who are on shift and who attend a meeting, for a period of 30 minutes following the end of their crib break; and
- no further wages will be paid until employees return to work.

17.—APPRENTICE WAGES

The RAC agrees to maintain the payment of wages to apprentices at the going rate during any time such apprentices may be absent from the workplace for the purpose of formal tuition.

18.—INDIVIDUAL WORK CONTRACTS

The RAC agrees not to introduce Workplace Agreements or Individual Contracts of Employment of any kind in respect of employees covered by this Agreement during the period of this Agreement.

The RAC reserves the right to discuss all matters relating to Contracts of Employment with its employees during the period of this Agreement.

19.—RENEWAL OF AGREEMENT

The parties shall commence discussions on the future of the Agreement no less than six (6) weeks prior to its expiry.

SCHEDULE A

SIGNATORIES TO AGREEMENT

"The Royal Automobile Club of WA (Incorporated) understand its rights and obligations under this Agreement, has freely entered into it and wishes to have this Agreement registered."

.....Signed..... Dated: 15/12/1998

Signature on behalf of
The Royal Automobile
Club of WA
Incorporated)

.....Mr N. Harrison.....
Name of person
authorised to sign (print)

228 Adelaide Terrace, PERTH WA 6000

"The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch, understands its rights and obligations under this Agreement, has freely entered into it and willing to have this Agreement registered."

THE COMMON SEAL of
The Automotive, Food, Metals, Engineering,
Printing and Kindred Industries Union of
Workers, Western Australian Branch

Sharp-Collett — State Secretary — Date: 21/12/1998
Signature — Title (print)

1111 Hay Street, West Perth, 6005
Address

S McGurk — Assistant Secretary — Date: 22/12/1998
Signature — Title (print)

1111 Hay Street, West Perth, 6005
Address

STAMFORD CERAMICS INDUSTRIAL AGREEMENT.

No. AG 42 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers

and

Garry Young, Paul Jones and Paul Russell
t/a Stamford Ceramics.

AG 42 of 1999.

Stamford Ceramics Industrial Agreement.

COMMISSIONER S J KENNER.

13 April 1999.

Order.

HAVING heard Mr G Giffard on behalf of the applicant and there being no appearance on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the Stamford Ceramics Industrial Agreement as filed in the Commission on 17 March 1999 be and is hereby registered as an industrial agreement.

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

WAGE AGREEMENT

Schedule.

1.—TITLE

This Agreement will be known as the Stamford Ceramics Industrial Agreement.

2.—ARRANGEMENT

3.—AREA AND PARTIES BOUND

This is an Agreement between The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers and the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch (hereinafter referred to as the "Unions") and Garry Young, Paul Jones and Paul Russell trading as Stamford Ceramics (hereinafter referred to as the "Company") in the State of Western Australia.

4.—APPLICATION

This Agreement shall be binding upon the Company, the Unions, its officers and members, and any person eligible to be members of the Unions employed by the Company on work covered by the terms of the Building Trades (Construction) Award 1987, No. 14 of 1978 (the "Award"). There are approximately three (3) employees covered by this agreement.

5.—DURATION

This Agreement shall commence from the first pay period on or after the date of signing and shall continue in effect until 31 October 1999.

The parties agree to commence discussion on the terms and conditions of any future agreement three calendar months prior to the expiration of this Agreement.

6.—DISPUTE SETTLEMENT PROCEDURE

In relation to any questions, disputes or difficulties arising out of the operation of this Agreement the dispute settlement procedure that shall apply shall be in the same terms as that outlined in Clause 46 Settlement of Disputes and Appendix – Resolution of Disputes Requirements of the Award.

7.—SINGLE ENTERPRISE

It is agreed that this Agreement applies in respect of a single enterprise as defined in Clause 41A(2) of the WA Industrial Relations Act 1979, as amended (the "Act").

8.—RELATIONSHIP WITH AWARDS

This Agreement shall be read wholly in conjunction with the Award. Where this Agreement is silent on rates of pay and other matters pertaining to the employment relationship, the Award shall apply. Where there is conflict between the rates of pay, conditions, allowances and other matters in this Agreement and the Award the higher rate shall apply.

9.—ENTERPRISE AGREEMENT

It is agreed that in the event of the Unions and the Company agreeing on the terms of a comprehensive enterprise agreement, this Agreement may be terminated in accordance with the requirements of the Act.

10.—WAGE INCREASE

This Agreement provides for increases in the hourly rate and allowances resulting in the wage rates in Appendix A—Wage Rates.

11.—SITE ALLOWANCE

This Agreement provides for site allowances as per Appendix C—Site Allowance.

12.—INDUSTRY STANDARDS

1. Redundancy

It is a term of this Agreement that the Company will immediately increase its payments to $50 per week per employee.

2. Superannuation

(i) The Company will immediately increase its level of payment to $60 per week per employee or 7% of Ordinary Time earnings, whichever is the greater.

The Company will advise all employees subject to the Agreement of their right to have payments made to a complying superannuation fund of their choice. The Company is bound by the employee's election. The aforementioned payment will then be made to that fund.

Until each employee nominates the fund of their choice the Company will make payments into the Construction + Building Unions Superannuation Scheme (the "C+BUSS").

In the event that any employee chooses a fund other than the C+BUSS the Company will, within seven days of the employee advising the Company of the fund of their choice, advise the Union in writing of the employee's decision.

In the event that the employee and the Company reach an agreement pursuant to section 49C(2)(d) of the Act to change the complying superannuation fund or scheme the Company will, within seven days of the employee and the Company reaching such an agreement, advise the Union in writing of the agreement. The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by the employee.

(ii) "Ordinary Time Earnings" (which for the purposes of the Superannuation Guarantee (Administration) Act 1992 will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, industry allowance, trade allowances, shift loading, special rates, qualification allowances (eg. First aid, laser safety officer), multi-storey allowance, site allowance, asbestos eradication allowance, leading hand alowances, in charge of plant allowance and supervisory allowances where applicable. The term includes any regular over-award pay as well as casual rates received and any additional rates and allowances paid for work undertaken during ordinary hours of work, excluding fares and travel and other reimbursement allowances.

3. Apprentice Rates

The Company agrees to maintain a ratio of no more than six tradespeople to one apprentice employed.

13.—CLOTHING AND FOOTWEAR

1. The following items will be supplied to each employee by the Company, upon the completion of five working days.

(a) 1 pair safety boots, and will be replaced on a fair wear and tear basis.

(b) 2 T-shirts with collars, and will be replaced on a fair wear and tear basis.

(c) 1 bluey jacket for each employee employed during the period 1 April to 31 October. (One issued per year)

2. The Company will also make available to each employee, when requested by them, sun screen lotion and sun brims to fit over safety helmets.

14.—TRAINING ALLOWANCE, TRAINING LEAVE, RECOGNITION OF PRIOR LEARNING

1. A training allowance of $12.00 per week per worker shall be paid by the employer to the Union Education and Training Fund.

2. Subject to all qualifications in this clause, an employee shall, upon application in writing to and with approval of the employer, be granted leave with pay each calender year, pro-rata to attend courses conducted or approved by the NBCITC. The employer's approval shall not be unreasonably withheld.

The application for leave shall be given to the employer at least two weeks in advance of the date of commencement of the course.

The time of taking leave shall be arranged so as to minimise any adverse effect on the employer's operations. The onus shall rest with the employer to demonstrate an inability to grant leave where an employee is otherwise entitled.

An employer shall not be liable for any additional expenses associated with an employee's attendance at a course other than—

course fees

course books and materials

payment of ordinary time earnings for such absence.

For the purpose of this clause ordinary time earnings shall be defined as the agreement classification rate.

Leave of absence granted pursuant to this clause shall count as service for all purposes of this agreement.

3. The employer will actively encourage employees to seek formal recognition of their skills (recognition of prior learning), and will allow leave as per (2) above for such purposes including but not limited to securing Tradesmen's Rights Certificates.

15.—SENIORITY

1. The parties agree the continuity of employment is desirable wherever possible, and that where it is not possible, employees will be retrenched in order of seniority.

2. When applying the "first on last off" principle it is agreed subject to the caveat of "all things being equal", it is intended to apply on a state basis rather than a site by site basis.

3. It is recognised that from time to time instances may arise where the employee's individual skills may be subject to this caveat. Where there is any disagreement as to the application of this the matter will be processed in accordance with Clause 6—Dispute Settlement Procedure.

4. An employee who has been retrenched by the Company shall have absolute preference and priority for re-employment/re-engagement by the Company. Where an employee is re-engaged within a period of six months the employee shall maintain continuity of service and all accrued entitlements with the Company.

16.—SICK LEAVE

For sick leave accrued after the date of signing this agreement the following will apply—

(a) The Company's employees shall have the option of converting 100% of accrued sick leave entitlement to a cash payment on termination; or

(b) If an employee who has been terminated by the Company without exercising the above option is re-engaged within a period of six months, the unpaid balance of sick leave shall continue from the date of re-engagement.

17.—PYRAMID SUB-CONTRACTING

1. "Pyramid Sub-Contracting" is defined as the practice of a sub-contractor, to whom a sub-contract is originally awarded, sub-letting that contract or part thereof to another sub-contractor.

2. Provided that where a sub-contractor does not have the technical capacity to handle a specialist section of the contract and intends to engage a specialist sub-contractor to perform that work, that section may be re-let to a specialist sub-contractor.

3. Further provided that when a sub-contract is let for labour and material, a labour-only sub-contract may be let by the sub-contractor, but it is unacceptable as a principle for further labour-only sub-contracts to be re-let.

4. A bona fide sub-contractor is generally an employer of labour, save for a machine owner-operator.

5. Where a disagreement arises in relation to the definition or application of the term "Pyramid Sub-Contracting" the parties shall discuss and determine the issue in accordance with the agreement dispute resolution procedure. In any event of a disagreement, the matter shall be negotiated further between the parties or referred to the Western Australian Industrial Relations Commission. Whilst these procedures are undertaken no industrial action shall occur.

18.—FARES AND TRAVELLING

In addition to Clause 12A of the award a travel payment shall be made in the form of a daily payment (on days worked) of $6.15 per day per employee.

19.—DRUG AND ALCOHOL, SAFETY AND REHABILITATION PROGRAM

The parties are committed to the Drug and Alcohol, Safety and Rehabilitation program as outlined in Appendix B—Drug and Alcohol, Safety and Rehabilitation Program.

20.—INCOME PROTECTION

The Company agrees to insure employees covered by this Agreement for injury and sickness. The scheme is to be negotiated through the ACTU Insurance Broking Pty Limited (ACN. 069 795 875).

21.—NO EXTRA CLAIMS

The Union will make no further claims on the Company over conditions set out in this Agreement for the life of the Agreement.

Signed for and on behalf of—

The Unions: BLPPU .....
Date: / /
.....
WITNESS

CMETU .....
Date: / /
.....
WITNESS

The Company: .....
SIGNATURE
Date: / /

Company Seal

.....
PRINT NAME
.....
WITNESS

APPENDIX A—WAGE RATES

	Date of Signing Hourly Rate $	1 August 1999 Hourly Rate $
Labourer Group 1	16.92	17.15
Labourer Group 2	16.34	16.56
Labourer Group 3	15.90	16.12
Plaster, Fixer	17.58	17.82
Painter, Glazier	17.19	17.42
Signwriter	17.56	17.80
Carpenter/Roofer	17.70	17.93
Bricklayer	17.52	17.75
Refractory Bricklayer	20.12	20.38
Stonemason	17.70	17.93
Rooftiler	17.38	17.62
Marker/Setter Out	18.21	18.46
Special Class T	18.45	18.69

APPRENTICE RATES

	Date of Signing Hourly Rate $	1 August 1999 Hourly Rate $
Plasterer, Fixer		
Year l	7.38	7.48
Year 2 (1/3)	9.68	9.81
Year 3 (2/3)	13.19	13.37
Year 4 (3/3)	15.48	15.69
Painter. Glazier		
Year l (.5/3/5)	7.22	7.32
Year 2 (1/3), (1.5/3.5)	9.45	9.58
Year 3 (2/3), (2.5/3.5)	12.89	13.06
Year 4 (3/3), (3.5/3.5)	15.13	15.33
Signwriter		
Year l (.5/3/5)	7.38	7.48
Year 2 (1/3), (1.5/3.5)	9.65	9.78
Year 3 (2/3), (2.5/3.5)	13.17	13.35
Year 4 (3/3), (3.5/3.5)	15.46	15.66
Carpenter		
Year l	7.44	7.54
Year 2 (1/3)	9.73	9.86
Year 3 (2/3)	13.27	13.45
Year 4 (3/3)	15.57	15.78
Bricklayer		
Year l	7.36	7.46
Year 2 (1/3)	9.63	9.76
Year 3 (2/3)	13.14	13.31
Year 4 (3/3)	15.41	15.62
Stonemason		
Year l	7.44	7.54
Year 2 (1/3)	9.73	9.86
Year 3 (2/3)	13.27	13.45
Year 4 (3/3)	15.57	15.78
Rooftiler		
6 months	9.91	10.04
2nd 6 months	10.90	11.04
Year 2	12.73	12.90
Year 3	14.94	15.14

APPENDIX B—DRUG AND ALCOHOL, SAFETY AND REHABILITATION PROGRAM

1. PRINCIPLE

People dangerously affected by alcohol, and/or drugs are a safety hazard to themselves and all other persons in the workplace.

2. FOCUS

- Site safety and the involvement of the site safety committee
- Peer intervention and support
- Rehabilitation

3. WORKPLACE POLICY

(a) A person who is dangerously affected by drugs or alcohol will not be allowed to work until that person can work in a safe manner.

(b) The decision on a person's ability to work in a safe manner will be made by the safety committee, or on projects with no safety committee, by a body of at least equal numbers of employee/employer representatives.

(c) There will be no payment of lost time to a person unable to work in a safe manner

(d) If this happens 3 times the worker shall be given a written warning and made aware of the availability of treatment/ counselling. If the worker refuses help he/she may be transferred/dismissed the next time he/she is dangerously affected.

(e) For the purposes of disciplinary action a warning shall be effective for a period of 12 months from the date of issue.

(f) A worker having problems with alcohol and or other drugs—

- Will not be sacked if he/she is willing to get help.
- Must undertake and continue with the recommended treatment to maintain the protection of this program.
- Will be entitled to sick leave or leave without pay while attending treatment.

4. IMPLEMENTATION

To assist with the adoption and implementation with this policy the company will—

(a) Clearly state its endorsement of the BTG Drug and Alcohol program and comply with it.

(b) Provide access at an agreed time and venue for a representative of the BTG Drug and Alcohol Program to address a meeting of employees to discuss and endorse the program.

(c) Authorise the attendance of appropriate company personnel eg. Safety delegate/officer, safety committee members, union delegate, consultative committee members(s) at the two hour BTG Drug and Safety in the Workplace training course.

APPENDIX C—SITE ALLOWANCE

1. This agreement is between the parties to this agreement and shall apply to construction work undertaken by principal contractors who are engaged in the commercial/industrial sector of the building industry in the state of Western Australia within a 50km radius of the Perth General Post Office.

2. This agreement provides for a site allowance to be paid to employees engaged on particular building projects, and for such site allowance to be paid in addition to the wage rates and allowances prescribed by the award as well as any industrial or certified agreements made in conjunction with the award which does not prescribe a site allowance.

3. The site allowance payable under this agreement is to be paid at a flat rate per hour for all hours worked to compensate for all special factors/disabilities on the project and in lieu of all award special rates, with the exception of rates relating to the lifting of heavy blocks, cleaning down brickwork and the use of explosive powered tools which will be payable to an employee when he/she encounters that particular disability.

4. Site Allowance Formula

At the commencement of a project the particular site allowance to apply shall be determined in accordance with the following formula—

4.1 Projects Located Within Perth C.B.D. (as defined)

New Work

Project Contractual Value		Site Allowance
Up to	$520,000	NIL
Above	$520,000 to $2.17m	$1.90
Above	$2.17m to $4.55m	$2.25
Over	$4.55m	$2.85

Renovations, Restorations and/or Refurbishment Work

Project Contractual Value		Site Allowance
Up to	$520,000	NIL
Above	$520,000 to $2.17m	$1.70
Above	$2.17m to $4.55m	$1.90
Over	$4.55m	$2.45

4.2 Projects Located Within West Perth (as defined)

New Work

Project Contractual Value		Site Allowance
Up to	$520,000	NIL
Above	$520,000 to $2.17m	$1.70
Above	$2.17m to $4.55m	$1.90
Over	$4.55m	$2.45

Renovations, Restorations and/or Refurbishment Work

Project Contractual Value		Site Allowance
Up to	$520,000	NIL
Above	$520,000 to $2.17m	$1.60
Above	$2.17m to $4.55m	$1.80
Over	$4.55m	$2.05

The site allowance on projects which are a combination of new and renovation work shall be governed by the majority of work involved. For example, where the majority of work is new work then the site allowance appropriate to new work shall be paid for all employees on the project.

4.3 Projects within 50 km radius of Perth G.P.O.

but not including the C.B.D. or West Perth (as defined)

Project Contractual Value		Site Allowance
Up to	$1m	NIL
Above	$1m to $2.17m	$1.30
Above	$2.l7m to 6m	$1.60
Above	$6m to $11.98m	$1.85
Above	$11.98m to $24.43m	$2.05
Above	$24.43m to $60.5m	$2.35
Over	$60.5m	$2.55

"C.B.D."—Central Business District shall mean the area bounded by the Swan River South, Swan River East to Nile Street running into Wittenoom Street, Hill Street to Royal Street, Royal Street to Lord Street, Lord Street to Newcastle Street, along Newcastle Street to the Freeway, the Freeway South to the Perth-Fremantle railway line, along the Perth-Fremantle railway line to Dyer Street, Dyer Street through to Havelock Street, Havelock Street to Kings Park Road, Kings Park Road to Fraser Avenue, Fraser Avenue projected through to the Swan River.

"West Perth"—shall mean the area contained within the boundaries formed by Thomas Street, Kings Park Road, Havelock Street, Dyer Street and the Perth-Fremantle railway line back to Thomas Street.

Boundary roads: If a road borders between two regions in which site allowances are to be paid as per this agreement, the parties confirm that one side of such a boundary road will be deemed to fall in one region and the other side of the boundary road will be deemed to fall in the other region. For example, the eastem side of Havelock Street will be in the 'CBD" and the western side of Havelock Street shall be in "West Perth".

"Project Contractual Value"—shall be deemed to mean the value of all tendered work which falls under the scope of the principal contractor's contract.

5. The site/project allowance and project contractual value detailed in this agreement shall be adjusted on 1 October each year by the total C.P.I. movements for Perth during the preceding four quarters ending 30 June and accordingly, the site allowance amounts shall be adjusted up or down to the nearest five cents.

6. Project contractual values shall be subject to review at any renewal of this agreement, but in any event shall not be adjusted by a percentage less than the total CPI movements for Perth during the preceding four quarters ending 30 June. Such adjustment being to the nearest $10,000.

7. The agreed site allowance once set pursuant to this agreement -shall be recorded in a site agreement to which the

applicable principal contractor and the Union will be signatories. The level of allowance once nominated at the commencement of the project will continue without change until completion of the project.

8. It is acknowledged that on certain projects a site agreement may be entered into between the principal contactor and the building trades group of unions for that project that may include matters regularly addressed within the industry, such as, but not limited to, the following—

- Disputes Procedures
- Occupational Health and Safety Procedures
- Demarcation Procedure
- First Aid Provisions and On-Site Amenities

and the unions will not unreasonably refuse to continue to discuss such matters if raised by the principal contractor.

9. This agreement does not apply to resource development projects or civil and engineering projects.

10. Where a dispute arises as to the application of the terms of this agreement, if the issue cannot be resolved in discussions between the parties, it is agreed that the matter will be referred to the appropriate industrial tribunal for resolution without recourse to industrial action.

11. It is a term of this agreement that all site allowance agreements entered into prior to this date will be honoured by all parties and will continue to apply for the life of the particular project.

12. Where because of a condition of contract the principal contractor is required not to allow for a site allowance, before final application of this agreement, discussions will be held between the parties with a view to resolving any problems that may arise as a result of this situation.

13. Productivity Allowance

In return to increase productivity and/or timely completion of projects it is agreed that a productivity allowance of $1.00 per hour worked shall be paid toemployees engaged upon projects (new construction only) which exceed two stories in height or building where the structure exceeds 10 metres in height (excluding spires, flagpoles and the like).

14. Structural Frame Allowance

It is agreed that a structural frame allowance of $1.00 per hour all purpose shall be paid to all employees engaged upon projects (new construction only) which exceed two stories in height or building where the structure exceeds 10 metres in height (excluding spires, flagpoles and the like).

15. Provision of Canteen

It is agreed that a canteen accommodation shall be provided where a project exceeds $35 million in value and where the operation of the canteen is financially self supporting in respect of consumables. Canteen to come into operation when on site manning levels exceed 50 and to cease when manning levels reduce to below 50.

16. Provision of Nurse

It is agreed that a qualified nurse shall be engaged where the forecast long term staffing levels for a project exceed 100 (one hundred) or when actual numbers exceed 100 not withstanding that forecasts may have been below that level. The nurse shall commence duties when staffing levels reach (fifty) and shall terminate when levels reduce to 50 (fifty). The requirement for a provision of a nurse shall be waived if the project is adjacent to a hospital with a public emergency department.

17. This agreement shall only apply to building contracts entered into on or tendered for on or after 1 January 1999.

18. Application to Apprentices

The rates prescribed in this agreement shall apply to all apprentices commencing employment after 31 December 1997 in the same proportion as the percentage of a tradesperson's wage rate as prescribed by the appropriate award or Enterprise Bargaining Agreement, being—

1st year	42%
2nd year	55%
3rd year	75%
4th year	88%

STEGGLES LIMITED (MAINTENANCE DIVISION) ENTERPRISE AGREEMENT 1998.

No. AG 255 of 1998.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

and

Steggles Limited.

AG 255 of 1998.

Steggles Limited (Maintenance Division) Enterprise Agreement 1998.

COMMISSIONER S J KENNER.

13 April 1999.

Order.

HAVING heard Mr M Anderton on behalf of the applicant and there being no appearance on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Steggles Limited (Maintenance Division) Enterprise Agreement 1998 as filed in the Commission on 20 November 1998 be and is hereby registered as an industrial agreement.

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

Steggles Limited

(Maintenance Division)

and

Australian Manufacturing Workers Union

Enterprise Agreement 1998

1.—THE AGREEMENT

1.1 TITLE

This Agreement shall be known as the Steggles Limited (Maintenance Division) Enterprise Agreement 1998.

1.2 PARTIES BOUND

(a) This Agreement shall be binding upon Steggles Limited WA, The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch, its officers and members and all employees employed at the Company's operations at Osborne Park who are eligible to be members of the Union, whether members of the Union or not. Upon registration of this Agreement it is anticipated that 8 employees will be covered by this Agreement.

(b) It is agreed that any new employee who is engaged by the employer during the term of this Agreement and whose contracted duties fall within the classification structure shall become party to this Agreement. The employees shall, as from the date of becoming a party, be entitled to all the benefits and be bound by all obligations under this Agreement.

1.3 DURATION AND RENEWAL

(a) This Agreement shall come into operation from the beginning of the first full pay period commencing on or after 1st July 1998 and shall remain in force until 30th June 2000.

(b) The parties to this Agreement agree that negotiations to renew this Agreement will commence no later than three months prior to the expiration of this Agreement.

(c) Should negotiations not achieve agreement, the wages and conditions of employment shall continue as at the date of expiration for a period of three months. If an agreement has not been reached by the end of three months the parties shall discuss interim arrangements.

1.4 RELATIONSHIP TO PARENT AWARD

(a) This Agreement shall be read and interpreted wholly in conjunction with the Metal Trades (General) Award, No. 13 of 1965.

(b) Where there is any inconsistency between the Agreement and Award, this Agreement shall prevail to the extent of such inconsistency and where this Agreement is silent, the provisions of the Award shall apply.

1.5 AIM OF AGREEMENT

The object of this Agreement is to ensure the commitment of both parties to develop and improve workplace culture and work practices to assist the Company in achieving world class performance in quality, safety, customer service and profitability.

Areas of focus during the term of this Agreement include but are not limited to—

- Waste reduction—includes but is not limited to, idle time, waste of product, waste of material and waste of energy and water
- Increasing efficiency and productivity
- Working together to increase job security, job satisfaction, training opportunities and career paths for employees
- Co-operate positively to implement work practices that are flexible and meet both the requirements of the Company and the employees within the Company
- Occupational health and safety issues with the view to reducing number of injuries and illnesses suffered by employees including the provision of appropriate safety equipment and apparel
- The parties are committed to a process of continuous improvement. The company and employees seek improvement in safety, quality, methods of production, work organisation and other areas which will improve the effectiveness of the company's operations and the employees' quality of working life.
- During the term of this agreement the parties have agreed to look at ways on a variety of issues relating to the hours of work with the view to finding common grounds with regards to future production demands and impact on maintenance rostering.

1.6 SINGLE BARGAINING UNIT

(a) This Agreement has been negotiated directly between the parties through a consultative process.

(b) The single bargaining unit consists of employees, Union and Company management representatives.

(c) The single bargaining unit has held negotiations and reached full agreement on the terms of this consent Agreement.

1.7 NO EXTRA CLAIMS

It is a condition of this Agreement that the Union and its members employed by Steggles Limited undertake not to pursue any extra claims for the duration of this Agreement except when consistent with the terms of this Agreement.

1.8 AGREEMENT TO BE AVAILABLE

Copies of this Agreement shall be available from the workplace delegate and the Human Resources Manager.

1.9 DEFINITIONS

(a) Commission—means the Western Australian Industrial Relations Commission.

(b) Union—means the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Works – Western Australian Branch.

(c) Employer—means Steggles Limited, WA.

1.10 NOT TO BE USED AS A PRECEDENT

This Agreement shall not be used in any manner whatsoever to obtain similar arrangements or benefits in any other section of the plant or enterprise.

2.—CONDITIONS OF EMPLOYMENT

2.1 HOURS OF WORK

The ordinary hours of work may be worked on any or all days of the week Monday to Friday inclusive and, except in the case of shift employees, shall be worked between the hours of 5.00am and 7.00pm.

2.2 SHIFT WORK

(a) The employer may work the establishment in shifts.

(b) The shift operation as agreed to as part of these discussions will continue to operate unless notices is given to the parties concerned that start and finish times of shifts are to be changed.

(c) All employees are required to participate in the shift roster when so required to ensure full coverage on all shifts.

(d) Under normal circumstances such work will be voluntary, however, there may be instances when an employee shall not unreasonably refuse to work a shift.

(e) Any problems arising from shift work may be given compassionate consideration.

(f) The hours for nightshift are dependent on production requirements and therefore may change should production so require.

(g) Changes to shift commencement or cessation times will be done in a consultative manner with mutual agreement between all parties to this Agreement.

2.3 MEAL BREAKS

(a) The employer may stagger the time for taking meals or rest breaks to meet operational requirements, however an employee shall not be compelled to work more than five hours without a meal interval.

(b) Meal breaks will be staggered between the hours of 11.30am and 1.30pm. Where possible minimum of two employees to be on duty at all times.

2.4 OVERTIME

(a) The employer may request an employee to work overtime. In such instances an employee where practicable, given the individuals circumstances, shall not refuse to work reasonable overtime to meet the needs of the enterprise.

(b) The Company has a need to supply customers' orders which means that overtime may be necessary during the week, on week-ends or on public holidays. Work required to be undertaken on Christmas day and Good Friday will be on a voluntary basis.

(c) The parties agree a commitment to meet production requirements needs a minimum coverage of three employees for such purposes.

2.5 ROSTERED DAYS OFF

(a) A rostered day off will accrue at the rate of one every four weeks

(b) The parties agree that their rostered day off entitlements be banked and five (5) days to be taken at a time mutually convenient to the Company and the employee with remaining days to be paid out at the rate of time and one half. Payment to be made in the last pay period immediately prior to Christmas in each year.

2.6 CASUAL AND CONTRACT LABOUR

The parties to this agreement confirm their commitment to permanent employment and agree to the following criteria regarding the engagement of casual and/or contract labour.

(a) Wherever possible in-house labour will be utilised, however, the company does reserve the right to use casual and/or contract labour as is deemed necessary.

(b) Casual/Contract labour shall be paid no less than the ordinary time rate of the equivalent classification plus appropriate loading as per Award.

2.7 CONFIDENTIALITY AND SECURITY

All employees are required to keep information about the business of the employer confidential. It is agreed disclosure may only be made with the express consent of the employer.

No employee may take any non-employee of Steggles Limited on to the site without the express approval of the Maintenance Manager, Plant Manager or the Human Resource Manager. In such cases, all visitors must sign in the visitor's log and wear such safety clothing as appropriate and requested for that area.

Any employee involved in the unauthorised entry shall be dealt with in accordance with Clause 4.0—Disciplinary Procedures.

3.—WAGES

3.1 Rates of Pay

(a) The weekly rate of pay for ordinary hours worked shall be the following—

Classification	Original Weekly Rate	FFPP on or after 1/7/98	FFPP on or after 1/11/98	FFPP on or after 1/7/99
C10	$563.20	$594.17	$618.31	$652.31
C9	$591.40	$623.92	$646.36	$681.91
C8	$621.70	$655.89	$678.57	$715.89

(b) The rates as shown in Clause 3 hereof are inclusive of all site, disabilities, over-award and tool allowances. No further allowances will be entered into.

3.2 PAYMENT OF WAGES

(a) The parties have agreed that payment of wages will be changed from the current weekly pay system to a fortnightly pay system.

(b) In order to avoid any hardship, employees may receive one week's pay in advance for the final pay period before the implementation of fortnightly pays.

(c) The overpayment will be deducted in even proportions over the following five fortnights until repayment is made in full.

3.3 INJURY AND SICKNESS SCHEME

The Company will make contributions into the ACTU Injury and Sickness Scheme as agreed to by parties to this Agreement.

4.—CONSULTATIVE ARRANGEMENTS

4.1 DISCIPLINARY PROCEDURES

The following procedures shall be adhered to by the Company and the employees.

Employees who exhibit unsatisfactory performance or behaviour shall be counseled so that they understand the standards expected of them and will be offered assistance and guidance in achieving those standards.

Confidential written records of such counseling will be made. The employee will be shown the written record and will have the opportunity of commenting on its contents whether in writing or orally. If the employee agrees, a copy can be provided to the relevant Union Delegate.

Employees whose performance or behavior is unsatisfactory will be given time as agreed between the employee and the Company to demonstrate a willingness to improve.

If the circumstances for which an employee has been disciplined continue he/she shall be provided with a written warning. If the employee's performance does not improve then a final written warning may be given.

Where an employee's conduct or performance does not improve following a final warning this may result in the employee being dismissed.

Nothing in this procedure shall limit the right of the Company to summarily dismiss an employee for serious and willful misconduct.

At all stages of the disciplinary process the employee will be entitled to have another available employee or union delegate present as a witness if desired, providing employee confidentiality is not breached.

4.2 DISPUTE RESOLUTION

To ensure the orderly conduct of and speedy resolution of issues, disagreements, conflicts, questions, disputes or difficulties, the following three stage Resolution Procedure will be adopted.

The object of the procedure is to promote the resolution of matters through consultation, co-operation and discussion between members of the shop floor and their respective line management. This procedure is based upon the recognition and development of the relationship between line management and their employees.

If a dispute or grievance arises, normal work, for example, shall continue.

The procedure is designed to resolve any matter in a fair manner and is based upon the following principles—

(a) Commitment by the parties to observe this procedure. This should be facilitated by the earliest possible advice by one party to the other of any issue or concern, which may give rise to conflict or dispute.

(b) Throughout all stages of this procedure all relevant facts shall be clearly identified and recorded.

(c) Realistic time limits shall be allowed for the completion of the various stages of the discussions.

(d) Emphasis shall be placed on an in-house settlement of issues bought about through consultation. However, if in-house consultation and negotiations is exhausted without resolution of the conflict or dispute the parties shall jointly or individually refer the matter to the Western Australian Industrial Relations Commission for conciliation or arbitration in resolving the dispute.

In order to achieve the peaceful resolution of issues the parties shall be committed to avoid stoppages of work, lockouts or any other bans or limitations of the performance of work whilst the procedures of consultation, negotiation, conciliation and arbitration are being followed. Observance of this principle will avoid interruption to the performance of work, the consequential loss of production and wage and disruption of supply to consumers.

THREE STAGE RESOLUTION PROCEDURE.

Stage One

The matter shall first be discussed between the employee affected and the appropriate supervisor. The supervisor will set aside time to hear the issue or concern in a private discussion with the employee. The employee may choose to be represented by his/her Union delegate. The issue or concern and the answer provided by the supervisor must be fully documented.

Stage Two

In the event of the employee not being satisfied with the answer provided, they will take their concern to the Union Delegate who will arrange a meeting with the supervisor and the employee concerned. As per Stage 1, all relevant facts to be clearly recorded.

Stage Three

In the event that the matter is still not being resolved it will be referred to the Human Resource Manager who shall convene a meeting with all parties. The Shop Steward may request the involvement of the Union.

If no negotiated settlement can be achieved and the process is exhausted without the dispute being resolved, the parties shall jointly or individually refer the matter to the Western Australian Industrial Relations Commission for conciliation or arbitration in resolving the dispute. At any meeting convened by the Commission, the parties will use their best endeavours to resolve the matter by conciliation.

4.3 CONSULTATIVE ARRANGEMENTS

(a) As soon as practicable following the ratification of this Agreement, there shall be the formation of a Consultative/ Workplace Committee.

(b) The Consultative Committee shall consist of equal number of employer and employee representatives. Each department shall be represented.

(c) Position as employee representative shall be called for from amongst the employees in each department. Where more than one representative nominates, a secret ballot shall be held to determine one representative.

(d) At the first meeting of the Consultative Committee, Terms of Reference shall be established. Generally the Terms of Reference shall ensure this and other site agreements are being implemented and skill based training issues are being considered.

(e) The Consultative Committee shall have the same term as this Agreement. Where an employee vacancy occurs, nominations shall be called from the relevant department and if necessary an election held to select the replacement member.

5.—UNION ARRANGEMENTS

5.1 Right of Entry

For the purpose of interviewing employees on legitimate union business, a duly accredited union representative shall have the right to enter the employers' premises where a Union member(s) is employed at an acknowledged break time on the following conditions—

(a) That, where practical, reasonable notice shall be given prior to the visit to either the Manager, HR Manager or Plant Engineer,

(b) That the representative shall attend at the office and notify of his/her presence and produce his/her authority.

(c) That he/she interviews employees at places where they are taking their meal or at such other place as is mutually agreed.

(d) That if an employer alleges that a representative is unduly interfering with his/her work or is creating dissatisfaction amongst his/her employees or is offensive in his/her methods or is committing a breach of any of the previous conditions, such employer may refuse the right of entry but the representative shall have the right to bring such refusal before a member of the Western Australian Industrial Relations Commission.

(e) Provided that where certain employees are working under a system of shift work which precludes a representative from interviewing them during the midday meal break the representative shall have the right to enter the employer's premises for the purpose of interviewing such employees at such time and such conditions as to notice as may be mutually arranged by the representative and the employer, or failing agreement at such times and under such conditions as a member of the Western Australian Industrial Relations Commission may decide.

(f) In the case of a disagreement existing or anticipated concerning any of the provisions of this agreement, the authorised official of the union, on notifying the company or a representative thereof, shall have the right to enter the business premises of the company to view the work subject of any disagreement but shall not unduly interfere with carrying out such work.

5.2 Leave to Attend Union Business

The union delegate shall be given reasonable leave to attend trade union training provided that—

(a) leave is to be confined to workplace union delegates or persons who have been elected as workplace representatives,

(b) courses for which leave is granted are those which are conducted by the union, or in absence an agreed training provider. The Union is to provide the employer details of the course, the provider and details of the method of assessment.

(c) application for leave must be made to the employer by the Union with reasonable notice being given before the course commences.

(d) the granting of leave is subject to the employer being able to make proper staffing arrangements for the relevant period and;

(e) without unduly affecting in an adverse manner the operations of the employer.

(f) an employee on leave approved in accordance with this clause shall be paid ordinary time earnings as per Clause 3.0 of this Agreement. Employees shall not be paid under this clause if they were not ordinarily scheduled to work.

(g) leave granted will not incur any additional payment to the extent that the course attended coincides with any other period of paid leave granted pursuant to this Agreement.

(h) the company shall not incur any liability with respect to the cost of travel to and from the place where the courses are conducted, nor to any accommodation and associated costs during such leave, or any other cost associated with the conducting of the course

6.—OCCUPATIONAL SAFETY AND HEALTH

6.1 OPERATION OF OCCUPATIONAL SAFETY AND HEALTH

(a) The parties to this Agreement are committed to the provision of high standards and continuous improvement in Occupational Safety and Health and as such shall comply with all relevant State OS&H Legislations and company policies and procedures.

(b) The parties are committed to comply with Company procedures with regards to reporting of work related injuries and hazards.

(c) The Company has signaled its intention of becoming a smoke-free site during the life of this Agreement. This commitment extends to all premises, depots and work vehicles either owned or operated by the Company.

(d) An employee called upon to lift shall do so in accordance with the Manual Handling Regulations issued by the Worksafe Western Australia Commission.

(e) Employees will be issued with safety equipment and clothing which must be worn.

(f) Any damage to plant or equipment should be reported to the appropriate supervisor/managers as soon as possible.

(g) It is strictly against the rules of this workplace to interfere with, or make inoperative, any safety equipment or guards.

(h) Horseplay, or unauthorised or irresponsible use of fire protection or safety equipment may lead to dismissal.

(i) It shall be part of an employee's duties to perform cleaning functions incidental to his/her work. This includes sweeping dusting work stations, the cleaning of implements used in the work and the cleaning of spillages and breakages in the work area.

6.2 Occupational Safety & Health Committee

(a) An Occupational Safety and Health Committee shall be established at the plant.

(b) The committee shall be formed in accordance with the requirements as stipulated in the OS&H Act.

(c) This committee shall consist of equal numbers of management and employee representatives from all areas at the plant ie. Production, maintenance and administration.

(d) The committee shall meet at least quarterly and will facilitate cooperation between management and employees on health and safety matters including the development, implementation and review of OS&H policy and procedures, analysis of injury/incident trends and workers compensation performance and review of accident/dangerous occurrence reports together with reports on preventative action taken.

6.3 Drugs and Alcohol

(a) An employee may be relieved of duty without pay where a supervisor and shop steward, in consultation with OS&H Co-ordinator, believes that the ability of that employee to do the job is compromised because of non prescription drugs and/or alcohol.

(b) Where an employee is required by his/her doctor to take prescription medication which may adversely affect his/her ability to perform the job, the employee shall be required to bring this to the attention of the supervisor at the start of the medication and at the completion of the medication.

6.4 ENVIRONMENTAL ISSUES

Employees agree to make themselves familiar with the Company's environmental policy and attend and participate in any training activities relating to environmental matters.

Employees agree to comply with all environmental standards, environmental licenses or approvals relating to products, processes and premises.

Employees agree to report any spill, leakage or other polluting incident and any contravention of any license approval or standard and will assist in preventing or stopping such occurrences.

7—OCCUPATIONAL SUPERANNUATION

(a) The employer shall notify employees of their entitlement to nominate a choice of superannuation fund.

(b) The employer shall contribute to a fund nominated, in writing, by the employee as required by the Superannuation Guarantee Act 1992, provided the chosen fund is—

- a complying superannuation fund in accordance with the Commonwealth Superannuation Guarantee (Administration) Act 1992 and;
- able to accept contributions made on behalf of the employee.

(c) The employer and employee shall be bound by the nomination of the employee unless the employer and employee agree to change the complying superannuation fund or scheme to which contributions are to be made.

(d) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund nominated by the employee.

(e) Where an employee does not nominate a choice of funds, contributions will be paid into the Goodman Fielder Superannuation Fund.

(f) Contributions shall be paid at the rate nominated in the Superannuation Guarantee (Administration) Act 1992.

8—TRAINING

The parties agree to the implementation of the National Metal and Engineering Competency Standards and shall provide opportunity for, and actively encourage the training of all employees to perform their current job effectively and up to their current job description which may involve both on and off the job training.

(a) Following the development of the Training Committee, the employer shall develop a training program consistent with—

- The current and future skill needs of the enterprise
- The skills and knowledge needs of the individual to achieve competence
- The size, structure and nature of the operations of the enterprise.
- The need to develop vocational skills relevant to the enterprise and the Metal and Engineering Industry through courses conducted by accredited educational institutions and/or providers as per competencies for the Metal Industry.

(b) Using the Training Committee, the training needs shall be identified for each employee and the employer shall make available wherever possible the required training, taking into account—

- Formulation of a training program and availability of training courses and career opportunities to employees;
- Dissemination of information on the training program and availability of training courses and career opportunities to employees;
- The recommending of individual employees for training and reclassification;
- Monitoring and advising management and employees regarding the ongoing effectiveness of the training.

(c) Where it is impracticable for training courses identified by the Training Committee and approved by the Company to be undertaken during normal working hours, payment shall be made at the employee's ordinary hourly rate of pay.

(d) An employee shall not unreasonably refuse to attend training outside ordinary hours, however, any employee not wishing to undertake training shall do so without prejudice to that employee.

9.—DECLARATION AND SIGNATORIES TO AGREEMENT

This Agreement has been negotiated through extensive consultation between management and employees. The content of the agreement has been canvassed with all parties. All parties are entering into this agreement with full knowledge as to the content and effect of the document.

This Agreement is made at Osborne Park on 17th November, 1998.

Signed for and on behalf of Steggles Ltd WA	.....Signed.....
In the presence of:	.....Signed.....
Signed for and on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers— Western Australian Branch	.....Signed.....
In the presence of:	.....Signed.....

VINIDEX TUBEMAKERS PTY LTD (MAINTENANCE SECTION-PERTH SITE) ENTERPRISE BARGAINING AGREEMENT 1998. No. AG 30 of 1999.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

and

Vinidex Tubemakers Pty Ltd.

AG 30 of 1999.

Vinidex Tubemakers Pty Ltd (Maintenance Section-Perth Site) Enterprise Bargaining Agreement 1998.

COMMISSIONER S J KENNER.

4 May 1999.

Order.

HAVING heard Mr M Golesworthy on behalf of the applicant and there being no appearance on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Vinidex Tubemakers Pty Ltd (Maintenance Section-Perth Site) Enterprise Bargaining Agreement 1998 as filed in the Commission on 3 March 1999 be and is hereby registered as an industrial agreement.

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

1.—TITLE

This Agreement shall be known as the Vinidex Tubemakers Pty Ltd (Maintenance Section—Perth Site) Enterprise Bargaining Agreement 1998.

2.—ARRANGEMENT

3.—AREA AND SCOPE

This Agreement shall apply to the maintenance section of Vinidex Tubemakers Pty Ltd with respect to employees engaged in classifications specified in Clause 31. – Wages and Supplementary Payments (including appendices 1 and 2 thereto) of the Metal Trades (General) Award No 13 of 1965.

4.—INCIDENCE AND PARTIES BOUND

This Agreement shall apply to and be binding upon Vinidex Tubemakers Pty Ltd and an estimated seven (7) employees employed in the classifications referred to in Clause 3. – Area and Scope, at its Perth division, and the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch.

5.—DATE AND PERIOD OF OPERATION

This Agreement shall operate from 3rd August, 1998 and remain in operation until 31st July, 2000 and will not continue in force after this date unless reviewed. All parties are committed to re-negotiating this Agreement and applying for its continuation, replacement, or cancellation before the expiry date.

6.—RELATIONSHIP TO PARENT AWARD

(1) This Agreement shall be read and interpreted wholly in conjunction with the Metal Trades (General) Award No. 13 of 1965.

(2) Where there is any inconsistency between this Agreement and the Award stipulated, this Agreement shall prevail to the extent of the inconsistency.

7.—SINGLE BARGAINING UNIT

(1) For the purposes of this Agreement and in accordance with the decision in the January 1992 Western Australian State Wage case, a single bargaining unit has been established by way of a Consultative Works Conim'ttee. This Committee shall be comprised of the following members—

- the Personnel Manager, the Manufacturing Manager; and
- two representatives of the Maintenance Section Workforce.

(2) The single bargaining unit shall be given all relevant information to enable effective monitoring of the implementation of the continuous improvement programme.

8.—TRAINING

(1) The Consultative Works Committee will also act as a Training Committee to establish, implement and monitor a training programme applicable to the maintenance staff of Vinidex Tubemakers at Perth. It is the intention of the Committee that opportunities will be made available for further enhancement of both administrative and technical skills. Training may be on or off-the-job but will be accredited and linked to a competency-based career path.

(2) Areas of training identified by the representative of the Maintenance Section for inclusion in the programme are—

Customer Service
Total Quality Control and Management
Restricted Electrical Licences
Pneumatics
Hydraulics

9.—PRODUCTIVITY IMPROVEMENT PROGRAMME

In accordance with the enterprise agreement reached in February 1994 the Productivity Improvement Programme will continue.

Following is a list of those items that will continue to be discussed with a view to maintaining—

(1) Consultation and Communication—

Two way communication between manufacturing management and production employees and the members of the maintenance section.

(2) Maintenance employees are to continue involvement in—

(a) Customer Service, both internal and external.

(b) Reducing down time, waste and replacement parts wherever possible.

(c) Projects to improve quality and output without increasing maintenance costs.

(d) Maintaining and improving the housekeeping standards of the maintenance work areas.

(e) Control of consumables.

(f) Plant design and modifications.

(g) Minimise the use of sick leave.

(h) Minimise overtime.

(i) Raising the priority of solving safety problems.

(j) Reducing the machine down time.

(k) Labour flexibility.

10.—WAGES

(1) Wage increases are payable as per Appendix 'A'.

(2) The percentage increase and total rate shall be payable on and from the date agreed between parties.

(3) The wage rates specified in subclause (1) hereof shall be payable for all purposes.

11.—COMMITMENTS

(1) The parties undertake that the terms of this Agreement will not be used to progress or obtain similar arrangements or benefits in any other enterprise or Vinidex Tubemakers site.

(2) This Agreement shall not operate to cause any employee to suffer a reduction in ordinary-time earnings, or to depart from the standards of the Western Australian Industrial Relations Commission in regard to hours of work, annual leave with pay or long service leave with pay.

(3) There shall not be any further wage increase for the life of this Agreement, except where consistent with a State Wage Case Decision.

12.—DISPUTES RESOLUTION PROCEDURE

(1) Any question difficulty or dispute shall be dealt with pursuant to Clause 34 of the Metal Trades (General Award) 1966 No 13 of 1965.

13.—REDUNDANCY

(1) This will be in accordance to the provisions of Clause 32A of the Metal Trades (General Award) 1966 with the exception of Paragraph (3) Severance: the rate will be—

(a) Less Than 1 Year Service—Nil Severance Pay

(b) More Than 1 Year Service—3 Weeks Pay for each completed year of service with a maximum payment of 52 weeks.

14.—INCOME PROTECTION INSURANCE

(1) Income protection insurance will be considered during the life of this Agreement if included in Metal Trades EBA's in all other Vinidex Tubemakers Pty Ltd sites.

APPENDIX 'A'

Position	Grade	4% 03/08/98			4% 02/08/99		
		Award	Marg	Paid Rate	Award	Marg	Paid Rate
Foreperson	C8	506.90 L/H 18.00	240.10	765	506.90 L/H 18.00	270.70	796
Leading Hand	C8	506.90 L/H 18.00	125.10	650	506.90 L/H 18.00	151.10	676
Electrical Fitter (Leading Hand)	C7	527.80 L/H 18.00	150.20	696	527.80 L/H 18.00	178.20	724
Electrical Fitter	C10	465.20	183.80	649	465.20	209.80	675
Fitter	C8	506.90	142.10	649	506.90	168.10	675
Trades Assistant	C11	433.50	183.50	617	433.50	208.50	642

SIGNATORIES

Signed for on behalf the Maintenance staff of Vinidex Tubemakers Pty Limited Perth.

J Sharp-Collett
State Secretary
Metals & Engineering
Workers Union

Agreed to by Management of Vinidex Tubemakers Pty Limited Perth ACN 000664942.

V J Middleton
General Manager
Western Region

Dated 18/02/1999

WESTRAC EQUIPMENT (SERVICE OPERATIONS) ENTERPRISE AGREEMENT 1999.
No. AG 33 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Westrac Equipment Pty Ltd

and

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch.

AG 33 of 1999.

Westrac Equipment (Service Operations) Enterprise Agreement 1999.

COMMISSIONER S J KENNER.

3 May 1999.

Amending Order.

HAVING heard Ms L Avon-Smith as agent on behalf of the applicant and Mr M Anderton as agent on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

(1) THAT order AG 33 of 1999 dated 9 April 1999 be and is hereby cancelled.

(2) THAT the Westrac Equipment (Service Operations) Enterprise Agreement 1999 as filed in the Commission on 4 March 1999 be and is hereby registered as an industrial agreement.

(3) THAT the Westrac Equipment (Service Operations) Enterprise Agreement 1997 No. AG 7 of 1997 be and is hereby cancelled.

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

1.—TITLE

This agreement shall be known as the WesTrac Equipment (Service Operations) Enterprise Agreement 1999 ("agreement").

2.—ARRANGEMENT

3.—TERM

This agreement shall operate from the beginning of the first pay period commencing on or after the date this agreement is registered and shall operate for a period of 24 months from the 1st January 1999.

The parties agree that the terms and conditions contained within this agreement shall continue until such time that

either the agreement is cancelled or another agreement is entered into.

The parties will endeavour to commence negotiations three months prior to the expiry of this agreement.

4.—AREA & SCOPE

This agreement shall apply to those classifications of employees, as contained within the Merit System, who are engaged within the company's Service Departments within either the Perth metropolitan area or the Regional locations.

This agreement shall operate in conjunction with Part I – General of the Metal Trades (General) Award No 13 of 1965 as amended at the operative date of this Agreement. This Agreement shall be interpreted in conjunction with this Award. Where there is any inconsistency between the award and this agreement, this agreement will prevail.

5.—PARTIES TO THE AGREEMENT

The parties to this agreement are WesTrac Equipment Pty Ltd ('the company") and the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch ("Union").

6.—PREAMBLE AND COMMITMENT

This agreement is the result of negotiation between the employer and the union for wages and conditions that are to apply to the service departments (approximately 400 employees) of the Perth and Regional operations.

It is a term of this agreement that the parties undertake for the duration of this agreement not to pursue any claims, beyond the terms of this agreement. This shall not be read to limit the company's right to effectively manage the business within the scope of the award, this agreement, common law, and legislation.

7.—AIM OF AGREEMENT

This Enterprise Agreement has the following objectives—

- To ensure that safety is the first priority with employees working in the safest manner for themselves and others
- To develop a culture responsive to change
- To improve the viability and service delivery of WesTrac Equipment.
- To improve efficiency and flexibility by changing the way work is organised.
- To organise workplace structure and job design to maximise WesTrac Equipment's competitiveness.
- To be committed to the principles of continuous improvement.
- To promote customer satisfaction through improved efficiency and quality of work.

WesTrac Equipment, the Employees and the Union are all committed to these objectives and will use their best endeavours to achieve these objectives during the term of this agreement.

8.—OCCUPATIONAL HEALTH & SAFETY

The parties are committed to ensuring a safe environment for all of WesTrac's employees.

9.—POLICIES AND PROCEDURES

Employees are required to comply with all reasonable directions of the Company and with the Company's rules, regulations, policies, practices and procedures. Details are provided in the Company's Policy and Procedures Manuals as amended or introduced from time to time and copies of the manual are available from your Supervisor or Human Resources representative.

10.—CONTRACT OF EMPLOYMENT

Except as provided elsewhere in this agreement, permanent employment for full-time and part-time employees shall be by the week and subject to a three-month probationary period.

11.—LOCATIONS

Under the Agreement, work locations will be classified as follows—

Classification A: Metropolitan locations excluding Abernethy Road and Guildford Field Service

Classification B: Regional branch locations, Abernethy Road and Guildford Field Service.

12.—HOURS

(1) Ordinary Hours—Location A: (other than continuous shift workers)

(a) An average of 38 hours per week shall be worked by full time employees which will consist of 38 ordinary hours. The 38 hours per week may be averaged over the work cycle or roster.

(b) The ordinary hours of work may be worked on any day of the week, Monday to Friday, between the hours of 0600 and 1800 (except shift workers) unless otherwise agreed between the employee and the company.

(c) The ordinary hours of work shall not exceed 12 on any day which shall be consecutive except for an unpaid meal break, the duration of which shall be agreed between the employee and the company, but which shall not exceed 30 minutes in duration.

(d) A paid rest break of 15 minutes shall be allowed each morning.

(e) The time that each employee's scheduled breaks are to be taken is flexible and may be determined, and changed if necessary, on the day in order to meet operational requirements.

(2) Ordinary Hours – Location B (other than continuous shift workers)—

(a) An average of 40 hours per week shall be worked by full time employees which will consist of 38 ordinary hours and 2 hours of compulsory overtime. The 2 hours of compulsory overtime per week shall be paid at the ordinary hour's rate of pay.

(b) Full time employees shall, as compensation for working the 2 hours of compulsory overtime per week at ordinary rates, be entitled to 5 days off per annum which shall be paid at the ordinary hours rate of pay. These days off may be taken separately or in conjunction with annual leave. Employees are to make application for these days off in the same manner as annual leave is requested.

(c) The 40 hours per week may be averaged over the work cycle or roster.

(d) The ordinary hours of work may be worked on any day of the week, Monday to Friday, between the hours of 0600 and 1800 (except shift workers) unless otherwise agreed between the employee and the company.

(e) The ordinary hours of work shall not exceed 12 on any day which shall be consecutive except for an unpaid meal break, the duration of which shall be agreed between the employee and the company, but which shall not exceed 30 minutes in duration.

(f) A paid rest break of 15 minutes shall be allowed each morning. The time that each employee's scheduled breaks are to be taken is flexible and may be determined, and changed by the company, if necessary, on the day in order to meet operational requirements.

(3) Ordinary Hours (continuous shift workers)

(a) An average of 38 hours per week shall be worked by full time employees which will consist of 38 ordinary hours. The 38 hours per week may be averaged over the work cycle or roster.

(b) The ordinary hours of work may be worked on any day of the week, Monday to Friday, between the hours of 0600 and 1800 (except shift workers) unless otherwise agreed between the employee and the company.

(c) The ordinary hours of work shall not exceed 12 on any day which shall be consecutive except for an paid meal break, the duration of which shall be agreed between the employee and the company, but which shall not exceed 30 minutes in duration.

(d) A paid rest break of 15 minutes shall be allowed each morning and afternoon.

(e) The time that each employee's scheduled breaks are to be taken is flexible and may be determined, and changed if necessary, on the day in order to meet operational requirements.

13.—FLEXIBILITY

WesTrac Equipment may, by arrangement between the employee/s and the company, with reasonable notice, introduce new shift rosters, modify and refine existing shift and continuous shift rosters to suit the needs of the business. The employee/s will not unreasonably refuse a request.

Due to economic necessity or in order to meet client demands WesTrac Equipment may, by arrangement between the employee/s and the company and with reasonable notice, transfer employee/s from day work to shift work (continuous or otherwise) and vice versa or from one location to another. Employees will not unreasonably refuse a request.

Where changes to working hours and locations are to be made the employer shall give the employee/s as much notice as is possible but such notice shall be no less than 7 days unless by mutual agreement between the employer and employee/s affected.

14.—SHIFT WORK

(1) A shift employee when working an afternoon or night shift shall be paid a shift allowance of 15% of the employee's ordinary rate of pay for all ordinary hours worked.

15.—RATES OF PAY

(1) Each employee shall be paid the appropriate rate shown in Schedule A.—Rates of Pay or pro rata where less than 38 hours or 40 hours are worked depending on the location.

(2) In recognition of past improvements in productivity and in anticipation of reaching the targets listed, the wage increases payable under this Agreement are as follows (subject to ratification by the Western Australian Industrial Relations Commission)—

- An increase in the field service allowance of $0.20 per hour as of the 1st January 1999.
- Payment of an income protection policy for wages employees.
- An increase of 1.6% on wages payable from the 1st January 1999.

(a) A 1% increase in wages on complete implementation of being paid from Kronos clock system and achievement of a ½% reduction in the agreed measures as a percent of service sales.

(b) A ½% increase in wages on achievement of a further ½% reduction in the agreed measures as a percent of service sales.

(c) A ½% increase in wages on achievement of a further ½% reduction in the agreed measures as a percent of service revenue.

(3) Targets—

- Implementation of being paid from Kronos
- Process mapping the different service areas
- Review of the Merit system
- Tea money applied per award
- A commitment to achieving the agreed targets

Refer to Appendix B for further details

(4) Agreed measures affected by employees performance.

- Rework.
- Service Supplies.
- Tool Replacement.
- Tech Training.
- Lost Time Sick.

Refer to Appendix B for further details

16.—FIELD SERVICE ALLOWANCE

For permanent field service staff, the field service allowance of $1.30 is added into the hourly rate. For non-permanent field service staff, a field service rate of $1.30 per hour will be added into the hourly rate for hours worked in field service.

17.—LOCATION ALLOWANCE

An employee shall be paid the weekly allowances when employed in the following locations—

Pilbara	$60.00 per week
Eastern Goldfields & Murchison	$45.00 per week
Bunbury and Geraldton	$10.00 per week

The location allowance will be paid as part of the hourly rate and specifically overrides Clause 22 of the award.

18.—ANNUAL LEAVE

(1) Paid annual leave will accrue at the pro-rata rate of 28 consecutive calendar days, exclusive of public holidays, for every 12 months of continuous service. An additional 7 consecutive calendar days of paid annual leave shall accrue on a pro-rata basis for every 12 months of continuous service an employee is engaged on a continuous shift roster.

(2) Annual leave may be taken in one continuous period, or in shorter periods, by agreement between the employer and employee.

(3) Payment for annual leave shall be made, if requested, to an employee prior to their taking of such leave. The amount to be paid for—

(a) Location A day workers proceeding on annual leave shall be paid the amount the employee would have received for ordinary hours the employee would have worked during the period over which the employee is taking leave. In addition an annual leave loading of 17.5% is payable when taking leave at the conclusion of each 12 months of continuous service.

(b) Location B day workers proceeding on annual leave shall be paid the amount the employee would have received for ordinary hours the employee would have worked during the period over which the employee is taking leave. In addition an annual leave loading of 13.3% is payable when taking leave at the conclusion of each 12 months of continuous service for their annual leave entitlement and the five days off in compensation for the 40 hours.

19.—SICK LEAVE

When a person has accrued twenty sick days, they will be able to use the excess sick days over 20 as family leave to care for a sick family member.

Family sick leave would be payable on submission of a doctors certificate for immediate family members (spouse/de facto partner, child, parent).

Example—

An employee has 28 accrued sick days, and his/her child is sick for three days and the employee cares for the child. They could call in sick explaining they are taking a family sick leave day. They would bring in the original doctor's certificate for their child stating that their child is sick for three days and fill in a leave form (attaching the doctor's certificate).

The three days would then be deducted from their accrued sick leave and they would have a balance of 25 accrued sick days.

Employees with pre-existing accruals of sick pay in excess of 20 days are entitled to use them as described above.

In taking family sick leave days, you must maintain a minimum balance of 20 accrued sick leave days.

The excess accrued sick leave may also be used for up to a maximum of 5 days bereavement leave for immediate family. The General Manager has authority to approve additional bereavement leave upon request.

20.—LONG SERVICE LEAVE

An employee is entitled to 13 weeks long service leave after 15 years of continuous service as provided in Volume 66 of the Western Australian Industrial Gazette.

Effective from 1st July 1995, pro-rata long service leave will apply after 7 years completed, continuous years of service as per company policy on long service leave. Terms and conditions for the accrual and taking of the long service will be in accordance with the company's policy.

21.—EXCEPTIONAL HOURS LEAVE

Where an employee works in excess of 450 hours in a 6-week continuous period, the employee shall be entitled to up to 1 weeks leave without pay after the 6 week period if so requested. The clause shall operate so as not to effect the employee's request for leave from other entitlements such as annual leave, or days off in lieu of overtime.

Employees, required to work on site, away from their Head Office / Regional Branch for extended periods (minimum of four weeks) without the ability to return home, can apply for pro rata (as above) leave without pay at the discretion of their Branch/Area manager. It will be subject to prior agreement between the company and the employee on a branch by branch basis.

22.—SUPERANNUATION

(1) The company will contribute superannuation on behalf of the employee. The percentage quantum will be in accordance with those specified by the Superannuation Guarantee Act. The employee may determine fund of their choice according to the appropriate legislation. The default superannuation fund in the absence of a choice is the WesTrac Employees Superannuation Fund.

(2) The company will notify employees of the entitlement to nominate a complying superannuation fund or scheme.

(3) The company will be bound by the nomination of the employee unless the company and employee agree to change the complying superannuation fund or scheme to which contributions are to be made.

(4) The company shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by an employee.

23.—EMPLOYEE RESOLUTION PROCESS

(1) Purpose of the Employee Resolution Process—

The purpose is to ensure that all employees have a process to raise and resolve issues which impact on their work environment which is confidential, fair and prompt.

(2) Steps in the Employee Resolution Process—

(a) First, contact your immediate Supervisor or Manager explaining that you would like to use the Employee Resolution Process and to make an appointment. The appointment should be as soon as possible. In the meeting, explain what the issue is and how it is impacting on you.

(b) If your Supervisor or Manager can not resolve the issue, ask him or her to make an appointment for you to meet with his or her Departmental or Branch Manager. At that meeting, explain the issue and your concerns.

(c) If you still feel that the matter is not resolved or that you are being treated unfairly, ask to make an appointment with the General Manager. At that meeting, explain the issue and your concerns.

(d) If you still feel dissatisfied, you should ask for an appointment for you to meet with the Chief Operating Officer. At that meeting, explain the issue and all your concerns.

(e) If you still feel that the issue has not been resolved to your satisfaction, you should ask to meet with the Managing Director. At that meeting explain the issue and all your concerns.

(3) Assistance with the Employee Resolution Process—

At any step during the process, you can have another person help you to represent or assist in the resolution of the issue. Refer to the HR Department for a full copy of the policy and for qualified assistance if required.

(4) Referral to Commission

Emphasis shall be placed on a negotiated settlement. However if the Employee Resolution Process is exhausted without the dispute being resolved, the parties may jointly or individually refer the matter to the Western Australian Industrial Relations Commission for assistance in resolving the question, dispute or difficulty.

24.—COUNSELLING AND DISCIPLINE PROCEDURE

(1) Five Step Process

Where, in the opinion of management, an employee's conduct, behaviour, or work performance is unacceptable; the following procedure will be followed.

Step 1) VERBAL COUNSELLING: informal verbal discussion will occur between the employee and the immediate supervisor. The supervisor will keep a personal diary note.

Step 2) VERBAL WARNING: If the employee's conduct, behaviour or performance does not improve, then further counselling and a formal verbal warning will be given. The supervisor will keep a personal diary note.

Step 3) WRITTEN WARNING: If the employee's conduct, behaviour or performance still remains unacceptable, the employee will be counselled by his or her manager and a formal written warning will be issued to the employee. The written warning will clearly state the unacceptable conduct, behaviour or performance and define what is to be rectified by the employee.

Step 4) FINAL WARNING: If the employee's conduct, behaviour or performance is still unacceptable, the employee will be counselled further and issued with a final written warning. The written warning will clearly state that if the employee's conduct, behaviour or performance does not improve then demotion or termination may result.

Step 5) TERMINATION OF EMPLOYMENT: For continued unacceptable conduct, behaviour or performance, the employee may be terminated or demoted.

2) The above does not affect an employers right to issue a written warning or final written warning for serious offences. In some cases the offence may be considered serious enough for a final warning to be given at the outset. Some examples of major offences would be: serious or continual horseplay, threats or threatening behaviour, safety breaches, insubordination, harassment, carelessness, and verbal abuse.

3) Where an employee has been issued with first or second warnings for different offences, it may be considered that he/she is a generally unreliable employee and merits dismissal. Some examples of minor offences would be: lateness (isolated incident), absenteeism (isolated incident), poor housekeeping, poor work performance, breach of smoking policy, failure to carry out reasonable directives.

4) This procedure does not affect the employer's right to terminate an employee's services without notice for conduct that justifies instant dismissal, such as malingering, inefficiency, fighting, serious harassment, malicious or wilful damage, vandalism, stealing, chronic absenteeism, fraud, dishonesty, or neglect of duty.

APPENDIX A—RATES OF PAY

Classification	Base Rate $ per 38 hr week	Hourly rate	Base Rate $ per 40 hr week
Tradesperson			
5th Merit	679.44	17.8801	715.20
4th Merit	652.89	17.1818	687.27
3rd Merit	631.63	16.6220	664.88
2nd Merit	610.45	16.0647	642.59
1st Merit	578.57	15.2258	609.03
Base	557.80	14.6792	587.17
Trackpress Operator, Tool Storeperson & Steamcleaner			
5th Merit	586.99	15.4470	617.88
4th Merit	564.14	14.8458	593.83
3rd Merit	545.75	14.3619	574.48
2nd Merit	527.42	13.8796	555.18
1st Merit	499.93	13.1559	526.24
Base	487.49	12.8293	513.17
Crane Operator			
3rd Merit	588.56	15.4879	619.52
2nd Merit	568.83	14.9692	598.77
1st Merit	539.12	14.1872	567.49
Base	494.60	13.0157	520.63

Classification	Base Rate $ per 38 hr week	Hourly rate	Base Rate $ per 40 hr week
Labourer			
5th Merit	514.81	13.5484	541.93
4th Merit	494.68	13.0180	520.72
3rd Merit	478.62	12.5954	503.81
2nd Merit	462.48	12.1712	486.85
1st Merit	438.32	11.5270	461.08
Base	435.16	11.4521	458.08
Leading Hand Rates			
3-10 Employees	21.74		22.92
11–20 Employees	33.32		35.09
20 + Employees	43.08		45.37
Apprentice Rates			
1st Year	234.27	6.1651	246.60
2nd Year	306.79	8.0726	322.91
3rd Year	418.35	11.0094	440.38
4th Year	490.86	12.9177	516.71
Adult Apprentice (1st & 2nd year only)	388.04	10.3124	412.50

The above rates do not include the tool allowance.

APPENDIX B: PERFORMANCE PAY

Performance Payment

1) The consultative committee will review the performance results no later than 10 days after the end of each month. The first review will be carried out in March to review September through February.

2) Pay rate increases will be effected no later than the third pay period after the target has been achieved.

3) Back pay will apply if the rate increase is not made by the third pay period.

4) Each 0.5% reduction in the year to date expenses from the benchmark will be measured on a 6 month rolling average of expenses as a percentage of sales for the life of the agreement.

5) Expense reductions and pay increases are not limited to the table listed below. Additional incremental gains beyond the overall 1.5 % reduction from the benchmark will be paid in the same way.

6) Achieved payment for targets will not be taken once given.

The Company and the Consultative Committee (elected and appointed by the employees) are committed to sharing in other collective gains should we reach the proposed targets sooner than expected. Other initiatives resulting in gains will be documented and given due recognition during the next negotiation.

Kronos Payment

1) The company seeks a commitment from employees that they will be committed to being paid from Kronos. Payment for that commitment is incorporated in the up front portion of the offer.

2) A further 0.5% rate increase will be paid on achievement of all applicable stores being paid from Kronos.

3) Employees will not be denied this payment as a result of issues that are beyond their control.

Process Mapping

1) The company seeks a commitment from employees that they will be committed to using the mapping process to identify potential process improvements.

2) All stores will have a minimum of one of the process related to their store mapped within 3 months of signing of this agreement. Payment for this achievement is incorporated in the up front portion of the offer.

3) Employees will not be penalised for issues that are beyond their control.

Merit System

1) The merit system is currently being reviewed on the basis of the issues raised by the Consultative Committee. The management and Consultative Committee are committed to finalising the review and updates by the end of April 1999

- Consistency of application.
- The questions and answers.
- Recognition of prior learning.
- Content and application of the essentials booklet.
- Company and Employee initiated transfers.

The expenses listed in the tables below from July 1998 through to December 1998 have been identified as the benchmark and baseline for the performance measures.

Performance Benchmarks

Expense Reduction Opportunity	July 97- Dec 98 % of Sale	June 98 – Dec 98 % of Sale
Rework	0.91%	0.98%
Service supplies	0.82%	1.34%
Tool Replacement	0.71%	0.70%
Tech Training	0.58%	1.27%
Lost time Sick	0.46%	0.59%
Total % of Sales	3.50%	4.88%

Performance Targets & Upfront Offer

Offer	Up front Payment	First target	Second target	Third target
Rate Increase	1.6%	1%	0.5%	0.5%
Income insurance	0.9%			
Total Increase	2.5%	1%	0.5%	0.5%

Rework:

To reduce the number of reworks through better processes.

Service Supplies Expense Reduction:

Through identifying opportunities of better usage and more appropriate products.

Tool Replacement Expense Reduction:

Through more care and proper use of tools.

Technical Training Expense Reduction:

The aim is for employees to work with management to identify where technical training is being applied inappropriately.

Lost-time Sick Expense Reduction:

Employees are expected to use sick leave for the purpose of maintaining income when sick. The opportunity is for employees to come to work when they are healthy.

APPENDIX C: SIGNATORIES

Signed _____
Paul Piercy
Managing Director
For WesTrac Equipment Pty Ltd.
Date _____

Signed _____
John Sharp-Collett
Secretary
For Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (Western Australian Branch)
Date _____

ZOOLOGICAL GARDENS BOARD (OPERATIONS EMPLOYEES) ENTERPRISE BARGAINING AGREEMENT 1999.

No. AG 65 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Chief Executive Officer

Zoological Gardens Board

and

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch

and

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Of Workers—Western Australian Branch

and

The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch.

No. AG 65 of 1999.

Zoological Gardens Board (Operations Employees) Enterprise Bargaining Agreement 1999.

11 May 1999.

Order.

WHEREAS the parties have advised that an error occurred in the agreed schedule to the order which issued in this matter on 13 April 1999;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order—

THAT the schedule which follows shall replace the schedule to the order which issued on the 13th day of April 1999..

(Sgd.) S.A. CAWLEY,
[L.S.] Commissioner.

Schedule.

1.—TITLE

This Enterprise Agreement shall be known as the "Zoological Gardens Board (Operations Employees) Enterprise Bargaining Agreement 1999" and shall replace the Zoological Gardens (Operations Employees) Enterprise Bargaining Agreement 1996.

2.—ARRANGEMENT

3.—PARTIES BOUND

This Agreement shall be binding upon the Chief Executive Officer of the Zoological Gardens Board and the organisations as set out below—

(1) The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch.

(2) The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers Western Australia Branch.

(3) The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch.

4.—SCOPE AND NUMBER OF EMPLOYEES COVERED

(1) This Agreement shall operate in respect of all persons employed by the Chief Executive Officer, Zoological Gardens Board who are members of or who are eligible to be members of any of the organisations listed at Clause 3.—Parties Bound of this Agreement.

(2) It is estimated that this Agreement will affect approximately sixty two (62) employees as at the registration of the Agreement by the Western Australian Industrial Relations Commission on 13 April 1999.

5.—TERM

(1) This Agreement shall operate from the first pay period on or after the date on which this Agreement is registered in the Western Australian Industrial Relations Commission and shall remain in force for a period of 24 months from that date of registration.

(2) The pay quantum achieved and the working arrangements introduced as a result of this Agreement will remain and form the base for future agreements or continue to apply in the absence of any further agreement.

(3) The parties will review this Agreement six (6) months prior to the date of expiry of this Agreement for the purpose of renewal or replacement of this Agreement.

(4) The parties will assess achievements in performance, productivity and efficiency during the term of this Agreement.

6.—PARENT AWARDS

(1) This Agreement shall be read in conjunction with the parent awards, orders or industrial agreements which have application to the employees covered by this Agreement.

(2) In the case of any inconsistencies between this Agreement and the relevant award, this Agreement shall prevail, and where the Agreement is silent, the relevant award shall apply.

(3) For the purposes of this Agreement the relevant parent awards are—

(a) Building Trades (Government) Award 1968;

(b) Engineering Trades (Government) Award, 1967 Award Nos. 29, 30 and 31 of 1961 and 3 of 1962;

(c) Gardeners (Government) 1986 Award No. 16 of 1983;

(d) Miscellaneous Government Conditions and Allowances Award No A4 of 1992;

(e) Zoological Gardens Employees Award 1969;

(f) Zoological Gardens Board—Keepers Career Structure Industrial Agreement 1996;

(g) Zoological Gardens Board—Gardeners Weekend Work Industrial Agreement 1995;

(h) Western Australian Government / Australian Liquor Hospitality and Miscellaneous Workers Union (ALHMWU) Redeployment, Retraining and Redundancy Award, 1994 (an award of the Australian Industrial Relations Commission).

7.—NO FURTHER CLAIMS

(1) The parties of this Agreement undertake that for the duration of this Agreement there shall be no further claims over matters encompassed by this Agreement.

(2) However, the parties recognise the importance of increasing productivity and improving pay and conditions beyond those currently identified in this Agreement. Where such improvements are identified and implemented they will form the basis for future negotiations.

(3) No provisions in this Agreement shall operate to cause any employee a reduction in ordinary time earnings or to cause a departure from the standards of the Australian Industrial Relations Commission and Western Australian Industrial Relations Commission in regard to hours of work, annual leave with pay or long service leave with pay.

8.—WAGES

(1) In recognition of the employees' agreement to participate in continuous improvement initiatives, and subject to the achievement of the productivity improvement measures in Clause 30—Productivity Improvement and Clause 17—Productivity Initiatives of this Agreement, the wage increases during the period of this Agreement will be—

(a) a 0.2% increase for Rostered employees and 4% for Non Rostered employees will be paid from the first pay period on or after the date the Agreement is registered; and

(b) a 3.0% increase will be payable from the first pay period on or after twelve months from the date of registration of the Agreement, subject to meeting the terms of this agreement.

(2) The wage shall be agreed as appropriate to the duties, skills and responsibilities of the position. Wage rates are listed as Appendix A—Wage Rates). All rates of pay will be annualised rates to include all relevant payments appropriate to the position. Consequently, the following allowances will not be paid under this Agreement—

(a) penalty rates for weekend work; and

(b) trade allowances.

9.—SINGLE BARGAINING UNIT

(1) The SBU shall be responsible for monitoring the effectiveness of this Agreement.

(2) The SBU shall deal with those matters contained in Clause 30.—Productivity Improvement and Clause 8.—Wages.

10.—DEFINITIONS

For the purposes of the Agreement the following expressions shall have the following meaning—

(1) "Animal Ethics Committee" shall mean the committee generally comprised of the Chief Executive Officer, the Director Research, the Director Conservation, the Senior Veterinarian, RSPCA Chair, Head of Veterinary Studies, Murdoch University, Staff representative and a community representative which determines issues of animal welfare arising under the relevant International Code of Practice. The membership of the Committee may vary from time to time;

(2) "Base Rate" shall mean the minimum wage applicable under this Agreement for the classification of the position held by the employee;

(3) "Board" shall mean the Zoological Gardens Board;

(4) "Casual Employee" shall mean a person engaged as such on an hourly basis for a period of less than one month and who receives a loading of 20 per cent on top of the appropriate hourly rate. "Seasonal employee" shall mean a person engaged for seasonal work during the peak periods of October to April, under the same conditions as a Casual employee;

(5) "Ordinary Rate" shall mean the base rate plus any allowances paid to the employee on a fortnightly basis as a condition of the Parent Award or arising from this Agreement.

(6) "SBU" shall mean the Single Bargaining Unit;

(7) "WAIRC" shall mean the Western Australian Industrial Relations Commission;

(8) "The Zoo" shall mean the Zoological Gardens Board;

11.—MISSION STATEMENT

(1) The mission of the Zoo is—

To advance the conservation of wildlife and to change community attitudes towards the preservation of life on Earth.

(2) The mission statement guides all operations, planning and development decisions.

12.—SHARED VISION

(1) The parties to this Agreement are committed to achieving the Vision of the Zoo which is—

To be a world class Zoo, integrating conservation, education, research and recreation.

(2) To achieve its mission and provide a continuously improving quality of service to all stake holders, the community and the Government, the Zoo is undertaking Organisation wide changes identified in its Business Plan which focus on—

(a) Maximising customer satisfaction;

(b) Maximising our contribution to conservation;

(c) Maximising community conservation awareness;

(d) Move towards self sufficiency;

(e) Enhanced employee satisfaction and well being;

(f) Ensure efficient and effective management;

(g) Ensure responsible asset management.

(3) To achieve our mission and vision the following supporting objectives will be pursued by the parties—

(a) Apply ethical practices;

(b) Apply environmental sound waste management practices;

(c) Use best management and operating practices;

(d) Devolution of responsibility which will maximise productivity and efficiency;

(e) Build on the commitment and talents of our employees to develop a work environment which values and rewards initiative, effort and excellence;

(f) Train, develop and support staff;

(g) Apply effective business systems;

(h) Use up to date technology;

(i) Implement modern human resource practices.

13.—CONTINUOUS IMPROVEMENT

(1) The parties recognise that the Zoo must be a dynamic organisation with the capacity for change and the ability to keep pace with modern zoo practices in this unique but vital industry.

(2) The Zoo will continually strive to improve business processes and performance at all levels.

(3) Enterprise Bargaining will be assisted by—

(a) delivering pay increases for employees based on shared productivity improvement, to improve the quality of working life for all employees;

(b) facilitating an efficient improvement process by encouraging all employees and managers to identify and deal with productivity barriers in a participative manner;

(c) achieving continuous improvement of all processes to reduce costs, improve quality, work organisation, customer service, delivery, time lines, health and safety, communications and training;

(d) employees undertaking multi-functions that are within the employee's skill, competence and training to perform, ie minor repairs and maintenance to equipment and property. This initiative will not result in a loss of jobs in the maintenance, gardening and environmental services areas;

(e) the employer consulting with affected union(s) and employees concerning any proposal to contract out services beyond current practice;

(f) encouraging and facilitating teamwork and team performance through effective leadership at all levels;

(g) employees having a strong focus on satisfying internal and external customer needs;

(h) developing the skills of employees through the provision of appropriate training and performance management systems;

(i) improving existing consultative mechanisms.

14.—TRAINING AND DEVELOPMENT

(1) All employees subject to this Agreement will be provided with the relevant training and development at the earliest opportunity to enable them to carry out a range of activities as a consequence of changes which may occur from the implementation of the Business Plan and continuing improvement.

(2) All training will be documented and recorded on the employee's personnel file to be used in conjunction with the performance appraisal system.

(3) Where an employee is required to undertake employment related training such training shall be conducted as far as practicable in the employee's usual working time and the employee shall not lose pay for attendance or extra travel associated with such training. Where it is necessary for the employee to attend training outside of the employee's usual working time the employee shall be paid for such attendance or extra travel time as if the employee had worked.

(4) Fees, materials or any other reasonable costs associated with the training referred to above shall apply equally to apprentices, trainees or other like classes of person engaged by the employer except where agreement to allow otherwise is reached with the relevant union.

(5) Employees may undertake on-the-job training and performance in other positions, when available, to assist in the development of skills and experience to further their careers.

15.—PROFESSIONAL DEVELOPMENT

(1) The parties agree to the ongoing identification of training needs for employees to meet the operational demands of the Zoo and/ or to assist employees in their personal career development. The employer will provide the relevant professional development opportunities to enable employees to carry out a range of activities as a consequence of any changes which may occur from the implementation of the Zoo's Business Plan and continuous improvement. Employees commit to undergo training required of him/her by the employer to meet organisational needs.

(2) Grade 4 Keepers agree to provide practical on-the-job and, at times, theoretical off-the-job training for other keepers as required by the employer. Training to undertake this role will be provided if required. ie. Train the Trainer.

16.—PERFORMANCE APPRAISAL INDICATORS

(1) The performance of all employees shall be determined by an annual performance appraisal to be conducted in accordance with the Human Resources policy of the Zoo.

(2) The employee and employer will discuss, identify and agree on a range of individual and/ or group performance indicators that link in to the Zoological Gardens Board Business Plan, Directorate Operational Plan, Workgroup and Individual Plans.

17.—PRODUCTIVITY INITIATIVES

(1) Consistent with the commitments to continuous improvement and shared vision contained in this Agreement, the parties agree to facilitate greater animal visibility at the Zoo.

(2) In particular, employees will develop rosters for hours of work which allow, to the extent possible, ie. where it is not possible because it would be detrimental to animal welfare—

(a) animals to be displayed until 5.00 pm;

(b) animals to be displayed at early morning and evening functions;

(c) later Zoo closing times;

(d) working of a eight hour day to a maximum of 10 hours per day when appropriate in accordance with subclause (2) of Clause 19.—Hours of Work of this Agreement;

(f) employees are entitled to annualised Rostered Days Off of 12 days a year. They will be able to take them, by previous arrangement with their manager, at any time during the year however it is preferred that they are taken between April and October, this being the less busy period of operational requirements;

(g) the limiting of the morning tea break strictly to 10 minutes.

(3) The employer shall provide function programs and details in advance to employees directly affected.

(4) Rosters will be developed where possible to undertake the work in ordinary time hours (including shift and weekend penalties) except where the function commences before 6.00 am or concludes after 9.00 pm outside of which overtime rates shall apply.

(5) The proposed roster shall be submitted for the approval of the Director Conservation.

(6) Where the roster is not approved, the Director Conservation shall refer the roster to the Chief Executive Officer for discussion with the union.

(7) Where agreement cannot be reached, the roster shall be referred to the Western Australian Industrial Relations Commission for determination.

(8) The parties agree to accept the recommendation of the Western Australian Industrial Relations Commission.

(9) (a) Any concern or dispute regarding the welfare of the animals including as a result of extended opening hours referred to in subclause (2) of this clause shall be referred to the Animal Ethics Committee for determination.

(b) The employee(s) directly concerned shall attend the Animal Ethics Committee meeting in a non-voting capacity.

(10) Over the term of this Agreement, the SBU shall review the arrangements referred to in subclause (2) and the arrangements shall continue if they are required to meet the outcomes regarding animal visibility.

18.—CASUAL EMPLOYMENT

The parties agree to the use of casual, or seasonal, employees to supplement full-time employment, to meet the needs of events and functions.

19.—HOURS OF WORK

(1) The ordinary hours of work shall be 38 hours per week to be worked between the hours of 6.00 am and 9.00pm Monday to Friday. The hours of duty shall be eight hours per day to a maximum of 10 hours per day.

(2) Subject to subclause (1) of Clause 22.—Overtime/Time Off in Lieu, where possible hours worked in excess of eight hours per day can be accrued as time in lieu (TIL). Overtime will be paid out only when TIL cannot be taken and will be subject to prior agreement between the employer and employee. Approval for working in excess of eight hours on any day must be obtained from the employee's supervisor before commencing the additional work.

(3) Hours of work may be rostered over seven days by arrangement between the employer and employee. Changes to the roster system will only be made after appropriate consultation processes have been undertaken and common agreement reached.

(4) Employees not required to work rosters may elect to work under the following optional arrangements—

(a) Tuesday to Saturday;

(b) Sunday to Thursday;

(c) Monday to Friday.

(5) A morning tea break of strictly 10 minutes duration shall be allowed without loss of pay and counted as time worked.

(6) The time of taking lunch and tea breaks may be set or altered by the employer if necessary to provide continuity of services or operations, but as far as possible the wishes of the employee shall be met.

(7) The employee shall not be required to work more than five hours without a meal break.

(8) Roster Days Off will be accumulated at the rate of 0.4 of one hour of each day worked and may be taken in accordance with paragraph (f) of subclause (2) of Clause 17.—Productivity Initiatives of this agreement and Clause 6.—38 Hour Week: Rostered Day Off of the Zoological Gardens Employees Award 1969.

20.—SALARY PACKAGING

(1) An employee may, by written agreement with the employer, enter into a salary packaging arrangement in accordance with the Western Australian Government Guidelines for Salary Packaging in the WA Public Sector.

(2) The salary packaging arrangement must comply with relevant taxation laws and the employer will not be liable for additional tax, penalties or other costs payable or which may become payable by the employee.

(3) In the event of any increase or additional payments of tax or penalties associated with the employment of the employee or the provision of employer benefits under the salary packaging agreement, such tax, penalties and any other costs shall be borne by the employee.

21.—EMPLOYEE ASSISTANCE PROGRAM

All employees shall have access to the authorised Employee Assistance Program. Employees may approach the EAP directly or the employer may direct an employee to attend EAP sessions in some circumstances where a work related performance issue has been identified. All information relating to sessions between the employee and the EAP provider will remain confidential at all times.

22.—OVERTIME/ TIME OFF IN LIEU

(1) Subject to prior agreement in writing between the employee and employer time off in lieu of payment for authorised overtime worked may be granted. Such time off in lieu shall be proportionate to the payment to which the employee is entitled.

(2) The actual period of time off in lieu may be accumulated and taken at a time agreed between employer and the employee concerned.

(3) The employee will be required to clear accumulated time off in lieu of payment for overtime within three months of the overtime being performed. If the employee is unable to make suitable arrangements to clear the TOIL within the specified period arrangements may be made to have the time paid out by mutual agreement between the employer and employee. Any time off in lieu of payment for overtime arising from extended opening hours shall be recorded separately.

(4) No claim for payment of overtime or accumulated time off in lieu for payment of overtime shall be allowed unless the overtime has been authorised.

(5) Employees regularly rostered to work on weekends will not be paid penalty rates for their weekend work but instead will receive an annualised wage inclusive of penalty rates for weekend work.

(6) Employees who are rostered to work on public holidays will receive a day off at the rate of time for time in lieu of overtime.

(7) Employees who work Tuesday to Saturday or Sunday to Thursday will receive a day off at the rate of time for time when a Public Holiday is observed on a Monday or Friday.

(8) Non-rostered employees opting to work in accordance with either paragraph (b) or (c) of subclause (4) of Clause 19.—Hours of Work of this agreement, for a minimum of three months in 12 months will not be paid overtime for their Weekend work and instead will be able to accumulate up to five (5) days per year supplementary leave, which may be added to annual leave, or otherwise as agreed by the employees supervisor. These days may not be taken until they are accrued.

23.—SHIFT WORK ALLOWANCE

(1) An employee required to work a shift for the purposes of a night zoo or special evening event will be paid a shift allowance of 15% in addition to the ordinary rate of pay and overtime will not be paid. The shift allowance will be payable for hours worked after 2.00 pm when an employee finishes their shift after 7.00pm.

(2) This allowance is not applicable to casual or seasonal employees.

24.—OCCUPATIONAL HEALTH AND SAFETY

A safe working environment will impact positively on morale and ultimately on the organisation's performance. In recognition of this the employer undertakes to—

(1) Provide and maintain workplaces, plant and systems of work such that employees are not unduly exposed to hazards where possible.

(2) Inform, instruct, train and supervise employees accordingly.

(3) Provide and maintain agreed and appropriate personal protective equipment and material where it is otherwise not possible to protect employees from hazards.

(4) Co-operate with the union nomination and election of, and consult and co-operate with, health and safety representatives and with other employees regarding occupational health and safety matters.

(5) In consultation with employees and their representatives, establish an occupational health and safety policy which enunciates the employer's duty of care, that of employees and contractors, and establishes agreed procedures for consultation, monitoring, reporting and recording, rehabilitation, and resolution of issues with those parties.

(6) Accept the right of employees to refuse work which in their opinion will expose them or any other person to risk of serious injury or harm to health, and accept the right of health and safety representatives to evaluate such risk and advise employees of their right to refuse such unsafe work in accordance with the Occupational Health Safety and Welfare Act 1994.

(7) Allow occupational health and safety representatives to attend up to ten (10) days occupational health and safety training with no loss of pay.

(8) In accordance with the Zoo's operational needs, the employer commits to provide training opportunities in occupational health and safety and employees commit to undergo such training as required for operational needs.

25.—HIGHER DUTIES

Provided an employee's current classification is provided for in the relevant award competency based career structure then—

(1) No Higher Duties Allowance will be payable within the same Award structure.

(2) Where an employee performs all or a proportion of the duties of a higher classification, under a different Award, in accordance with subclause (1) of this clause that proportion shall be determined by the employer and an allowance paid which is equal to that proportion of the difference between the employee's own hourly rate and the minimum rate of the higher position.

(3) There shall be no reduction of wages or conditions for any employee who may be required to perform duties of a lower classification, or equivalent, than their own on a temporary basis.

(4) Where an employee performs higher duties in accordance with subclause (2) of this clause for a continuous period of 12 months or more he/she shall be entitled to be paid at that higher rate for any annual leave accrued during that period.

26.—ANNUAL LEAVE

(1) Non-rostered employees shall be entitled to four weeks paid leave for each completed year of service, or six weeks for rostered employees in lieu of public holidays.

(2) For three months after the registration of the Agreement permanent employees may request a once only conversion of accrued annual leave entitlements in excess of 4 weeks (or in excess of 6 weeks for keepers) into cash at 100% of the salary applying at the time of conversion. Conversion is subject to employer approval. After the three months period applications for conversion will not be considered.

27.—LONG SERVICE LEAVE

Employees subject to this Agreement may, by agreement with their manager, clear any accrued entitlement to long service leave in multiples of two weeks.

28.—FIRST AID CERTIFICATE

(1) Employees who obtain and-maintain a current first aid certificate from St. Johns' Ambulance or a similar body shall be reimbursed for the full cost of such training upon the employee providing evidence of the successful completion of the course.

(2) Employees shall undertake such training in their own time.

29.—PAST PRODUCTIVITY

This Agreement is in recognition of all past productivity improvements. These include but are not limited to—

(1) Review of contract staff; and

(2) Savings in Workers Compensation premiums.

30.—PRODUCTIVITY IMPROVEMENT

The parties are committed to the following productivity improvement measures—

(1) the use of casual, or seasonal, employees to supplement full-time employment, for events and functions;

(2) the parties recognise that due to the operational requirements of the Zoo, that the taking of Lunch and Tea breaks should be flexible and by agreement between the supervisor and the employee;

(3) accepting the introduction of annualised wages;

(4) accepting the introduction of annualised RDO's;

(5) contributing to Zoorassic Park as required by the supervisor to ensure its success;

(6) committing to occupational health and safety training and other strategies to reduce the incidence of accidents at work and time off caused by work injuries;

(7) committing to the achievement of target reductions in overtime;

(8) assist in the target of achieving an increase in profit from extended Zoo functions and events including Night Zoo and Twilights with due consideration of animal welfare; and

(9) agree to fully participate in and co-operate with the review of Conservation and its implementation.

31.—FAMILY CARERS LEAVE

(1) An employee may use a total of 38 hours of his/her personal accrued sick leave each year to supervise the convalescence of a family member. So as not to breach the Minimum Conditions of Employment Act 1996, only sick leave entitlements accrued in previous years may be taken for family carer's leave.

(2) In this clause 'family member' means the employee's spouse, de facto spouse, child, step child, parent, step parent, sibling or another person who lives with the employee as a member of the employee's family.

(3) The employee shall, wherever practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee (where applicable), the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee shall notify the employer by telephone or such absence at the first opportunity on the day of absence.

(4) The employee shall, if required by the employer, establish by production of a medical certificate or statutory declaration, the illness of the person concerned and that the illness is such as to require care by another.

(5) Family Carers Leave may be taken on an hourly basis.

32.—BEREAVEMENT LEAVE

(1) An employee, on the death of a spouse or de facto spouse, child or step child, parent or parent in law, brother, sister or any other persons who immediately before that person's death lived with the employee as a member of the employee's family, the employee is entitled to bereavement leave without loss of earnings for up to two (2) working days.

(2) Bereavement leave shall at the discretion of the employee be taken at any time up to and including the two days following the day of the funeral.

(3) Payment for such leave may be subject to the employee providing proof of the death, satisfactory to the employer.

(4) Bereavement leave is not to be taken when the employee is absent on another form of leave or would not otherwise have been on duty.

33.—DISPUTE SETTLEMENT PROCEDURES

(1) The objective of these procedures is to provide a set of provisions for dealing with any question, dispute or difficulties that arises between the parties about the meaning or the effect of this Agreement or disagreement between the parties during agency negotiations.

(2) In the event of any question, dispute or difficulty under subclause (1) hereof, arising between the parties, the following procedures shall apply—

(a) The matter to be discussed between employee and his/her supervisor.

(b) The matter be referred by the supervisor to the relevant senior manager for further discussion.

(c) If the matter is unable to be discussed or unable to be resolved through discussion then the matter is to be discussed between the employee and/or the union's employee representative and the employer representative and an attempt made to resolve the matter.

(d) If the matter is unable to be resolved through discussions between the employee and/or the union's employee representative and the employer representative the matter is to be discussed between the employee and/or the union's employee representative and the Chief Executive Officer or his/her nominee as soon as practicable but within two working days. Notification of any question or disagreement may be made verbally and/or in writing.

(e) The parties may individually or collectively seek advice from any appropriate organisation or person in an attempt to resolve the matter.

(f) If the matter is not resolved within five working days of the date of notification in (b) hereof, either party may notify the Secretary of the union or his/her nominee, or the Chief Executive Officer or his/her nominee of the existence of a dispute or disagreement.

Such notification shall be in writing with a copy to be provided to all other parties. The notification is to include the parties' interpretation of the matters in dispute.

(g) The Secretary of the union or his/her nominee and the Chief Executive Officer or his/her nominee shall confer on the matters notified by the parties within five working days and—

(i) where there is agreement on the matters in dispute the parties shall be advised within two working days;

(ii) where there is disagreement on any matter it may be submitted to the Western Australian Industrial Relations Commission.

Provided that with effect from 22 November, 1997 it is required that persons involved in the question, dispute or difficulty shall confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission.

(3) Nothing in this Clause shall be read so as to exclude an organisation party to or bound by this Agreement from representing its members or any employee from involving their Union in any dispute or grievance.

34.—WAGE INCREASE

(1) Subject to the achievement of the productivity improvement measures in Clause 30—Productivity Improvement and Clause 17—Productivity Initiatives wage increases will be paid to employees in the following manner—

(a) Effective from first pay period on or after date of registration 0.2% for Rostered employees and 4.0% for Non Rostered employees);

(b) First pay period on or after 12 months after date of registration, subject to the approval of the Cabinet Standing Committee on Labour Relations 3.0%.

(2) Any additional savings identified during the term of this Agreement will be declared and included in the negotiations for the next agreement between the parties.

(3) A schedule of wages appears at Appendix A—Wage Rates, of this Agreement.

35.—RESERVED MATTERS

The parties agree that the matters below be reserved through the term of this Agreement, but may be brought forward for consideration if the parties agree—

(1) The availability of injury and sickness income protection insurance for Zoo employees.

(2) Further review of roster arrangements in order to achieve improvements to the system.

APPENDIX A—WAGE RATES

Operative Date: Pay period commencing 16 April 1999.

Keepers

Grade	Previous EBA Rates Annual $	Annualised Rates [20%] Annual $	From Date of Signing [0.2%] Annual $	12 Months After 13 April 1999 [3%] Annual $
Grade 1				
1.1	$24,263	$29,116	$29,174	$30,049
1.2	$24,835	$29,802	$29,862	$30,757
1.3	$25,407	$30,488	$30,549	$31,466
Grade 2				
2.1	$26,134	$31,361	$31,424	$32,366
2.2	$26,803	$32,164	$32,228	$33,195
2.3	$27,845	$33,414	$33,481	$34,485
2.4	$28,165	$33,798	$33,866	$34,882
Grade 3				
3.1	$28,846	$34,615	$34,684	$35,725
3.2	$29,528	$35,434	$35,504	$36,570
3.3	$30,208	$36,250	$36,322	$37,412
3.4	$30,900	$37,080	$37,154	$38,269
Grade 4				
4.1	$32,062	$38,474	$38,551	$39,708
4.2	$32,909	$39,491	$39,570	$40,757
4.3	$33,813	$40,576	$40,657	$41,876
Keeper in training = 76% of Grade 2 Year 1	$19,862	$23,834	$23,882	$24,575

Horticulture

Grade	Previous EBA Rates Annual $	From Date of Signing [4%] Annual $	12 Months After 13 April 1999 [3%] Annual $
Grade 1			
1.1	$24,263	$25,234	$25,991
1.2	$24,835	$25,828	$26,603
1.3	$25,407	$26,423	$27,216
Grade 2			
2.1	$26,134	$27,179	$27,995
2.2	$26,803	$27,875	$28,711
2.3	$27,845	$28,959	$29,828
2.4	$28,165	$29,292	$30,170
Grade 3			
3.1	$28,846	$30,000	$30,900
3.2	$29,528	$30,709	$31,630
3.3	$30,208	$31,416	$32,359
3.4	$30,900	$32,136	$33,100

Horticulture

Grade	Previous EBA Rates Annual $	From Date of Signing [4%] Annual $	12 Months After 13 April 1999 [3%] Annual $
Grade 4			
4.1	$32,062	$33,344	$34,345
4.2	$32,909	$34,225	$35,252
4.3	$33,813	$35,166	$36,220
Level 9	$30,270	$31,481	$32,425
Bldg L6	$28,416	$29,553	$30,439
Eng C 10	$26,321	$27,374	$28,195
Eng C 8	$28,817	$29,970	$30,869

Note: Annualised trades allowances are paid separate to wages.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Chief Executive Officer
Zoological Gardens Board

and

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch

and

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Of Workers—Western Australian Branch

and

The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch.

No. AG 65 of 1999.

Zoological Gardens Board (Operations Employees) Enterprise Bargaining Agreement 1999.

13 April 1999.

Order.

HAVING heard Mr J Lange on behalf of the Chief Executive Officer Zoological Gardens Board, and Mr J Ridley on behalf of The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch, and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Of Workers—Western Australian Branch, and there being no appearance on behalf of The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch, now therefore, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order—

1. THAT the agreement to be known as the "Zoological Gardens Board (Operations Employees) Enterprise Bargaining Agreement 1999" reflected in the schedule to this order shall be and is registered with effect on the 13th day of April 1999.
2. THAT the Zoological Gardens Board (Operations Employees) Enterprise Bargaining Agreement 1999 shall replace the Zoological Gardens Board (Operations Employees) Enterprise Bargaining Agreement 1996 with effect on the 13th day of April 1999.

(Sgd.) S. A. CAWLEY,
[L.S.] Commissioner.

Schedule.

1.—TITLE

This Enterprise Agreement shall be known as the "Zoological Gardens Board (Operations Employees) Enterprise Bargaining Agreement 1999" and shall replace the Zoological Gardens (Operations Employees) Enterprise Bargaining Agreement 1996.

2.—ARRANGEMENT

3.—PARTIES BOUND

This Agreement shall be binding upon the Chief Executive Officer of the Zoological Gardens Board and the organisations as set out below—

(1) The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch.

(2) The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers Western Australia Branch.

(3) The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch.

4.—SCOPE AND NUMBER OF EMPLOYEES COVERED

(1) This Agreement shall operate in respect of all persons employed by the Chief Executive Officer, Zoological Gardens Board who are members of or who are eligible to be members of any of the organisations listed at Clause 3.—Parties Bound of this Agreement.

(2) It is estimated that this Agreement will affect approximately sixty two (62) employees as at the registration of the Agreement by the Western Australian Industrial Relations Commission on 13 April 1999.

5.—TERM

(1) This Agreement shall operate from the first pay period on or after the date on which this Agreement is registered in the Western Australian Industrial Relations Commission and shall remain in force for a period of 24 months from that date of registration.

(2) The pay quantum achieved and the working arrangements introduced as a result of this Agreement will remain and form the base for future agreements or continue to apply in the absence of any further agreement.

(3) The parties will review this Agreement six (6) months prior to the date of expiry of this Agreement for the purpose of renewal or replacement of this Agreement.

(4) The parties will assess achievements in performance, productivity and efficiency during the term of this Agreement.

6.—PARENT AWARDS

(1) This Agreement shall be read in conjunction with the parent awards, orders or industrial agreements which have application to the employees covered by this Agreement.

(2) In the case of any inconsistencies between this Agreement and the relevant award, this Agreement shall prevail, and where the Agreement is silent, the relevant award shall apply.

(3) For the purposes of this Agreement the relevant parent awards are—

(a) Building Trades (Government) Award 1968;

(b) Engineering Trades (Government) Award, 1967 Award Nos. 29, 30 and 31 of 1961 and 3 of 1962;

(c) Gardeners (Government) 1986 Award No. 16 of 1983;

(d) Miscellaneous Government Conditions and Allowances Award No A4 of 1992;

(e) Zoological Gardens Employees Award 1969;

(f) Zoological Gardens Board—Keepers Career Structure Industrial Agreement 1996;

(g) Zoological Gardens Board—Gardeners Weekend Work Industrial Agreement 1995;

(h) Western Australian Government / Australian Liquor Hospitality and Miscellaneous Workers Union (ALHMWU) Redeployment, Retraining and Redundancy Award, 1994 (an award of the Australian Industrial Relations Commission).

7.—NO FURTHER CLAIMS

(1) The parties of this Agreement undertake that for the duration of this Agreement there shall be no further claims over matters encompassed by this Agreement.

(2) However, the parties recognise the importance of increasing productivity and improving pay and conditions beyond those currently identified in this Agreement. Where such improvements are identified and implemented they will form the basis for future negotiations.

(3) No provisions in this Agreement shall operate to cause any employee a reduction in ordinary time earnings or to cause a departure from the standards of the Australian Industrial Relations Commission and Western Australian Industrial Relations Commission in regard to hours of work, annual leave with pay or long service leave with pay.

8.—WAGES

(1) In recognition of the employees' agreement to participate in continuous improvement initiatives, and subject to the achievement of the productivity improvement measures in Clause 30—Productivity Improvement and Clause 17—Productivity Initiatives of this Agreement, the wage increases during the period of this Agreement will be—

(a) a 0.2% increase for Rostered employees and 4% for Non Rostered employees will be paid from the first pay period on or after the date the Agreement is registered; and

(b) a 3.0% increase will be payable from the first pay period on or after twelve months from the date of registration of the Agreement, subject to meeting the terms of this agreement.

(2) The wage shall be agreed as appropriate to the duties, skills and responsibilities of the position. Wage rates are listed as Appendix A—Wage Rates). All rates of pay will be annualised rates to include all relevant payments appropriate to the position. Consequently, the following allowances will not be paid under this Agreement—

(a) penalty rates for weekend work; and

(b) trade allowances.

9.—SINGLE BARGAINING UNIT

(1) The SBU shall be responsible for monitoring the effectiveness of this Agreement.

(2) The SBU shall deal with those matters contained in Clause 30.—Productivity Improvement and Clause 8.—Wages.

10.—DEFINITIONS

For the purposes of the Agreement the following expressions shall have the following meaning—

(1) "Animal Ethics Committee" shall mean the committee generally comprised of the Chief Executive Officer, the Director Research, the Director Conservation, the Senior Veterinarian, RSPCA Chair, Head of Veterinary Studies, Murdoch University, Staff representative and a community representative which determines issues of animal welfare arising under the relevant International Code of Practice. The membership of the Committee may vary from time to time;

(2) "Base Rate" shall mean the minimum wage applicable under this Agreement for the classification of the position held by the employee;

(3) "Board" shall mean the Zoological Gardens Board;

(4) "Casual Employee" shall mean a person engaged as such on an hourly basis for a period of less than one month and who receives a loading of 20 per cent on top of the appropriate hourly rate. "Seasonal employee" shall mean a person engaged for seasonal work during the peak periods of October to April, under the same conditions as a Casual employee;

(5) "Ordinary Rate" shall mean the base rate plus any allowances paid to the employee on a fortnightly basis as a condition of the Parent Award or arising from this Agreement.

(6) "SBU" shall mean the Single Bargaining Unit;

(7) "WAIRC" shall mean the Western Australian Industrial Relations Commission;

(8) "The Zoo" shall mean the Zoological Gardens Board;

11.—MISSION STATEMENT

(1) The mission of the Zoo is—

To advance the conservation of wildlife and to change community attitudes towards the preservation of life on Earth.

(2) The mission statement guides all operations, planning and development decisions.

12.—SHARED VISION

(1) The parties to this Agreement are committed to achieving the Vision of the Zoo which is—

To be a world class Zoo, integrating conservation, education, research and recreation.

(2) To achieve its mission and provide a continuously improving quality of service to all stake holders, the community and the Government, the Zoo is undertaking Organisation wide changes identified in its Business Plan which focus on—

(a) Maximising customer satisfaction;
(b) Maximising our contribution to conservation;
(c) Maximising community conservation awareness;
(d) Move towards self sufficiency;
(e) Enhanced employee satisfaction and well being;
(f) Ensure efficient and effective management;
(g) Ensure responsible asset management.

(3) To achieve our mission and vision the following supporting objectives will be pursued by the parties—

(a) Apply ethical practices;
(b) Apply environmental sound waste management practices;
(c) Use best management and operating practices;
(d) Devolution of responsibility which will maximise productivity and efficiency;
(e) Build on the commitment and talents of our employees to develop a work environment which values and rewards initiative, effort and excellence;
(f) Train, develop and support staff;
(g) Apply effective business systems;
(h) Use up to date technology;
(i) Implement modern human resource practices.

13.—CONTINUOUS IMPROVEMENT

(1) The parties recognise that the Zoo must be a dynamic organisation with the capacity for change and the ability to keep pace with modern zoo practices in this unique but vital industry.

(2) The Zoo will continually strive to improve business processes and performance at all levels.

(3) Enterprise Bargaining will be assisted by—

(a) delivering pay increases for employees based on shared productivity improvement, to improve the quality of working life for all employees;
(b) facilitating an efficient improvement process by encouraging all employees and managers to identify and deal with productivity barriers in a participative manner;
(c) achieving continuous improvement of all processes to reduce costs, improve quality, work organisation, customer service, delivery, time lines, health and safety, communications and training;
(d) employees undertaking multi-functions that are within the employee's skill, competence and training to perform, ie minor repairs and maintenance to equipment and property. This initiative will not result in a loss of jobs in the maintenance, gardening and environmental services areas;
(e) the employer consulting with affected union(s) and employees concerning any proposal to contract out services beyond current practice;
(f) encouraging and facilitating teamwork and team performance through effective leadership at all levels;
(g) employees having a strong focus on satisfying internal and external customer needs;
(h) developing the skills of employees through the provision of appropriate training and performance management systems;
(i) improving existing consultative mechanisms.

14.—TRAINING AND DEVELOPMENT

(1) All employees subject to this Agreement will be provided with the relevant training and development at the earliest opportunity to enable them to carry out a range of activities as a consequence of changes which may occur from the implementation of the Business Plan and continuing improvement.

(2) All training will be documented and recorded on the employee's personnel file to be used in conjunction with the performance appraisal system.

(3) Where an employee is required to undertake employment related training such training shall be conducted as far as practicable in the employee's usual working time and the employee shall not lose pay for attendance or extra travel associated with such training. Where it is necessary for the employee to attend training outside of the employee's usual working time the employee shall be paid for such attendance or extra travel time as if the employee had worked.

(4) Fees, materials or any other reasonable costs associated with the training referred to above shall apply equally to apprentices, trainees or other like classes of person engaged by the employer except where agreement to allow otherwise is reached with the relevant union.

(5) Employees may undertake on-the-job training and performance in other positions, when available, to assist in the development of skills and experience to further their careers.

15.—PROFESSIONAL DEVELOPMENT

(1) The parties agree to the ongoing identification of training needs for employees to meet the operational demands of the Zoo and/ or to assist employees in their personal career development. The employer will provide the relevant professional development opportunities to enable employees to carry out a range of activities as a consequence of any changes which may occur from the implementation of the Zoo's Business Plan and continuous improvement. Employees commit to undergo training required of him/her by the employer to meet organisational needs.

(2) Grade 4 Keepers agree to provide practical on-the-job and, at times, theoretical off-the-job training for other keepers

as required by the employer. Training to undertake this role will be provided if required. ie. Train the Trainer.

16.—PERFORMANCE APPRAISAL INDICATORS

(1) The performance of all employees shall be determined by an annual performance appraisal to be conducted in accordance with the Human Resources policy of the Zoo.

(2) The employee and employer will discuss, identify and agree on a range of individual and/ or group performance indicators that link in to the Zoological Gardens Board Business Plan, Directorate Operational Plan, Workgroup and Individual Plans.

17.—PRODUCTIVITY INITIATIVES

(1) Consistent with the commitments to continuous improvement and shared vision contained in this Agreement, the parties agree to facilitate greater animal visibility at the Zoo.

(2) In particular, employees will develop rosters for hours of work which allow, to the extent possible, ie. where it is not possible because it would be detrimental to animal welfare—

(a) animals to be displayed until 5.00 pm;

(b) animals to be displayed at early morning and evening functions;

(c) later Zoo closing times;

(d) working of a eight hour day to a maximum of 10 hours per day when appropriate in accordance with subclause (2) of Clause 19.—Hours of Work of this Agreement;

(f) employees are entitled to annualised Rostered Days Off of 12 days a year. They will be able to take them, by previous arrangement with their manager, at any time during the year however it is preferred that they are taken between April and October, this being the less busy period of operational requirements;

(g) the limiting of the morning tea break strictly to 10 minutes.

(3) The employer shall provide function programs and details in advance to employees directly affected.

(4) Rosters will be developed where possible to undertake the work in ordinary time hours (including shift and weekend penalties) except where the function commences before 6.00 am or concludes after 9.00 pm outside of which overtime rates shall apply.

(5) The proposed roster shall be submitted for the approval of the Director Conservation.

(6) Where the roster is not approved, the Director Conservation shall refer the roster to the Chief Executive Officer for discussion with the union.

(7) Where agreement cannot be reached, the roster shall be referred to the Western Australian Industrial Relations Commission for determination.

(8) The parties agree to accept the recommendation of the Western Australian Industrial Relations Commission.

(9) (a) Any concern or dispute regarding the welfare of the animals including as a result of extended opening hours referred to in subclause (2) of this clause shall be referred to the Animal Ethics Committee for determination.

(b) The employee(s) directly concerned shall attend the Animal Ethics Committee meeting in a non-voting capacity.

(10) Over the term of this Agreement, the SBU shall review the arrangements referred to in subclause (2) and the arrangements shall continue if they are required to meet the outcomes regarding animal visibility.

18.—CASUAL EMPLOYMENT

The parties agree to the use of casual, or seasonal, employees to supplement full-time employment, to meet the needs of events and functions.

19.—HOURS OF WORK

(1) The ordinary hours of work shall be 38 hours per week to be worked between the hours of 6.00 am and 9.00pm Monday to Friday. The hours of duty shall be eight hours per day to a maximum of 10 hours per day.

(2) Subject to subclause (1) of Clause 22.—Overtime/Time Off in Lieu, where possible hours worked in excess of eight hours per day can be accrued as time in lieu (TIL). Overtime will be paid out only when TIL cannot be taken and will be subject to prior agreement between the employer and employee. Approval for working in excess of eight hours on any day must be obtained from the employee's supervisor before commencing the additional work.

(3) Hours of work may be rostered over seven days by arrangement between the employer and employee. Changes to the roster system will only be made after appropriate consultation processes have been undertaken and common agreement reached.

(4) Employees not required to work rosters may elect to work under the following optional arrangements—

(a) Tuesday to Saturday;

(b) Sunday to Thursday;

(c) Monday to Friday.

(5) A morning tea break of strictly 10 minutes duration shall be allowed without loss of pay and counted as time worked.

(6) The time of taking lunch and tea breaks may be set or altered by the employer if necessary to provide continuity of services or operations, but as far as possible the wishes of the employee shall be met.

(7) The employee shall not be required to work more than five hours without a meal break.

(8) Roster Days Off will be accumulated at the rate of 0.4 of one hour of each day worked and may be taken in accordance with paragraph (f) of subclause (2) of Clause 17.—Productivity Initiatives of this agreement and Clause 6.—38 Hour Week: Rostered Day Off of the Zoological Gardens Employees Award 1969.

20.—SALARY PACKAGING

(1) An employee may, by written agreement with the employer, enter into a salary packaging arrangement in accordance with the Western Australian Government Guidelines for Salary Packaging in the WA Public Sector.

(2) The salary packaging arrangement must comply with relevant taxation laws and the employer will not be liable for additional tax, penalties or other costs payable or which may become payable by the employee.

(3) In the event of any increase or additional payments of tax or penalties associated with the employment of the employee or the provision of employer benefits under the salary packaging agreement, such tax, penalties and any other costs shall be borne by the employee.

21.—EMPLOYEE ASSISTANCE PROGRAM

All employees shall have access to the authorised Employee Assistance Program. Employees may approach the EAP directly or the employer may direct an employee to attend EAP sessions in some circumstances where a work related performance issue has been identified. All information relating to sessions between the employee and the EAP provider will remain confidential at all times.

22.—OVERTIME/ TIME OFF IN LIEU

(1) Subject to prior agreement in writing between the employee and employer time off in lieu of payment for authorised overtime worked may be granted. Such time off in lieu shall be proportionate to the payment to which the employee is entitled.

(2) The actual period of time off in lieu may be accumulated and taken at a time agreed between employer and the employee concerned.

(3) The employee will be required to clear accumulated time off in lieu of payment for overtime within three months of the overtime being performed. If the employee is unable to make suitable arrangements to clear the TOIL within the specified period arrangements may be made to have the time paid out by mutual agreement between the employer and employee. Any time off in lieu of payment for overtime arising from extended opening hours shall be recorded separately.

(4) No claim for payment of overtime or accumulated time off in lieu for payment of overtime shall be allowed unless the overtime has been authorised.

(5) Employees regularly rostered to work on weekends will not be paid penalty rates for their weekend work but instead will receive an annualised wage inclusive of penalty rates for weekend work.

(6) Employees who are rostered to work on public holidays will receive a day off at the rate of time for time in lieu of overtime.

(7) Employees who work Tuesday to Saturday or Sunday to Thursday will receive a day off at the rate of time for time when a Public Holiday is observed on a Monday or Friday.

(8) Non-rostered employees opting to work in accordance with either paragraph (b) or (c) of subclause (4) of Clause 19.—Hours of Work of this agreement, for a minimum of three months in 12 months will not be paid overtime for their Weekend work and instead will be able to accumulate up to five (5) days per year supplementary leave, which may be added to annual leave, or otherwise as agreed by the employees supervisor. These days may not be taken until they are accrued.

23.—SHIFT WORK ALLOWANCE

(1) An employee required to work a shift for the purposes of a night zoo or special evening event will be paid a shift allowance of 15% in addition to the ordinary rate of pay and overtime will not be paid. The shift allowance will be payable for hours worked after 2.00 pm when an employee finishes their shift after 7.00pm.

(2) This allowance is not applicable to casual or seasonal employees.

24.—OCCUPATIONAL HEALTH AND SAFETY

A safe working environment will impact positively on morale and ultimately on the organisation's performance. In recognition of this the employer undertakes to—

(1) Provide and maintain workplaces, plant and systems of work such that employees are not unduly exposed to hazards where possible.

(2) Inform, instruct, train and supervise employees accordingly.

(3) Provide and maintain agreed and appropriate personal protective equipment and material where it is otherwise not possible to protect employees from hazards.

(4) Co-operate with the union nomination and election of, and consult and co-operate with, health and safety representatives and with other employees regarding occupational health and safety matters.

(5) In consultation with employees and their representatives, establish an occupational health and safety policy which enunciates the employer's duty of care, that of employees and contractors, and establishes agreed procedures for consultation, monitoring, reporting and recording, rehabilitation, and resolution of issues with those parties.

(6) Accept the right of employees to refuse work which in their opinion will expose them or any other person to risk of serious injury or harm to health, and accept the right of health and safety representatives to evaluate such risk and advise employees of their right to refuse such unsafe work in accordance with the Occupational Health Safety and Welfare Act 1994.

(7) Allow occupational health and safety representatives to attend up to ten (10) days occupational health and safety training with no loss of pay.

(8) In accordance with the Zoo's operational needs, the employer commits to provide training opportunities in occupational health and safety and employees commit to undergo such training as required for operational needs.

25.—HIGHER DUTIES

Provided an employee's current classification is provided for in the relevant award competency based career structure then—

(1) No Higher Duties Allowance will be payable within the same Award structure.

(2) Where an employee performs all or a proportion of the duties of a higher classification, under a different Award, in accordance with subclause (1) of this clause that proportion shall be determined by the employer and an allowance paid which is equal to that proportion of the difference between the employee's own hourly rate and the minimum rate of the higher position.

(3) There shall be no reduction of wages or conditions for any employee who may be required to perform duties of a lower classification, or equivalent, than their own on a temporary basis.

(4) Where an employee performs higher duties in accordance with subclause (2) of this clause for a continuous period of 12 months or more he/she shall be entitled to be paid at that higher rate for any annual leave accrued during that period.

26.—ANNUAL LEAVE

(1) Non-rostered employees shall be entitled to four weeks paid leave for each completed year of service, or six weeks for rostered employees in lieu of public holidays.

(2) For three months after the registration of the Agreement permanent employees may request a once only conversion of accrued annual leave entitlements in excess of 4 weeks (or in excess of 6 weeks for keepers) into cash at 100% of the salary applying at the time of conversion. Conversion is subject to employer approval. After the three months period applications for conversion will not be considered.

27.—LONG SERVICE LEAVE

Employees subject to this Agreement may, by agreement with their manager, clear any accrued entitlement to long service leave in multiples of two weeks.

28.—FIRST AID CERTIFICATE

(1) Employees who obtain and-maintain a current first aid certificate from St. Johns' Ambulance or a similar body shall be reimbursed for the full cost of such training upon the employee providing evidence of the successful completion of the course.

(2) Employees shall undertake such training in their own time.

29.—PAST PRODUCTIVITY

This Agreement is in recognition of all past productivity improvements. These include but are not limited to—

(1) Review of contract staff; and

(2) Savings in Workers Compensation premiums.

30.—PRODUCTIVITY IMPROVEMENT

The parties are committed to the following productivity improvement measures—

(1) the use of casual, or seasonal, employees to supplement full-time employment, for events and functions;

(2) the parties recognise that due to the operational requirements of the Zoo, that the taking of Lunch and Tea breaks should be flexible and by agreement between the supervisor and the employee;

(3) accepting the introduction of annualised wages;

(4) accepting the introduction of annualised RDO's;

(5) contributing to Zoorassic Park as required by the supervisor to ensure its success;

(6) committing to occupational health and safety training and other strategies to reduce the incidence of accidents at work and time off caused by work injuries;

(7) committing to the achievement of target reductions in overtime;

(8) assist in the target of achieving an increase in profit from extended Zoo functions and events including Night Zoo and Twilights with due consideration of animal welfare; and

(9) agree to fully participate in and co-operate with the review of Conservation and its implementation.

31.—FAMILY CARERS LEAVE

(1) An employee may use a total of 38 hours of his/her personal accrued sick leave each year to supervise the convalescence of a family member. So as not to breach the Minimum Conditions of Employment Act 1996, only sick leave entitlements accrued in previous years may be taken for family carer's leave.

(2) In this clause 'family member' means the employee's spouse, de facto spouse, child, step child, parent, step parent, sibling or another person who lives with the employee as a member of the employee's family.

(3) The employee shall, wherever practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee (where applicable), the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee shall notify the employer by telephone or such absence at the first opportunity on the day of absence.

(4) The employee shall, if required by the employer, establish by production of a medical certificate or statutory declaration, the illness of the person concerned and that the illness is such as to require care by another.

(5) Family Carers Leave may be taken on an hourly basis.

32.—BEREAVEMENT LEAVE

(1) An employee, on the death of a spouse or de facto spouse, child or step child, parent or parent in law, brother, sister or any other persons who immediately before that person's death lived with the employee as a member of the employee's family, the employee is entitled to bereavement leave without loss of earnings for up to two (2) working days.

(2) Bereavement leave shall at the discretion of the employee be taken at any time up to and including the two days following the day of the funeral.

(3) Payment for such leave may be subject to the employee providing proof of the death, satisfactory to the employer.

(4) Bereavement leave is not to be taken when the employee is absent on another form of leave or would not otherwise have been on duty.

33.—DISPUTE SETTLEMENT PROCEDURES

(1) The objective of these procedures is to provide a set of provisions for dealing with any question, dispute or difficulties that arises between the parties about the meaning or the effect of this Agreement or disagreement between the parties during agency negotiations.

(2) In the event of any question, dispute or difficulty under subclause (1) hereof, arising between the parties, the following procedures shall apply—

(a) The matter to be discussed between employee and his/her supervisor.

(b) The matter be referred by the supervisor to the relevant senior manager for further discussion.

(c) If the matter is unable to be discussed or unable to be resolved through discussion then the matter is to be discussed between the employee and/or the union's employee representative and the employer representative and an attempt made to resolve the matter.

(d) If the matter is unable to be resolved through discussions between the employee and/or the union's employee representative and the employer representative the matter is to be discussed between the employee and/or the union's employee representative and the Chief Executive Officer or his/her nominee as soon as practicable but within two working days. Notification of any question or disagreement may be made verbally and/or in writing.

(e) The parties may individually or collectively seek advice from any appropriate organisation or person in an attempt to resolve the matter.

(f) If the matter is not resolved within five working days of the date of notification in (b) hereof, either party may notify the Secretary of the union or his/her nominee, or the Chief Executive Officer or his/her nominee of the existence of a dispute or disagreement.

Such notification shall be in writing with a copy to be provided to all other parties. The notification is to include the parties' interpretation of the matters in dispute.

(g) The Secretary of the union or his/her nominee and the Chief Executive Officer or his/her nominee shall confer on the matters notified by the parties within five working days and—

(i) where there is agreement on the matters in dispute the parties shall be advised within two working days;

(ii) where there is disagreement on any matter it may be submitted to the Western Australian Industrial Relations Commission.

Provided that with effect from 22 November, 1997 it is required that persons involved in the question, dispute or difficulty shall confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission.

(3) Nothing in this Clause shall be read so as to exclude an organisation party to or bound by this Agreement from representing its members or any employee from involving their Union in any dispute or grievance.

34.—WAGE INCREASE

(1) Subject to the achievement of the productivity improvement measures in Clause 30—Productivity Improvement and Clause 17—Productivity Initiatives wage increases will be paid to employees in the following manner—

(a) Effective from first pay period on or after date of registration 0.2% for Rostered employees and 4.0% for Non Rostered employees);

(b) First pay period on or after 12 months after date of registration, subject to the approval of the Cabinet Standing Committee on Labour Relations 3.0%.

(2) Any additional savings identified during the term of this Agreement will be declared and included in the negotiations for the next agreement between the parties.

(3) A schedule of wages appears at Appendix A—Wage Rates, of this Agreement.

35.—RESERVED MATTERS

The parties agree that the matters below be reserved through the term of this Agreement, but may be brought forward for consideration if the parties agree—

(1) The availability of injury and sickness income protection insurance for Zoo employees.

(2) Further review of roster arrangements in order to achieve improvements to the system.

APPENDIX A—WAGE RATES

Operative Date: Pay period commencing 16 April 1999.

Keepers

Grade	Previous EBA Rates Annual $	Annualised Rates [20%] Annual $	From Date of Signing [0.2%] Annual $	12 Months After 13 April 1999 [3%] Annual $
Grade 1				
1.1	$24,263	$29,116	$29,698	$30,589
1.2	$24,835	$29,802	$30,398	$31,310
1.3	$25,407	$30,488	$31,098	$32,031
Grade 2				
2.1	$26,134	$31,361	$31,988	$32,948
2.2	$26,803	$32,164	$32,807	$33,791
2.3	$27,845	$33,414	$34,082	$35,105
2.4	$28,165	$33,798	$34,474	$35,508
Grade 3				
3.1	$28,846	$34,615	$35,308	$36,367
3.2	$29,528	$35,434	$36,142	$37,227
3.3	$30,208	$36,250	$36,975	$38,084
3.4	$30,900	$37,080	$37,822	$38,956
Grade 4				
4.1	$32,062	$38,474	$39,244	$40,421
4.2	$32,909	$39,491	$40,281	$41,489
4.3	$33,813	$40,576	$41,387	$42,629
Keeper in training = 76% of Grade 2 Year 1				
	$19,862	$23,834	$24,311	$25,040

Horticulture

Grade	Previous EBA Rates Annual $	From Date of Signing [4%] Annual $	12 Months After 13 April 1999 [3%] Annual $
Grade 1			
1.1	$24,263	$25,234	$25,991
1.2	$24,835	$25,828	$26,603
1.3	$25,407	$26,423	$27,216
Grade 2			
2.1	$26,134	$27,179	$27,995
2.2	$26,803	$27,875	$28,711
2.3	$27,845	$28,959	$29,828
2.4	$28,165	$29,292	$30,170
Grade 3			
3.1	$28,846	$30,000	$30,900
3.2	$29,528	$30,709	$31,630
3.3	$30,208	$31,416	$32,359
3.4	$30,900	$32,136	$33,100
Grade 4			
4.1	$32,062	$33,344	$34,345
4.2	$32,909	$34,225	$35,252
4.3	$33,813	$35,166	$36,220
Level 9	$30,270	$31,481	$32,425
Bldg L6	$28,416	$29,553	$30,439
Eng C 10	$26,321	$27,374	$28,195
Eng C 8	$28,817	$29,970	$30,869

Note: Annualised trades allowances are paid separate to wages.

AWARDS/AGREEMENTS— Variation of—

RADIO AND TELEVISION EMPLOYEES' AWARD. No. 3 of 1980.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch

and

Hills Industries Ltd and Others.

No. 1979 of 1998.

Radio and Television Employees' Award.
No. 3 of 1980.

COMMISSIONER S J KENNER.

5 May 1999.

Order.

Having heard Mr C Young on behalf of the applicant and there being no appearance on behalf of the respondents and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Radio and Television Employees' Award No. 3 of 1980 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 5 May 1999.

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

Schedule.

1. Clause 29 – Wages: Delete paragraph (b) of subclause (1) of this clause and insert the following in lieu thereof—

(b) The rates of pay in this award include four arbitrated safety net adjustments totalling $34.00 the last payable from the beginning of the first pay period on or after the 14th day of November 1997. These arbitrated safety net adjustments shall be absorbed into any overaward payments.

Furthermore the rates of pay in this award include the arbitrated safety net adjustments of the following amounts—

(i) $14.00 per week increase in award rates up to and including $550.00 per week.

(ii) $12.00 per week increase in award rates about $550.00 per week and up to and including $700.00 per week; and

(iii) $10.00 per week increase in award rates above $700 per week.

This arbitrated safety net adjustments shall be offset against any equivalent amount in rates of pay received by employees since 1 November 1991 whose wages and conditions are regulated by this award and which are above the wage rates prescribed in it, provided that the above award payments include wages payable under an enterprise agreement in which absorption is not contrary to the terms of the enterprise agreement.

Increases made under State Wage Case Principles prior to June 1998, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $14.00, $12.00 or $10.00 per week as the case may be.

2. Clause 29A – Minimum Wage – Adult Employees: Delete this clause and insert the following in lieu thereof—

29A. – ADULT MINIMUM AWARD WAGE

(1) No adult employee shall be paid less than the Minimum Adult Wage unless otherwise provided by this clause.

(2) The Minimum Adult Award Wage for full time adult employees is $373.40 per week payable from the beginning of the first pay period on or after 5th May 1999.

(3) The Minimum Adult Award Wage of $373.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions to June 1998, including the arbitrated safety net adjustment of $14.00, $12.00 or $10.00 per week as the case may be, from Matter No. 757 of 1998.

(4) Unless otherwise provided in this clause adults employed as casual or part time employees shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

(5) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision of the Minimum Adult Award Wage of $373.40 per week.

(6) (a) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on Traineeships, or Jobskills placements or to other categories of employees who by prescription are paid less than the minimum award rate.

(b) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.

(7) Subject to this subclause the Minimum Adult Award Wage shall —

(a) Apply to all work in ordinary hours.

(b) Apply to the calculation of overtime and all other penalty rates, superannuation, payments during sick leave, long service leave and for all other purposes of this award.

(8) (a) The rates of pay in this award include the minimum weekly wage for adult employees payable under the June 1998 State Wage Case Decision. Any increase arising from the insertion of the adult minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this

award which are above the wage rates prescribed in the award. Such above payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award agreements. Absorption which is contrary to the terms of an agreement is not required.

(b) Increased under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the adult minimum wage.

(Note: A notation will be made in each relevant award by the Registrar where the adult apprentice rate requires specific mention as at 13th November 1997.)

TIMBER YARD WORKERS AWARD.
No. 11 of 1951.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Construction, Mining, Energy Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch

and

Bunnings Limited and Others.

No. 183 of 1999.

Timber Yard Workers Award.
No. 11 of 1951.

COMMISSIONER S J KENNER.

5 May 1999.

Order.

Having heard Mr G Giffard on behalf of the applicant and Ms L Avon-Smith on behalf of the respondents and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Timber Yard Workers Award No. 11 of 1951 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 5 May 1999.

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

Schedule.

1. Clause 6 – Special Rates and Conditions: Delete subclause (7) of this clause and insert the following in lieu thereof—

(7) Disability Allowance—

Employees shall be paid an allowance in accordance with the following—

(a) Employees employed in bush or logging operations (other than log truck drivers)—at the rate of $15.03 per week.

(b) Employees employed in or in the immediate vicinity of sawmills and log truck drivers – at the rate of $9.90.

(c) The allowance shall be paid during overtime but shall not be subject to penalty additions.

2. Clause 6 – Special Rates and Conditions: Delete subclause (9) of this clause and insert the following in lieu thereof—

(9) Drivers who handle cash during any week or portion of a week as part of their duties and account for it shall be paid in addition to the rate of wage prescribed by Clause 29. – Wages, as follows—

For any amount up to	$ 20	$0.76 per week
Over $ 20 but not exceeding	$ 200	$1.40 per week
Over $ 200 but not exceeding	$ 600	$2.67 per week
Over $ 600 but not exceeding	$1,000	$3.69 per week
Over $1,000 but not exceeding	$1,200	$5.22 per week
Over $1,200 but not exceeding	$1,600	$7.62 per week
Over $1,600 but not exceeding	$2,000	$8.89 per week
Over $2,000 …….		$10.17 per week

3. Clause 29 – Wages: Delete subclause (1) of this clause and insert the following in lieu thereof—

(1) The minimum rates of wages payable to employees employed in classifications contained in subclause (2) of this clause shall be as follows—

Broadbanded Groups	Base Rate $	Supplementary Payment $	Arbitrated Safety Net Adjustments $	Total Minimum Weekly Rate (38 Hours) $
1	284.80	40.60	48.00	373.40
2	299.50	42.50	48.00	390.00
3	319.20	45.40	48.00	412.60
4	337.40	48.10	48.00	433.50
5	365.20	52.00	48.00	465.20
6	383.50	54.60	48.00	486.10

4. Clause 29 – Wages: Delete subclause (3) of this clause and insert the following in lieu thereof—

(1) The minimum rates of wages payable to employees employed in classifications contained in this subclause shall be as follows—

Broadbanded Groups	Base Rate $	Supplementary Payment $	Arbitrated Safety Net Adjustments $	Total Minimum Weekly Rate (38 Hours) $
1	327.70	46.80	48.00	422.50
2	334.40	47.80	48.00	430.20
3	344.50	49.20	48.00	441.70
4	351.10	50.20	48.00	449.30
5	357.90	51.10	48.00	457.00

Grade 1

(i) Driver, rigid vehicle to 4.5 tonnes GVM (Gross Vehicle Mass)

(ii) Driver of tow motor

Grade 2

(i) Driver Rigid Vehicle from 4.5 tonnes to 13.9 tonnes GVM or GCM (Gross Combination Mass)

(ii) Driver, fork lift up to and including 5 tonnes lifting capacity

Grade 3

(i) Driver rigid vehicle over 13.9 tonnes GVM or GCM and up to 13 tonnes capacity

(ii) Straddle Carrier Driver

(iii) Driver of fork lift over 5 and up to 10 tonnes lifting capacity

Grade 4

(i) Driver, articulated vehicle to 22.4 tonnes GCM

(ii) Driver, rigid vehicle and heavy trailer to 22.4 tonnes GCM

(iii) Driver, rigid vehicle 4 or more axles over 13.9 tonnes GVM or GCM

(iv) Driver of fork lift over 10 and up to 34 tonnes lifting capacity

Grade 5

(i) Driver, articulated vehicle over 22.4 tonnes GCM and up to 39 tonnes capacity

(ii) Driver, rigid vehicle and heavy trailer to 22.4 tonnes GCM

(iii) Driver of fork lift over 34 tonnes lifting capacity

An employee who, in the course of his/her employment, drives a vehicle with self loading equipment which requires the possession of a certificate of competency shall be paid an extra $9.91 per week.

5. Clause 29 – Wages: Delete subclause (6) of this clause and insert the following in lieu thereof—

(6) Leading Hands—

In charge of 3—10 employees—extra	$16.26
In charge of 11—20 employees—extra	$24.45
In charge of over 20 employees—extra	$31.75

6. Clause 29 – Wages: Delete subclause (7) of this clause and insert the following in lieu thereof—

(7) The rates of pay in this award include four arbitrated safety net adjustments totalling $34.00 the last payable from the beginning of the first pay period on or after the 14th day of November 1997. These arbitrated safety net adjustments shall be absorbed into any overaward payments.

Furthermore the rates of pay in this award include the arbitrated safety net adjustments of the following amounts—

(i) $14.00 per week increase in award rates up to and including $550.00 per week.

(ii) $12.00 per week increase in award rates above $550.00 per week and up to and including $700.00 per week; and

(ii) $10.00 per week increase in award rates above $700.00 per week.

These arbitrated safety net adjustments shall be offset against any equivalent amount in rates of pay received by employees since 1 November 1991 whose wages and conditions are regulated by this award and which are above the wage rates prescribed in it, provided that the above award payments include wages payable under an enterprise agreement under which absorption is not contrary to the terms of the enterprise agreement.

Increases made under State Wage Case Principles prior to June 1998, except those resulting from enterprise agreements, are not to be used to offset these arbitrated safety net adjustment of $14.00, $12.00 or $10.00 per week as the case may be.

7. Clause 30 – Minimum Wage – Adult Males and Females: Delete this clause and insert the following in lieu thereof—

Notwithstanding the terms of this clause (or subclause) no adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided in this clause.

(i) The Minimum Adult Award Wage for full time adult employees is $373.40 per week payable from the beginning of the first pay period on or after 5th May 1999.

(ii) The Minimum Adult Award Wage of $373.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions to June 1998, including the safety net adjustments of $14.00, $12.00 or $10.00 per week as the case may be, from Matter No. 757 of 1998.

(iii) Unless otherwise provided in this subclause adults employed as casual or part time employees shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

(iv) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision to the Minimum Adult Award Wage of $373.40 per week.

(v) (aa) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships, or Jobskills traineeships or to other categories of employees who by prescription are paid less than the minimum award rate.

(bb) Liberty to apply is reserved in relation to employees excluded under (aa) above and any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.

(vi) Subject to this subclause the Minimum Adult Award Wage shall —

(aa) apply to all work in ordinary hours.

(bb) apply to the calculation of overtime and all other penalty rates, superannuation, payments during sick leave, long service leave and annual leave and for all other purposes of this award.

(vii) Nothing in this clause (or subclause) shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force on 13th November 1997.

(viii) The rates of pay in this award include the minimum weekly wage for adult employees payable under the June 1998 State Wage Case Decision. Any increase arising from the insertion of the adult minimum wage will be offset against any equivalent amounts in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in this award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements are not to be used to offset the adult minimum wage.

(Note: A notation will be made in each relevant award by the Registrar where the adult apprentice rate requires specific mention as at 13th November 1997.)

AWARDS/AGREEMENTS— Application for variation of— No variation resulting—

CONTRACT CLEANERS' (MINISTRY OF EDUCATION) AWARD 1990.

No. A5 of 1981.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch

and

P & O Berkeley Challenge Pty Ltd and Others

(No. 1690 of 1997)

30 April 1999

Order.

WHEREAS the applicant advised the Commission on 22 April 1999 that it did not wish to proceed on this claim; and

WHEREAS respondent parties were informed of this and notice was given that the Commission intended to discontinue the matter by leave; and

WHEREAS no party has sought to be heard on this intention;

NOW THEREFORE, / now therefore I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT this application shall be and is hereby discontinued by leave.

(Sgd.) S. A. CAWLEY,
[L.S.] Commissioner.

GRACEVILLE WOMEN'S CENTRE—SALVATION ARMY INDUSTRIAL AGREEMENT 1997.
No. AG 183 of 1997.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch

and

Salvation Army (Western Australia) Property Trust.

No. 2136 1998.

COMMISSIONER P E SCOTT.

29 April 1999.

Order.

WHEREAS this is an application to amend an agreement registered pursuant to Section 41A of the Industrial Relations Act 1979; and

WHEREAS by letter dated Thursday the 22nd day of April 1999, the Applicant requested that the file be closed.

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT this application be, and is hereby dismissed.

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

AGREEMENTS—
Industrial—Retirements from—

ARGYLE DIAMONDS ENTERPRISE AGREEMENT 1997.
No AG 210 of 1997.
ARGYLE DIAMONDS ENTERPRISE AGREEMENT 1996.
No AG 244 of 1996.
ARGYLE DIAMOND ENTERPRISE AGREEMENT 1994.
No AG 73 of 1994.
ARGYLE DIAMONDS ENTERPRISE BARGAINING AGREEMENT 1992.
No AG 12 of 1993.

IN THE WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION

No. 575 of 1999.
No. 576 of 1999.
No. 578 of 1999.
No. 579 of 1999.

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of Notices of Retirement from Industrial Agreements in accordance with section 41(7) of the said Act.

Argyle Diamond Mines Pty Limited will cease to be a party to the—

1. Argyle Diamonds Enterprise Agreement 1997 No AG 210 of 1997;
2. Argyle Diamonds Enterprise Agreement 1996 No AG 244 of 1996;
3. Argyle Diamond Enterprise Agreement 1994 No AG 73 of 1994; and
4. Argyle Diamonds Enterprise Bargaining Agreement 1992 No AG 12 of 1993

on and from the 28th day of May 1999.

DATED at Perth this 27th day of April 1999.

J.A. SPURLING,
Registrar.

CANCELLATION OF AWARDS/ AGREEMENTS/ RESPONDENTS—

CROTHALL HOSPITAL SERVICES W.A. PTY LTD AWARD.
No. A3 of 1987.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

s.47

Cancellation of Award.

No. 686 of 1977, Part 166A.

Crothall Hospital Services W.A. Pty Ltd Award.
No. A3 of 1987.

CHIEF COMMISSIONER W.S. COLEMAN.

19 April 1999.

Order.

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 24 day of February, 1999 of an intention to make an Order cancelling such award;

AND WHEREAS at the 24 day of March, 1999 there were no objections to the making of such an Order;

NOW THEREFORE, I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled.

Crothall Hospital Services W.A. Pty Ltd Award No. A3 of 1987

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

TEA ATTENDANTS AND CANTEEN WORKERS' (S.E.C.) AWARD, 1975.
No. 27 of 1974.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

s.47.

Cancellation of Award.

No. 686 of 1977, Part 131.

Tea Attendants and Canteen Workers' (S.E.C.) Award, 1975.
No. 27 of 1974.

CHIEF COMMISSIONER W.S. COLEMAN.

19 April 1999.

Order.

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 24 day of February, 1999 of an intention to make an Order cancelling such award;

AND WHEREAS at the 24 day of March, 1999 there were no objections to the making of such an Order;

NOW THEREFORE, I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled.

Tea Attendants and Canteen Workers' (S.E.C.) Award, 1975 No. 27 of 1974

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

PUBLIC SERVICE ARBITRATOR— Matters Dealt With—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer, Agriculture Western Australia.

No. PSAC B 60 of 1998.

7 May 1999.

Order.

WHEREAS this application involved a dispute over the ability of employees covered by an award to pursue salary packaging arrangements with the employer; and

WHEREAS conciliation was pursued; and

WHEREAS following a decision by the Commission in Court Session and a decision on appeal to the Industrial Appeal Court the parties were requested to advise whether or not any issue remained between them for the purposes of this matter; and

WHEREAS no such advice has been received; and

WHEREAS notice was given by the Commission of an intention to discontinue this application on the basis that no remaining dispute had been notified;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT this application shall be and is hereby discontinued.

(Sgd.) S.A. CAWLEY,
[L.S.] Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Board of Western Australian Centre for Pathology and Medical Research.

No. PSAC D 60 of 1998.

7 May 1999.

Order.

WHEREAS this application involved a dispute over the ability of employees covered by an award to pursue salary packaging arrangements with the employer; and

WHEREAS conciliation was pursued; and

WHEREAS following a decision by the Commission in Court Session and a decision on appeal to the Industrial Appeal Court the parties were requested to advise whether or not any issue remained between them for the purposes of this matter; and

WHEREAS no such advice has been received; and

WHEREAS notice was given by the Commission of an intention to discontinue this application on the basis that no remaining dispute had been notified;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT this application shall be and is hereby discontinued.

(Sgd.) S.A. CAWLEY,
[L.S.] Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer, Department of Education Services.

No. PSACR 22 of 1998.

PUBLIC SERVICE ARBITRATOR A.R. BEECH.

9 April 1999.

Reasons for Decision.

The Department of Education Services has a workforce of approximately 20 employees. The Chief Executive Officer of the Department concluded a workplace agreement with 15 of those employees which was registered on 30 May 1997. However, 3 other employees ("the three employees") working at the Department who had indicated their willingness to sign the workplace agreement are, or were at that time, not employees of the Department but were working in the Department on secondment. They were therefore not able to sign the Department's workplace agreement because the Chief Executive Officer of the Department was not their employer. The remaining 2 employees who chose not to accept the Department's workplace agreement offer became covered by an enterprise bargaining agreement which was registered in the Commission on 24 December 1997.

The three employees were only able to be party to a workplace agreement between each of them and their respective employer or employers. The three employees eventually did enter into workplace agreements with their respective employer or employers and these were registered on 28 October and 5 November 1997. Upon registration of their workplace agreements, the Chief Executive Officer of the Department paid them an administrative payment equivalent to the wage which would have been paid to them if their workplace agreements had in fact been registered on 30 May 1997. However, no such payment was made to the 2 employees whose conditions of employment are covered by the enterprise bargaining agreement when it was registered.

On the evidence of the then Manager, Corporate Services, of the Secondary Education Authority, Mr McEvoy, the Chief Executive Officer had not realised that the three employees would not be able to sign its workplace agreement offer. At the time of the offer, various departments were amalgamating to form the current Department and the three employees had been regarded as part of the Department's own workforce. His realisation that the three employees would not be able to sign the Department's workplace agreement only occurred after the three employees did not receive the wage increases which were received by the Department's own employees who had signed the workplace agreement.

The Civil Service Association claims that the Chief Executive Officer of the Department has acted unfairly by paying an administrative payment to the three employees but not to the 2 employees whose conditions of employment are covered by the enterprise bargaining agreement. In effect, the Chief Executive Officer paid the three employees, outside the terms of their respective workplace agreements, as though their workplace agreements had been registered retrospectively while refusing to pay the 2 employees whose conditions of employment are covered by the enterprise bargaining agreement as though their enterprise bargaining agreement had been registered retrospectively.

The claim before the Commission is that, in all fairness, the Chief Executive Officer, having made an administrative payment to the three employees upon the registration of the agreements containing their conditions of employment, should make a similar administrative payment to the two other employees upon the registration of the agreement containing their conditions of employment. The union points to the small size of the respondent's workforce and that all of the workforce was treated as one unit by the respondent in the contribution the employees all made to the productivity of the respondent. The union believes that the payment by the respondent of an administrative payment to the three employees on the basis

that they had been prepared to sign a workplace agreement as at 30 May 1997 but could not do so, is discriminatory. That is, by making the administrative payment to the three employees who were prepared to sign the workplace agreement but could not do so, and not making the same administrative payment to the two employees who, through their union, had been prepared to "sign" the enterprise bargaining agreement but could not do so, is an unfair exercise of the respondent's right to make the administrative payment.

The issue before the Commission is concerned, really, with the fairness of what has happened. The respondent has a workforce of approximately twenty employees. The Commission was informed that all of them have contributed to the productivity of the respondent. They are treated by the respondent as a unit for that purpose notwithstanding that some employees are parties to workplace agreements and some are covered by an enterprise bargaining agreement. Although there are obvious legal differences between a workplace agreement and an enterprise bargaining agreement, all employees contributed the same to the productivity of the Department. Had the facts revealed nothing more than that a number of employees had signed workplace agreements which were registered from a date or dates earlier than the date of registration of an enterprise bargaining agreement in the same workplace then there would be no warrant for the Commission to intervene in this matter. It is quite likely that a workplace agreement and an enterprise bargaining agreement in the same workplace will come into effect in accordance with the *Workplace Agreements Act, 1993* and the *Industrial Relations Act, 1979* respectively from different dates. It is matter of government policy that wage increases payable to employees which result from the registration of a workplace agreement to which they are party, or from the registration of an enterprise bargaining agreement under which they are to be employed, are payable upon registration and not from an earlier date. If the respective dates of registration of a workplace agreement and an enterprise bargaining agreement are different, then the wage increases will apply to the respective employees from those different dates.

In this case, however, the respondent decided to pay the three employees an additional payment administratively. In effect, he paid them as though their workplace agreements had been registered retrospectively. There was no obligation on the respondent to do so. He was not obliged to do so by the terms of their workplace agreements. Although the three employees were not parties to the Department's workplace agreement which was registered on 30 May 1997 the Chief Executive Officer elected to treat them as though they had been. He did so because the three employees had been willing to sign the Department's workplace agreement as at 30 May 1997 but were not able to do so because they were not employees of the respondent. However, on the material before the Commission that reasoning is equally applicable to the two employees whose conditions of employment are covered by the enterprise bargaining agreement. They also were quite willing to have the enterprise bargaining agreement signed as at a date in July or August 1997 when an agreement "in principle" on the enterprise bargaining agreement had been reached between the respondent and the union.

In the context of this Department's operations it cannot be fair to make an administrative payment to three employees because they had been willing to sign a workplace agreement earlier than it was registered, but not to make a similar payment to two employees who had agreed to an enterprise bargaining agreement earlier than it was registered. It discriminates between employees on the basis of whether or not they were prepared to sign a workplace agreement and that, at the very least, is not fair. The Commission in Court Session came to that conclusion in *The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch and Others v The Western Australian Mint* (1996) 76 WAIG 1700) where the payment by the Western Australian Mint of a bonus to all employees other than those whose employment conditions were prescribed in an award was held to be unfair. The Commission stated that there is no reason to discriminate between employees solely on the basis of the method of prescription of their conditions of employment. The different treatment by an employer of similar employees doing the same work in the same workplace is a natural cause of industrial unhappiness. Although differences in the payments made to employees in the one workplace can occur when some employees' conditions of employment are derived from a workplace agreement and are different from some other employees' conditions of employment which are derived from an enterprise bargaining agreement, in this case the different treatment which has occurred is not sanctioned by force of any Act of Parliament. While employees might understand that the registration of an enterprise bargaining agreement will involve a different procedure and different places of registration and that therefore a workplace agreement and an enterprise bargaining agreement might operate from different dates, that is not the case here. It can be readily understood that a sense of unfairness was generated when the two employees saw three of their colleagues being given an administrative payment which has the effect of "back dating" a workplace agreement, when they are not similarly treated in respect of their enterprise bargaining agreement.

Accordingly, the claim of the union has been made out.

It remains to be considered the form in which the Commission is able to give effect to its decision. Although the claim before the Commission seeks an order which pays the two employees a "retrospective salary adjustment" in the same terms that were paid to the three employees, the Commission is not able, in the circumstances of this case, to require the *Department of Education Services of Western Australia Enterprise Bargaining Agreement 1997* which was registered on 24 December 1997 to now operate retrospectively. In that respect the preliminary point, which was raised by the respondent, somewhat belatedly, is sound. However, I see no reason why the Commission is not able, as a matter of jurisdiction and power, to require the respondent to now pay the two employees a sum of money. Such an order does not offend the State Wage Principles and does not, itself, operate retrospectively. The application of the principle behind the administrative payment made to the three employees means that the payment ordered will be calculated by reference to the wage increase payable under the enterprise bargaining agreement for the period of time between July/August 1997 and 24 December 1997. That payment will have the result of treating the two employees in the same manner as the three employees were treated and is the fair resolution of this issue.

The parties are requested to agree on that sum of money within 14 days of this decision and advise the Commission of the sum agreed. The Commission will then issue a Minute of Proposed Order in those terms and the parties may speak to the Minutes at a date to be arranged if it is required.

Appearances: Mr D. Newman and with him Mr E. Rea on behalf of the applicant.

Mr B. Appleby and with him Mr S. Narula on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer, Department of Education Services.

No. PSACR 22 of 1998.

30 April 1999.

Order.

WHEREAS the parties have met in accordance with the Reasons for Decision in this matter and agreed upon the calculation of the sums of money consistent with those Reasons—

NOW, therefore, I the undersigned, pursuant to the powers conferred on me under the Industrial Relations Act 1979 hereby direct—

THAT the Chief Executive Officer, Department of Education Services forthwith pay the following employees the sum of money adjacent to their name—

Ms Iaschi	$660.45
Ms Coppard	$488.35

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer, Department of Environmental Protection.

No. PSAC A 66 of 1998.

7 May 1999.

Order.

WHEREAS this application involved a dispute over the ability of employees covered by an award to pursue salary packaging arrangements with the employer; and

WHEREAS conciliation was pursued; and

WHEREAS following a decision by the Commission in Court Session and a decision on appeal to the Industrial Appeal Court the parties were requested to advise whether or not any issue remained between them for the purposes of this matter; and

WHEREAS no such advice has been received; and

WHEREAS notice was given by the Commission of an intention to discontinue this application on the basis that no remaining dispute had been notified;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT this application shall be and is hereby discontinued.

(Sgd.) S.A. CAWLEY,
[L.S.] Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Executive Director, Fisheries Department.

No. PSAC E 60 of 1998.

7 May 1999.

Order.

WHEREAS this application involved a dispute over the ability of employees covered by an award to pursue salary packaging arrangements with the employer; and

WHEREAS conciliation was pursued; and

WHEREAS following a decision by the Commission in Court Session and a decision on appeal to the Industrial Appeal Court the parties were requested to advise whether or not any issue remained between them for the purposes of this matter; and

WHEREAS no such advice has been received; and

WHEREAS notice was given by the Commission of an intention to discontinue this application on the basis that no remaining dispute had been notified;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT this application shall be and is hereby discontinued.

(Sgd.) S. A. CAWLEY,
[L.S.] Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer, Department of Resources Development.

No. PSAC 65 of 1998.

7 May 1999.

Order.

WHEREAS this application involved a dispute over the ability of employees covered by an award to pursue salary packaging arrangements with the employer; and

WHEREAS conciliation was pursued; and

WHEREAS following a decision by the Commission in Court Session and a decision on appeal to the Industrial Appeal Court the parties were requested to advise whether or not any issue remained between them for the purposes of this matter; and

WHEREAS no such advice has been received; and

WHEREAS notice was given by the Commission of an intention to discontinue this application on the basis that no remaining dispute had been notified;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT this application shall be and is hereby discontinued.

(Sgd.) S. A. CAWLEY,
[L.S.] Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Legal Aid Commission of Western Australia.

No. PSAC C 60 of 1998.

7 May 1999.

Order.

WHEREAS this application involved a dispute over the ability of employees covered by an award to pursue salary packaging arrangements with the employer; and

WHEREAS conciliation was pursued; and

WHEREAS following a decision by the Commission in Court Session and a decision on appeal to the Industrial Appeal Court the parties were requested to advise whether or not any issue remained between them for the purposes of this matter; and

WHEREAS no such advice has been received; and

WHEREAS notice was given by the Commission of an intention to discontinue this application on the basis that no remaining dispute had been notified;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT this application shall be and is hereby discontinued.

(Sgd.) S. A. CAWLEY,
[L.S.] Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Commissioner of Main Roads.

No. PSAC 58 of 1998.

7 May 1999.

Order.

WHEREAS this application involved a dispute over the ability of employees covered by an award to pursue salary packaging arrangements with the employer; and

WHEREAS conciliation was pursued; and

WHEREAS following a decision by the Commission in Court Session and a decision on appeal to the Industrial Appeal Court the parties were requested to advise whether or not any issue remained between them for the purposes of this matter; and

WHEREAS no such advice has been received; and

WHEREAS notice was given by the Commission of an intention to discontinue this application on the basis that no remaining dispute had been notified;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order—

THAT this application shall be and is hereby discontinued.

(Sgd.) S. A. CAWLEY,
[L.S.] Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer, Ministry of Planning.

No. PSAC 67 of 1998.

7 May 1999.

Order.

WHEREAS this application involved a dispute over the ability of employees covered by an award to pursue salary packaging arrangements with the employer; and

WHEREAS conciliation was pursued; and

WHEREAS following a decision by the Commission in Court Session and a decision on appeal to the Industrial Appeal Court the parties were requested to advise whether or not any issue remained between them for the purposes of this matter; and

WHEREAS no such advice has been received; and

WHEREAS notice was given by the Commission of an intention to discontinue this application on the basis that no remaining dispute had been notified;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT this application shall be and is hereby discontinued.

(Sgd.) S.A. CAWLEY,
[L.S.] Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Director General, Ministry of Justice.

No. PSAC A 60 of 1998.

7 May 1999.

Order.

WHEREAS this application involved a dispute over the ability of employees covered by an award to pursue salary packaging arrangements with the employer; and

WHEREAS conciliation was pursued; and

WHEREAS following a decision by the Commission in Court Session and a decision on appeal to the Industrial Appeal Court the parties were requested to advise whether or not any issue remained between them for the purposes of this matter; and

WHEREAS no such advice has been received; and

WHEREAS notice was given by the Commission of an intention to discontinue this application on the basis that no remaining dispute had been notified;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT this application shall be and is hereby discontinued.

(Sgd.) S.A. CAWLEY,
[L.S.] Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Governing Council of the South Metropolitan College of TAFE.

No. PSAC B 61 of 1998.

7 May 1999.

Order.

WHEREAS this application involved a dispute over the ability of employees covered by an award to pursue salary packaging arrangements with the employer; and

WHEREAS conciliation was pursued; and

WHEREAS following a decision by the Commission in Court Session and a decision on appeal to the Industrial Appeal Court the parties were requested to advise whether or not any issue remained between them for the purposes of this matter; and

WHEREAS no such advice has been received; and

WHEREAS notice was given by the Commission of an intention to discontinue this application on the basis that no remaining dispute had been notified;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT this application shall be and is hereby discontinued.

(Sgd.) S.A. CAWLEY,
[L.S.] Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Managing Director, South Metropolitan College of TAFE.

No. PSACR 34 of 1998.

13 April 1999.

Order.

WHEREAS the Commission issued Reasons for Decision in this matter on 18 January 1999;

AND WHEREAS on 8 April 1999 the respondent requested the Commission to issue an order reflecting the findings of the Commission as contained in those Reasons for Decision;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act, 1979*, hereby—

DECLARE
1. THAT the Commission does have the jurisdiction to deal with this matter to the extent that it does not go to matters within the relevant public sector standard;
2. THAT the Commission does have the jurisdiction to issue an order in the terms sought by the union in its letter of 22 September 1998;

ORDER THAT the application be re-listed for hearing and determination.

(Sgd.) A.R. BEECH,
[L.S.] Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer, WA Department of Training.

No. PSAC B 66 of 1998.

7 May 1999.

Order.

WHEREAS this application involved a dispute over the ability of employees covered by an award to pursue salary packaging arrangements with the employer; and

WHEREAS conciliation was pursued; and

WHEREAS following a decision by the Commission in Court Session and a decision on appeal to the Industrial Appeal Court the parties were requested to advise whether or not any issue remained between them for the purposes of this matter; and

WHEREAS no such advice has been received; and

WHEREAS notice was given by the Commission of an intention to discontinue this application on the basis that no remaining dispute had been notified;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order—

THAT this application shall be and is hereby discontinued.

(Sgd.) S.A. CAWLEY,
[L.S.] Commissioner,
Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia (Incorporated)

and

Registrar, Western Australian Industrial Relations Commission.

No. P35 of 1998.

COMMISSIONER J F GREGOR.

16 April 1999.

Direction.

WHEREAS on 12 March 1999, the Commission issued Directions concerning a dispute between the Civil Service Association of Western Australian (Incorporated) (the CSA) and the Registrar of the Western Australian Industrial Relations Commission; and

WHEREAS Direction 2 provided as follows—

THAT in order to ensure that a proper written formal assessment of the skills and competencies of each of the officers involved in these matters is prepared, the Registrar arrange for a professional independent body to conduct an audit of the skills and the competencies of each of the officers, being Mr Ranjit Ratnayake; Ms Cheryl D'Souza; Ms Jasmine Richards; Ms Lena Dundon and Ms Nanette Constant; and

WHEREAS a further conference was held on 13 April 1999 and at that conference the Commission advised the parties that it would make a further Direction that the written formal assessment of skills and competencies of each of the officers named in Direction 2 of the Directions issued on 12 March 1999 be completed by 13 May 1999, provided that the Registrar would have liberty to apply for an extension to that date.

NOW THEREFORE pursuant to the powers vested in it by s. 32 of the Industrial Relations Act, 1979 the Commission hereby directs—

THAT the written formal assessment of skills and competencies of each of the officers named in Direction 2 of the Directions issued on 12 March 1999 be completed by 13 May 1999 provided that the Registrar shall have liberty to apply in writing for an extension of time to complete the task.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

UNFAIR DISMISSAL/ CONTRACTUAL ENTITLEMENTS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Paul Antoni

and

A T Adams Pty Ltd trading as The Smart Service Trust.

No. 1917 of 1998.

COMMISSIONER P E SCOTT.

16 April 1999.

Reasons for Decision.

THE COMMISSIONER: By this claim, made pursuant to s.29(1)(b)(ii) of the Industrial Relations Act 1979, ("the Act") the Applicant claims that he has been denied benefits arising from his contract of employment being unpaid salary of $856.36 and unused annual leave of $1,258.30.

The Applicant was employed by the Respondent from 1 July 1996. According to the Applicant, on approximately 80 per cent of pay periods throughout the period of employment the Respondent failed to pay him on time, in accordance with his contract of employment. On 28 September 1998, the Applicant wrote to Mr Rob Rohrlach, a director of the Respondent, on the basis that on Friday 25 September 1998 he had again not been paid his salary in full. The Applicant put forward a number of conditions to which he sought agreement. He wrote "regretfully, under these conditions, I wish to advise you that until I am satisfied that the company is in a better financial position, the terms of payment for my salary are to be—

"• Paid weekly, one week in advance, instead of four weekly in arrears.
- Paid by cash or cheque made out to cash by 4.00pm the Friday of every week.
- Terms are to be effective from the next pay period which commences on 28/9/98.
- No changes to any other existing benefits or entitlements."

(Exhibit 2)

By letter dated 30 September 1998 the Applicant sought to record the terms of an agreement reached with Mr Rohrlach. This letter, addressed to Mr Rohrlach says—

"The following are the changes to my terms of payment that are agreed to.

- salary paid weekly, one week in arrears, instead of 4 weekly in arrears.
- payment by cash or cheque made out to cash, by 4.00pm on the Friday of every week.
- pay slip to be provided with cheque.
- terms are to be effective from the next pay period which commenced on 28/9/98
- no changes to any other existing benefits or entitlements."

(Exhibit 3)

The Applicant has given evidence that the signature at the bottom of the letter under the words "I have accepted the above changes to terms of payment for the salary of Paul Antoni" is Mr Rohrlach's signature and that is dated 30/9/98. He says that Mr Rohrlach signed that document in his presence.

The Applicant says that on 16 October 1998, he tendered his resignation. The letter of resignation of that date, addressed to Mr Rohrlach, says—

"Unfortunately, due to the precarious financial position The Smart Company is in, coupled with the recent history of not paying staff whom have left, I must ask, that for me to continue providing my services to your company over the next two weeks that my salary be paid one week in advance.

I ask that you have a cheque for my salary ready by 9.00am on Monday October 19 1998 for that week and then by 4.00pm Friday October 23 1998 a cheque for the next (final week's salary) which will include payment of all unused annual leave, owing up to October 30 1998" (Exhibit 4).

This letter goes on to ask for payment to be made by cash or cheque and that on the last day he be provided with a number of documents relating to his employment. The letter also says—

"provided that you can meet my requirements, I will continue to provide my services for the remainder of the two week period in the same professional manner that I have always carried out my duties".

The Applicant says that on 19 October 1998, Rohrlach verbally accepted the changes as set out in that letter and paid him on October 1998 as proposed in the letter.

On Friday 23 October 1998, advance payment was due for the last week of work in accordance with the agreement the Applicant says he had with Rohrlach. However, the Applicant was not paid on this day. He approached Rohrlach who said that he would pay the Applicant on Monday. The Applicant believed that the contract of employment which required payment in advance on Friday 23 October 1998, had been breached and he did not believe that he was going to be paid on the Monday. With the contract breached on the Friday, the Applicant filed this application. The Applicant says that on Monday 26 October 1998, Rohrlach refused to pay him so he served him with a copy of the application. He also provided to the Respondent a letter addressed to Rohrlach dated that day, which says—

"Dear Rob,

Due to the precarious financial position your company is in, coupled with your continued inability to pay staff and creditors, you have, as my employer, again defaulted on your contractual obligations to me.

While you honoured our last agreement by paying me on Monday October 19, 1998, on Friday the 23rd of October, you were again unable to pay any of my salary or benefits, nor were you able to assure me precisely when it would be paid.

Your inability to pay me or the remaining staff on Friday leaves me little choice but to withdraw my services as indicated in my last letter to you, ref : sma1016.let. However I still expect to be paid this week in full as I remain willing to work—provided I am paid according to our last agreement—one week in advance, including all outstanding entitlements claimed.

The sooner you are able to pay me this week, the sooner I will return, to work out the days remaining in this week. Please note that Friday October 30, 1998 is the last day that I am available to work for you.

I sincerely hope you are able to pay me as soon as possible so that we can both benefit from my remaining time at The Smart Company, and end our relationship in an agreeable and professional manner.

Yours sincerely,

signed

Paul Antoni"

(Exhibit 5)

The Applicant says that he was ready, willing and available to work for the remainder of the week in accordance with his contract of employment, provided his employer complied with its obligation under the contract. He was not paid and did not return to work. He says that the Respondent has breached the contract of employment and he is entitled to be paid for the last week of his employment during which he was available to work subject to the Respondent continuing to pay him in the manner agreed. He says he is also owed pro rata annual leave.

The Respondent does not challenge the amounts claimed to be owed to the Applicant but denies that the Applicant was entitled to be paid in advance. It acknowledges that due to cash flow problems, the Respondent was not able to pay the Applicant on time on a number of occasions for a period of between 6 and 8 months which it says concluded in about June 1998. The Applicant would have been paid within a day or two of the required pay time. It does, however, acknowledge that there was an unreasonable number of times when the Applicant was not paid on time.

The Respondent says that a file note (Exhibit 10) purportedly prepared by Rohrlach indicates that no agreement was reached with the Applicant that the Applicant be paid in advance. Rohrlach did not give evidence.

It is said that the Applicant was only paid in advance because it would be commercially sensible to do so as Rohrlach and the Company's secretary, David Bertram Tilly, who gave evidence, would be away on business. The Respondent says that this did not reflect an agreement reached that there would be payment in advance for the final two weeks. Further, Tilley says that because the Applicant says in his evidence that he cannot exactly recall what work he performed during the last period of his employment that his memory regarding the agreement which he purports to have made with Rohrlach should not be relied upon. In any event, Tilley also says that the Applicant had always previously ensured that any agreements between the parties were made in writing and that it is therefore questionable that an agreement was reached with Rohrlach because Rohrlach was not asked to confirm this in writing, nor did he. Tilley also says that to his knowledge Rohrlach would not make any file notes which were not correct, he also says that he had a discussion with Rohrlach where Rohrlach and he agreed that it was not appropriate to pay employees in

advance and that it would be extremely rare that either of the directors would diverge from an agreement reached with the other directors. He also says that as a general principle payment should always be made in arrears as a means of ensuring that work is actually performed.

The Respondent relies on advice which Tilley says was received from an officer on the "wage line" that the claim was not in accordance with the minimum employment conditions which I take to mean the Minimum Conditions of Employment Act and accordingly, says the amounts claimed are not owed to the Applicant.

I have observed the witnesses as they gave their evidence and I find that the Applicant's evidence was credible and is to be relied upon. Tilley's evidence was of a hearsay nature and based on supposition. In contrast to Tilley's evidence, the Commission has before it the evidence of the Applicant of a direct and first hand nature and this evidence is to be preferred in the circumstances. Accordingly, I find that on 16 October 1998, Rohrlach on behalf of the Respondent agreed to pay the Applicant his final two weeks salary each week in advance and that his final payment for unused annual leave owing up to 30 October 1998 was also to be paid in advance. The first such payment was paid on Monday 19 October 1998. However, the agreement required the final week's pay to be paid by 4.00pm Friday 23 October 1998. The Respondent did not comply. Accordingly, the Respondent had, as it had done many times before, breached the employment contract. The Applicant was advised that he would be paid on Monday. Payment was not made to him on Monday and he advised that he would not work out the remainder of his notice until he was paid in accordance with his contract, at which time he would be available to complete the week's work. No payment was made to him.

In accordance with *Belo Fisheries and Froggett ((1983 63 WAIG 2394)*, in dealing with an application for benefits arising under a contract of service the Commission is to assess the entitlements in accordance with the obligations arising under s.26(1)(a) of the Act, to act according to equity, good conscience and substantial merits of the case without regard to technicalities or legal form.

I am satisfied that the Applicant was entitled to pay in advance both for his salary for the final week of his notice period and entitled to payment for the outstanding annual leave, in accordance with his contract of employment. This may not be a standard practice in industry. However, in the Applicant's case, it became part of his contract of employment following his request for a change to the contract, and following his employer's agreement to that change. His employer breached the contract of employment between the parties and he is entitled to payment. The Applicant indicated in his letter that he was available to return to work upon receipt of payment but it was not made to him. I find that the Applicant is entitled to the amounts claimed.

As to the question of the Minimum Conditions of Employment Act, the Applicant does not seek to enforce those conditions. The enforcement of the Minimum of Conditions Employment Act arises in another jurisdiction. It is the terms of the Applicant's contract of employment which he seeks to enforce and which are enforceable in this jurisdiction. Having found that the Applicant had an agreement for payment for his salary and for unused annual leave owing up to 30 October 1998 to be paid by 4.00pm on Friday 23 October 1998, and that he has received neither, the Applicant is entitled to be paid the amount claimed.

Order accordingly.

Appearances: The Applicant appeared on his own behalf.

Mr D B Tilley appeared on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Paul Antoni

and

A T Adams Pty Ltd trading as The Smart Service Trust.

No. 1917 of 1998.

COMMISSIONER P E SCOTT.

21 April 1999.

Order.

HAVING heard the Applicant on his own on behalf and Mr D B Tilley on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

1. That the Respondent shall pay to the Applicant the amounts of—
   (a) $865.36 being unpaid salary, and
   (b) $1258.30 being unpaid annual leave entitlements.
2. Such payments shall be made within 7 days of the date of this Order.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Anthony Maurice Battista

and

York Grove Holdings Pty Ltd
t/a Rockingham Landscape Supplies.

No. 1860 of 1998.

COMMISSIONER A.R. BEECH.

3 May 1999.

Reasons for Decision.

THE respondent in this matter is a company which is primarily in the business of selling a variety of garden and landscape supplies. Mr Battista, the applicant, was employed as a salesman/driver from 26 February 1997 until his summary dismissal for misconduct on 25 September 1998. Mr Battista claims that his dismissal was harsh, oppressive or unfair and asks the Commission to either re-instate him or award him compensation for his loss or injury arising from the dismissal. Due to the summary nature of the dismissal, the respondent presented its evidence first. The Commission heard evidence from Mr Kevin Dorotich, a director of the respondent, Ms Gail Cooper who performs administrative work for the respondent and its associated company, and from Ms Michelle Carter, who was a teacher at the Baldivis Pre-Primary School. Mr Battista gave evidence on his own behalf and also tendered a statutory declaration from a person for whom he had built a woodshed enclosure that fact being an incident relevant to these proceedings.

The Commission approaches Mr Battista's claim on the basis that it is for the respondent to show that insofar as was within its power, before dismissing Mr Battista, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; that it gave Mr Battista every reasonable opportunity and sufficient time to answer all allegations and respond to them; and that having done those things, Mr Dorotich honestly and genuinely believed, and had reasonable grounds for believing on the information available at that time, that Mr Battista was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, the misconduct justified dismissal. If the respondent

does show those matters, the onus is then upon Mr Battista to show that the respondent's right to dismiss him has been exercised so harshly or oppressively towards him that it amounts to an abuse of that right.

The respondent dismissed Mr Battista as a result of two incidents. The first came to the respondent's notice when the Baldivis Pre-Primary School rang the respondent inquiring about a pergola structure with shade cloth to cover the play area of the pre-primary school. The caller indicated that a quote had already been given and she was waiting for the job to be done. The caller was Ms Carter. The person she spoke to at the respondent was Gail Cooper. Ms Cooper established that the respondent did not know anything about the job and she then raised the matter with Mr Dorotich. Later, when Mr Battista had returned from leave, Mr Dorotich asked Mr Battista what he knew of the quote. What then followed was a conversation between Mr Dorotich and Mr Battista. Ms Cooper was present or overheard at least part of the conversation. Mr Battista disagrees with the evidence given by Mr Dorotich of the conversation, at least in some significant parts. However, Mr Dorotich has the advantage of having made a typewritten note of the conversation shortly afterwards. On balance, I am prepared to accept that the conversation occurred largely as Mr Dorotich has relayed to the Commission. His recollection is supported by his typewritten note. Although Mr Battista suggested, in passing, that the note could be a fabrication, I am not inclined to believe that it is a fabrication. Having observed Mr Dorotich give evidence, and answer questions under cross-examination from Mr Battista, he struck me as being straightforward and truthful in his recollection of events. I therefore accept Mr Dorotich's recollection of the conversation that occurred. That is, that Mr Battista had said to Mr Dorotich that he had taken the call from the Baldivis Pre-Primary and decided it was a job he could do on his day off and that he had arranged it with Ian Knight (a fellow employee). Mr Battista also told Mr Dorotich that he had priced the job according to quotations for materials from a competitor company. Mr Dorotich believed that Mr Battista had done this because otherwise the repondent would have known of the job. After some further discussion, Mr Dorotich advised Mr Battista that he wished to give the issue some more thought because it was a serious matter and a betrayal by a senior employee of his employment. He closed the conversation and asked Mr Battista for his keys and indicated that the matter would be discussed further the next day.

Mr Dorotich's evidence of the conversation on the next day is similarly supported by a note that he made subsequently. For the reasons I expressed earlier, I therefore prefer Mr Dorotich's evidence of what happened in that conversation. As a result of a comment made by Ms Cooper to Mr Battista during the meeting, Mr Dorotich became aware that Mr Battista, in May, had enquired about taking some material from the respondent to build a cover over a woodpile for a customer who had come in to the respondent. He questioned Mr Battista about the job and Mr Battista admitted that he had done it. Mr Battista maintained that he had taken some Colorbond coversheets and some old pallets and that he had been paid $60 for the job.

Mr Dorotich believed that as a result of those two instances he would dismiss Mr Battista, and he did so.

Mr Battista's evidence was quite brief overall. His evidence consisted simply of denying any involvement in the Baldivis Pre-Primary matter, stating "All I did was refer it to the registered handyman, Ian Knight." It was Mr Battista's belief that the Baldivis Pre-Primary School job was a type of job not normally done by the respondent. For example, a request to the respondent for the installation of reticulation would be forwarded to an appropriate contractor. As to the cover over the woodpile, Mr Battista insisted that Ms Cooper had given him permission to take the material and knew he was doing the job.

Overall, I prefer the evidence of Mr Dorotich to the evidence of Mr Battista. I do so for the reason that the evidence before the Commission is that Mr Battista's involvement in the Baldivis Pre-Primary School pergola was far more than merely referring the issue on to Mr Knight. I have no hesitation in accepting Ms Carter's evidence that, even though she had not seen Mr Battista before the Commission hearing, she had spoken to him twice on the telephone and that he had discussed the timetabling of the work with her on those occasions. Further, I have no doubt that Ms Carter believed that she was dealing with the respondent and not with an employee doing a job privately for them. I therefore conclude that Mr Battista had intended a far more active role by himself in the Baldivis Pre-Primary School matter than he now admits.

I also find that Mr Battista did construct a cover over Ms Willett's woodpile in approximately April or May 1998, using some materials taken from the respondent's premises. He did so without the permission of the respondent. In this regard, I accept the evidence of Ms Cooper that she did not have the authority to give Mr Battista the materials he requested. That evidence was not challenged and she remained quite firm in it. The Commission has no reason to disbelieve her evidence. Although Mr Battista suggested in his cross-examination of Ms Cooper that he had subsequently told her that he had done the job and been paid for it and that the customer was satisfied, he did not give that evidence himself when he was under oath. Furthermore, Ms Cooper denied that he ever said such a thing and I accept her evidence.

Given that I prefer the evidence of Mr Dorotich, it follows that I also find that Mr Battista did say to Mr Dorotich that he had obtained a quote for materials for the Baldivis Pre-Primary pergola from the competitor company. To hold otherwise would be to find that Mr Dorotich had made up that allegation, and that is not the impression gained by the manner in which he gave his evidence.

Furthermore, although Mr Battista asserted that neither the covering over the woodshed nor the pergola at the Baldivis Pre-Primary School was work usually undertaken by the respondent, the evidence before the Commission does not bear out his assertion. Mr Dorotich gave evidence that he had spoken to the staff of the respondent at the time saying that it needed every job that it could get. He also gave evidence that the respondent has on occasions done these sorts of jobs before, although infrequently. It was sometimes arranged that such a job would be done in conjunction with the respondent's associated company although the sale would eventually be credited to the respondent. I therefore find that these two jobs were work that was of a kind that the respondent would either perform, or be involved in with its associated company. Therefore, given that Mr Battista's involvement in the pre-primary school pergola was as I have found, and that he performed work putting the covering over the woodshed using materials from the respondent which he had no permission to use, Mr Battista did indeed commit a misconduct. I therefore find that the respondent has discharged the evidentiary onus upon it and shown that Mr Dorotich honestly and genuinely believed and had reasonable grounds for believing, on the information available at the time, that Mr Battista was guilty of the misconduct alleged.

Mr Battista also has not been able to show that his dismissal was unfair. It is quite clear on the evidence that he occupied a position of trust within the respondent's operations. He was apparently seen as the day-to-day yard manager. Mr Battista's actions seriously affected any trust that Mr Dorotich had in him. While I am not without sympathy for Mr Battista's description of the job performed covering the woodpile as being a small job using second-hand materials for a needy member of the community, even if his characterisation of the job is correct, Mr Uphill is quite correct in saying that it nevertheless should have been cleared with his employer. I am satisfied that it was not. Further, there is no satisfactory evidence to show that there is a practice in the respondent's operations, for work which had been brought to it that it might not directly perform, to be done by its employees outside working time and without the knowledge of the respondent. That is what has happened in this case and, on the evidence, is what is likely to have happened in relation to the Baldivis Pre-Primary School pergola had it not been for the telephone call from Ms Carter. I am satisfied that the work to be done in these two jobs is work that the company should have had the option of either doing, or doing in association with its associated company, or contracting to a known contractor. By Mr Battista's actions, he denied his employer that opportunity, and that is inconsistent with his obligations as the respondent's employee and certainly as its day-to-day yard manager.

It is true to say that not all misconduct justifies dismissal. However, an act of misconduct that goes to the trust that an employer needs to have in a relatively senior employee can be serious enough to warrant summary dismissal. Trust is a commodity that is built up over time but can be destroyed by a single act. I think that is the case here. Although Mr Battista has suggested, in passing, that the respondent company had intentions of replacing him with Mr Ling, or by references he made to the employment of Ms Cooper's son, that the two jobs were not the real reason for his dismissal, it cannot be fairly said that the evidence shows Mr Battista to be correct. There is no suggestion in the evidence that Mr Ling was to replace Mr Battista and the evidence regarding Ms Cooper's son establishes at the most a casual and intermittent working relationship. Accordingly, it cannot be said that Mr Battista has shown that his dismissal is harsh, oppressive or unfair towards him, and his application will therefore be dismissed.

An order now issues to that effect.

Appearances: The applicant on his own behalf.

Mr J.N. Uphill on behalf of respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Anthony Maurice Battista

and

York Grove Holdings Pty Ltd
T/a Rockingham Landscape Supplies.

No. 1860 of 1998.

3 May 1999.

Order.

HAVING HEARD Mr A Battista on behalf of himself as the applicant and Mr J. N. Uphill on behalf of the respondent, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order—

THAT the application be dismissed.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gregory Mark Berger

and

Albany Milk Distributors.

No. 1218 of 1998.

CHIEF COMMISSIONER W.S. COLEMAN.

7 May 1999.

Reasons for Decision.

CHIEF COMMISSIONER: The application alleging unfair dismissal in circumstances of summary termination of employment was dismissed. The respondent now claims costs as recompense in "taking all necessary steps to defend the claim made by the applicant." The amount sought totals $2961.25. This figure is calculated on the basis of—

141 hours spent by the respondent in answering the claim. (This appears to include time spent in court)

141 hours @ $20.00 per hour	$2820.00
Telephone calls	$ 10.75
Kilometrage	$ 48.00
Postage and Typing	$ 40.90
Photocopying	$ 21.60
Issue fees and subpoenas	$ 10.00
Conduct money	$ 10.00
	$2961.25

The respondent submits that it is a general principle that "cost follow the event". The findings made in the first instance that the applicant had been treated with respect and concern by the respondent over the period of the employment relationship and that the applicant had acted dishonestly were cited.

The respondent had at the outset served notice that the claim alleging unfair dismissal lacked merit and that costs would be pursued in the event that the application was dismissed. It is submitted that the applicant's claim lacked substance and that the respondent was put to unwarranted cost and expense in defending a lawful position in prolonged proceedings.

The applicant meets this claim with the assertion that the Commission does not have jurisdiction to order costs.

Section 27(1)(c) of the Act, the power to award costs, is subject to section 23(3)(h). This provides that the Commission in the exercise of the jurisdiction conferred on it by Part 2 of the Act shall not make any order on a claim of harsh, oppressive or unfair dismissal except an order that is authorised by section 23A of the Act. It is argued that section 23A of the Act does not authorise the Commission to make any order for costs on an application by an employee in respect of harsh, oppressive or unfair dismissal.

In the alternative, it is argued that if the Commission does have jurisdiction under section 27(1)(c) of the Act, this is limited to "costs and expenses" and does not extend to personal "fees" of a litigant calculated on the basis of an hourly rate. Here, it is submitted, the respondent is attempting to charge its own time in preparing its defence. "There is nothing to indicate that the employer is actually out of pocket, let alone to any other party". Furthermore it is submitted that the wages being claimed have not been quantified. There is no indication whether the wages claimed are "attributable to drawings paid to the two partners constituting the respondent, or their employees, or to other persons". The schedule (which details dates and hours only) is "manifestly inadequate".

Finally if it is established that the Commission has jurisdiction to order costs, the applicant submits that the only costs that could possibly be ordered are those "in the nature of true third party costs ie disbursements. (See Silberschnieder v. MRSA Earthmoving Pty Ltd (1988) AILR 195 per Brunsden J.).

It is the applicant's position that each party should bear their own costs.

The limitation imposed by s23A of the Act as to scope of orders which may be authorised in the case of claims for harsh, oppressive or unfair dismissal goes to the issue of relief. It does not derogate nor displace the operation of s27(1)(c) of the Act. Indeed section 23A(c) empowers the Commission to make any ancillary or incidental orders considered necessary for giving effect to any order made under subsection 23A(1) of the Act.

The general policy in industrial jurisdictions is that costs ought not to be awarded except in extreme cases. (Brailey v. Mendex Pty Ltd t/as Mair & Co Maylands (1993) 73 WAIG 26 at 27). It is applied having regard to the relative informality of proceedings before the Commission (TWU v. Tip Top Bakeries (1995) 75 WAIG 9 at 11).

The thrust of the respondent's application is that the applicant's claim was unmeritorious and misconceived. These amount to assertions that the application was frivolous or vexatious. In this respect the test is whether the claim is "so obviously untenable that it cannot possibly succeed," is "manifestly groundless" or "so manifestly faulty that it does not admit of argument." (See Industrial Appeal Court in TWU v. Tip top Bakeries (1995) 75 WAIG 9 at 11 ref General Steel Industries Inc v. Commissioner of Railways (NSW)(1964) 112 CLR 125 at 129 Barwick C.J.). However where there is relative informality in proceedings and the Commission is not a Court of pleadings, these considerations militate against the strict application of this test. In discharging its statutory obligations, the Commission is required to act according to equity, good conscience and the substantial merits of the case (section 26(1)(a)).

The case argued by the applicant rested heavily on the assertion that the respondent had advertised his position and therefore had conspired to terminate his services. While this was ill founded, that only became apparent in the hearing. If it

had been the case that this matter had been pleaded, the application may then have taken a different course. However having regard to all of the circumstances of the case I am not convinced that the applicant's claim was manifestly groundless nor so lacking in substance so as to attract consideration as being extreme.

The respondent's application is dismissed.

Appearances: Mr Clifton (of Counsel) on behalf of the Applicant.

Mr N Graham (of Counsel) on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Thomas Cholkowski

and

Horizon Satellite Systems.

No. 1206 of 1998

COMMISSIONER J F GREGOR.

21 APRIL 1999.

Reasons for Decision.
(Extempore)

This application by Thomas Cholkowski, the applicant, is for denied contractual benefits which he claims are due to him at the conclusion of a contract of employment with Horizon Satellite Systems. There was no appearance by Horizon Satellite Systems (the respondent) at the hearing on 31 March 1999 and for the reasons that now follow, the Commission decided to hear the application in the absence of the respondent. The reasons for decision of the Commission, which are repeated here, are extracted from pages 3—6 of the transcript of proceedings and have been edited.

> This matter was filed in the Registry on the 1 July 1998. The application names Horizon Satellite Systems as the respondent. The applicant has presented a letter (Exhibit 1) which relates to his resignation. It is dated the 21 May 1998. The caption on the top of the page is "Horizon Satellite Systems," and printed above is the name Texfocus Pty Ltd, ACN 075 296 196.
>
> The applicant claims that the Horizon Satellite Systems and Texfocus Pty Ltd are one and the same in that Horizon Satellite Systems is the trading name of Texfocus Pty Ltd. Although in other circumstances one might find that there is a potential for the respondent to be incorrectly named, the letterhead makes it clear that Horizon Satellite Systems is a trading name for Texfocus Pty Ltd. That having been said, it seems to me the application adequately identifies the respondent.
>
> After the application was filed, attempts were made by an officer of the Registry to contact the respondent. There is a note on the file recording calls were made on the 4 August and on 10 August 1998 when messages were left for a principal of the respondent, a Mr Ehrenfeld, to contact the Registry regarding the claim. According to the note he did not respond. The applicant was told on the 17 August 1998 of the attempts by an officer of the Registry to contact Mr Ehrenfeld. At the time the applicant passed the comment to the officer that he did not believe the respondent would attend a conciliation conference because Mr Ehrenfeld did not appear at a Small Claims Tribunal matter a number of days before. Since 17 August 1998 time no documentation has been filed on behalf of the respondent. The provisions of Industrial Relations Commission Regulations 1985 requiring the respondent to file a Notice of Answer and Counter Proposal have not been complied with.
>
> The matter was listed for a conference to be held on the 25 September 1998. That conference took place but the respondent did not appear. At the conference the applicant told the Commission the respondent was involved in a number of companies that had financial difficulties. The applicant was told of potential difficulties to exercise jurisdiction by the Commission if that company was in receivership or otherwise in proceedings under the Bankruptcy Act. It was the applicant's opinion at that time that no formal bankruptcy proceedings had started.
>
> Also on the file are cuttings from the 'West Australian' newspaper, which report that insolvency accountants had been called in to sort out the affairs of the company and that the Supreme Court was due to hear an application from a computer supplier for Joshua Corporation, a company not involved in these proceedings, to be wound up.
>
> The comment that the article makes is that the appointment of an administrator was not designed to negate a liquidation application but was part of plans put forward by Mr Ehrenfeld to make a deed of arrangement. The article does not indicate that the respondent in these proceedings is subject to proceedings under the Corporations Law, but it does indicate that there were some difficulties with the finances of the company, as the applicant told the Commission. Also on the Commission's File is a company extract relating to Texfocus Pty Ltd. This extract was printed on the 30 September 1998. The company was registered as an Australian proprietary company with limited shares. At the time the extract was taken the company was trading, although for 3 years it had not submitted annual returns except for on the 31 January 1998.
>
> The name of the respondent was called outside the court, and there was no appearance. Having reviewed the history of the application it is open to find, and I do, that this respondent has made no attempt to take part in proceedings before this Commission to defend the action that has been brought against it. Every effort has been made by the Registry to contact the respondent. The respondent has received two notices from the Commission, one sent to it on 24 August 1998 advising of a conference, at which no appearance was made, and a notice of hearing, which bears the stamp of the Registry of 13 November 1998, advising that this hearing will take place today. There has been no appearance.
>
> In those circumstances it is open for me to conclude that the respondent will not take part in these proceedings, and exercising the powers vested in me under section 27(1)(d) of the Industrial Relations Act I intend to hear the matter and dispose of it.
>
> ("The Commission then heard the applicant. At the conclusion of the submissions and evidence of the applicant the Commission issued the Reasons for Decision that follow, extempore")

This is an application for contractual benefits the applicant claims were payable to him at the end of a contract of employment with the respondent. The applicant was employed in November 1997. He received a letter of appointment on the 3 December 1997. The letter of appointment is a detailed contract (Exhibit 2). It discusses the reporting lines in the company, delineates the area of responsibility of the applicant which was the assembly, service, maintenance and repair of satellite antennas and associated receiving equipment as well as cabling setup, installation and demonstration of antennas on site for clients.

There were other tasks associated with the implementation and administration of business procedures, subject to various assignments. There were expected outcomes which are described in the respondent's code of conduct. The applicant was to work in an exclusive arrangement. The hours of employment are detailed in the letter When required, the workshop, operated by the respondent, was open 7 days a week. A schedule of work time (Exhibit 3) shows that on occasions the applicant was required to work on the weekend. Normally the hours were 8.30am to 6.30pm. There was an arrangement for work outside normal hours whereby the applicant was to receive paid time in lieu. He was entitled to 4 weeks annual leave after 12 months continuous service and 4 weeks per calendar year. A leave loading of 17.5 per cent would be paid in addition to his salary and he was entitled to sick leave of 10 days per year. At the time of commencement he had a remuneration package in the vicinity of $30,000 which included leave loading and superannuation. He also received a tool allowance. There are other requirements of the contract which are not germane to the proceeding before the Commission.

That contract was subject to a review in a document headed "Review of Remuneration" (Exhibit 5). The review occurred, according to the applicant, by arrangement between the parties. The document is in very similar form to the first contract (Exhibit 2) except the entitlement to paid time in lieu of overtime is clarified. Under the paragraph "Hours of Employment" is the following sentence—

> "Time in lieu of overtime will be given at a time mutually agreeable between yourself and the company. In the absence of agreement the company will advise when time in lieu can be taken."

The annual leave provisions are the same, as are the sick-leave provisions. The remuneration was increased to $36,000 with an annual leave loading of $446. The other parts of the contract are not relevant to the matter to be decided. The Commission in dealing with these matters is to apply the tests set out in *Simmons v. Business Computers International Pty Ltd (1885 65 WAIG 2039)*. It is to examine the contract, discover its true terms and, if the contract is not the subject of an award or order of the Commission, to give effect to that contract if any of its terms have not been met by the respondent.

I deal first with the claim for salary. The entitlement is clearly set out in the paragraph headed "Remuneration" in both the initial letter of offer (Exhibit 2) and the contract of employment and in the review of remuneration (Exhibit 5). The applicant was entitled to payment if he worked the hours set out in the contract of employment and which on the evidence he did.

The applicant said that he was paid weekly in arrears. He produced a bank statement which shows he was paid on 30 May 1998. He says under oath that this last payment was for work done up to 25 May 1998. I accept his evidence and I find that he has made out his claim for salary from 25 May 1998 to 2 June 1998. He will be awarded the sum of $892.08.

As for the claim for time in lieu, I observe that there is no provision in the contract of employment that time worked in lieu of overtime be converted to money. The contract provides—

> "Time in lieu of overtime can be given at a time mutually agreed between the company and yourself. In the absence of agreement the company will advise when the time in lieu can be taken."

What the applicant says is that there was a collateral agreement made between the parties immediately proceeding his resignation. He says a letter written to him by the chairman of the respondent, Mr Gabriel Ehrenfeld, on the 21 May 1998 creates a right to payment for time in lieu of overtime as opposed to time off without loss of pay. He says the right arises from the following words—

> "With respect to your claim for time in lieu we say there is an accrued entitlement since 7th May 1998. The accrued entitlement prior to this date was extinguished under our agreement; however, we would like to part on amicable terms and agree to pay your reconciled claim for time in lieu provided the company is able to obtain the same co-operation and benefit for the balance of the time that you work here'."

The applicant gave evidence that he continued to work after he received the letter for a period from the 20 May through to 2nd June 1999. I accept the schedule of hours he has submitted and I accept that he worked during the period. He has therefore honoured his side of the arrangement. The right of the applicant to payment only arises from the collateral agreement made between him and Mr Ehrenfeld on the 21 May 1998. In the absence of this agreement I would find against him because the contract does not provide for payment in lieu, it provides for time in lieu only. However, the applicant has been able to establish that he had a contractual entitlement at the time the contract came to an end in the sum of $1,123.00.

The applicant also claims payment for pro-rata annual leave. The annual leave provisions in both the contracts are the same (Exhibit 5). The provision is—

> "You will be entitled to 4 weeks annual leave after 12 months continuous service with the employer and 4 weeks per calendar year thereafter. A leave loading will be paid in addition to your salary for the two fortnights of annual leave."

I conclude that the applicant worked from the 17th November 1997 to the 2nd June 1998. He did not complete 12 months continuous service with the company. On the face of the contract he is only entitled to payment once he has completed 12 months. There is no provision for a pro rata payment and there is nothing which would suggest to me that such a payment could be implied into the contract (see *BP Refinery (Western Point) Pty Ltd v. Hasting Shire Council (1978) 52 ALVR 20)*. I am therefore unable to find in favour of the applicant concerning the claim for annual leave as in my view the contract, the original contract, and its review as set out in Exhibits 2 and 5 do not provide a basis upon which I could make such an order.

The Commission will make orders against the respondent in this matter for the payment of salary of $892.08 and $1123.00 for payment in lieu of overtime. My comments concerning entitlement leave loading are the same as I made for annual leave and I reject that part of the claim.

Appearances: The applicant appeared in person.

No appearance for the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Thomas Cholkowski

and

Horizon Satellite Systems.

No. 1206 of 1998.

COMMISSIONER J F GREGOR.

21 April 1999.

Order.

HAVING heard the applicant in person and no appearance on behalf of the respondent, the Commission pursuant to the powers vested in it under the Industrial Relations Act, 1979 hereby orders—

1. THAT the respondent pay to the applicant the sum of $892.08 and $1123.00 for payment in lieu of overtime; and
2. THAT the claim for annual leave and pro-rata annual leave be and is hereby dismissed.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Sharon de Ross

and

Miners and Norsemen Workers Club.

No. 830 of 1997.

CHIEF COMMISSIONER W.S. COLEMAN.

7 April 1999.

Reasons for Decision.

CHIEF COMMISSIONER: The applicant, Mrs de Ross, was employed as a barperson by the respondent club. In April 1997, when it is alleged the employment relationship was terminated, the applicant was rostered to work on a permanent part-time basis.

On 19th April, the applicant commenced work at 10.00am and finished her shift at 2.55pm. In discharging her duties as a barperson that day the applicant alleges that she was confronted with a highly offensive sexual proposition from a regular customer. It was her evidence that this was not the first time that this has occurred. She claims to have reported the incidents to management.

Next day the applicant was called to a meeting with the manager and president of the club. It is Mrs de Ross' evidence that she was told that there were complaints from two patrons, both of whom had been drinking at the bar the previous day. They had claimed that money had been tendered for drinks but that sales had not always been "rung-up" on the till. One of the complaints was the customer whom the applicant alleges made the offensive remark to her that day. At the meeting with the manager and president, Mrs de Ross claimed to have been pressed to explain whether or not she had "rung-up" the till correctly and to account for certain calculations in her handwriting on scrap paper retrieved from the rubbish bin located in the bar. The applicant stated that she had been accused of stealing stock.

According to Mrs de Ross, the interview on 20th April went for approximately two hours. Mrs de Ross stated that when she could not explain the calculations she was bullied and asked if she was incompetent. In the course of the interview the applicant volunteered to have the CIB called in. She denied any wrong-doing. She also claimed to have raised issues going to under-payment of her wages, the fact that the back gate had been left open and her concern about the use of the key to a games machine in the bar.

At the conclusion of the discussion that Sunday evening the applicant claims that she felt that her services has been terminated. Those words were not stated to her but the applicant believed that was the case.

Furthermore, she claimed to have prevailed on her husband to ring the manager the next morning and understood that he was told that she was no longer on the roster. When the telephone conversation concluded, the applicant states that her husband said, "You've been sacked".

The applicant visited a medical practitioner on 3rd May and sought treatment for an injury she claimed to have incurred while shifting blocks of beer at work in 21st April. That date was subsequently amended by the doctor on the applicant's advice as having occurred on 19th April, the last day of work (exhibit D).

This application was the subject of protracted conciliation. Indeed, the employment relationship was re-established on a trial basis. However, despite the best endeavours of the advocates representing the respective parties the matter could not be resolved. It is accepted by the respondent that re-employment or reinstatement is impractical.

The applicant submits the following as the basis for the claim of harsh, oppressive or unfair dismissal—

"(1) That the employer repudiated the contract by not taking action to prevent members making offensive and objectionable statements.

(2) That the employer unfairly and without cause accused the applicant of misconduct on 20th April 1997 and without cause complained to the police of stealing.

(3) As from 21st April 1997 removed the applicant from the roster of employment.

(4) Terminated the service while the applicant was injured and subject to total incapacity from 19 April through injury sustained from 11 February 1997.

(5) By not providing a safe place of employment."

(Schedule completed at Commission's direction).

It was submitted on behalf of the applicant that her services were terminated by the respondent on 21st April. In the alternative, if that is not accepted, that she was constructively dismissed on 20th April at the conclusion of a "two-hour interrogation" when Mrs de Ross complained about the employer failing to act upon her previous complaints about vulgar remarks made to her in the course of her employment. Furthermore, it is argued that in failing to adhere to the terms of the award, the employer breached the contract of employment and that is "an ingredient in unfair dismissal." Finally, that as Mrs de Ross had reported difficulties she was experiencing in lifting beer cartons and kegs in February, had attended her doctor and again reported the problems in March, it was unfair for her to be terminated from employment "while that condition of total incapacity pertains".

The respondent submitted—

"(i) The Club denies ground 1 for unfair dismissal, since at no time was any member of management of the Club ever informed by the Applicant of any members making any offensive or objectionable comments. In lieu, the Club management maintains that the Applicant dressed in an inappropriate manner, inviting provocative comments from Club members, due to her short skirts and unbuttoned tops.

(ii) At the meeting of the 20th April, 1997, which was convened to ask the Applicant her explanation in respect to complaints that she was not putting all monies received from beer sales into the cash register. Also, to receive her explanation in respect to alleged discrepancies of the till tape from the previous day.

(iii) At no time did the former manager or President directly or indirectly by their actions or conversation accuse the Applicant of theft. At no time did the Applicant indicate to them that she was ill or suffering from an old injury. The applicant was not dismissed or suspended at this meeting. No satisfactory explanation was given by the Applicant concerning the complaints and the discrepancies with the beer sales.

(iv) It is admitted that the interview went on for two hours. The length of the interview was caused by the Applicant attempting to raise irrelevant matters and accusing other staff of misdemeanours. The meeting ended in frustration when the employer could not obtain direct answers to their questions about the problems.

(v) The Applicant was not deleted from the roster until May 1997. She failed to report to work or advise the Club that she was on sick leave. This is different from what she informed the Workers Compensation hearing, where she claimed she was on sick leave for the period of 20 April 1997 to 15 July 1997. The Club was never advised by the Applicant that she was unable to attend work due to injury or sick leave, nor prior to the compensation hearing, ever sighted any medical certificates, as required under the award.

(vi) The Club denies that the Applicant was totally incapacitated due to an alleged work injury. Her original claim for compensation was refused by Wesfarmers Insurance, on the grounds that she was carrying out a normal active life, including redecorating her home and constructing a chook pen.

(vii) In the record of proceedings of review of matter no. 1697/97, the review officer ordered that an amount of $2700 be paid as full and final settlement of weekly payments, on a without prejudice basis. There is no mention in the decision for total incapacity for any period of her employment.

(viii) The Club denies that it has an unsafe working environment. It also denies any liability of causing any injury on the dates claimed by the applicant."

(Respondent's Further & Better Particulars submitted in response to applicant's schedule)

The applicant called her husband Mr de Ross in support of her claim that she had been unfairly dismissed. He testified that he had telephoned Mrs Debbie Epis, the manager at approximately, 9.00am on Monday, 21st April. Mr de Ross enquiried as to whether his wife was on the roster. He stated that he was told she was not "rostered on". Apparently, that was the extent of the conversation.

Mr de Ross acknowledged that his wife had not used the words that she had been sacked when she returned home from the meeting with Mrs Epis (manager at the time)and Mrs O'Shaughnessy (club president) on Sunday evening. However, from the tenor of that discussion it appears he had assumed that her employment had been terminated. He stated that that was why he rang Mrs Epis on Monday morning.

It was his belief that the Club was trying to "get rid off" his wife. Mr de Ross also stated that his wife had spoken to him about the vulgar remarks being directed at her from patrons and that he had advised her to complain to Mrs Epis, the manager. He assumed that his wife had followed that advice.

The respondent club called evidence from Mrs O'Shaughnessy, Mrs Debbie Epis and Mr Faithful and Mr Saggers, two club members who regularly drink at the club and who attended the bar in Saturday, 19th April.

The evidence from the manager and president clarified the terms of the complaints upon which they acted in interviewing the applicant on 20th April. The initial issue went to the number of stubbies purchased by Mr Faithful between approximately 11.00am and 1.00pm on Saturday. When the till tape did not disclose any purchases against the five or six stubbies consumed by him in that period, that gave rise to the basis for an investigation. Next was the allegation that drinks including 7oz beers had not been correctly rung-up. However, the inquiry never really progressed beyond an attempt to understand the absence of five or six purchases of stubbies at $3.30 each from the till tape. It is noted that the till records the time of sales and that various beverages have different identification codes.

According to Mrs O'Shaughnessy and Mrs Epis the thrust of the interview with Mrs de Ross was to see if there was an explanation for the alleged purchases of the stubbies. Both witnesses claim that it was not a hostile discussion. No allegation of theft about money or stock was levelled at Mrs de Ross. Although the "further and better particulars" provided by the respondent agree that the interview went for two hours, the evidence provided by these witnesses indicates a duration of something between one hour and one and a half-hours.

Both witnesses attested to being frustrated with the applicant's evasive responses about the till tape and the scribbled calculations. They claimed that Mrs de Ross endeavoured to blame other members of staff. Mrs Epis denied that Mrs de Ross had ever raised anything about vulgar propositions or sexual harassment at that meeting or at any other time. It was not put to her that she had previously advised Mrs de Ross to take a broad view of matters given that this was a mining town. Similarly, it was not put to her that she had previously witnessed the applicant being subjected to offensive language by Mr Saggers over his bike being located in the bar. According to these witnesses at no time in the interview was Mrs de Ross told that her services were terminated, that she was not wanted or that she was suspended. Likewise, each denies that at that time or on prior occasions were they told by Mrs de Ross of any disability or incapacity arising from her duties. Mrs Epis disputed the claims set out by the applicant in her affidavit about the weight and extent of liquor she had been required to move.

Mrs Epis denied that Mr de Ross had spoken to her on the telephone on Monday, 21st April. She stated that she had attempted to phone Mrs de Ross on Tuesday, 22nd April to inquire as to whether or not she would be attending to work her shift that day after she had failed to work the previous day. However, the phone call had not been answered. It was her evidence that she had attempted to phone Mrs de Ross several times the following week without success. Mrs Epis stated that Mr de Ross had phoned her on 11 May and asked whether his wife was rostered on to work the next day. He was advised that she was not. Mr de Ross' response had been "So she's not working?" Mrs Epis responded, "No".

It is noted that Mrs Epis stated that Mrs de Ross had attended the Club on 7th May and handed her two medical certificates. On 12th May Mr de Ross called in and gave Mrs Epis three medical certificates. She stated that at that time he indicated that the dates on two certificates had been changed and that one was undated.

There was a conflict in the evidence presented between Mrs O'Shaughnessy and Mrs Epis as to whether Mrs de Ross was told the name of the Club member that had raised the complaint about her alleged failure to register the correct sale of five or six stubbies on 19th April. Nothing was raised in examination of these witnesses about the assertion set out in the "further and better particulars" about the inappropriateness of Mrs de Ross' attire or that it "invited provocative comments".

Mr Faithful, the author of the complaint about the sale of the stubbies presented evidence. He could not see what was being registered on the till and received a commentary on that from Mr Saggers who sat at the bar directly in front of the till. It is Mr Faithful's testimony that all of the money collected from him for his drinks was deposited in the till and this activity had been accompanied by Mrs de Ross making a notation on a piece of paper kept beside the till.

Mr Saggers gave evidence that the total of each sale registered in the till was displayed some eighteen inches in front of him. However, he could not see the till keyboard. He claimed that the purchases of some stubbies and glasses of beer were not being rung-up. The respondent's advocate did not examine him on the applicant's allegation concerning an improper proposal she claimed to have occurred on 19th April nor on any other alleged incidents concerning vulgar language. Those matters were taken up in cross-examination. Mr Saggers emphatically denied that he had uttered the alleged offensive proposition or that he had used bad language to Mrs de Ross.

Considerable emphasis was placed on matters going to workers compensation claims, the dates and amended dates upon which claims were made, whether or not a final certificate had issued and the assertions set out by the applicant in a matter under the Workers Compensation and Rehabilitation Act (exhibits C, D, E, G and 4). However, while some of this evidence goes to credibility, this issue of worker compensation may only impact upon the application if termination of employment was effected during the period of incapacity.

To the extent that it was inferred that there was a conspiracy to "get rid" of Mrs de Ross from her position with the club, this is rejected. Statements were attributed to a number of people within the community but that was rumour and innuendo not evidence.

The primary focus of the claim was that Mrs de Ross was dismissed on 21st April or was constructively dismissed on 20th April. The first of these dates relates to the alleged phone call from the applicant's husband to the manager and the second refers to the interview held with the manager and president arising from Mr Faithful's complaint.

I find that the interview conducted on 20th April was a reasonable attempt by the respondent to address the complaint raised by Mr Faithful. While I can accept that the manager and president became frustrated with Mrs de Ross' evasion, I do not believe that this was manifested as an overt or implied termination of employment. I accept the evidence of Mrs O'Shaughnessy and Mrs Epis as to the tenor of the discussion and the issues that were canvassed. Mrs de Ross was not accused of stealing money by manipulating the till nor was she accused of stealing stock as she claimed. I find that she was given the tapes to peruse. I reject any inference that she was harassed or threatened or that she was accused of misconduct. It is acknowledged that the term "termination" or "sacking" was not used.

I do not accept that any belief held by Mrs de Ross that that was the effect of the discussion. The discussion was reasonable. While the interview may have concluded on an unsatisfactory basis without an understanding of what would follow, there is nothing to suggest that termination of Mrs de Ross' employment was either inevitable or contemplated. I accept the evidence that her name was maintained on the roster until 2nd May. It was removed when she had not contacted the respondent. I do not accept that there was a duty on the manager to contact the applicant either personally, by telephone or by letter. There was nothing before her as at 20th April to indicate that the applicant was not fit for work. Indeed, despite the applicant's subsequent attendance on her doctor on 3rd May about an injury, it was her evidence that she was willing to work on 21st April but for the "feeling" she had been terminated.

The first time the term "sacked" seems to have arisen is when Mr de Ross informed his wife that she was no longer on the roster after he had spoken with Mrs Epis. It was Mr de Ross who gave currency to that position not Mrs Epis. I reject the evidence that telephone contact was made by Mr de Ross with Mrs Epis on Monday, 21st April. I prefer the evidence of Mrs Epis in this regard a being more credible. In this respect I note the rosters and Mrs de Ross allocation of shifts until 2nd May. I also accept Mrs Epis' evidence about her attempts to telephone the applicant on 22nd April and the subsequent week. I note that Mrs de Ross did not attend the medical practitioner about an alleged injury until 3rd May and that she had presented at the Club on 7th May with medical certificates without raising any issue of work with Mrs Epis.

I accept that Mr de Ross dropped off claims on 12th May and that was the day after he had spoken with Mrs Epis. In summary, I accept the evidence of both Mrs O'Shaughnessy and Mrs Epis to that of the applicant and her husband. I accept that the respondent did not accuse the applicant of misconduct and sought to obtain from her information about the purchase of drinks and the operation of the till on 19th April. Despite what the applicant said she was given the tape to review at that time. The involvement of the police was subsequent to the investigation attempted by the respondent and appears to have come about only after an application under the Act was lodged. It was initiated on the suggestion of the respondent's industrial relations representative. That action did not change the tenor of the interview held on 19th April.

There was a paucity of evidence about the alleged offensive language and improper proposition claimed to have been made by the club member associated with the complaint about Mrs de Ross' operation of the till. There were claims about the context within which bad language was said to have been used but this was not pursued with the relevant witnesses. As to the improper sexual remark there was nothing more than the bald assertions that it was uttered and that the complaint was made to the manager. There was nothing to indicate when that was supposed to have been taken up by the applicant. Was it on 19th April or in the discussion on 20th April? Against this is the general denial by Mrs Epis and Mrs O'Shaughnessy that it was not raised with either of them. Mr Saggers denied that he had made such a remark. Nothing was put to him about the alleged context within which it was claimed to have been stated nor his response to what is alleged to have been said to him as a retort.

There is insufficient before me to find whether an offensive statement was made to Mrs de Ross. However, I am satisfied that nothing was reported to Mrs Epis by way of comment or complaint either as a specific matter or within the context of the discussion that took place on 20th April. I accept the truth of her evidence and that of Mrs O'Shaughnessy.

I reject the argument that the club had repudiated the contract by not taking action to prevent members making offensive and objectionable statements. Any inference that such behaviour had occurred because the club subsequently took steps to ensure that standards of behaviour were maintained is rejected.

In the absence of a finding that the applicant's services were terminated on 21st April or that there was a constructive dismissal on 20th April, there is nothing upon which to base this application, therefore it is dismissed.

Appearances: Mr R. Clohessy on behalf of the applicant.

Mr T. Crossley on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Sharon de Ross

and

Miners and Norsemen Workers Club.

No. 830 of 1997.

CHIEF COMMISSIONER W.S. COLEMAN.

7 April 1999.

Order.

HAVING heard Mr R. Clohessy on behalf of applicant and Mr T. Crossley on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT this application is dismissed.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Ergin Erol

and

Marconi Café.

No. 1344 of 1998.

COMMISSIONER J F GREGOR.

15 April 1999.

Reasons for Decision.
(Extempore)

This is an application by Ergin Erol (the applicant) which he filed in the Commission on the 17th of July 1998. The applicant seeks orders pursuant to section 29 of the *Industrial Relations Act, 1979* (the Act) for outstanding benefits. He says at the end of an employment relationship with Café Marconi (the respondent) he was owed monies through an alleged failure by the respondent to pay notice of one week, the correct rate of pay agreed between the parties, a public holiday and meal breaks worked.

The applicant told the Commission he worked as an unqualified chef performing all duties in the kitchen, and filling orders that were placed in the cafe, be they short-orders or others. He was responsible for general kitchen duties as well.

He had been employed as a casual or part-time, he was not quite sure which, but he had negotiated a rate which was above the rate set out in the award.

I heard evidence from Andrew McKay who told me he was the manager and owner of the respondent's business. He told me that the respondent applies the Restaurant, Tearoom and Catering Workers Award (the Award) to its employees, that he has copies of the Award at the workplace and that he receives information from the government Wageline service concerning rates of pay. He said most of his employees are paid above the Award. Eighty per cent of them are casual or part-time workers who are paid the loadings which are set out in the Award.

Mr McKay was asked by the Commission whether his business performed the same type of services in the industry as Forum Tea & Coffee Lounge of 657 Hay Street, Perth, Albert's Coffee Lounge and Take-away Foods of Victoria Park and the Armadale Coffee Lounge of Armadale Square, Armadale which are businesses that appear in the schedule of respondents to the Award. He said his business performed the same general activities as those businesses but he said he was not in the same business as The Cellars Restaurant Catering in Fremantle, which he said was a bottle shop.

From this evidence the Commission is able to make a number of findings. Before doing so, I note that for the Commission to have power in this matter the applicant must be entitled to excite the jurisdiction which is conferred on the Commission by section 29(1)(b) of the Industrial Relations Act 1979. By that section—

> "*An industrial matter may be referred to the Commission in the case of a claim by an employee that has not been allowed by his employer a benefit not being a benefit under an award or order to which he is entitled under his contract of service.*"

This means that if the person who makes the application is entitled to a benefit under an award or order of the Commission there is no jurisdiction arising under the section. The section is designed to cover people who are not covered otherwise by awards or orders of the Commission, in other words people who are award-free or who have a range of common law contracts with employers other than contracts which are the subject of the *Workplace Agreements Act, 1996.*

The evidence is that the respondent claims that it is bound by the terms of the Restaurant, Tearoom and Catering Workers Award. The respondent is not directly named in the Award and if it is it bound it must be because of the effect of section 37 of the Act. The section enacts that, unless expressly provided otherwise, awards extend to and bind all employees employed in any calling mentioned therein in the industry to which the award applies and to all employers employing these

employees. The principal authorities to be applied when determining whether an award is a common rule one are *Western Australian Carpenters and Joiners, bricklayers and Stoneworkers Industrial Union of Workers v. Terry Glover Pty Ltd (1970) 50 WAIG 704 (Glover's Case), and, Parker and Son v. Amalgamated Society of Engineers (1926) 26 WALR 90 (Parker's Case).*

The witness for the respondent, Mr McKay, was able to tell the Commission that his business was in the same industry as three businesses which appear in schedule B of the list of respondents to the award. He told me that the classifications that are contained in the Award and set out in Clause 21— Wages are the classifications used in the business, and that is confirmed by the evidence of the applicant who also produced in support of his claim (Exhibit 1) a document from the Department of Productivity and Labour Relations wage service which sets out the basic entitlements in the way of a precis of the Award. The applicant was able to identify a number of those entitlements which he said were due to him, and in fact a number of them are ones for which he purports to sue in this application.

Having considered the evidence I find that this respondent is, on the balance of probabilities and on the application of the proper authorities, bound by the Restaurant, Tearoom and Catering Workers Award. That being the case, the jurisdiction that is conferred on the Commission by section 29(1)(b) of the Act is not available to the applicant in this case and I am obliged to dismiss the application for want of jurisdiction.

Appearances: Mr Ergin Erol appeared in person.

Mr Andrew McKay appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Ergin Erol

and

Marconi Café.

No. 1344 of 1998.

COMMISSIONER J F GREGOR.

15 April 1999.

Order.

HAVING heard the applicant in person and Mr Andrew McKay on behalf of the respondent, the Commission pursuant to the powers vested in it under the Industrial Relations Act, 1979 hereby orders—

THAT the application be and is hereby dismissed for want of jurisdiction.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Graham Feltham

and

Home Building Society Ltd.

No. 1645 of 1992.

20 April 1999.

Reasons for Decision.

COMMISSIONER C.B. PARKS: The applicant resigned from his employment with the respondent in the circumstance which, the Commission held after a preliminary hearing, constituted a dismissal by the respondent (74 WAIG 2384) and that Mr Feltham was entitled to pursue his application claiming he had been unfairly dismissed (1645 of 1992) and a separate application claiming contract benefits allegedly due to him as a consequence of the dismissal (1644 of 1992). Presently before the Commission for determination is the first mentioned of these two applications.

At the time of his dismissal in December 1992 Mr Feltham held the position of District Manager with the respondent and was responsible for branches operated by the respondent in an area designated district B. He was one of three District Managers appointed to the separate districts designated A, B and C. Mr Feltham commenced his employment with the respondent in May 1983 and held a number of different positions during his period of employment. The latest positions held were that of Regional Sales Manager from a date in 1989, and then Regional Manager from August 1991 until November 1991 when the five region structure was replaced with a three district structure and the positions of District Manager were created. The August 1991 appointment of Mr Feltham to the position of Regional Manager occurred as part of a management restructure and his subsequent appointment to the position of District Manager occurred with a further restructure in November 1991 at which stage in the vicinity of 28 employees, including a substantial number of managerial staff, were made redundant.

The division of branches and agencies into three districts increased the number of branches under the purview of Mr Feltham and his role and responsibility changed from that which had applied to a Regional Manager. An employee designated Managerial Assistant was allocated to district B to directly assist Mr Feltham with administration and in addition two Business Development Managers were assigned to the district in subordinate roles to Mr Feltham whereas previously this level of manager fell within a separate and centralised line of management from where a group of them provided assistance to branch management when requested.

The hearing of the matter occupied eighteen days spread over an eight month period with one aspect of the argument being dealt with by way of written submissions. At the outset of proceedings Counsel for the respondent applied to have the Commission refrain from further hearing the claim of Mr Feltham that he be reinstated to the position of employment that he had held. Material to that argument was the nature of remedies s23A of the Industrial Relations Act, 1979 ("the Act") empowered the Commission to grant, as it stood in April 1995, and whether they could be effected. Whilst the hearing was in progress, s23A of the Act was amended and comment is made thereon later in these reasons.

It was the threshold argument of Counsel for the respondent that the primary remedy prescribed by s23A of the Act at the time was reinstatement or re-employment where an unfair dismissal was found to have occurred. The claim made by Mr Feltham is for reinstatement, ie, his return to the position of employment that he held immediately prior to dismissal, and in addition, that he be awarded the remuneration he would ordinarily have received between the date of dismissal and that of reinstatement. In regard thereto it was said, that during the substantial period of in excess of two years which had elapsed since the dismissal the situation of the respondent had changed, a new district and management structure operates which no longer includes the position and role previously filled by Mr Feltham and therefore reinstatement is not available. There was supporting evidence from Mr TJ Pye the Assistant General Manager, Corporate Services, for the respondent, that during the latter half of 1994 the operations of the respondent had undergone a further restructure that saw the abolition of two senior management positions and a reallocation of the associated duties, the abolition of the position which Mr Feltham had occupied ie, District Manager, district B, and the formation of a new two district structure. District Managers are appointed to each of these districts, however, their role and level of responsibility is greater than that which applied when Mr Feltham was employed and they are now classified as senior management level whereas previously they had been classified as middle management within the hierarchy of the respondent. It was said that were an order of reinstatement to be made however, given the impracticability of compliance, the secondary and alternative relief of monetary compensation would likely arise for consideration but no compensation

could be awarded by the Commission. That is so Counsel asserted because the allowable level is limited to a maximum of six months remuneration and Mr Feltham suffered no such loss or injury the respondent having paid him the equivalent of eight months salary upon termination.

The opposing Counsel argued that the reorganisation completed by the respondent at the end of 1994 was finalised in the full knowledge that the claim of reinstatement by Mr Feltham was afoot and therefore it ought not, by its own action to restructure, be allowed to avoid a remedy related to its earlier conduct if such is held to be warranted. There is evidence that between the date of dismissal and that of the hearing one of the now two District Managers had been replaced and the respondent had the opportunity to make a temporary appointment to the position in order that it might readily reinstate Mr Feltham to the position of District Manager if the respondent were ordered to do so. Furthermore, throughout the period several vacancies have occurred and been filled in Branch Manager positions and although the position of District Manager is superior to these, the re-employment of Mr Feltham in such a position is also a possible remedy. It was submitted that re-employment as a Branch Manager is an alternative outcome acceptable to Mr Feltham. The Commission ought not, it was said, allow the respondent to rely upon an argument involving the anticipatory breach of an order for reinstatement and cause the threshold application to be decided in reference to the matter of compensatory relief. The matter of compensation requires consideration of the loss or injury suffered by the applicant and neither of these have been addressed or assessed to date.

For the reasons which now follow, the Commission refused the threshold application and proceeded to hear the parties in relation to the substantive application. Both parties submitted, and correctly so, that the primary remedy the Commission is required to consider in relation to a matter of unfair dismissal is reinstatement of the dismissed employee. Counsel for Mr Feltham also alluded to the primary remedy including the alternative of re-employment to that of reinstatement and that, in the plain words of s23A(1)(b) and the established law, may be ordered by the Commission. Notwithstanding the application made by Mr Feltham expressly seeks reinstatement the Commission is not bound to consider that remedy alone. Section 26(1) of the Act directs that "In the exercise of its jurisdiction …… the Commission …… shall act according to equity, good conscience and the substantial merits of the case" and at sub-s(2), that "In granting relief or redress …… the Commission is not restricted to the specific claim or the subject matter of the claim." Hence in the ordinary course of determining a remedy for unfair dismissal it is open for the Commission to award re-employment if that be warranted, furthermore, it has now been indicated on behalf of Mr Feltham that such is an acceptable remedy. Given that it has not been shown that re-employment is not available, that as a primary remedy remains to be considered. It therefore follows that the secondary alternative of monetary compensation need not be addressed with regard to the threshold argument.

Called by the respondent to give evidence were Messrs JG Dornan, the Manager Administrative Services for the respondent, which position he held when the applicant was dismissed; MA Holsey, an ex-employee of the respondent who at the time of the dismissal was on secondment to GIO Australia; KM Ormrod, an ex-employee of the respondent who had been the Senior Manager of branches and agencies; TJ Pye, the Assistant General Manager, Corporate Services for the respondent; and Mesdames AF Caudwell, a District Manager for the respondent; DS Ferrell, a Branch Manager district B; C Flay, a Business Development Manager district B, at the time of dismissal; SD Forward, an ex-employee of the respondent who had been a Branch Manager district B; IA Harvey, a Branch Manager located in district B at the time of dismissal; DE Hintz, a District Manager who at the time of dismissal had been a Business Development Manager in district B; CA Hodgson, an ex-employee of the respondent who had been a Branch Manager district B at the time of dismissal; JM Parry an ex-employee of the respondent who had been the Senior Training Officer; and finally MA Rankin an ex-employee who had been a Branch Manager district B.

Mr Feltham gave evidence to the Commission together with his wife Ms OM Feltham; and Mesdames CJ Cundall, an ex-employee of the respondent and previously a Branch Manager district B; CD Evans, an ex-employee of the respondent and previously a Branch Manager district B; BA McDougall, an ex-employee of the respondent and a Branch Manager district B at the time of her resignation shortly prior to the dismissal of the applicant; and finally PA Price an ex-employee who had worked as a Branch Manager district B prior to her resignation in early 1992.

It is plain that in 1991 the business of the respondent had declined and that resulted in the decision to reduce staff, restructure operations, and adopt a different management focus. The role of a District Manager appointed in November 1991 was to develop the knowledge and skills of those who were subordinate, to interact with them and develop a team spirit as compared to the role of Regional Manager which had been primarily administrative.

Mr Feltham underwent a formal appraisal of his performance as District Manager in April 1992 (exhibit K6). Mr Ormrod, the appraiser and immediate superior of Mr Feltham, praised aspects of the applicant's skills and performance. He also expressed concern, for the style of leadership he had adopted, that difficulties existed with motivational skills which needed to be overcome, and that the method and manner of communication used required attention. Mr Ormrod rated the overall performance of the applicant as satisfactory however expressed the view that further improvement was required by him and he needed to further relinquish tasks associated with the previous role of Regional Sales Manager and continue the transition to the role of developer of both other employees and business. In late May 1992 Ms Flay, a subordinate of Mr Feltham forwarded him a memorandum which she also copied to Mr Ormrod (exhibit K14). Therein she complained to Mr Feltham that he had failed to address communication problems in the district which they had previously discussed. A meeting between Mr Feltham and Ms Flay followed which was attended for part of the time by Ms Hintz. Mr Feltham says he was annoyed by the inaccurate content of the memorandum and that it had copied to his superior and consequently he addressed these matters with Ms Flay in a firm but pleasant manner. Both Ms Flay and Ms Hintz say Mr Feltham displayed anger towards Ms Flay by his words, his appearance, and that he shouted at her at a level which Ms Hintz was able to hear from a nearby room where she had gone to organise refreshment. Both women said that Mr Feltham expressed the concern that the memorandum had been copied to Mr Ormrod, he also commented to the effect that Mr Ormrod had questioned his performance and the action of Ms Flay might lead to him losing his job. I have no doubt that the descriptions by Mesdames Flay and Hintz of what occurred in the meeting with Mr Feltham accurately relate what occurred. This discloses two separate things relating to Mr Feltham. Firstly, his inclination to portray himself in the best possible light, and secondly his awareness that Mr Ormrod had reservations regarding some aspects of his performance. The suggestion by Mr Feltham that he might lose his job I view as an overdramatization as there is no evidence that at the time it was said there had been any suggestion to Mr Feltham that his performance was lacking to the degree that his continued employment was in immediate jeopardy.

In or about July 1992 Mr Ormrod and Mr Feltham met over a light lunch at a hotel. According to Mr Ormrod this occurred at his instigation at the conclusion of a meeting he had with the three District Managers, the purpose of which he indicated to Mr Feltham was to discuss some additional matters with him. Mr Feltham described the meeting as informal and, so far as his performance was concerned, was limited to Mr Ormrod indicating that it had come to his attention there was a perception about that Mr Feltham had employees in his district whom he favoured and he should act to dispel that situation. Mr Feltham says he endeavoured to ascertain from Mr Ormrod who had indicated to him that such was the case in order that he might give them greater attention. According to Mr Ormrod he did raise the matter of favouritism but he also made mention of his need to effectively communicate with and motivate the staff in his district. However, Mr Feltham was more interested in ascertaining who it was that had indicated to him that Mr Feltham favoured certain employees.

In August 1992 Mr Ormrod, in consultation with a superior, decided to transfer Mr Feltham from district B to district C and this he says was decided for a two-fold reason which

related to the performance of the managers in each district. It appears that the reason initially given to Mr Feltham for the transfer was that he had attributes as a manager that would benefit the situation in district C. The applicant was discontent with the instruction to transfer which became known to the General Manager, Mr C Dryborough who decided that the transfer should not proceed. That decision was followed by a memorandum from Mr Ormrod to Mr Feltham (exhibit K7) which informed him that because of the non transfer they would need to work closer together in order to correct areas of Mr Feltham's management style which he, Mr Ormrod, felt could have been strengthened by the transfer and particularly matters related to leadership, communication, and others said to have been previously discussed. The technical skills achieved were recognised and it was said these needed to be maintained while the trust, confidence and entrepreneurial skills of the district Branch Managers is developed, which according to Mr Ormrod reflects the reasoning behind the original decision to transfer Mr Feltham. It does not appear from the evidence that Mr Feltham was informed of these reasons for transfer when he was told that he was to transfer, ie, there were shortcomings in his performance, that it was believed the transfer might overcome and that ought to have been made known to him at the time. Notwithstanding however, the memorandum served to inform the applicant that Mr Ormrod required improvement in his management performance and, in my view, is confirmation of concerns that Mr Ormrod had with Mr Feltham since his appraisal in April 1992. That those concerns existed throughout leads me to believe that it is more probable than not that Mr Ormrod made mention of some of these matters at the lunch meeting with Mr Feltham in or about July 1992 but that the applicant had focused his attention upon ascertaining the identity of who had provided information to Mr Ormrod.

On 19 November 1992 Mr Feltham issued a memorandum to the staff of branches in his district (exhibit K13) which dealt with the attendance of staff at breakfast and evening functions held in relation to GIO Australia. The message contained therein is that the functions are a relationship building exercise, attendance was not compulsory and if any staff felt pressured to attend that would be overcome by contact with him or Mr Tijou. Both Mr Ormrod and Mr Pye informed the Commission that senior management of GIO Australia came into possession of a copy of the memorandum and that caused some embarrassment for the respondent because of a financial and operating relationship which had been entered into between GIO Australia and the respondent. A relationship which was under some strain and which Mr Ormrod had instructed his subordinates was a relationship to be fostered. The governing Board of the respondent considered the memorandum and although it was unhappy with the content, the Board, in the words of Mr Pye, concluded that Mr Feltham had not committed "a hanging offence". It is plain from the evidence that some persons in the management of the respondent had expressed some contrary views to the official position of the respondent regarding the relationship created with GIO Australia, but it is also plain that there was the express requirement that the relationship be fostered and that was known to Mr Feltham. The message which Mr Feltham conveyed in his memorandum is most imprudently worded in the circumstances and in my view is a prime indication of one of the concerns Mr Ormrod had with the communication skill of Mr Feltham.

On 9 December 1992 Ms Flay forwarded a memorandum to Mr Ormrod wherein she complained of the lack of morale in district B and expressed the view that it was in the main due to the lack of support and encouragement from Mr Feltham (exhibit K15). The record of an exit interview conducted with Ms S Ridge, a person who terminated her employment with the respondent on 9 December 1992, was brought to the attention of Mr Ormrod because of the extensive criticism of the management by Mr Feltham (exhibit K16). Mr Ormrod spoke to his superiors about the need to investigate the performance of Mr Feltham in light of the complaints made and it was agreed that he conduct such. Mr Ormrod interviewed a number of employees who were either subordinate to Mr Feltham, or worked in association with him, the majority of whom were critical of Mr Feltham's management and led him, Mr Ormrod, to conclude that Mr Feltham had failed to direct, lead or support his staff and had demonstrated an inability to execute the role of District Manager. Mr Ormrod discussed his conclusions with his superiors, Mr Tijou and Mr Pye and it was decided to recommend to Mr Dryborough that the employment of Mr Feltham be brought to an end.

The weight of the evidence from the witnesses in these proceedings plainly demonstrates that Mr Feltham failed to overcome the deficiencies in his performance which had been expressly brought to his attention in April, in or about July, and in August 1992. The failure of Mr Feltham to satisfactorily perform his role provided valid reason for his dismissal from employment.

It is trite to say that notwithstanding there was valid reason to dismiss Mr Feltham and hence the respondent was entitled to exercise that right, the law is clear that it may not be exercised unfairly. The salient evidence referred to, and the findings I have made in relation thereto, earlier herein also serves to show that at no time while Mr Feltham was a District Manager was there an indication to him by any superior that his non attainment of a particular level of performance had become so serious that it might lead to some remedial action, and possibly the termination of his employment. The Commission so found in its earlier Reasons for Decision (op cit) and also that Mr Feltham was given no opportunity to respond to the various allegations made against him before the decision was taken to end his employment. There the Commission also found Mr Feltham had been misled as to the true purpose of the meeting he attended on 16 December 1992 when he was confronted with the ultimatum of resign or be dismissed. Mr Feltham was given no reasonable opportunity to consider the situation he faced. His dismissal was effected at the meeting, it was immediate, and the respondent took possession of its property which had been in the custody of Mr Feltham, including a motor vehicle, and he was accompanied from the respondent's premises and transported to his home. In the opinion of the Commission Mr Feltham was not afforded natural justice nor procedural fairness and therefore his dismissal was unfair.

Counsel for the applicant asserted that the dismissal had also been unlawful and that also contributed to the unfairness. However, given the finding I have already made I do not see it as necessary to address the detailed and comprehensive arguments of the parties in relation to this matter.

Mr Feltham seeks a return to employment with the respondent either by way of reinstatement or re-employment but if that not be practicable then he be granted monetary compensation to the maximum allowable given that he has suffered a financial loss in excess of that as a consequence of his dismissal. The sum claimed is $27,200.00. In the opinion of Mr Feltham, he could readily return to employment with the respondent and would experience no difficulty working with the management and staff. Counsel for the respondent argues that a return to employment with the respondent is impracticable and would be destructive given that dismissal occurred because of the failure of Mr Feltham to meet the requirements of management when they had been brought to his attention on a number of occasions. There is a genuine lack of confidence in his performing to a level required and furthermore there would be the difficulty with his working in association with employees who criticised his performance when he was their superior.

It has now been a number of years since Mr Feltham was employed by the respondent, but I hasten to add that the time lapse which has occurred is no fault of his. However, that combined with my belief that the return of Mr Feltham to employment with the respondent would be most unsatisfactory for the reasons given by Counsel for the respondent and therefore I am of the view that such would be impracticable.

I now turn to consider the alternative of monetary compensation. There is no challenge by the respondent to the claim of Mr Feltham that since his dismissal he has experienced a loss of salary exceeding the maximum the Commission may award as compensation. It is submitted that the applicant had a duty to mitigate his loss, and correctly so, but that he took no active steps to mitigate that loss during 1993 save for two short periods of casual employment. Additionally it is argued that upon termination Mr Feltham was paid 41.75 weeks' salary as compensation for the termination of his employment and it would therefore be unfair, inequitable and unconscionable for him to recover a further amount from the respondent.

Before the Commission are applications Mr Feltham has made for employment since his dismissal, together with a schedule of their description (exhibit L50), which indicates the extensive activity of the applicant in this regard from early December 1993 onward. Mr Feltham has told the Commission that during the course of 1993 he was registered with the Commonwealth Employment Service and several private employment agencies, and that he regularly attended the firstmentioned, and made regular telephone enquiries of both types of agencies, seeking employment but without success. There is no indication that Mr Feltham sought out and pursued employment vacancies himself as he did from December 1993 onwards and I therefore conclude his efforts in 1993 to mitigate his loss were not as strenuous as they could have been.

It was not argued on behalf of the applicant that the payment made to him upon termination, and which his Counsel described as "ex-gratia", has a character that ought not be brought into account in the consideration of compensation. The payment was referred to only in the context that when taken into account Mr Feltham still suffered a financial loss of a magnitude in excess of the maximum compensation allowable.

At the time of his dismissal Mr Feltham, under duress, signed a letter of resignation. That he did in the knowledge that the respondent would pay to him the sum of $35307.69 over and above other payments associated with the terms of his contract of employment and such was a payment he would not receive if he were terminated by an apparent dismissal. Upon the evidence of Mr Pye that sum represented 33.75 weeks salary and the purpose thereof was to allow Mr Feltham to resign with dignity and he would be able to seek alternative employment with a "clean sheet", which I understand to mean without the stigma of dismissal. It was also said to recognise the service of the applicant. The payment was plainly made with the sole purpose of securing the resignation of Mr Feltham and it follows that it was intended to achieve a parting which would not be contested. That being so it is proper that the benefit Mr Feltham has received from the additional payment ought be taken into account and means that he in effect received from the respondent the equivalent of his salary for the 33.75 weeks immediately following the date of his dismissal. On the evidence I do not believe that, had Mr Feltham been afforded the opportunity to respond to the allegations made against him, the outcome would have been any different and consequently his employment was unlikely to have continued for the next six months and given that he were also afforded a reasonable period of notice of his dismissal. Hence I am of the view that his employment was likely to have ended within the 33.75 week period and as he had no potential loss in that period no compensation is necessary. Accordingly his claim for compensation is refused.

Appearances: Mr A. Lucev (of Counsel) and Ms M. Foley (of Counsel) on behalf of the applicant.

Mr S. Kenner (of Counsel) on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Graham Feltham

and

Home Building Society Ltd.

No. 1645 of 1992.

20 April 1999.

Order.

HAVING heard Mr A. Lucev (of Counsel) and Ms M. Foley (of Counsel) on behalf of the applicant and Mr S. Kenner (of Counsel) on behalf of the respondent the Commission, pursuant to the power conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) C.B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Richard Lawrence Hindle

and

JAL (Jack) Bonnet Coral Cleaning Services.

No. 2103 of 1998.

COMMISSIONER P E SCOTT.

3 May 1999.

Reasons for Decision.

THE COMMISSIONER: By this application the Applicant says that he has been harshly, oppressively or unfairly dismissed from his employment with the Respondent. The Applicant was employed by the Respondent in its contract cleaning business as a "temporary/casual" gardener/cleaner.

The Commission heard this matter in Bunbury on Friday, 23 April 1999 and heard evidence from the Applicant and Jacques Alain Lewis Bonnet, the owner of the Respondent's business.

The first issue which arises is whether the application was made within the time allowed by s.29(2) of the Industrial Relations Act, 1979, which provides that a claim of unfair dismissal cannot be made more than 28 days after the date of termination. The question of the application being out of time does not appear to have been raised with the Applicant prior to the hearing and was only raised by the Commission because of the Applicant's conflicting evidence regarding the matter.

The application was lodged with the Registry on 25 November 1998. The schedule attached to the Form 1 was not completed by the Applicant as to the dates when the Applicant's employment commenced or terminated. During his evidence, the Applicant said his employment was for approximately six months and terminated on some unspecified date in September or October 1998. The Commission drew the Applicant's attention to a letter he had written to one of the Commission's Registry officers, stamped as being received on 27 November 1998, the relevant part of which says—

> "In response to your request of the work period that I did for Jacques Bonnet Coral Cleaning Services. Started round the 1st of July and ended on the 6th of November 1998".

In response to my query about the date of termination, the Applicant said that one of the dates in the letter was correct and the other was not, and he cannot recall which was the correct one.

The Applicant also said that he lodged the application about week after his employment terminated. This does not correspond with either the date of 6 November 1998, which he wrote in his letter received on 27 November 1998, or with the termination being in September or October 1998. The Applicant says he commenced in July 1998. If his employment terminated in September or October, or at the latest, in the first week of November 1998, then the most it could have been was for a little over four months.

During the course of the hearing, the Commission asked Mr Bonnet if he could advise of the Applicant's commencement and termination dates, but he could not.

For the application to have been lodged within the time allowed by s.29(2), termination would need to have been no earlier than 3 November 1998. The onus is on the Applicant to prove his case. In this preliminary issue of whether the application was made within the time allowed, the Applicant's evidence is confused, contradictory and unreliable. According to the Applicant's own evidence, the termination could have been in September, October, 6 November or 18 November, 1998. I am unable to conclude, based on all of the evidence before me, and on the balance of probabilities, when the Applicant's employment terminated. I am unable to find that the application was made no more than 28 days after the employment actually terminated. Accordingly, the application ought be dismissed.

Appearances: The Applicant appeared on his own behalf.

Mr J A L Bonnet appeared on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Richard Lawrence Hindle

and

JAL (Jack) Bonnet Coral Cleaning Services.

No. 2103 of 1998.

COMMISSIONER P E SCOTT.

3 May 1999.

Order.

HAVING heard the Applicant on his own behalf and Mr J A L Bonnet on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this matter be, and is hereby dismissed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John Humble

and

AAA Industries.

No. 1784 and 1800 of 1998.

Michael Chisholm Harvey

and

AAA Industries.

No. 2197 of 1998.

COMMISSIONER J F GREGOR.

27 April 1999.

Reasons for Decision.
(Extempore)

There are three matters before the Commission; applications 1784, 1800 and 2197 of 1998, involving the same respondent, AAA Industries. The Commission listed application 2197 of 1998 for hearing on the 19 February 1999. The matter had previously been the subject of an attempt to hold a conference. That attempt was unsuccessful. On 8 February 1999, the Commission had cause to communicate to the respondent and to Mr Harvey, the applicant, in the following terms—

Further to the conversation I had with you on Tuesday to advise the above matter had been allocated to our Chambers and was listed for conference on the 15 February 1999.

It appears that a conciliation conference will be of no use in reaching a settlement between the parties. For this reason, and to ensure your time and the time of the applicant is not wasted, I am instructed to list the matter for hearing.

This matter has been listed for hearing on the 19 February 1999 and a Notice of Hearing is attached.

The notice of hearing bears the stamp (File 2197 of 1998; letter from Associate N Chisholm) of the Registry of 8 February 1999. Prior to the commencement of the hearing on 19 February 1999 an event occurred. This event became the subject of a letter from Associate Chisholm to the respondent from the Commission dated 23 February 1999—

On 8 February 1999, the Commission wrote to you advising that the above matter had been listed for hearing on Friday, 19 February 1999. After the commencement of the hearing, Commissioner Gregor was notified that a telephone call had been received advising that you had been involved in a motor vehicle accident, preventing your attendance in court. The hearing was immediately discontinued.

The Commissioner is aware that you are named the respondent in file numbers 1800 of 1998 and 1784 of 1998 that are to be heard before him on Friday, 26 March 1999 at 10.30am. In order to save you the inconvenience of appearing before the Commission on two separate occasions, I have been instructed to list file number 2197 of 1998 on the same day and date.

If this is not acceptable to you or you do not intend to appear, please advise the Commission within 7 days the date of this letter. Should you not appear at the above hearings, the Commission can hear the applicants' claims in your absence and make a Decision based on (file 2197 of 1998) those assertions.

An Amended Notice of Hearing bearing the stamp of the Registry was sent to the respondent on the 3 March 1999. It was also sent to the applicant in that matter, Mr M.C. Harvey.

The disposal of these applications has been subject to communications with a person known to the Commission as Christine McLochlan and I say known by virtue of a person of that name ringing and speaking to officers of the Registry and purporting to represent the respondent. That person has had a series of conversations with officers of the Registry.

There is a file note from an officer of the Registry, Mr Cordell Jackson, which details a telephone conversation between him and Ms McLochlan. Without reading the note into the record, the thrust of it is that Ms McLochlan became agitated and tried to have a jurisdictional argument over the phone in relation to whether the person who filed the application was a subcontractor or not. Ms McLochlan was told that if she wanted the Commission to know her side of the story, she should send in a Notice of Answer and Counter-Proposal. Mr Jackson notes that he sent to assist the respondent a Form 3 and instruction sheet.

There was another conversation between another officer of the Registry, Mr Stevenson, and the respondent (Ms McLochlan), in relation to application 2197 of 1998. Mr Stevenson made a file note of that conversation, recording amongst other things that the respondent vehemently insists that the application was without foundation. Nevertheless, she was informed of the processes the application would follow and advised that officers of the Registry were unable to comment on the merit or otherwise of the matter.

Mr Stephenson forwarded a copy of the 'Sources of Advice', a document published by the Registry. He suggested to Ms McLochlan that, given the variety of issues she had concerns about she might like to seek independent advice. According to Mr Stevenson, she indicated that she would complete and lodge a Notice of Answer. There is no evidence on the file that any such Answer was ever filed, nor is there any Declaration of Service. Again, the memorandum notes that the respondent was aggrieved that the applications had been accepted.

All of these files have a history where the Registry and Commission has done, in my assessment of the facts, everything reasonably possible to assist the respondent to answer the claims. It is one thing for the respondent to, over the telephone, deny jurisdiction. It is quite another for a respondent to expect that this Commission would act upon such telephone advice, particularly when its contentions are disputed and matters have been listed for hearing. This respondent has made it clear that conferences would be unavailing. The respondent's representative had a number of discussions with officers of the Registry and with my Associate. All of these discussions have been noted on the running sheets. She did not appear when the matter was last listed. She rang and said that she or a family member had been involved in a traffic accident but did not submit anything in writing to verify that contention, nor has there been any contact from her since. In those circumstances, the Commission can do nothing other than hear each matter in the absence of the respondent as it is empowered to do under Section 27(1)(d) of the Act having been satisfied that the respondent has been duly served with a notice of proceedings

(*The Commission then heard evidence and submissions from each of the applicants at the conclusion of which it issued the following Reasons for Decision extempore*)—

Concerning Applications 1784 and 1800 of 1998, Mr John Humble (the applicant) has told the Commission

that he went to Centrelink and saw an advertisement (Exhibit H1). The position was for a bricklayer to work in the Landsdale area. The successful applicant was required to be "reliable, enthusiastic, fully qualified. Own tools preferable but can be negotiated, must be able to work unsupervised." As a result of this Job Network advertisement, the applicant approached the respondent and offered to work with it.

The applicant told the Commission that he had a PPS taxation exemption, but he was to work as an employee of the respondent and was to pay PAYE tax. He did not supply materials although he did supply a cement mixer and a wheelbarrow. His work was supervised. He was told where the jobs were located, and he went about the task of laying bricks. He did not submit quotes for the work to be done. Neither did he submit an invoice for the work done, nor did he provide evidence of tax exemptions. In all the circumstances, the indicia that he was an employee outweighed those which would support the contention he was a sub-contractor although there has been no defence submitted. I am assuming that the defence of the respondent in this matter would be that the worker was a sub-contractor. I am required to make the assessment about the applicant's contractual status. First, to satisfy myself that there is jurisdiction and secondly, as an abundance of caution, to ensure that the applicant is what he claims to be. That is, an employee.

The applicant says that he worked 8 hours a day. He was to be paid $25 an hour. Over the time he was employed, that is, between 7 September to 21 of September 1998, he worked so that he was entitled to $2400, but his evidence is he was paid $960, which leaves a sum of $1440 as a contractual benefit he says has been denied to him.

He also says that he has been unfairly dismissed. He says simply that he was told he was dismissed because one of the clients of the respondent, for whom he was working, asked for his phone number.

Before the Commission are letters from the owners of properties on which the applicant performed work (MFI Exhibit H2 through to MFI Exhibit H4). These letters show that work was done on a number of properties. Two writers named the applicant as a sub-contract bricklayer, but I accept his explanation that those people did not know his correct employment status.

I observed the applicant in the witness box. I reminded him that he was giving evidence before the Commission on oath, and I find that from all the indications, both in my questioning of him and his demeanour and conduct, his is more likely than not to be a truthful witness. I have no reason to disbelieve his story.

Concerning application 2197 of 1998 I heard from Mr Michael Harvey, who is the applicant in that matter. He had a slightly different story to the applicant in applications 1784 and 1800 of 1998. He had met with a person who purported to act on behalf of AAA Landscaping (the respondent) in a coffee lounge, had a discussion about work in the landscape business, and as a result of that discussion, he was offered work as a leading hand. He could have been described as "a team leader" perhaps, but, in any event, there was some supervisory element in his work.

He says he was directed where to go to perform the work and was told he should use his own vehicle. He assumed he would get paid for use of the vehicle, although his evidence is that there was no sum of money agreed. He went to work at various places between 16 November 1998 to 24 November 1998. Mr Derek Wedge, who had interviewed him, would attend upon the site from time to time, give him directions as to work, and generally supervise his activities.

On occasion, when there was not enough cement on site, Mr Harvey went with Mr Wedge to a hardware store where Mr Wedge purchased cement. On other occasions, Mr Wedge told him to go and buy cement and he would be reimbursed. Mr Harvey did not supply bricks or any materials, other than the cement. He supplied some tools. He says his dismissal came about in circumstances where he was merely told that he was no longer required. He says that the basis of his claim is that he wants the money to which he is entitled, under his contract of employment. He seeks nothing else.

I had the opportunity of listening to Mr Harvey and inspected of the documentation that he presented (Exhibit H1). The hours of work were not recorded on a contemporaneous basis, but the explanation of the applicant is that he worked 8 hours a day, and that was the arrangement. If he was to work more he would have asked for more money and his rate of pay was to be $165 a day. I have had the opportunity of observing him give sworn testimony. I have no reason to believe he has not told me the truth of the matter as he sees it. I find he is a truthful witness.

Turning to my analysis of this matter, when dealing with the unfair dismissal part of the applications, the Commission is to apply the ratio of the decision in *Undercliff Nursing Home v. Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385*, that in fundamental terms establishes that an employer has right to hire and fire. That right should not be exercised in a way that is harsh, oppressive or unfair. If there is a fault in procedure, that will not necessarily render the whole of the dismissal unfair, *Shire of Esperance v. Mouritz (1991) 71 WAIG 891*.

Insofar as the contractual entitlements are concerned, by section 29(1)(b)(ii) of the Act, the Commission is to decide whether an employee has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under a contract of service.

The first question is whether there was a contract of service or a contract for services. On the information before me, having examined in chief both of the applicants myself, it cannot be sustained that the applicants were sub-contractors. It appears to me that both of them have more the appearance of being an employee than not. Therefore there is jurisdiction to deal with the application by Mr Harvey. I have made a similar finding earlier concerning the status by Mr Humble.

When considering the contractual benefits, the Commission is to act judicially (*Reginald Simons v Business Computers International Pty Ltd 1985 (65 WAIG 2039)*. It can only give effect to the terms of a contract when it has discovered the true terms made between the parties. For instance, it cannot draw the conclusion that the contract should have been framed in a different way to it was, or that the contract, when first made, was unfair. It must discover what were the true terms of the contract, and give effect to them if there has been a failure by one of the parties to do so.

I deal with Mr Humble first. Even though he says that he was dismissed because he was asked to give a telephone number, or he gave his telephone number to a client, I am uneasy about making a finding of unfairness, given the nature of this industry. It is basically a casual industry. The engagement of Mr Humble was of the nature of casual employment. It was very short term. If the contract had gone for longer than it did I may have been moved to consider it in a different light. It may have been unfair of the employer in a procedural sense to terminate the contract in the way it did, but I am unable to reach the conclusion when considered in its totality the dismissal was harsh and oppressive or unfair.

The application that Mr Humble has made concerning unfair dismissal, 1800 of 1988 will be dismissed. I deal with his claim for contractual benefits. I find he has established the claim. I accept his evidence, as being truthful. I have examined his diary and even though it does not precisely record the hours, there is sufficient indication in it that he performed the work that he claims he did. I accept that he has not been paid for the total time worked. The total amount for the period between the 7 September to the 21 September 1998, is $2400. There is a residual of $1440 after payment that has been made, and I will issue an order that the respondent pay to the applicant the sum of $1440 within 7 days of the date of the order.

Mr Harvey says he does not wish to proceed with his claim for unfair dismissal. He says simply that he wants

to receive payment for the work that he did. I have heard his evidence and, I accept that he worked on the days he said he worked, even though the records he has placed before the Commission are not contemporaneously made. They do not give a different impression than the impression he gave in his evidence, and I find that he worked for 7 days and accept that he had made an arrangement with the respondent to be paid $165 per day.

I accept that he entered into a collateral contract with the respondent through its agent, Mr Derek Wedge, to be reimbursed for cement purchased by him for use for the respondent's behalf. He was able to establish that he purchased cement to the value of $28.00. An order will issue that the respondent reimburse him that amount.

Mr Harvey has not been able to establish the quantum of money agreed between him and the respondent for car expenses. He says that it was an agreement that he use his car and he has allocated what he believes is a fair amount for that. The authorities (*Simmonds Case)* do not authorise me to interpolate into the contract a value for the car expenses.

I therefore will award him $1155 for the work due, that is, 7 days at $165 a day, plus $28 for the cement he purchased, making a total of $1183. The order will require that amount to be paid within 7 days.

Appearances: The applicants appeared in person.

No appearance on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John Humble

and

A A A Industries.

No. 1784 of 1998.

COMMISSIONER J.F. GREGOR.

29 April 1999.

Order.

HAVING heard Mr John Humble on his own behalf and there having been no appearance on behalf of the respondent, the Commission pursuant to the powers vested in it under the Industrial Relations Act, 1979 hereby orders—

THAT the respondent pay to the applicant the sum of $1440.00 within 7 days of the date of this Order.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John Humble

and

A A A Industries.

No. 1800 of 1998.

COMMISSIONER J.F. GREGOR.

23 April 1999.

Order.

HAVING heard Mr John Humble on his own behalf and there having been no appearance on behalf of the respondent, the Commission pursuant to the powers vested in it under the Industrial Relations Act, 1979 hereby orders—

THAT the claim for unfair dismissal be and is hereby dismissed.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Michael Chisholm Harvey

and

A A A Landscaping / Earthmoving.

No. 2197 of 1998.

COMMISSIONER J.F. GREGOR.

29 April 1999.

Order.

HAVING heard Mr Michael Chisholm Harvey on his own behalf and there having been no appearance on behalf of the respondent, the Commission pursuant to the powers vested in it under the Industrial Relations Act, 1979 hereby orders—

1. THAT the respondent pay to the applicant the sum of $1155.00 in unpaid contractual entitlements;
2. THAT the respondent pay to the applicant the sum of $28.00 for cement purchased by the applicant on behalf of the respondent; and
3. THAT the claim for unfair dismissal be and is hereby dismissed.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mandy James

and

Royal Automobile Club of WA (Incorporated).

No. 29 of 1999.

29 April 1999.

Reasons for Decision.
(extempore)

SENIOR COMMISSIONER: The Applicant was employed as a part time telephonist at the Respondent's Road Service control room at Maddington. As I understand it, she had been so employed since February 1996. In 1997 or early 1998 following a review of the Road Service operations the Respondent decided to amalgamate its membership service activities with its road service activities and transfer the employees engaged in membership services to the Maddington control room where the Applicant worked. Concurrently with this change the Respondent required all the telephone staff at the control room to become multi-skilled so as to deal with membership matters as well as road service matters. Apparently to make this more effective, all the staff were required to work in "a team" on a 24 hours rotating shift basis over seven days a week. Prior to the implementation of this change the Applicant, as is common ground, worked a day shift on Monday to Friday. She was unable to work the rotating shift because of domestic considerations associated with the care and maintenance of the well-being of her children.

The Applicant says that she first learnt of this restructure, at least formally, on or about the 18 June 1998 when she was given, seemingly along with the rest of the staff, a memorandum indicating that the proposed change was to take effect on or from the 9 October 1998. In that memorandum the staff were told that if they were unable to work the new shift arrangements and redeployment was not possible then the provisions stipulated under the Respondent's policy with respect to redundancies would apply. The staff were told that they needed to notify the Respondent in writing by 3 July 1998 as to whether or not they were prepared to take up the new shift work position. It is common ground that the Applicant advised the Respondent by that date that she would be unable to take up the new shift work position. At about the same time

she went on leave. Some time after she returned to work, approximately a month later, she was asked if she would remain working under the existing arrangements at least until December 1998. Apparently there were delays in implementing the proposed changes. She agreed to do that. Her employment was terminated on or about 18 or 19 December 1998. She was paid her contractual entitlements consisting of accrued annual leave and the like, together with a redundancy payment calculated on a pro-rata basis of three weeks pay for each year of service.

The Applicant by these proceedings complains that she was unfairly dismissed from her employment. As I understand it, that is said to be so essentially because there was no detailed discussions with her regarding the change and alternatives which could flow from the change, there was no real effort made by the Respondent to redeploy her, and she was not paid the severance pay that she said she was promised. Also, it is said that she was treated differently from others. It is said that some others, who for personal or other reasons did not wish or were unable to work shift work, were allowed to continue under arrangements that did not involve shift work.

The Respondent by its Notice of Answer denies that the dismissal was unfair. It asserts that the restructure was implemented only after consultation with a consultative committee which had amongst its personnel, fellow employees in the control room. Furthermore, it says that the implementation of the change was delayed for approximately six months and that the Applicant was offered the opportunity to remain in employment in her existing arrangement until March 1999. As I understand it, the change has only recently been implemented or is about to be finally implemented if not the end of last month, the end of this month. By its Answer the Respondent asserts that employees who were unable to change to the new working arrangements were offered the opportunity to take a redundancy payment or where there was suitable alternative employment, to take another position with the Respondent. The Respondent asserts that the Applicant elected to take the redundancy. The Respondent asserts that it did not have an alternative position to offer her. The Respondent disputes the Applicant's assertion that it did not discuss the implications of the change with her directly. The Respondent asserts that not only did it have discussions with the Applicant but with the relevant union regarding her position. The Respondent would have it that only subsequently has the Applicant asserted that her dismissal was unfair.

The Applicant carries the onus to establish on the balance of probabilities that she was unfairly dismissed. The situation is not the reverse. It is not for the Respondent to establish that the dismissal was not unfair. On what I have heard even to this point, that is, to the close of the Applicant's case, I am simply not satisfied on balance that the dismissal was unfair.

Of all the witnesses called by or on behalf of the Applicant, the Applicant impressed me as being the least credible. Where her evidence conflicts with that of the other witnesses, I prefer the testimony of the others as being the most reliable.

I am simply not satisfied on what I have heard thus far that the change came about as suddenly and with as little discussion or consultation as the Applicant would have me believe. In this respect I prefer the evidence of the other witnesses, in particular the evidence of Mrs Manera and Mrs Dooley. Mrs Dooley testified that the Applicant attended at least one of the meetings which were called to discuss the change and its affects. I accept that to be the case. I accept too, as indeed seems to be almost incontrovertible, that as well as meetings with the staff to discuss the matter, notification of and progress reports regarding the change was given to the staff by the Respondent in newsletters which I am quite satisfied were readily available to the affected employees, including the Applicant. Notification of that kind appears to be given in newsletters, on the evidence of one of the witnesses, as early as November 1997.

I note that the memorandum of 18 June 1998 is predicated on the basis that there had been previous discussions. The memorandum mentions "that some staff have indicated that they will be unable to change over to the new shift work arrangements due to their personal circumstances." Clearly that indicates that there must have been discussions before that regarding the proposed arrangement. I find it difficult to accept, particularly in light of the evidence of the other witnesses, that the Applicant did not know what was happening. In any event, even if the position was that the Applicant first heard of it on the occasion the memorandum was distributed so that she was only then able to indicate that she was not prepared to work the new shift arrangements, her position was not unduly prejudiced. The memorandum makes provision for notification of her intentions, which indeed, she complied with. There was ample time thereafter for the Applicant to make adjustments for her well-being given that at that time the change was not to take place until October. That was slightly more than three months away. As the events occurred, at least so far as she is concerned, the change did not take place for another six months thereafter so she had ample notice. I am satisfied and find that in that period she was told that she could apply for alternate positions with the Respondent as indeed in fact she did. I accept the evidence of others that from time to time notices were put up on the board by which means the Applicant could have applied for other jobs. That the Applicant did not do so, accept on one occasion, is really her own undoing.

As previously indicated having regard to the evidence of the other witnesses I am far from convinced that the Respondent did not inform the Applicant of the change nor involve her in discussions regarding the impact of the change on her or ways to minimise the effects of the change. I am satisfied that the Respondent put in place a scheme which gave the Applicant fair opportunity to apply for alternative employment with the Respondent. Other employees in much the same position as the Applicant appear to have done much more to minimise the affects of the change on themselves than has the Applicant. In particular, they do not appear to have had difficulty in finding and reading the newsletter, or in finding the notices advertising alternative employment and in some cases in obtaining satisfactory alternative employment. The Applicant can hardly complain if she does not find suitable alternative employment if she did not apply for further employment except on one occasion and then for a job which she admits she was not properly qualified. The Applicant complains that she was not told that she had the right to limited paid leave to find alternative employment. There was no evidence that the Respondent refused the Applicant leave to find alternative employment. There is no obligation on the Respondent to inform the Applicant of that right. In any event, if there was some irregularity in that respect I do not consider in the circumstances that to be so drastic as to render the dismissal unfair.

The Applicant appears to have expected that the Respondent should go to great lengths to find her suitable alternative employment or otherwise address her personal difficulties with the new shift arrangements. Her attitude in this respect is no better exemplified than in her reaction to the Respondent's offer to continue her employment under the then existing arrangements until March of this year. She acknowledges that such an offer was made to her by the Respondent but complains that it was only made in "casual" conversation and not in writing. She appears to consider that because it was not in writing the offer should be disregarded. In my view, she expected too much. The law requires only that once an employer has made a decision to implement change, which is likely to have a significant affect on all or some of its employees, it should inform the affected employees of that decision and discuss with them the likely effects of the change on them and the measures that may be taken to minimise the effect of that change. It is not the case that the employer cannot introduce change which impacts adversely on its employees or that employees adversely affected need do nothing to help minimise the effect of the change on them. As I indicated to Mr Crossley during the course of the proceedings there needs to be some self help in the situation which faced the Applicant. I do not think it is fair or reasonable for the Applicant to expect to be spoonfed in the way in which she appeared to expect.

I am not satisfied by any means that the Applicant was treated any differently from the others particularly in respect of ongoing employment, as she complains. Indeed, I am satisfied that the reverse was the case. Of the four witnesses called by the Applicant, all of whom are currently working for the Respondent, all are employed on a basis different to that formerly worked by the Applicant to which the Applicant seeks reinstatement. Two employees are working on a casual basis. The Applicant seeks permanent part time employment.

Another of the witnesses, Mrs Dooley testified that she worked only day shift until recently when proposed changes were implemented fully. She testified that she was told, as indeed was the case for the Applicant, that she had to work shiftwork or seek alternative employment. Consistent with this she has recently been required to work shift work, notwithstanding limitations imposed by her health. I am quite satisfied, having heard the Applicant that the somewhat similar offer was made to her she testified that she was told, albeit to use her words only "casually" that she could stay on until March on the same arrangements as she was working before. The other employee Mrs Manera, who for family reasons could not work the shifts, applied for and was successful after three attempts in obtaining alternative employment with the Respondent. There is nothing on the evidence to suggest that she was given any special treatment in this regard.

There was no suggestion that the restructuring was other than bona fide. The Applicant admitted that the changes were brought about to multi-skill the workforce and presumably to provide more efficiency. All in all, having regard to the length of notice given to the Applicant of the change; to the fact that on the basis of the evidence at least four of the witnesses, a detailed and extensive consultative process was in place regarding the implications of the change, (I am not satisfied on what I have heard from the Applicant that she was excluded from or not included in that process); and to the fact that not only was she, as well as the others, given the opportunity to find alternative employment but in the absence of being able to find alternative employment was paid a redundancy payment which in the circumstances could not, on balance, be said to be inadequate, I am not satisfied that her dismissal was either harsh, oppressive or unfair.

For all those reasons in my view, the Applicant has simply not discharged the onus that she carries to establish that the dismissal was unfair. Because she has not established on her case that the dismissal was unfair, I consider it only right and proper that the matter be dismissed at this stage.

Appearances: Mr T C Crossley appeared on behalf of the Applicant.

Mr Mr A J Randles appeared on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mandy James

and

Royal Automobile Club of WA (Incorporated).

No. 29 of 1999.

29 April 1999.

Order.

HAVING heard Mr T.C. Crossley as agent on behalf of the Applicant and Mr A.J. Randles as agent 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.) G.L. FIELDING,
[L.S.] Senior Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gary Leonard Marston

and

Marine Fire & Security / McCaskey Enterprises Pty Ltd

No.7 of 1999

Andrew John Green

and

Marine Fire & Security / McCaskey Enterprises Pty Ltd.

No. 8 of 1999.

COMMISSIONER J F GREGOR.

29 April 1999.

Reasons for Decision.

BY these applications, Gary Leonard Marston and Andrew John Green (the applicants) seek orders from the Commission pursuant to Section 29 on the grounds that they were denied contractual benefits at the completion of contracts of employment they each had with Marine Fire & Security/McCaskey Enterprises Pty Ltd (the respondent). Both of the men had been employed by the respondent as security officers on what was described to the Commission as the 'OceanFast contract'. Mr Green accepted an 'Offer and Conditions of Employment' on 4 July 1998 and Mr Marston accepted an offer in identical terms on 20 July 1998. Both of the documents contain in paragraph 1 the wording that follows—

> 1. *Hire is on a permanent basis for the duration of the OceanFast contract. Employment may be terminated by either party giving 2 weeks notice (in writing), or immediately if employee is in breach of the company's "Code of Conduct" or "Security Standard Orders".*

On 7 December 1998, both of them received a letter in identical terms from the respondent. The text of the letter addressed to Andrew Green (Exhibit 2, Exhibit A for Marsden) is as follows—

> *It is with regret I must advise that OceanFast wish to restructure there (sic) current agreement with my company, further OceanFast lapsed three months into arrears with payments thus I am forced to terminate there (sic) contract as of 14 December 1998, if payment is not received by the end of the week.*
>
> *However I have approached three security companies who are willing to take OceanFast over and employ all my officers.*
>
> *Currently I am negotiating between all parties with the prime concerns (sic) being that you are gamefully (sic) employed and that I received outstanding moneys to pay out any benefits owing to your self (sic).*
>
> *Please be assured I will contact you personally when I have further information at hand.*

The events that followed are slightly different for each applicant. Mr Marston continued to work for the respondent being deployed on work the respondent was performing in Northam. The roster on which he is engaged is on the Commission's file as Appendix B. It is common ground that arrangement continued until 21 December 1998, when Mr Marston resigned. The resignation discussed with Mr McCaskey, the respondent's representative on the morning of 21 December and Mr Marston finishing work that evening.

The contract of employment of Mr Green was terminated in different circumstances. After he received the letter, previously cited in these Reasons (Exhibit 2), he received a communication from Mr McCaskey on 9 December 1998, which advised him that it has been organised for him to have an interview with Protective Services Australia in an attempt to gain casual employment at the OceanFast site. The evidence is unclear as to the outcome of that interview but it is clear that the employment relationship of Mr Green with the respondent came to an end on or about that time and he received no notice, other than that set out in the letter cited above or alternatively, no payment in lieu of notice.

Both of the applicants claim denial of contractual benefits in the form of two weeks pay in lieu of notice. Mr Marston claims additional amounts for pro-rata annual leave, meal allowance and travel allowance.

The respondent's position is that in accordance with paragraph 1 of the Offer and Conditions of Employment, two weeks notice was not required to be given if the contract for security services that the respondent had with OceanFast was cancelled. The circumstances of that cancellation have been quoted above. In his evidence, Mr McCaskey told the Commission that OceanFast had lapsed into arrears. Mr Green had advised him of some rumours about an impending closure of the company and the respondent found itself in the position that if it had not received payment by the end of the week of 14 December 1998, it would be in a position of having to terminate the contract with OceanFast. The contract was terminated and as a result it is the position of the respondent that the fundamental term of contract, that is, there be an existence between the respondent and OceanFast for a contract to provide security services of its premises no longer existed. The ongoing hire of both the applicants was dependent upon that. The respondent was placed in a position similar to *Force Majeure.* It was forced to terminate the contract with OceanFast and because the OceanFast contract ceased to exist, the basis upon which the contract of employment was erected had gone. The provision in the Offer and Conditions of Employment (Exhibit A) above relating to notice, on that interpretation of the document it is only payable if the contract of employment is bought to an end during the currency of a contract between OceanFast and the respondent because that contract is the foundation upon which the employment relationship depended.

As for Mr Marston, the respondent says that he was offered new employment with W. McCaskey Enterprises Pty Ltd which he accepted. The rosters showed the days of work that he was employed. It is the respondent's contention that Mr Marston resigned without giving notice, as he was required to do in his agreement. He had done so after he had been questioned about poor performance and unacceptable behaviour. In other words, the contract came to an end against the background of some controversy between the parties with the respondent alleging the applicant was in possession of property of the respondent. The meal allowance was paid in full. He was entitled to one meal under the arrangements made between the parties and that payment was made. As for travel allowance, it was agreed between the parties that Mr Marston would be paid a loading upon his normal work to compensate for the locality. There was no travel allowance to be paid for normal duties. The applicant (Marston) was aware of this.

The Commission has heard evidence from each of the applicants and from Mr McCaskey on behalf of the respondent. Insofar as the quality of that evidence is concerned, I have doubts about the evidence given by Mr Marston. He was inclined to be evasive and this was drawn to his attention by the Commission during his cross-examination. I have no difficulty with evidence of Mr Green or Mr McCaskey. As I perceive this matter, there is no need for me to make any findings on the credit of witnesses which might be adverse to Mr Marston because each of the applications stands or falls upon the wording of the contract of employment.

When dealing with applications under Section 29(1)(b)(ii) where an employee claims that he/she has been denied a benefit payable under a contract not being a benefit under an Award or Order of the Commission, the duty of the adjudicator is to discover the real meaning of the terms of the order (*Reginald Simons v Business Computers International Pty Ltd 1985 (65 WAIG 2039).*

The contracts under examination here are identical. They were clearly not drafted by a person with legal training and the best interpretation I can make of the words contained in them is that the existence of the contract of employment was based upon the continuation of a contract between the respondent and OceanFast. Once that contract was brought to an end, then the basis for the employment relationship disappeared. That is the clear meaning of the first sentence in paragraph 1 of the Offer and Conditions of Employment. I would interpret the whole of the clause to mean that the continuation of the employment relationship was inextricably linked to a relationship ongoing between the respondent and OceanFast. Those provisions concerning notice in writing only have effect during the life of the contract between the respondent and OceanFast and have been inserted to allow a mechanism to bring the employment relationship to an end in that circumstance or if an employee breaches the company's code of conduct or security standing orders. Nothing has been put to the Commission concerning implying notice into the contract but even if it had been I am of the view that the interpretation of the clause that I have set out above is the preferred one. As I understand the authorities one would apply notice into a contract of employment if there were no notice provisions in the contract at all. In this case, the notice provisions are particularly related to the circumstances of the arrangement which I have no need to labour.

Applying this interpretation to the individual cases, insofar as Mr Marston is concerned, his contract was ongoing after the OceanFast contract and it is more likely than not that he agreed with W. McCaskey Enterprises Pty Limited to continue a relationship and it is more likely than not that the relationship required two weeks notice. That being a different arrangement to that which applied to Mr Marston while he worked at OceanFast. The respondent has said that Mr Marston did not bring the contract to an end in a proper manner because he did not give a fortnight's notice when he left the company's employ at Northam. It seems to me even if the respondent has a claim for pay in lieu against Mr Marston, by writing him a letter on 21 December 1998, acknowledging his resignation (Exhibit M2) and drawing to his attention that he was obliged to give two weeks notice, then waiving its claim to forfeiture as a parting *"jesture of thanks"(sic)* that the respondent has foregone any claim to that amount.

The respondent paid the applicant (Marston) the sum of $335.30 net. There is no description of what that money is for. I need to consider the other three heads of claim. The first is two weeks pay for annual leave. No argument at all was advanced why that amount should be paid other than that the offer and acceptance of employment indicated that annual leave would consist of 5 weeks at the Award rate or 4 weeks at the fixed rate. Mr Marston said that he read the agreement as providing that he would be entitled to holiday pay if he worked less than one year. I am unable to find with any certitude whether an entitlement exists or not. It may well be that the matter is one that ought to be pursued under Section 21 of the Minimum Conditions of Employment Act. In any event, I am unable to conclude on the authorities that there are monies owing that might be the subject of an Order for annual leave. I accept the evidence of Mr McCaskey in preference to that of Mr Marston concerning entitlement to a meal allowance and over-time payments.

Insofar as Mr Green is concerned, the interpretation that I have made of his offer and acceptance of employment is the same as that for the applicant (Marston). Applying that to Mr Green's circumstance there is no entitlement to notice.

For the reasons that I have set out above, both of these applications will be determined by an order of dismissal.

Appearances: Mr G L Marston appeared on his own behalf

Mr A J Green appeared on his own behalf.

Mr McCaskey appeared for the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gary Leonard Marston

and

Marine Fire & Security / McCaskey Enterprises Pty Ltd.

No.7 of 1999.

COMMISSIONER J F GREGOR.

29 April 1999.

Order.

HAVING heard Mr G L Marston on his own behalf and Mr McCaskey on behalf of the respondent, the Commission

pursuant to the powers vested in it under the Industrial Relations Act, 1979 hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Andrew John Green

and

Marine Fire & Security / McCaskey Enterprises Pty Ltd.

No. 8 of 1999.

COMMISSIONER J F GREGOR.

29 April 1999.

Order.

HAVING heard Mr A J Green on his own behalf and Mr McCaskey on behalf of the respondent, the Commission pursuant to the powers vested in it under the Industrial Relations Act, 1979 hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Guy Davey Melhuish

and

Perceptions Home Builders.

No. 134 of 1999.

23 April 1999.

Reasons for Decision.

COMMISSIONER S A CAWLEY: This application is brought pursuant to section 29(1)(b)(i) of the Industrial Relations Act, 1979 ("the Act"). By it Guy Davey Melhuish ("the applicant") claims he has been unfairly dismissed from employment by Perceptions Home Builders. Section 29(1)(b)(i) is as follows—

29. (1) An industrial matter may be referred to the Commission —

(a) …

(b) in the case of a claim by an employee —

(i) that he has been harshly, oppressively or unfairly dismissed from his employment; or

(ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of service,

by the employe[r].

It is a right of access limited to a dismissed employee. However the right for a dismissed employee to make such a claim is limited by section 29(2) which is as follows—

(2) A referral by an employee under subsection (1) (b) (i) cannot be made more than 28 days after the day on which the employee's employment terminated.

That is, while the Act establishes a right for a dismissed employee to pursue a claim of unfair dismissal by application to the Western Australian Industrial Relations Commission ("the Commission") the right exists only for 28 days from the date the employment ended.

Prerequisites for the jurisdiction of the Commission to arise therefore are that the person making the claim to the Commission for it to enquire into and deal with must have been an employee who has been dismissed from a contract of service with the respondent and the right of access to the Commission must be exercised within the prescribed time (28 days) from the point of dismissal. If either of these conditions are not established in fact then there is no jurisdiction for the Commission to proceed any further. That is, without jurisdiction, there is no authority for this tribunal to enquire into and deal with the allegation of unfairness. The questions of whether or not the applicant was an employee of the respondent and whether the application was filed in time are matters of fact.

First, the question of whether the application was filed within the time allowed. This arose out of the application itself. The record of this application shows that it was filed on 2 February 1999. However the schedule of particulars filed with the application (Form 1) states that the employment ended on 6 December 1998. On the face of it then, the application has been filed out of the time allowed by the Act for the exercise of the right of access conferred by section 29(1)(b)(i). This was drawn to the attention of the applicant who sought a hearing. The hearing which proceeded then was limited to the question of whether there was jurisdiction for the Commission to enquire into and deal with Mr Melhuish's claim. It proceeded on 15 April 1999.

The applicant, who represented himself, confirmed at the hearing that he claimed he was dismissed on or about 6 December 1998 and he did not dispute the date of filing recorded on the Form 1 application by the Registrar as 2 February 1999. In the face of this (and without explanation of justification of the length of time should the Commission even have power to allow a claim out of time to proceed), it follows that the prerequisite of timely filing for the right of access to arise has not been met.

But there is another reason why the Commission cannot deal with this claim. The applicant described himself as a subcontractor engaged by the respondent on a building site. As there is no jurisdiction for the Commission to deal with a dispute between a subcontractor and contractor (a contract for services as distinct from a contract of service between an employee and employer), this raised another issue to be overcome by the applicant.

Mindful that labels attached to an employment relationship should not be allowed to disguise what in fact, having regard for all the circumstances of the relationship, amounts to that of an employee-employer, a number of questions as to the organisation of work, directions and payment were posed to the applicant. But his answers suggest any arrangement which existed was more consistent with that of a subcontractor engaged to provide building services on a project basis than with that of an employee. In the absence of any other submission or evidence I am bound to conclude to the applicant's employment was as a subcontractor and not an employee.

On these two counts then it must be found that the Commission has no jurisdiction to deal with the applicant's claim.

It is noted that this result does not go to any reflection on the capabilities of the applicant or on the justice of his claim of his claim of unfair treatment. The outcome is strictly limited to the conclusion that the law does not allow this Commission to deal with his complaint.

The order reflecting this conclusion now issues.

Appearances: The applicant appeared on behalf of the applicant.

Mr J Noordzy and with him Mr K Borsboom appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Guy Davey Melhuish

and

Perceptions Home Builders.

No. 134 of 1999.

23 April 1999.

Order.

HAVING heard the applicant on his own behalf and Mr J Noordzy and with him Mr K Borsboom on behalf of the respondent, now therefore, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT this application shall be and is hereby discontinued for want of jurisdiction.

(Sgd.) S. A. CAWLEY,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Brian Clark Mosson

and

Brear & Doonan (1992) Pty Ltd.

No. 2187 of 1998.

COMMISSIONER A.R. BEECH.

14 April 1999.

Reasons for Decision.

Brian Mosson was employed by the respondent as an electrical mechanic in August or September 1998. He was dismissed on 12 November 1998. He complains that his dismissal was unfair. According to his Notice of Application he believes that the dismissal was because he had asked for safety training for work on live cables and that his job was under threat. The Commission convened a conference of the parties under s.32 of the Act. At that conference Mr Mosson expanded upon his belief that his dismissal related to his concerns regarding safety standards. He acknowledges, however, that he was told at the time of his dismissal that the reason related to the respondent's work for Western Power reducing in volume and, indeed, it is the respondent's simple position that Mr Mosson was made redundant along with other employees due to the respondent failing to secure further contracts with Western Power.

No agreement was reached at the conference and the Commission informed the parties at its conclusion as follows—

> The respondent's reason for dismissing Mr Mosson means that much of Mr Mosson's statements to the Commission regarding his safety concerns may not be relevant to the Commission deciding Mr Mosson's claim. Therefore, in the event that Mr Mosson wishes to proceed with his claim the Commission will require him to provide to the Commission, within a further 7 days after he has received the respondent's statement, a statement of his evidence why the dismissal was unfair. A copy should also be sent to the respondent.
>
> The Commission will then consider whether or not this matter should be listed for hearing and determination.

The Commission has subsequently received a response from Mr Mosson and a further statement from the respondent which provides greater detail of the reason for dismissing Mr Mosson. I have given consideration to whether this application should now be listed for hearing. I have concluded that it should not for the following reasons.

According to the further statement made by the respondent it dismissed Mr Mosson by reason of redundancy. At the time it employed Mr Mosson the respondent had nine other electricians working for it. The respondent was contracted to do work for Western Power and Mr Mosson was one of the employees doing that work. The respondent needed Mr Mosson, and other employees, at that time because of the workload. The respondent hoped that the Western Power work would be continuous. Unfortunately, the work decreased and stopped completely in November 1998. At the time of Mr Mosson's dismissal, two other employees were also dismissed and their positions were not filled by any other employee. Two employees who were absent due to long service leave and workers' compensation respectively also were not replaced. Essentially, Mr Mosson was dismissed because there was no longer any work and his position was thereby redundant. The Separation Certificate given to Mr Mosson, and which Mr Mosson appended to his response, confirms this conclusion.

The three electricians who were dismissed, including Mr Mosson, have not been replaced and, since November, the respondent has not employed any other electricians.

Mr Mosson's response to the Commission, however, only expanded upon his views at the conference. He really seeks assistance to conduct a time and wages search to help establish the names of the other employees of the respondent with whom he worked. He wants to know the type of electrical licence that they had and the work the apprentices did. He provides other information regarding complaints made to Worksafe, a statement he has made to the Office of Energy, a paper clipping regarding working conditions generally and information regarding a Western Power employee who, apparently, received an electric shock.

The decided cases make it quite clear that an employee in Mr Mosson's position is only able to show his dismissal was harsh, oppressive or unfair if he is able to show that redundancy was not the genuine reason for his dismissal, or that, if it was a genuine reason, another employee should have been made redundant instead of him (see *Gromark Packaging v Federated Miscellaneous Workers' Union of Australia, WA Branch* (1992) 73 WAIG 220 at 224; *AMWSU and OPDU v Australian Shipbuilding Industries* (1987) 67 WAIG 733 per Brinsden J at page 734 and per Olney J at page 738; *Gilmore v Cecil Bros, FDR Pty Ltd, Cecil Bros Pty Ltd* (1996) 76 WAIG 1184; as confirmed on appeal at 4434 (FB) and (1998) 78 WAIG 1099 (IAC)). It is quite clear from Mr Mosson's Notice of Application and his response to the Commission that he is not attempting to argue either of these grounds. He does not dispute the facts alleged by the respondent concerning the respondent's contracts with Western Power. On that basis, the Commission is entitled to find, and I do so, that Mr Mosson was made redundant. There is nothing in Mr Mosson's Notice of Application and his response to the Commission which argues that another employee should have been made redundant before him. There is no suggestion that the dismissal was unfair for procedural reasons.

For those reasons, I am unable to see that Mr Mosson can succeed in his claim. Accordingly, I am satisfied pursuant to s.27(1) of the Act that Mr Mosson's application should be dismissed because further proceedings are not necessary or desirable in the public interest. Although Mr Mosson has indicated that he believes there are safety issues relating to the period of employment which he is pursuing, they are not issues which are able to be pursued in a claim before this Commission that his dismissal was unfair.

An Order will, therefore, issue dismissing this application.

Appearances: Mr B.C. Mosson on his own behalf.

Ms V. Paul on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Brian Clark Mosson

and

Brear & Doonan (1992) Pty Ltd.

No. 2187 of 1998.

14 April 1999.

Order.

HAVING heard Mr B.C. Mosson on his own behalf and Ms V. Paul 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 dismissed.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Ben Notley

and

Northside Rentals.

No. 2273 of 1998.

22 April 1999.

Reasons for Decision.

COMMISSIONER S A CAWLEY: This application is brought pursuant to section 29(1)(b) of the Industrial Relations Act, 1979 ("the Act"). By it Ben Notley ("the applicant") claim she was unfairly dismissed from employment by Northside Rentals ("the respondent') and that he has been denied contractual benefits due him under that contract. The contractual benefits claimed are $35.00 for six hours of work on Saturday 28 November 1998 and one week's wages claimed as due for a failure to pay in lieu of notice on termination of the contract by the respondent. The applicant, who has found other employment, does not seek any remedy specific to the claim of unfair dismissal other than an order for the benefits claimed.

Answers to the claims were filed by the respondent on 3 February 1999. In these the respondent concedes that the applicant has not been paid $35.18 for work carried out on Saturday 28 November 1998 due, it says, to a debt it claims the applicant had with the respondent. The claim for wages in lieu of notice is denied however. According to the respondent's answers the applicant was given one week's notice of termination on 2 December 1998 following criticisms of his performance but failed to work out that notice. Accordingly, it says, there is no entitlement as claimed by the applicant.

A conciliation conference pursuant to section 32 of the Act was listed for 4.00pm on Thursday 25 February 1999. Notices of it were forwarded to the parties on 11 February 1999. The applicant attended at the listed time but there was no appearance by or on behalf of the respondent and the conference did not proceed. The matter was further listed for a conciliation conference on 12 April 1999. Again the applicant attended but there was no appearance by or on behalf of the respondent and the matter proceeded to hearing as per the notice of 16 March 1999 forwarded to each party.

The applicant represented himself at that hearing. There was no appearance by or on behalf of the respondent. Notwithstanding this absence it remains the case that the onus of proving his claim on the balance of probabilities remained for the applicant.

The applicant gave evidence under oath at the hearing and produced some exhibits. The evidence can be summarised as follows. The respondent operates a car hire business. The applicant was employed in it as a car detailer and driver with duties involving cleaning, polishing, vacuuming and otherwise detailing cars and delivering and picking up cars. The employment commenced on 3 November 1998. The employment was described as permanent and full time and the applicant says he worked 40 hours per week for a weekly wage of $234.50 gross; the hourly rate amounting to $5.86 gross. The wage was paid weekly on Fridays. The last pay received was for the week ending Friday 27 November 1998. The pay was received in cash in an envelope which notes that $26.80 has been deducted from the weekly wage of $234.50 leaving a nett figure of $207.70. The envelope was produced on evidence. The applicant worked on Saturday 28 November 1998 for six hours. No payment for that work has been made by the respondent. The applicant did not attend for work on Monday 1 December 1998. He says he was ill that day and left a message to that effect on an answering machine at the workplace at approximately 7.30am that day with a request that the principal of the respondent business, "David", telephone him. The applicant did not receive any call in return and he did not attend for work the following day either because, he says, he was ill again that day. The following day, Wednesday 3 December 1998 he attended at the workplace but, according to him he was dismissed by David without notice or any payment in notice. The applicant says that the respondent had by then already taken steps to replace him and produced an advertisement in the name of the respondent in the positions vacant columns of *The West Australian* newspaper of 1 December 1998 for a car rental assistant to carry out car detailing and delivery and collection of cars duties. The advertisement was produced in evidence.

The applicant unequivocally denied the allegations raised by the respondent in its answering statement when these were put to him. He says he was not warned on any occasion during the employment about unsatisfactory work performance or lack of co-operation and arguments with other employees. He acknowledged that he was late for work once due to a car breakdown and that on occasions he was critical of a co-worker who he thought sometimes shirked his share of work. But none of this, he says, was the subject of any warning to him that his employment was at risk. And he emphatically denied that he was given a week's notice of termination on Wednesday 2 December 1998 and that he walked off the job rather than work out that week.

I have concluded that the applicant was employed on a full time basis for the weekly rate of $234.50. In its answers the respondent concedes that the applicant was not paid for hours worked on Saturday 28 November 1998 . The claim for payment for hours worked on that Saturday will be allowed accordingly. The respondent effectively acknowledges in those answers that it was a term of the contract that a weeks' notice of termination of the contract be given by either party. At issue so far as the latter goes is the claim in the answers that the respondent gave notice to the applicant on Wednesday 3 December 1998 and he reacted by walking off the job against the applicant's sworn evidence that, without warning, the respondent summarily terminated his employment on that date.

Having had the advantage of seeing the applicant give evidence I have concluded that he was a truthful, guileless witness. I accept his evidence as to his attempt to communicate with the respondent on Monday 1 December 1999 and that, on attendance at work on Wednesday 2 December 1998, he found that steps to replace him had been taken by the respondent who ended the contract, without warning, then and there.

This dismissal was unfair in all the circumstances. No reinstatement or other remedy is sought; the applicant having obtained other employment. The only remedy sought by the applicant out of this claims is one for denied contractual benefits, being wages due for 6 hours already worked and a week's wages in lieu of notice. These are entitlements under the contract. On what is before the Commission these amount to $269.68. The decision will reflect this.

Minutes now issue. There will be a speaking to the minutes as required at 3.45pm on 22 April 1999 following which the final order will issue.

Appearances: The applicant appeared on his own behalf.

There was no appearance for the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Ben Notley

and

Northside Rentals.

No. 2273 of 1998.

22 April 1999.

Order.

HAVING heard the applicant on his own behalf and there being no appearance by or on behalf of the respondent, now

therefore, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT Northside Rentals pay to Ben Notley the sum of $269.68 within fourteen (14) days of the 22nd day of April 1999.

(Sgd.) S. A. CAWLEY,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Andrew Quince

and

Muchea Rural Sheds Pty Ltd.

No. 1540 of 1998.

COMMISSIONER P E SCOTT.

13 April 1999.

Reasons for Decision.

THE COMMISSIONER: This is an application pursuant to s.29 of the Industrial Relations Act 1979, whereby the Applicant claims that he has been harshly, oppressively or unfairly dismissed from his employment with the Respondent.

The Applicant commenced employment with the Respondent in approximately February 1993 as a labourer/welder. By the time his employment terminated more than 5 years later, on 31 July 1998, he was foreman of the workshop. During this period the Respondent's business had developed and grown, and a general manager had been employed. The Commission has heard a great deal of evidence about the Applicant's employment, his role in raising issues of concern and suggestions for improvements with his employer, his literacy difficulties and questions of whether he suffered stress or anxiety in the performance of his work. It is uncontested that until the day of dismissal, the Applicant had no reason to believe that his employment was in jeopardy. He performed his job at least adequately and was one of a number of persons to whom the Respondent's managing director, Paul Davies, directed special thanks for their contribution at a dinner no more than a couple of weeks prior to his dismissal.

The issue before the Commission is quite straight forward. It is alleged by the Respondent and denied by the Applicant that on Friday, 31 July 1998, the Applicant instructed the employees who worked under his direction as foreman to refuse to work on the Saturday, for the purpose of forcing the employer to increase the Saturday rate of pay. Saturday was a day which usually involved voluntary work and an agreement had been reached between the employer and those who wanted Saturday work as to a particular arrangement and a rate of pay. It is also said that the Applicant knew that there was urgent work to be done on the Saturday. It is also said that having so instructed the employees under his control, the Applicant abandoned his post without good cause and went home. The Applicant denies these things. He says that the issue of the Saturday rate was of no interest to him as he chose not to work Saturdays.

The test in a matter such as this is whether the employer, in exercising its right to terminate employment, has done so unfairly, whether there has been a "fair go all round" *(Undercliffe Nursing Home v FMWU (1985) 65 WAIG 385)*. The Applicant bears the onus of proving that he has been harshly, oppressively or unfairly dismissed. Further, if the dismissal is for misconduct then the Respondent bears an onus of proving that it had good cause to believe that the conduct alleged has occurred, that it has undertaken a reasonable investigation in the circumstances, given the employee a reasonable opportunity to explain allegations put to him and then, taking account of that, made a decision based upon a reasonable belief as to the employee's conduct *(Western Mining Corporation Limited v AWU (1997) 77 WAIG 1985)*. The Respondent says that this is not a termination for misconduct because it has paid the Applicant in lieu of notice and therefore it is a normal dismissal for cause.

The Commission heard evidence from fifteen witnesses, and there was a good deal of conflict in that evidence, in particular as to the events of the day of dismissal. There was a substantial amount of evidence about some aspects of the Induction Booklet (Exhibit 6) such as the Code of Conduct and the Chain of Command, and of employees being taken through the Booklet which evidence is irrelevant to the central issues outlined above. Further, there was a good deal of evidence about whether the Applicant was known to be violent or threatening, a matter with which I shall deal later in these reasons. I do not intend to recite all of the evidence. In coming to conclusions about the facts, I draw upon my observations of the witnesses during the course of the hearing. I found the Applicant to be an unreliable witness. I have taken account of his not being particularly articulate, yet the Applicant was able to convey his evidence clearly. Where there is conflict in the evidence, I have no hesitation in accepting the evidence of Mathew Mawson and Darren Williams as to what occurred on the day of dismissal. I was also impressed by Paul Douglas Davies' evidence.

Having considered all of the evidence, on the balance of probabilities, I find as follows—

1. Over a number of years, the Applicant performed well, within limitations, however, he was unco-operative when it came to the Respondent trying out potential foremen. The Applicant was eventually appointed foreman, although his limitations were known.
2. The Applicant had a good relationship with the Respondent's founder and managing director, Paul Douglas Davies.
3. In October 1997, Davies employed Mathew Mawson as general manager so as to ease his own work load and withdraw from the day to day management of the business, to enable him to meet his personal obligations. Mawson had management expertise and qualifications which would help the business's development.
4. The Applicant did not agree with the number of changes introduced after Mawson's arrival such as the Saturday work arrangements and the removal of the tape measures. He also disagreed with Mawson's management style.
5. Soon after work commenced on Friday 31 July 1998, the Applicant was expressing to the leading hand, Darren Williams, his dissatisfaction about Mawson's decision to withdraw the tape measures from immediate access. Somehow, the discussion turned to the Saturday rate of pay.
6. The Applicant called some other employees over, including Stephen Lawrence, Shane Wilton and Alan Robert Raeburn to talk about the Saturday pay rate. He told them they were "mad to work for" the amount they were being paid. They "should be getting double the amount". He did not simply remind them that Saturday work was voluntary, and that if they were not happy with the rate they should not work. Rather, he urged or instructed them to not work on the Saturday unless the pay was increased. He told them to "stick to (their) guns". He told them they were to all stop work until they got better pay.
7. The Applicant then went home. I have heard of the Applicant's inability to handle stress, and I find that he went home partly as a result of the stress he felt at having put himself in a position of urging the employees under his direction to refuse Saturday work. By leaving, the Applicant also ensured that he was not present when his employer learned of the employees' intentions not to work the next day. As he acknowledged in his evidence, he was not otherwise unwell. He made no efforts to contact Mawson or Davies or to leave a message for Mawson to alert his employer to the employees' intention to not work.
8. At around 8.30am, Mawson arrived at work and on discovering that the Applicant was absent, made enquiries. He spoke to Darren Williams and Stephen Lawrence together and separately, and they told him what had occurred. He spoke with John Lawrence who told him they were not working the next day.

9. Mawson then telephoned Davies to discuss the matter with him. It was agreed that Mawson should discuss the matter with the Applicant and if the Applicant confirmed this situation then he would be instantly dismissed. If in discussing the matter with the Applicant, there was any doubt in Mawson's mind as to what had occurred then he would not terminate the Applicant's employment. However, if having given the Applicant an opportunity to put his side of the story, he was not satisfied then he would terminate his employment instantly. Mawson was to prepare a letter of dismissal for use in that eventuality.
10. Mawson proceeded to the Applicant's home. When he arrived at the Applicant's house, Mawson found the Applicant was feeding his pigeons. He asked him what was going on and the Applicant simply responded "I'm just feeding my pigeons". He asked the Applicant why he was not at work and he said "I don't know". He asked the Applicant if there were any problems, to which the Applicant said no, everything was all right. Mawson wanted to allow the Applicant to tell him what was going on before he put to him what he had heard. He asked the Applicant what was going on and the Applicant said that he was "sick and tired of the guys nagging him and he just had to go home" and "all the guys were sick of working on Saturday" at the rate they were getting and "they decided not to work on Saturday any more" (transcript page 163). Mawson asked him who had decided this and initially the Applicant said that he did not want to tell him any names. He then named "Steve and Darren". Mawson told the Applicant that he was extremely disappointed in him and that he did not believe him. He told the Applicant that he had spoken to Stephen and Darren and that they had said that it was his, the Applicant's, idea for them not to work. The Applicant told him that this was a load of rubbish and started to storm away from him. Mawson concluded that the Applicant was not telling him the truth, the Applicant's attitude and his lack of response confirmed his concerns. He gave the Applicant the letter of dismissal.

By his conduct in encouraging or inciting employees under his direction to refuse Saturday work until the rate of pay was increased, and in leaving the work place in the circumstances, the Applicant seriously breached his responsibility to his employer. As a foreman, the Applicant was not simply another employee. It is true that the foreman occupies a unique position with sometimes conflicting roles in that he might find himself caught between the management's wishes and those of the employees. He may act as a conduit between those parties, but his primary responsibility is to management. It may not be unusual for employees to withdraw their labour in support of a claim for higher wages, but it is totally contrary to his responsibility to his employer for a foreman to encourage such activity. His responsibility would have been to report the employee's dissatisfaction and their decision to not work to his employer, at the first opportunity, particularly as the employees' refusal to work was to affect the next day's schedule. Instead, the Applicant left the scene to ensure that he would not be around when the employer became aware of the problem. When asked by his employer for an explanation, the Applicant was not honest and forthright.

In this case, I am satisfied that the Applicant conducted himself in a manner which constituted a serious breach of his responsibility to his employer. His conduct could not be said to be in support of the employees he directed, because, having encouraged their refusal to work, he left them to tell their employer, themselves, and to deal with the consequences. He did not act in a principled way towards either his employer or his employees. Accordingly, the Applicant has conducted himself in a manner which struck at the heart of the contract of employment, and such conduct warrants summary dismissal.

I have considered the conflicting evidence of threats of violence or retribution by the Applicant. Whether or not the Applicant used such threats matters not in the context of my earlier conclusions. If he had done so, this would have been a further and even more serious breach of his contract of employment. Without the threats, he still breached his fundamental responsibility to his employer by encouraging the employees to withdraw their labour, and in failing to report their intentions.

I have considered the prospect that the Applicant had nothing to gain by the employees taking action in support of an increase in the Saturday rate due to the Applicant not working Saturdays. His reason for declining Saturday work appears to have been his desire to work with his pigeons, not necessarily the wages. Accordingly, the Applicant would not have gained from an increase in the Saturday rate. However, from the facts found, I conclude that his interest was in his conflict with, and opposition to Mawson. He saw this issue as a way to challenge Mawson and as a way of improving his own status in the eyes of the employees. I noted earlier the Applicant's lack of co-operation with prospective foremen. Mawson's arrival was an even greater challenge to him. Mawson's more demanding and professional management methods compared with those of Davies were a threat to the Applicant who was used to the flexible, and in some cases, laissez-faire, approach taken by Davies. Such issues as the morning tea break being longer to enable the Applicant to absent himself from the workplace to go home to feed his pigeons, and to take longer than the specified break to do this; and the Applicant's control of the tape measures were threatened by Mawson's changes. The introduction of the Induction Booklet, with the formalised approach that it brought with it, was a threat to the comfortable arrangement the Applicant had enjoyed. Accordingly, I find that the Applicant's motivation was not the increased rate of pay he might gain from Saturday work as a consequence of the employees refusing Saturday work. Rather his motivation was his dissatisfaction with and challenge to Mawson.

As to the question of the procedure applied by the Respondent, I am satisfied that the Respondent undertook a reasonable investigation of the matter in the circumstances. It provided the Applicant with a reasonable opportunity to be heard, and on a reasonable conclusion that he was not being honest and forthright, terminated his employment.

There is nothing in the substance of the reason for dismissal or this process which was harsh, oppressive or unfair.

APPEARANCES: Ms D Collins (of Counsel) on behalf of the Applicant.

Mr C Fayle on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Andrew Quince

and

Muchea Rural Sheds Pty Ltd.

No. 1540 of 1998.

COMMISSIONER P E SCOTT.

13 April 1999.

Order.

HAVING heard Ms D Collins (of Counsel) on behalf of the Applicant and Mr C Fayle on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this matter be, and is hereby dismissed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Andrew Richardson

and

Pipunya Pty Ltd & Anor

No. 254 of 1999

Sandra Richardson

and

Pipunya Pty Ltd & Anor.

No. 255 of 1999.

20 April 1999.

Reasons for Decision.

SENIOR COMMISSIONER: The Applicants in each of these matters were formerly employed, allegedly jointly employed, as the General Managers of the Marble Bar Liquor Store. That store is owned by the first named Respondent, Pipunya Pty Ltd.

On or about the 16th February 1998 the directors of the first named Respondent resolved to terminate the employment of each of the Applicants with effect from the 18th February 1998, with one weeks' pay in lieu of notice. Each of the Applicants assert that the termination of their employment was either harsh, oppressive or unfair. As a consequence, they each seek relief under the provisions of the Industrial Relations Act 1979 in the form of compensation. In addition, they each seek orders for the payment of monies in respect of benefits alleged to have been denied them under their contract or contracts of employment.

The Applicants assert that the Store, though owned by the first named Respondent, was at all material times operated and managed for the first named Respondent by the second named Respondent. Accordingly, each of the Applicants assert that they were employed by the second named Respondent or alternatively by the first named Respondent. The first named Respondent admits to being the employer of the Applicants. The second named Respondent denies that it was ever their employer. It asserts that any offers of employment made by it to the Applicants were made on behalf of the first named Respondent, an allegation which the first named Respondent supports.

On or about the 30th March 1998 after each of these matters had been listed for hearing and determination, the directors of the first named Respondent resolved that in their opinion the company is insolvent and that an Administrator of the first named Respondent should be appointed. On the same day under the authority of section 436A of the Corporations Law the first named Respondent appointed an Administrator.

The Administrator, Mr Nilant, contends that these proceedings so far as they affect the first named Respondent are caught by the provisions of section 440D of the Corporations Law and should not proceed further at this time.

Section 440D of that Law provides—

Stay of proceedings

(1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except—

(a) with the administrator's written consent; or

(b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

(2) Subsection (1) does not apply to—

(a) a criminal proceeding; or

(b) a prescribed proceeding.

The Administrator has not given his written consent to either of these applications proceeding against the first named Respondent nor has leave been obtained from the appropriate court for the applications to proceed in the absence of his consent.

In support of his contention the Administrator refers to, and relies on, the decision of a Full Bench of the Commission in *Helm v. Hansley Holdings Pty Ltd (Under Administration) (1998) 79 WAIG 23*. In that case the Full Bench held that the Commission was prevented, by reason of the provisions of section 471B of the Corporations Law, from proceeding with an application of the kind now in question against a company in liquidation. Although arrived at by a somewhat different route, the decision of the Commission in *Helm v. Hansley Holdings Pty Ltd (Under Administration)* (supra) was said to be consistent with a decision of the NSW Supreme Court in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW (1998) 30 ACSR 38*, a decision upon which the Administrator placed much reliance. In that case the Court held that the provisions of section 440D applied to stay proceedings in respect of a claim for relief before the New South Wales Industrial Relations Commission under the unfair dismissal laws of that State.

The Administrator contends that the decision in each of these cases is consistent with the purpose and object of the provisions of that Part of the Corporations Law governing the affairs of a company under formal administration. The Administrator argues that the object of that Part is to impose a moratorium "to protect the company from all civil actions so that the administrator can formulate a rational plan for future action". In any event, the Administrator suggests that the proceedings should be stayed in the exercise of the general powers vested in the Commission under section 27 of the Industrial Relations Act 1979. He argues that it is inconsistent with the public interest that litigation of his kind should be allowed to proceed at this time. To allow the applications to proceed would be to give a benefit to the Applicants over other potential creditors and furthermore has potential to unduly interfere with the proper administration of the company by requiring the Administrator to devote much of his attention to these proceedings rather than to the affairs of the company. He also argues that there is a greater need for a moratorium when a company is in administration rather than in liquidation because the period of administration is designed to provide a period of inactivity to enable the administrator to determine whether it might be possible for the company to trade out of its parlous financial state. Furthermore, having only recently been appointed, he contends that he needs more time to ascertain the true state of the company's affairs.

The Applicants on the other hand argue that the provisions of section 440D of the Corporations Law have no application on this occasion. The Applicants concede that each of the applications are "a proceeding" within the meaning of section 440D of the Law but they deny that the Commission is "a court" for the purposes of the section. To the extent that the decision of the Full Bench in *Helm v. Hansley Holdings Pty Ltd (Under Administration)* (supra) decides otherwise, they question its veracity and in any event, argue that it ought to be distinguished on the grounds that it was concerned with the provisions of section 471B of the Law and not section 440D. Equally, they argue that *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra) is distinguishable on the grounds that the New South Wales Industrial Relation Commission has court-like features not possessed by the Western Australian Industrial Relation Commission. Although by force of section 12 of the Industrial Relations Act 1979 the Commission is described as "a Court of Record" the Applicants argue, relying on the decision of the Supreme Court in *Ex Parte: Robe River Mining Company Pty Ltd (Sup. Ct. of WA; Library No. 940031; 28 January 1994 (unreported))* that this does not mean the Commission is a court for all purposes under the law of this State. Regard must be had to the purpose and object of the Corporations Law. It is inconsistent with the provisions of the Corporations Law, and in particular to provisions of section 58AA to hold that the Commission is a "court" for the purposes of the Law.

The Applicants argue that for the purposes of section 440D "a court" is as defined by section 58AA of the Corporations Law. So far as is material that section defines a "court" to mean "any court when exercising the jurisdiction of this jurisdiction". The import of that definition, the Applicants contend, is that to be a "court" the court must have jurisdiction within this State to deal with matters arising under the Corporations Law. The Commission does not have that jurisdiction. Accordingly, it is not a court as defined for those purposes of section 440D of the Law and thus the proceedings now in question are not caught by the Law. In this regard the Applicants refer to

the fact that the Australian Industrial Relations Commission held in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v. Sands and McDougall (Aust) Pty Ltd; Print L9809; (1995) 37 AILR 3-105 (89)* at least inferentially, that the provisions of section 440D of the Corporations Law did not prevent it from dealing with proceedings relating to an alleged industrial dispute.

The Applicants argue that the purpose and object of the legislation as explained in extraneous material cannot be used to override clear legislative provisions to the contrary, as they suggest appears to have occurred in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra). Even if, as suggested in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra), the definition of a court in section 58AA of the Law does not have application in these circumstances and the expression "court" appearing in section 440D is to be given its ordinary meaning, the Applicants still argue that the Commission does not fall within the scope of section 440D. They contend that the Commission is an arbitration tribunal, not a court in the normally accepted sense. Although from time to time the Commission might act in a judicial manner, the Commission does not exercise judicial power. It does not enforce existing legal rights and obligations between the respective parties. Instead, in general, it performs an administrative or legislative function; for example, in granting relief arising out of an unfair dismissal the Commission acts legislatively. The granting of such relief is said by the Applicants to involve the "creation of new legal rights and obligations, not the enforcement of existing legal rights and obligations" between the former employee and the former employer. Much the same is said of claims for denied contractual benefits. The Applicants argue, relying on the observations of the Full Bench in *Waroona Contracting v. Usher (1984) 64 WAIG 1500 at 1502*, that although the Commission may be involved in ascertaining "in a judicial fashion" the terms of particular contracts of employment the function performed by the Commission in cases of this kind "is not the ascertainment and declaration of a legal right but the determination, as a matter of discretionary judgment, of fair compensation for a contractual benefit which has not been allowed".

The Applicants contend, contrary to the argument advanced by the Administrator, that there is nothing untoward in excluding proceedings of the nature of those now in question from the operation of section 440D of the Corporations Law. They contend that provisions of section 440D are not as wide as those of section 417B and more especially those of section 500 of the Law. Section 500 so far as is relevant, provides that after the passing of a resolution for voluntary winding up "no action or other civil proceeding" shall be proceeded with or commenced against the company except by leave of the appropriate court. The Applicants point to and rely upon the fact that section 500 makes no reference to actions or other civil proceeding in a "court", but refers to actions or civil proceedings in general, irrespective of the body before whom it is instigated. On the other hand, section 440D is confined to proceedings in a "court". In those circumstances, it is not unrealistic or otherwise improper to confine the operation of section 440D to proceedings before a "court" as traditionally understood. Furthermore, such an interpretation the Applicants argue, is not inconsistent with the purpose or object of the Law because there is more reason to halt litigation once a company is in the process of being wound up and therefore facing extinction rather than in consequence of an appointment of an administrator where the company is still trading and in existence.

In my opinion, despite the able attempt by Mr Caspersz to persuade me otherwise, these proceedings, at least so far as they apply to the first named Respondent, are caught by the provisions of section 440D of the Corporations Law. In short, I so conclude for the reasons advanced by Austin J. in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra).

As previously noted the parties accept, and in my view correctly, that these proceedings are properly described as a "proceeding" for the purposes of section 440D of the Corporations Law. In my opinion the proceedings are also a proceeding in "a court" for the purposes of that section. The Applicants and the Administrator both appear to accept that the Commission is not a "court" as defined by section 58AA of the Corporations Law but essentially for the reasons advanced by Austin J. in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra) the Commission is, in my view, nonetheless a "court" for the purposes of section 440D of the Law.

Section 9 of the Corporations Law provides relevantly that "Unless the contrary intention appears" the expression "court" for the purposes of the Law "has the meaning given by section 58AA" of the Law. Furthermore, section 6(1) of the Law also provides that the provisions of section 9, amongst others, have effect for the purposes of the Law "except so far as the contrary intention appears" in the Law. Section 58AA relevantly defines a "court" to be "any court when exercising the jurisdiction of this jurisdiction". It is common ground between the Applicants and the Administrator that the reference to "the jurisdiction of this jurisdiction" is a reference to the jurisdiction arising under the corporations legislation of the relevant State or Territory [in this case in Western Australia] in civil matters, as indeed, was held to be the case in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra). In any event, for the reasons advanced by Austin J. in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra) I accept that to be the proper interpretation to be placed on the definition. I respectfully disagree with the contrary view expressed by Kenner C in *Rokita v. Jay Brock Pty Ltd t/a Drake Brockman First National Real Estate (1998) 78 WAIG 4936*. I read the decision of the Full Bench in *Helm v. Hansley Holdings Pty Ltd (Under Administration)* (supra) as not deciding this question.

It follows that the Commission is not a "court" as defined in section 58AA of the Corporations Law. It does not exercise jurisdiction under the Corporations Law, just as the New South Wales Industrial Relations Commission did not exercise jurisdiction under that law. However, as Austin J. observed in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra), section 58AA is not to be read in isolation but in the context of the Corporations Law as a whole. As previously mentioned, the Corporations Law expressly provides that the definition of a "court" in section 58AA applies only unless the contrary intention appears in the Law. In my view, again for the reasons advanced by Austin J. in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra), the contrary intention does appear in the Law. Section 109H of the Law provides that in the interpretation of a provision of the law "a construction that would promote the purpose or object underlying the law (whether that purpose or object is expressly stated in the law or not) is to be preferred to a construction that would not promote that purpose or object". Section 435A of the Law stipulates that the object of that Part of the Law governing the formal administration of a company by an administrator is—

> *"To provide for the business, property and affairs of an insolvent company to be administered in a way that—*
>
> *(a) maximises the chances of the company, or as much as possible of its business, continuing in its existence; or*
>
> *(b) if it is not possible for the company or its business to continue in existence – results in a better return for the company's creditors and members than would result from an immediate winding up of the company."*

As Austin J. observed in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra) at page 49 the object of this Part of the Law "is to provide for the affairs of an insolvent company to be administered in a way that maximises the chance of the company continuing in existence. The fulfilment of that object requires that an administrator be permitted to investigate the company's affairs and make a proposal to creditors within a brief period of time, without being diverted from this task by such things as litigation bought against the company". Furthermore, Austin J. observed in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra) at page 45 this Part "sets up a structure for the administration of an insolvent company in which it is essential that decisions as to the future of the company be taken by creditors within a confined time frame, and that the administrator should not be diverted from his or her task of investigating

and reporting to creditors by the actions of chargees, property owners and litigants, especially given the risk of personal liability to the administrator which such actions may entail". It would be nonsensical in these circumstances to confine the interpretation of a "court" in section 440D to a "court" as defined in section 58AA. As Austin J. pointed out in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra) at page 48 were that interpretation to be applied to section 440D the moratorium imposed by the Part on proceedings in a court would apply "to a very small sub-class of the proceedings which are capable of distracting an administrator during the course of a voluntary administration". Again, as Rich J. noted in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra) at page 49, that such a consequence is not the intention of the Law is supported by reference to extrinsic material in the form of the Explanatory Memorandum relating to the provisions in question and the Report of the Law Reform Commission which lead to the enactment of the provisions in question. That material makes reference to the purpose of section 440D being to establish a moratorium to protect the affected company from "all civil actions" so that the administrator "can formulate a rational plan for future actions". The Law by section 109J expressly allows extrinsic material to be called in aid in interpreting the Law.

Counsel for the Applicants argues, and in my view correctly, that it is impermissible to depart from the literal meaning of the Law by adopting a purposive approach to its interpretation, an approach which he submits was wrongly adopted by the Court in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra). However, as Austin J. observed in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra) at page 50 to interpret the definition of "court" in section 58AA as not being applicable in the circumstances "does not modify or torture the statutory language" of the Law. Rather, "it simply gives effect to the legislative injunction in s 6(1) and the introductory words to s 9", that the statutory definition should not be applied "where a contrary intention appears". As he further pointed out at page 48 "even a literal reading of s 440D and s 58AA requires the court to have regard to the intention underlying s 440D. This is because (for the reasons explained above) s 58AA, being a definition provision, does not apply if the contrary intention appears. When one reflects on the legislative intention underlying s 440D, it is evident that the purpose of the section would be frustrated if the definition of 'court' in s 58AA were applied, because the general moratorium on legal proceedings which is necessary to enable the administrator to discharge the statutory function imposed by Pt 5.3A would then largely evaporate". With respect I agree with and adopt those observations.

It remains then to consider whether the Commission is a "court" as referred to in section 440D as was held to be the case for the New South Wales Industrial Relations Commission in the exercise of its jurisdiction relating to claims relating to unfair dismissal from employment. In *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra) Austin J. at page 51 suggested that "the determination of whether a particular tribunal is or is not a 'court' is governed by the purpose for which the question is asked". That was essentially the approach adopted by the Supreme Court of this State in *Ex Parte: Robe River Mining Company Pty Ltd* (supra). In that case the Court held that the word should be given a liberal and beneficial construction to accord with the purpose and policy of the relevant legislation, albeit in that case the Commission was held not to be a court for the purposes of Suitor's Fund Act 1964. However, the Court did not suggest in that case that the Commission could not be and was not a court for the purpose of any other legislation.

It is undoubtedly the case as Counsel for the Applicants contend that some elements of the Commission's functions are not court-like. The Commission, in the exercise of its jurisdiction relating to proceedings of the kind now in question does not act in precisely the same way as a court of law in that the Commission by virtue of section 26 of the Industrial Relations Act 1979 is bound to act "according to equity, good conscience and the substantial merits of the matter". Furthermore, in granting relief the Commission is not restricted to the specific claim or to the subject matter of the claim. Also as, Counsel suggests the Commission, unlike a court, is not so much concerned with the ascertainment of existing rights and obligations but, at least in the case of claims for unfair dismissal, with determining new rights and obligations. These features are also features of the New South Wales Industrial Relations Commission. However, as Austin J. observed in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra) at page 55 in respect of the New South Wales Industrial Relations Commission the fact that "some elements of the commission's functions and powers are not court–like" is not necessarily fatal to finding that the Commission is a court for the purposes of the Corporations Law. As was held to be the case in respect of the New South Wales Industrial Relations Commission there also features of the Western Australian Industrial Relations Commission which suggest that it is a court at least when exercising the jurisdiction now in issue. Those features are set out in length in *Helm v. Hansley Holdings Pty Ltd (Under Administration)* (supra) at page 26. To the matters listed there might be added the power to compel the attendance of witnesses, and the power to compel the production and inspection of documents.

In my view there is little of significance to distinguish the circumstances which lead to the finding in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra) that the New South Wales Industrial Relations Commission, when exercising its jurisdiction with respect to claims arising out of unfair dismissal, was a court and the circumstances under which the Western Australian Industrial Relations Commission exercises similar jurisdiction. Although as Counsel for the Applicants argued there are some differences but in my view they are not significant. One difference is the fact that the Industrial Relations Act 1979 by section 12 expressly establishes the Western Australian Industrial Relations Commission as a court of record when exercising its unfair dismissal jurisdiction. Although, as was pointed out in *Ex Parte: Robe River Mining Company Pty Ltd* (supra) and in *Rochford (admin apptd) Ltd v. Textile Clothing & Footwear Union of NSW* (supra), when exercising its unfair dismissal jurisdiction that is not determinative, it is nonetheless a factor to which some significance must be attached for those purposes.

A finding that the Commission is a court for the purposes of the Corporations Law is not inconsistent with the decision of the Supreme Court of Western Australia in *Ex Parte: Robe River Mining Company Pty Ltd* (supra). In that case the Court accepted the view expressed in *Amalgamated Metal Workers and Shipwrights Union of Western Australia & Anor v. State Energy Commission of Western Australia (1979) 59 WAIG 494 at 496* that the Commission is "in some respects an administrative body, in some respect [sic] a Court of Record and in some respects a legislative body". Having regard to the nature of the jurisdiction of the Commission with respect to relief for unfair dismissal from employment and for denied benefits under a contract of employment, I would have thought of all of the functions of the Commission its function in this regard above almost all others, bore the closest resemblance to the function of a traditional court of law. Whilst it may be, at least in respect of relief from unfair dismissal from employment, that the Commission creates new rights rather than enforces existing rights, proceedings associated with this aspect of the jurisdiction have a great many of the hallmarks of proceedings before a court of law. Normally relief is granted only on the basis of information presented by the respective parties and after a hearing involving adversarial procedures. Furthermore, the outcome of the proceedings depends to a significant extent on the ascertainment of the existing rights and liabilities of the parties. Those provisions of the Industrial Relations Act 1979 which enable the Commission in granting relief to go outside the specific claims and the specific subject matter of the claim rarely, if ever, have any application in proceedings of this nature. As is the case for the New South Wales Industrial Relations Commission, the Commission in such matters has the power to make a final and binding order determining the outcome of the matters in issue which is more like an order issued by the traditional courts than by a traditional arbitration tribunal. The fact that the order might not be immediately enforceable, in that in order to levy execution or otherwise deal with non compliance with an order requires an order of the Industrial Magistrates Court, that does not take

away the fact that the orders issued by the Commission are final and binding and determinative of the issues between the parties.

In my view, the nature of the jurisdiction and the manner by which the Commission is required to exercise its jurisdiction with respect to claims for relief arising out of unfair dismissal from employment and the denial of benefits under a contract of employment is such that the Commission, in the exercise of that jurisdiction, is to be taken as a court for the purposes of section 440D of the Corporations Law. This conclusion is supported by reference to previous decisions of the Commission. The Full Bench of the Commission in *Helm v. Hansley Holdings Pty Ltd (Under Administration)* (supra) held the Commission to be a "court" for the purposes of section 471B of the Corporations Law. Although that case might be distinguished on the basis that that decision was concerned with a different section of the Corporations Law, the facts and circumstances upon which it relied to find that the Commission was a court for the purposes of that section are indistinguishable for these purposes. There are other decisions of the Commission to the same effect. Also in *Rokita v. Jay Brock Pty Ltd t/a Drake Brockman First National Real Estate* (supra) the Commission was held to be a court for the purposes of section 471B of the Corporations Law, essentially for the same reasons as in *Helm v. Hansley Holdings Pty Ltd (Under Administration)* (supra). Furthermore, in *Walden v. Hansley Holdings Pty Ltd T/a GIS Engineering (1998) 78 WAIG 3370*, the Commission was held to be a court for the purposes of section 440D at least when exercising jurisdiction of the kind now in question. The decision of the Australian Industrial Relations Commission in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v. Sands and McDougall (Aust) Pty Ltd*, (supra) to which counsel for the Applicants referred, and from which it might reasonably be inferred that the Australian Industrial Relations Commission considered that the provisions of section 440D of the Corporations Law did not apply to proceedings before it, and did not directly deal with the matter, at least in its published reasons. It can only be inferred that the Commission took the view that the section did not apply. On the other hand, in *Foxcroft v. The Ink Group Pty Ltd (1994) 12 ACLC 1063* it appears to have been accepted before the Federal Court that the provisions of the section did apply to proceedings before the Australian Industrial Relations Commission. The proceedings in those cases were unlike those now in question. Furthermore, in many respects the structure and powers of the Australian Industrial Relations Commission are significantly different from those of the Western Australian Industrial Relations Commission. Where there is conflict between interstate decisions and decisions of courts and tribunals in this State clearly the Commission should follow the latter.

For the foregoing reasons, I hold that the Commission is a court for the purposes of section 440D of the Corporations Law. It follows that the proceedings associated with each of these applications insofar as they are directed towards Pipunya Pty Ltd cannot proceed further by virtue of section 440D of the Corporations Law. The Administrator has declined to give his written consent for the proceedings to proceed further and it is apparent that leave has not been sought nor therefore granted from an appropriate court for the proceedings to proceed in the absence of such consent.

Appearances: Mr T H Caspersz appeared on behalf of the Applicant.

Mr R E Keen appeared on behalf of the Administrator and the first named Respondent.

Mrs A Dowley appeared on behalf of the second named Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Andrew Richardson

and

Pipunya Pty Ltd & Anor

No. 254 of 1999

Sandra Richardson

and

Pipunya Pty Ltd & Anor.

No. 255 of 1999.

20 April 1999.

Minutes of Proposed Order.

HAVING heard Mr T H Caspersz on behalf of the Applicant and Mr R E Keen on behalf of the Administrator and the first named Respondent and Mrs A Dowley on behalf of the second named Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the proceedings against Pipunya Pty Ltd be stayed unless and until one or other of the conditions precedent specified in section 440D of the Corporations Law is satisfied.

[L.S.] Senior Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Peter James Shimmings

and

Alzheimer's Disease and Related Disorders Association of WA (Inc) t/a Alzheimer's Association WA.

No. 1694 of 1996 and No 1695 of 1996.

CHIEF COMMISSIONER W.S. COLEMAN.

15 April 1999.

Order.

HAVING heard Mr Schapper on behalf of the applicant and Mr Papadopoulos on behalf of the respondent;

NOW THEREFORE, With the consent of the parties the Commission pursuant to powers conferred under the Industrial Relations Act 1979 hereby—

1. Declares that Peter James Shimmings was unfairly dismissed from employment with the respondent and;
2. Order that the respondent pays to Peter James Shimmings by way of compensation the sum agree to between the parties; and that this payment be made to Peter James Shimmings no later than Friday 9th April.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Bruce Thomas

and

Applied Chemicals Pty Ltd.

No. 589 of 1998.

COMMISSIONER A.R. BEECH.

11 March 1999.

Reasons for Decision.

Mr Thomas was employed by the respondent for approximately 23 months prior to his dismissal. He was employed as a Service Technician for the respondent's Tom Price operations. The respondent manufactures water based cleaning products throughout Australia. He was dismissed by reason of redundancy and claims that his dismissal was unfair.

The decided cases clearly show that, if an employee is dismissed by reason of redundancy, the employee is only able to challenge the dismissal on two grounds. The first ground is to show that the reason for the redundancy is not genuine. That is, there was not a loss of contracts, or not a loss of business, or not a restructure of the business and so forth. If the redundancy was, however, genuine, then the employee must show that someone else should have been made redundant in preference to him. Since the advent of the *Minimum Conditions of Employment Act, 1993*, an employee has implied into his or her contract of employment a provision which entitles the employee to be consulted by the employer as soon as the decision is made to make the position redundant. The discussion is to cover the likely effects of the employer's decision to make the position redundant and any alternatives which are available to the employer to minimise the effect of the decision on that employee.

On the evidence before the Commission, Mr Thomas was, indeed, made redundant. Mr Thomas' duties involved the servicing of pumps and equipment, new installations and liaising with clients at Dampier, Tom Price and Paraburdoo. On Mr Thomas' own evidence, the contract at Paraburdoo was lost. There was a reduction of work at Tom Price as chemical sales fell. Mr Thomas admitted that he may not have worked to full capacity other than during breakdowns. Indeed, he admitted informing a representative of Hamersley Iron that, if Hamersley Iron did not buy more chemicals, he would not be able to service the company properly because his employer would put him elsewhere.

This evidence supports the evidence brought by the respondent. Mr Power, the General Manager for Sales in Western Australia spoke of the changes which occurred in the respondent's operations. A fitter, who had been employed by the respondent as a lubrication serviceman based at Tom Price, returned to Queensland. The respondent made an attempt to replace him, but a subsequent examination of the hours involved meant that the position would not be a full time position. In the circumstances, the respondent decided to amalgamate the position occupied by Mr Thomas and the now vacant position which had been performed by the fitter who had returned to Queensland. Both positions would be made redundant and effectively combined into a new position.

Mr Thomas effectively admitted that both positions had been combined into a new position. He believes, however, that was an excuse for his dismissal. He suggests that the real reason for his termination was his "stirring" in the past. However, there is simply no evidence to support Mr Thomas' claim that he was seen by the respondent as "a stirrer" and that it then sought to get rid of him. Certainly, he wrote some letters of complaint but these were some time prior to the events which led to his dismissal. If there had not been the fall off in sales and the departure of the fitter to Queensland, circumstances might have lent a greater credibility to Mr Thomas' assertion. As it is, the evidence before the Commission permits only the conclusion that the redundancy was genuine.

Furthermore, Mr Thomas is not a fitter by training and would not have been able to do the work of the fitter without further training. Even then, he would not have held the trade qualification which was, apparently, seen as important in the combined position. It is entirely believable that the respondent would prefer to have a qualified fitter in that position rather than a person who would have required further training. In the circumstances I cannot conclude that Mr Thomas has shown that the redundancy which occurred was a device to get rid of him, nor has he been able to show that someone other than him should have been made redundant.

The manner in which his dismissal occurred is, however, a different matter. On the evidence of Mr Power, the decision to make the position redundant occurred in late January 1998. The dismissal occurred on 24 February 1998 at Tom Price. Mr Power flew to Tom Price for the purpose of dismissing Mr Thomas, although he may have had other reasons for travelling to Tom Price at some time. Certainly Mr Thomas was unaware of his impending dismissal. He was called in and informed of the redundancy of the position and his dismissal from the company. I am quite satisfied that there was not the consultation between the respondent and Mr Thomas which is required by the *Minimum Conditions of Employment Act, 1993*. In part, that conclusion is apparent because Mr Power had already decided that there were no other positions available for Mr Thomas with the respondent. Thus, on the weekend prior to the dismissal, the respondent advertised two vacant positions in the local newspaper for a Trainee Customer Service Representative and a Production/Distribution Employee. Mr Power found it difficult to accept that Mr Thomas would be willing to discuss alternative positions at a lower salary, including the fact that the positions were based in Perth. He therefore did not even mention these positions to Mr Thomas. Although I accept that Mr Power had his reasons, the fact remains that Mr Thomas was not consulted on any views he might have had. As far as Mr Thomas was concerned, he was unaware of his dismissal until the redundancy was put into effect. He was not informed of what positions might have been available in the company and was not given any opportunity at all to indicate whether he believed he was suitable or even interested in them.

Although Mr Power indicated that he had not presented Mr Thomas with a *fait accompli*, I find to the contrary. While there may have been some discussion regarding the structure of any redundancy package, and Mr Thomas disputes that there was, the decision that Mr Thomas would be dismissed as a result of the redundancy was certainly presented to Mr Thomas as a *fait accompli*.

It is also the fact that, half way through the discussion between Mr Thomas and Mr Power, the replacement employee who had been taken on in the combined position, walked in. Mr Power introduced the new employee to Mr Thomas. Given that Mr Thomas was in the process of coming to grips with having been dismissed, to meet his replacement so suddenly and directly was rather unfortunate. Mr Power's evidence, however, is that he was unaware that the replacement employee was in Tom Price on that day. Mr Power's evidence is that he was as surprised as Mr Thomas when the new employee walked in. Although I think Mr Thomas doubts Mr Power's evidence in this regard, I am prepared to accept Mr Power's evidence and find that the attendance of the new employee was more by way of coincidence than by design on the part of the respondent. I nevertheless accept, however, that the circumstance added to Mr Thomas' unhappy situation.

The difficulty which Mr Thomas now faces is that the evidence does not permit the conclusion that there was, indeed, an alternative position open to him following his redundancy. Although he gave evidence that he may have given consideration to one of the two positions which had been advertised in Perth, not only is he quite frank in admitting that he prefers to stay in the North West and not come to Perth, but the evidence of Mr Power, evidence which was not in any sense attacked, is that the two positions in Perth did not themselves eventuate. The evidence of Mr Power is that, in fact, the first position was not filled because the tender upon which the position was based was not successful. As to the second position, it was eventually let to contract and was not filled. Thus, even if Mr Thomas had persuaded the respondent to offer him one of those two positions, his employment would not have continued for more than one or two weeks. Mr Thomas was unable to show that there was any other position available in the company which he could have validly performed. In the circumstances of this case, the lack of discussion is not

sufficient to make the dismissal of Mr Thomas harsh, oppressive or unfair.

Those circumstances also include Mr Thomas' final termination payments. They are not suggested to be inadequate. I find that he was given two weeks' notice, four weeks' severance pay and a further four weeks' wages as a redundancy pay. While it is not clear that there is any difference between a payment which is called a "severance pay" and payment which is called a "redundancy pay", at least on the evidence in this case, the fact remains that Mr Thomas was paid eight weeks' wages in addition to two weeks' wages in lieu of notice. The period of notice is the minimum required pursuant to the relevant Federal legislation. Even if I were to hold that Mr Thomas ought to have been given one month's notice because his letter of appointment required one month's notice to be given by him if he resigned, in fairness, the additional two weeks would be offset against the severance and redundancy payments made to him. The reason that they would be offset is that the severance and redundancy payments are not themselves entitlements under Mr Thomas' contract. If, under his contract, he had been entitled to the four weeks' severance and four weeks' redundancy pay, then his argument that he should also have been given one month's notice would have had greater force. As it is, certainly by the standards set out in the Metal Trades (General) Award 1966, an award which is not inappropriate to use as a guide for a person in Mr Thomas' position, the payments made to Mr Thomas were in excess of his entitlements and thus, in fairness, any shortfall in the period of notice should be offset against the payments made to him that were not part of his contract of employment.

Thus, although there is room for some criticism of the manner in which the respondent decided that Mr Thomas would be dismissed, as distinct from the decision to make his position redundant, I am not satisfied on the evidence before the Commission that there was an unfairness such that the Commission should intervene in this matter. Accordingly, the application will be dismissed.

Order accordingly.

Appearances: Mr O. Moon on behalf of the applicant.

Mr L. Pilgrim on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Bruce Thomas

and

Applied Chemicals Pty Ltd.

No. 589 of 1998.

11 March 1999.

Order.

HAVING heard Mr O. Moon on behalf of the applicant and Mr L. Pilgrim 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 dismissed.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Norae Thomas

and

Andrew Grove, William Grove, Alison Smith,
and John Grove trading as The Indian Ocean Hotel.

No. 1672 of 1998.

COMMISSIONER S J KENNER.

16 April 1999.

Reasons for Decision.

THE COMMISSIONER: At all material times the applicant was employed by the respondent as a receptionist at the respondent's hotel in Scarborough, Western Australia. The applicant commenced employment on or about 25 February 1998 and ceased employment on or about 14 August 1998. The applicant has commenced these proceedings pursuant to section 29(1)(b)(i) of the Industrial Relations Act, 1979 ("the Act") alleging that the respondent dismissed her harshly, oppressively or unfairly. The applicant does not seek reinstatement or re-employment by this application, but seeks compensation instead.

The respondent contested the applicant's claim and denied that the applicant had been dismissed at all, to attract the jurisdiction of the Commission.

Leave was granted to amend the name of the respondent to reflect the proper name, the Commission being satisfied it was a case of misdescription only.

Background

There was considerable common ground between the parties in this application. The parties filed an agreed statement of facts in relation to non-contentious issues that provided as follows—

1. The applicant commenced employment with the respondent on 25 February 1998 on a casual basis.
2. The applicant was employed as a receptionist and performed other general clerical duties associated with the arrival and departure of guests from the respondent's business.
3. The applicant became a permanent part-time employee on 25 April 1998.
4. Between 25 April 1998 and 10 August 1998 the applicant worked an average of 36.7 hours per week.
5. During the entire period of employment the applicant's conditions of employment were subject to the Clerks (Hotels, Motels and Clubs) Award.
6. The performance of the applicant is not an issue in relation to the dismissal of the applicant.
7. On 12 July 1998 the applicant gave notice to cease her employment on 6 August 1998 in anticipation of joining the WA Police Force.
8. The applicant continued working beyond the anticipated date of resignation. The circumstances as to why this occurred are in dispute between the parties as is the status of the applicant's employment i.e. casual or permanent from this date on.
9. On Friday 14 August 1998 a letter was left by the respondent for the applicant regarding some performance issues, which the respondent wished to discuss with the applicant.
10. Suzanne Hart, on behalf of the respondent, discussed the contents of the letter referred to at point nine with the applicant on the afternoon of 14 August 1998.
11. The applicant's last day of work was on 14 August 1998.

The Issues

In short, the issues arising in these proceedings are first, what was the status of the applicant's employment from approximately in or about mid August 1998 and secondly, did the events which transpired on the afternoon of 14 August 1998, constitute a termination of the employment at the initiative of the respondent. A further issue arises such that if the

circumstances of the events on the afternoon of 14 August 1998 did not constitute in law a dismissal, did subsequent correspondence from the respondent to the applicant dated 18 August 1998 constitute a dismissal. Furthermore, if there was a dismissal, was it harsh, oppressive or unfair.

Given the extent of the common ground as represented by the statement of agreed facts in this matter, it is only necessary for me to consider the factual circumstances relating to these specific issues.

The Employment Status

The applicant gave evidence that on or about 12 July 1998 she wrote a letter to the respondent indicating that she intended to undertake a course for the purposes of making application to join the WA Police Force. That letter was exhibit A1 in these proceedings. The letter indicates that the applicant had enrolled in a course involving Monday and Thursday nights. The letter further indicates that the applicant would not be able to maintain a full-time job as well as undertake the course of study and look after her family. The applicant testified that the course she was proposing to undertake would commence on approximately 24 August 1998. The applicant said that she intended her resignation to take effect on or about 6 August 1998. However, the applicant said that despite her intended resignation date, following discussions with Mr Grove and Ms Hart of the respondent, it was agreed that she would remain employed by the respondent for a further 5 or 6 weeks in order to cover the absence of Ms Hart whilst she was overseas on holidays.

The applicant further testified that on or about 10 August 1998, at a regular meeting involving the respondent's staff, the applicant discussed with Ms Hart the benefits of becoming a casual employee, in view of the changes to the employment arrangements foreshadowed by the applicant's letter of 12 July 1998. The applicant said that as a result of these discussions with Ms Hart, she was going to think about becoming a casual employee and get back to the Ms Hart with her decision. The applicant said that following this meeting, she never did get back to Ms Hart to advise her of what her decision was about reverting to casual employment status. Accordingly, it was the applicant's evidence that as at the date of her dismissal, she was still a permanent part-time employee.

The applicant denied in cross-examination that she told an employee of the respondent, Mr Anderson, in or about the second week of August 1998, that she was then employed as a casual employee by the respondent.

Mr Anderson, a night porter for the respondent, was called to give evidence. He testified that at the end of June 1998 he went on annual leave and returned at about the end of July 1998. He said that on his return from annual leave, he saw the applicant and she asked him whether he had heard that she was resigning from the respondent to join the WA Police Force. Mr Anderson gave evidence that the applicant told him that she would be finishing employment within about three weeks of that conversation. Thereafter, Mr Anderson noticed that the applicant was still at work beyond this period of time and queried this with the applicant. He specifically asked the applicant why she was still at work and he testified that the applicant told him that she did finish but was then employed on a casual basis. Mr Anderson was emphatic when giving this evidence, which evidence not shaken in cross-examination.

In relation to this issue, Ms Hart gave evidence that when the respondent received the applicant's letter dated 12 July 1998, indicating that she intended to resign, a meeting took place on 10 August 1998, at which the applicant's employment was discussed. Ms Hart said that it was not possible to reduce the applicant's working hours as a part-time employee, as the applicant had requested, as that would require the respondent to employ another part-time employee to cover the work requirements. Following this meeting, Ms Hart testified that the applicant accompanied her to her office and she explained to the applicant the benefits of being employed on a casual basis. Ms Hart said that the following day, the applicant came to see her and said that she did want to be employed on a casual basis, as they had discussed the day previously. Ms Hart also confirmed that in the discussions on 10 August 1998, the applicant agreed to fill in for her whilst she was overseas on holidays.

For the respondent Mr Grove also gave evidence on this point. He said that the applicant did resign her permanent position and took up the respondent's offer of casual employment to fill in for Ms Hart whilst she was on annual leave, which employment was on a casual basis for approximately 24 hours per week, as requested by the applicant.

There is a conflict in the evidence between the applicant and the respondent on this issue. Having heard the witnesses give their evidence in the proceedings, I prefer the evidence of the respondent's witnesses. I have no reason to doubt the evidence given by Mr Anderson, although he remained an employee of the respondent at the time he gave the evidence and accordingly, may not be regarded as totally independent. His evidence of the conversations he had with the applicant about her employment status was not, as I have already observed, in any way shaken and I accept it. Furthermore, the respondent's contention on this issue was supported by other documentary evidence tendered in the proceedings before the Commission. In this regard, I refer to the letter of dismissal from Ms Hart to the applicant dated 18 August 1998 (exhibit A3), a letter dated 18 August 1998 from the respondent's payroll officer to the applicant (exhibit A6), and a letter dated 26 August 1998 from Mr Grove to the applicant (exhibit A2). I am far from satisfied that the respondent prepared these letters in an attempt to justify its position after the event, as suggested by the agent for the applicant.

I therefore conclude that from on or about 11 August 1998, the respondent engaged the applicant as a casual employee. That employment was proposed to be for a period of approximately six weeks with the applicant to work approximately 24 hours per week. I now turn to consider the circumstances of the termination of the applicant's employment.

The Dismissal

In relation to this issue, the applicant said that when she arrived for work on or about 14 August 1998 she received a letter from Ms Hart of the same date. The letter (exhibit A4) referred to various matters discussed at a recent reception meeting with the respondent's reception staff. Those matters related to the need for adequate information to be recorded on guest reservation slips and some problems experienced with bookings. Of particular relevance to these proceedings, is the second last paragraph of the letter that provided as follows—

> *"I think you can be a good worker Norae but I have noticed that you seem to be less enthusiastic to what you used to be. I am not quite sure if this is because you no longer want to be here and want to get into the police force as soon as possible or that you are finding it's quite tough balancing a family life and a work life together."*

The applicant testified that when she received this letter she was upset with the reference in the above paragraph to her family life. She said that at no stage did she discuss her family affairs at work and felt that this was an unwarranted intrusion by the respondent into her private affairs. There had not been a problem expressed previously by the respondent, in relation to any conflict between her family and work responsibilities. She said that on receiving the letter she saw Ms Hart and asked to speak with her about its contents. Apparently, Ms Hart was at that time engaged in a management meeting and was not immediately available to discuss the letter. Some thirty minutes or thereabouts later, a meeting took place between the applicant and Ms Hart in an office behind the respondent's reception area. The applicant said that the initial part of the meeting concerned the matters raised by the respondent about reception and the bookings etc. The discussion then turned to the second last paragraph, concerning the reference to the applicant's personal life. The applicant testified that she was upset at the inference that her family life was being questioned in the workplace. On the applicant's evidence, the discussion between her and Ms Hart on this issue became heated. She said that when the discussion reached the point that she thought was the end of the meeting, she left the room to return to her reception duties. However, the applicant testified that Ms Hart came out of the office, saying that she had not finished the discussions with her and asked her to go back into the office. The applicant said that she and Ms Hart then went over the matters again that were earlier discussed. The discussion was still heated and loud voices were used.

At this point the applicant once again left the office, following which Ms Hart asked the applicant to return again. Following further heated argument, the applicant testified that Ms Hart told her in words to the effect *"you can finish your shift tonight, but don't bother coming back, that's the end of your employment"*. The applicant testified that she told Ms Hart that as she was a permanent employee, the respondent couldn't dismiss her so easily. The applicant said that Ms Hart told her that she was a casual employee and to collect her things and leave. The applicant's evidence was that she had no doubt in her mind that the effect of this discussion was that the respondent was dismissing her.

Ms Kusic was called on behalf of the applicant and she testified that she heard the argument between the applicant and Ms Hart, as she was working at the reception desk at the time. She said that both the applicant and Ms Hart were using loud voices. She said that the voices were so loud that customers of the respondent in the reception area could hear them. And the end of the meeting, Ms Kusic said that the applicant came out of the office and Ms Hart said words something like *"get out of here"*. Ms Kusic said that the applicant asked her whether she had heard that, to which she replied in the affirmative, and the applicant then left the respondent's premises. I pause to observe that Ms Kusic said that she prepared a statement about these matters on the day of the incident, however somewhat surprisingly, the statement was not produced in evidence. I do not however, draw any inferences adverse to Ms Kusic from this failure.

In cross-examination, Ms Kusic said that she interpreted the words used by Ms Hart as words of dismissal from the way in which are they were uttered.

The respondent's version of the events, from the evidence of Ms Hart, was somewhat different in relation to the content of the discussion itself. According to Ms Hart, as soon as the meeting started the applicant was upset with the reference to her family life in the letter of 14 August 1998 and immediately expressed her anger about this. Ms Hart also said that during the conversation, the applicant was critical of other staff members of the respondent, including Mr Grove, one of the owners of the respondent, and Ms Hart herself. She said that the applicant also raised with Ms Hart general dissatisfaction from other staff members as to Ms Hart's management style. Ms Hart testified that this upset her as in her view, the meeting was not to discuss her own performance. According to Ms Hart, both her and the applicant were very upset during the course of this meeting. At the conclusion of the meeting, Ms Hart said that the applicant was upset and she told the applicant to "get out and leave". Ms Hart denied that she told the applicant that her employment was terminated, despite being asked this by the applicant in the meeting.

The applicant was then rostered to work the next day, being the Saturday, commencing in the afternoon. The applicant did not to attend for work as rostered. By letter dated 18 August 1998, Ms Hart wrote to the applicant advising that because of the applicant's unacceptable behaviour on the previous Friday 14 August 1998, her services would no longer be required as a casual employee. Ms Hart expanded on this in her evidence to include reference to the applicant not attending for duty the next day as a reason for termination. I pause to observe that there is no reference in the letter to the applicant allegedly abandoning her employment with the respondent. Ms Hart testified that whilst the respondent would normally attempt to contact an employee who did not attend for rostered duty, in the applicant's case, as they had had an argument on the previous Friday, Ms Hart thought that the applicant may not be coming back to work.

Mr Grove testified that the meeting between the applicant and Ms Hart was very heated. He said that he left them to it "to sort the matter out" and he did not intervene, despite being an owner of the respondent. Mr Grove also confirmed the evidence of Ms Kusic, that the applicant was told to "get out, go on leave" by Ms Hart. In cross-examination, he conceded that these words, in the context of the meeting that he overheard, could be construed as words of dismissal.

As I have already noted above, various other documents also refer to the termination of the applicant's employment by the respondent. Ms Hart confirmed in cross-examination, that she considered the applicant's behaviour in the meeting on the Friday, as sufficient to justify dismissal for misconduct. She said that it was her decision to dismiss the applicant.

In terms of my findings in relation to this issue, I am satisfied on the evidence and find that as a result of the receipt by the applicant of exhibit A4, a meeting took place between the applicant and Ms Hart to discuss its contents. I accept the evidence that the applicant was upset with the reference in exhibit A4 to her family life and furthermore, that there had been apparently, no earlier adverse comment in relation to the applicant's employment, specifically related to her family responsibilities. To this extent, raising such a matter in the letter without previous reference to it may have been, with hindsight, inappropriate. I also am satisfied on the evidence and find that the meeting was indeed very heated, with both the applicant and Ms Hart shouting at one another. I am far from satisfied however, that the altercation between the two of them was in any way one-sided. I accept that the applicant may have queried certain aspects of Ms Hart's work performance which no doubt upset her. That was an error of judgement by the applicant, as the meeting was convened at the applicant's request to discuss the content of the letter as it related to her and not that of Ms Hart.

At the conclusion of the meeting, I am satisfied on the evidence that the applicant was told by Ms Hart in words to the effect *"get out, just leave"* and this was said in a manner that could convey the impression that the applicant's services were no longer required by the respondent. This is consistent with the evidence given by Ms Kusic as to this issue. I do not accept on the evidence that Ms Hart's words were to the effect that the applicant should merely go home for the rest of that shift only. This was clearly not what was said and the words used must been considered in the context of the tone of the meeting generally. I return to this issue below when dealing with my conclusions in relation to the matter. I further find that the applicant was not told by Ms Hart in the meeting that she was not dismissed.

I am also satisfied on the evidence that the principal reason given by the respondent for the termination of the applicant's employment, was the meeting that took place on Friday 14 August 1998.

Before I turn to my conclusions in this matter, I make some observations in relation to the relevant principles.

Principles

It is trite to observe that in order for the Commission's jurisdiction to be attracted in this matter, the applicant must have been dismissed by the respondent: *MTT v Gersdorf* (1981) 61 WAIG 661. In a case where plain or unambiguous words of resignation or dismissal are used, generally speaking, resort should not be had to surrounding circumstances to determine what a reasonable employer or employee would have understood the words to mean. However, it is established that if the words used are ambiguous, then resort may be had to circumstances surrounding the events as they unfolded and the understanding of the parties as to the meaning of what was actually said: *BG Gale Ltd v Gilbert* (1978) ICR 1149 at 1152-1153. In *Gale* the English Employment Appeal Tribunal held that when considering words of dismissal that are directed to an employee, the approach should be to ascertain what would be understood by an ordinary reasonable employee in the circumstances.

If of course there was a dismissal in this case, then it is for the applicant to establish whether the dismissal was harsh, oppressive or unfair, in the sense that the employer has exercised its right to dismiss, such as to amount to an abuse of that right: *Miles v The Federated Miscellaneous Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch* (1985) 65 WAIG 385. Furthermore, in matters such as these, the Commission is required to consider a dismissal objectively and not to assume the functions of the manager of the respondent. The statutory provisions are to be applied in a common sense manner: *Gibson v Bosmac* (1995) 60 IR 1. It has also been said that the denial to an applicant of procedural fairness, can be a most important factor in determining whether overall, a dismissal is harsh, oppressive, or unfair: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891.

Furthermore, on the relevant authorities, an employee who is truly in law a casual employee, may still be unfairly dismissed and indeed, may be reinstated: *Ryde-Eastwood Leagues Club*

v Taylor (1994) 56 IR 385; *Serco (Australia Pty Ltd) v Moreno* (1996) 76 WAIG 939-940; *Swan Yacht Club v Leanne Bramwell* (1998) 78 WAIG 579.

I turn now to my conclusions in this matter.

Conclusions

I have already found that as at the date of the termination of the applicant's employment, the respondent engaged the applicant as a casual employee.

As I have earlier mentioned, the question that arises is whether, as a result of the meeting that took place between the applicant and Ms Hart on 14 August 1998, the applicant's employment was terminated by the respondent, or the applicant abandoned her employment. Secondly, that what was the effect of the letter from Ms Hart dated 18 August 1998 (exhibit A3) in terms of the applicant's contract of employment?

In my opinion, the respondent dismissed the applicant and she did not abandon her employment, as argued by the agent for the respondent. From the evidence of the applicant, Ms Hart and Ms Kusic, in my view, a reasonable employee could clearly have construed the words used by Ms Hart, in the circumstances of the meeting, as words of dismissal. In my view, this places the non-attendance of the applicant at work on the next working day in context. There appeared to be no reason why the applicant failed to attend for duty on the following Saturday, other than her understanding that she had been dismissed and was no longer required by the respondent. Moreover, the respondent did not attempt to follow the applicant up on her non-attendance on the Saturday, which, on the uncontroverted evidence, would have been the usual practice. In any event however, as an alternative, even if the words used by Ms Hart in the course of the meeting were to be regarded as ambiguous, the surrounding circumstances, in particular the terms of exhibit A3, put the matter beyond doubt in my opinion. Taken with the evidence of Ms Hart, who testified that she did dismiss the applicant primarily as a result of the meeting on 14 August 1998, her letter makes it clear that the respondent dismissed the applicant. As I have already noted, this is supported by other correspondence from the respondent to the applicant.

My conclusion, that the respondent dismissed the applicant, is not of course the end of the matter. The onus is on the applicant to establish that in all the circumstances, the dismissal was harsh, oppressive or unfair. That is, whether the applicant was in all the circumstances denied "a fair go all around". There is no doubt in my mind from the evidence, that the real reason that Ms Hart dismissed the applicant was Ms Hart's perceptions of her conduct in the meeting on 14 August 1998. I have already found on the evidence that the discussion between both the applicant and Ms Hart was very heated. I do not consider however from all of the evidence, as I have mentioned already, that the verbal altercation between them was the fault of the applicant alone. There is no doubt that both the applicant and Ms Hart were very upset with one another during the course of that meeting. I have already observed that some of the issues raised by the applicant lacked judgement. However, that is a different matter to constituting grounds for dismissal.

I am far from persuaded that the applicant's conduct amounted to insubordination or involved abusive language in any sense. Nor was there any evidence before me that this meeting was the result of a pattern of conduct by the applicant. Moreover, it was apparent from the evidence that there was no suggestion that the applicant had other than an unblemished record of employment with the respondent. This was, at least in large part, confirmed in the agreed statement of facts filed in this matter, in that the performance of the applicant was not an issue in relation to the applicant's dismissal.

On the evidence before me, the applicant clearly had no opportunity of responding to the proposed course of action by the respondent to terminate her employment by the letter of 18 August 1998. There was no opportunity afforded to the applicant to put her version of the events as to the course of the meeting and moreover, no real warning to her that as a consequence of the meeting, her employment either could be or would be terminated. Overall, I am not satisfied that the applicant's conduct during the course of the meeting on 14 August 1998, would of itself justify dismissal, in all of the circumstances.

For all of these reasons, I consider the applicant's dismissal to have been harsh, oppressive and unfair.

I now turn to consider the issue of relief.

Remedy

The applicant does not seek reinstatement on the grounds that she commenced other employment on or about 15 February 1999, albeit that employment was subject to a three-month probation term. Instead, the applicant seeks compensation for the loss and injury she says that she sustained by reason of the unfair dismissal. In support of her application for compensation for loss and injury, the applicant tendered a schedule of loss (exhibit A1), the content of which was not objected to by the agent for the respondent. The total financial loss claimed by the applicant was the sum of $8,156.40. This amount comprised $10,591.62, which represented wages that would have been paid from the date of dismissal to 15 February 1999, capped to the maximum compensation available under the Act of 26 weeks at the applicant's normal weekly wage. From this amount, was deducted wages earned by the applicant in the period 14 December 1998 to 31 January 1999, in the amount of $2,435.22. The applicant also argued that she had suffered hurt and humiliation as a consequence of the dismissal. The applicant also gave evidence that she had taken steps to mitigate her loss which steps I find to be reasonable: *Growers Market Butchers v Backman* (unreported Full Bench WAIRC, 15 April 1999).

It is trite to observe that the assessment of compensation by the Commission for loss and injury established on the evidence, is not an exact science. The principles to be applied in the assessment of compensation pursuant to section 23A of the Act, have been the subject of a number of decisions of the Full Bench of the Commission: *Gilmore v Cecil Brothers FDR Pty Ltd* (1996) 76 WAIG 4434; *Katina Pty Ltd t/as Kato Concrete Co v Western Australia Builders' Labourers, Painters and Plasterers Union of Workers* (1997) 77 WAIG 2863; *Smith v CDM Australia Pty Ltd* (1997) 78 WAIG 307; *Simons v Ismail Holdings Pty Ltd t/as Envelope Specialists* (1998) 78 WAIG 2332. Most recently, the matter was considered by the Full Bench in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8. I apply the principles set out in *Bogunovich* for the purposes of assessing compensation in this matter.

In my reasons for decision in *Bogunovich* and more recently in *Scott v Consolidated Paper Industries (WA) Pty Ltd* (1999) 79 WAIG 601, I made the observation that an unfairly dismissed employee has no automatic entitlement to compensation for the loss of wages or salary from the date of dismissal to the date of the hearing of the application. This recognises that this may be the ultimate outcome, in view of the findings by the Commission in relation to loss and/or injury. A relevant consideration in the Commission making findings as to loss, is the prospect of an on-going employment relationship, whether by the unfairly dismissed employee being fairly dismissed in any event, alternatively, the employment coming to an end as a result of other circumstances. Having made a finding in relation to this matter, the Commission then assesses compensation under section 23A(1)(ba) of the Act, having regard to s 26 of the Act.

Given that the applicant now has other employment and did not seek reinstatement, I am of the view that in all the circumstances of this case, reinstatement or re-employment of the applicant would be impracticable for the purposes of relief. On the evidence, as I have noted I am satisfied and find that the arrangements entered into between the applicant and the respondent, in relation to the applicant's on-going employment after she became a casual employee, did not entitle the applicant to an expectation of employment beyond a period of approximately 6 weeks from in or about mid August 1998. It was clear on the evidence, that the applicant would, from in or about this time, occupy a position that in effect, was filling in for the absence of Ms Hart whilst she was overseas on holidays.

Thus in my opinion, it is open for me to find on the evidence and I do find, that it was more likely than not, that the applicant's regular employment would not have continued beyond this time: *Malec v JC Hutton Pty Ltd* 92 ALR 545. Even if it was to continue in some fashion beyond this time, then the evidence suggests that it would have done so on an "as required" basis by the respondent. Having regard to this, in my opinion, an appropriate and fair award of compensation,

having regard to the equity and good conscience of the matter under section 26 of the Act, would be the sum of $1,900.00. This represents an approximate amount of wages for the applicant over this 6 week period, taking the applicant's ordinary working hours of 24 per week as they were projected to be for this period, at the casual rate of pay of $13.3156 per hour.

As to the claim for injury, whilst it is established that compensation for injury is available in this jurisdiction, restraint is required in considering this matter as there is an element of distress in every termination: *Burazin v Blacktown City Guardian* (1996) 142 ALR 144. There needs to be in my opinion, cogent evidence of injury to sustain such a claim. There was no such evidence in this matter in my view.

Minutes of proposed order now issue to give effect to these reasons for decision.

APPEARANCES: Mr R Dhue as agent appeared on behalf of the applicant

Ms S Laferla as agent appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Norae Thomas

and

Andrew Grove, William Grove, Alison Smith, and John Grove trading as The Indian Ocean Hotel.

No. 1672 of 1998.

COMMISSIONER S J KENNER.

23 April 1999.

Order.

HAVING heard Mr R Dhue as agent on behalf of the applicant and Ms S Laferla as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) ORDERS that the name of the respondent in the notice of application and the notice of answer and counter proposal be deleted and in lieu thereof be inserted "Andrew Grove, William Grove, Alison Smith and John Grove trading as the Indian Ocean Hotel".

(2) DECLARES that the applicant was harshly, oppressively and unfairly dismissed from her employment by the respondent on or about 14 August 1998 alternatively 18 August 1998.

(3) DECLARES that reinstatement or re-employment of the applicant is impracticable.

(4) ORDERS the respondent to pay to the applicant within 21 days of the date of this order the sum of $1,900.00 less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

David Robert Warren

and

Altronic Distributors Pty Ltd.

No. 968 of 1998.

COMMISSIONER P E SCOTT.

18 March 1999.

Reasons for Decision.

THE COMMISSIONER: The Applicant claims that he has been harshly, oppressively or unfairly dismissed from his employment with the Respondent. The Applicant says that this was a summary dismissal, that there was no proper investigation and that the allegations associated with his dismissal were not properly put to him prior to his dismissal.

The Respondent says that the reasons for dismissal are those set out in the letter of 2 June 1998 to the Applicant, save that point 3 of the letter is not a ground for dismissal. It says that the issues which arose were properly investigated and put to the Applicant for his response. The Respondent says that it was not a summary dismissal but that payments were made to the Applicant within a reasonable time after his dismissal, on the return by him of samples of product held in his custody. He was paid 2 weeks pay in lieu of notice and his annual leave entitlements.

The Commission has heard evidence from: the Applicant; Hans Groothuis, the Managing Director and shareholder of MASS Technologies Pty Ltd ("MASS"); Colin Frederick Deacon-Fobister, who at the time the Applicant commenced working in the wholesale division was Assistant Manager of wholesale sales; Jamie Francis Falzon currently the Respondent's Retail Manager; John (Jack) Michael O'Donnell, the owner and director of the Respondent; and Brian Douglas Sorensen, the Respondent's General Manager.

The evidence is that the Applicant commenced employment in the retail store associated with the Respondent's business in February 1994 as a shop assistant. In March 1995, he was appointed the Retail Manager. In June 1997, he took up a position as a sales representative within the Respondent's wholesale division. There was no evidence of any difficulties associated with the Applicant's employment until Tuesday, 26 May 1998. His employment was terminated by the Respondent on Friday, 29 May 1998.

The background to this application includes two particular matters. The first is that the Respondent has a pricing policy whereby there are a number of price levels called price codes. Price code 1 is said to be the standard retail price it charges for the goods it sells. Price code 5 is the lowest price code and this applies to customers of the Respondent who are purchasing large quantities and spending a significant amount of money with the Respondent each year. There are very few such customers. The computer system contains all of the price codes, and each regular customer is allocated a price code. When quoting prices to these customers or preparing invoices, the sales representative simply accesses the computer records and the allocated price code is automatically applied to the goods involved. Sales representatives have the ability to override this automatic price code allocation to match competitors prices, or to provide a better price in certain circumstances. There is dispute between the parties as to the extent of the sales representatives' power and discretion in reducing prices.

The second significant matter is that in around November 1997, the Applicant and Sorensen, on behalf of the Respondent, met with Groothius and another representative of MASS to discuss the future relationship between the Respondent as supplier and MASS as its customer. The Applicant says that as a result of that meeting, he was instructed to prepare a quotation for a range of products which MASS had indicated it would be purchasing on a regular basis, and in increasing quantities as its business grew. It is said that MASS had potential to be a significant customer of the Respondent. The Applicant prepared this quotation and gave it to Sorensen for his approval. The Applicant says he was instructed to prepare this quotation based on price code 5, ie the cheapest listed

prices. The Respondent says that the price code allocated to MASS and automatically applied through the computer was price code 3. The Applicant says that when he, as the sales representative allocated to deal with MASS, subsequently dealt with MASS, he applied the policy as he understood it, of applying a better price than that allocated if it was necessary to meet competitors' prices or to otherwise make the sale. He is also quite clear in his evidence that following the meeting between himself, Sorensen, Groothius and another person, that Sorensen told him to look after the customer (MASS) to ensure that it remained a customer. He says that no limit was ever placed on his discretion to provide a price lower than the price code allocated to the customer. The Respondent's witnesses have given evidence which is contrary to this, in that both Sorensen and Deacon-Fobister gave evidence of limits placed on the sales representatives' discretion in negotiating prices with customers. However, the limits which each says apply were different.

The Applicant's termination came about following the receipt by John (Jack) O'Donnell, of an anonymous letter alleging that an employee of the company was engaged in providing goods at low prices, or providing goods without invoices in return for favourable treatment. The letter was not the basis for the Applicant's dismissal, but it precipitated the investigation and discussions which lead to the dismissal. O'Donnell discussed this letter with Sorensen and they called in a number of people to discuss the matter with them including Deacon-Fobister. He was asked whether he was aware of any members of staff who had mechanical repairs done to their car. Deacon-Fobister said he was aware of an employee in the retail shop having mechanical repairs to his car at the premises of Hans Groothuis of MASS. The Applicant and John O'Donnell, the Managing Director's son, were called in to discuss whether they knew of any employees who were having vehicle repairs done by MASS. The Applicant says they were asked if anyone was trading stock for favours including mechanical repairs and they said no. O'Donnell gave evidence that he then called Phil Cannon, the Warehouse Manager and asked him about the part numbers for certain loud speakers which had gone missing a few weeks before and wondered if that matter was related to the allegations raised in the anonymous letter. He then went into Sorensen's office and called the Applicant in. He explained to the Applicant the situation regarding the missing speakers and that it may be part of the matters referred to in the anonymous letter. He asked the Applicant to visit MASS premises and see if the speakers were on the premises. The Applicant said that he would do so. He never made this visit as it was overtaken by other events.

O'Donnell then had printed out all sales transactions with MASS (Exhibit 10). O'Donnell says that he was a bit stunned to look through and see the low profit margins associated with these sales and that some sales were below cost. He called the Applicant in and asked him to explain the figures on the print out. There is conflict between the evidence of the witnesses about exactly what occurred. However, it is clear that O'Donnell and the Applicant discussed why the prices charged were so low. The Applicant says that O'Donnell asked him why the gross profit margin was 33 per cent, to which the Applicant says he responded that he was never given any indication of what profit margin he was to work to. The Applicant says that when he was told that MASS had been charged prices which gave a 33 per cent margin, Sorensen told him that a margin of 38 per cent was expected. The Applicant says he was asked for an explanation of why it was so low, and he cannot recall volunteering that it was because the customer was on price code 5 but says that if he was asked, he probably would have said that he quoted price code 5. He says that his answer to why the prices were so low was "I was given this customer and told to look after this customer".

The Applicant denies that, during this meeting, he twice denied charging less than price code 5.

He says that O'Donnell and Sorensen went through a couple of products and asked why the prices were so low, and he "pointed out that power supplies were a deleted item and the solder, which was a deleted item, and I was matching competitors' prices" (Transcript page 33a).

The Applicant says that O'Donnell had to leave, and said to him "It doesn't look good for you". He says that no allegations were put to him, nor did he have any understanding that he had done anything wrong. He says that—

> "… Well Brian (Sorensen) was still in the office and he didn't seem too pleased and I—- again, I reiterated that I was matching competitors' prices, they were concerned about why some prices were so low and I said, "Well, I've been matching competitive prices like I've been doing for 5 years, like I was instructed to do" and that was all that was said. The rest of the day nothing was said. On the Wednesday I was there and nothing was said."
>
> (Transcript page 18)

The Applicant gave evidence that in dealing with this customer, he would have overridden the computer price code allocation and his overriding of the computer was done in the manner he was shown by Deacon-Fobister at the beginning of his employment with the wholesale division.

O'Donnell's evidence conflicts with that of the Applicant. He says that in this meeting of 26 May 1998, the Applicant said that the customer was on price level 5 although O'Donnell asked Sorensen, who looked doubtful about that. O'Donnell says that he asked the Applicant again, "Are you sure that they are on price code 5?" to which the Applicant is alleged to have said, "I'm sure". He says that he asked the Applicant to explain the low margins and whether the customer had ever been charged less then price code 5. He says the Applicant replied, "No, definitely not". He asked the Applicant if he agreed that he was the sales representative responsible for the invoices for that customer and the Applicant said he was.

O'Donnell says that later in the day, at approximately 4.00pm, Sorensen called him. Sorensen told him that he had a further discussion with the Applicant and had pointed to specific transactions on the print out and that the Applicant had maintained to him that the customer had never been invoiced below price code 5. He asked the Applicant if he was trading goods for favours and the Applicant had denied this. The Applicant then told him that he had given the customer good prices to keep his business.

Sorensen's evidence was that on Tuesday 26 May 1998, when he and O'Donnell examined the print out of sales to MASS, he was alarmed because of the low profit margins of 33.19 per cent displayed at the bottom of the page, and that he would expect a margin of 43-44 per cent for "that type of customer with that type of product" (Transcript page 256). Sorensen says that when O'Donnell asked the Applicant why the margin was so low, the Applicant said "words to the effect that MASS Technologies was on price code 5" (Transcript page 257). Sorensen had said that he believed MASS was on price code 3. He says O'Donnell left, and then he discussed the matter further with the Applicant. His evidence was—

> "… I spoke to David further, asking about the margin. I asked several times why he had sold goods at lower than the price set out and initially he was quite vague. Upon questioning him again he said that he had supplied the goods at lower prices to maintain Mass Technologies' business. I also asked David in the same meeting whether he had supplied goods in lieu of favours as per the anonymous letters, ie trading stock for mechanical repairs. He denied that.
>
> You have used the words that David was initially vague when questioned. Can you give any more details in relation to that? Did he respond at all?—He just couldn't reply or wouldn't reply initially.
>
> Did he say anything?—No.
>
> And what else was said?—I said to him at the time that it was a very serious problem and it was a breach of company policy and that – words to the effect that things did not look too good for him."
>
> (Transcript page 257)

Sorensen says that he does not recall previously telling the Applicant "to look after" MASS. If he had he would have meant that the Applicant was to provide MASS "with good service, to make sure that they were fully up-to-date with our procedures, make sure that orders were fulfilled quickly so that basically if they had any queries, inquiries, to get back to them as quickly as possible to offer good service."

(Transcript page 264)

O'Donnell says that he had the invoices for MASS printed out, analysed, and compared with price code 5. This analysis was not completed until the Thursday. O'Donnell says that he instructed that the Applicant was not to go out on the road but was to be kept in the premises to be available to answer any questions if they arose. Nothing arose on the Wednesday. On the Thursday, the Applicant was absent on sick leave. On the Friday, the Applicant was also absent.

O'Donnell says that on the Thursday, he examined the invoices which had been produced and the analysis of those invoices demonstrated that a significant number of prices had been charged at below price code 5. O'Donnell says that he had the figures analysed on the basis of price code 5 even though the company's records showed that MASS was allocated price code 3, so as to give the Applicant the benefit of the doubt. O'Donnell believed that the low prices demonstrated that there had been systematic and deliberate underpricing.

A courier docket is also said to have come to light which indicated that goods were sent to MASS without an invoice. O'Donnell saw that the matter was serious. He decided to terminate the Applicant's employment and Sorensen was instructed to make a formal complaint the WA Police which was done on the following morning.

O'Donnell then instructed that the company's security be reviewed and during this review, it was discovered that the Applicant was still holding a master key apparently left over from the time when he was the Retail Manager. O'Donnell instructed that a telephone call be made to the Applicant's residence to ensure that he was home and a courier be sent to collect the key.

The Applicant says that he was at home ill, however, when the courier came to collect his key he became concerned and went in to the office. He went to O'Donnell's office and on being signalled to come in, said he wanted to know why his key had been picked up. O'Donnell says that the Applicant mentioned that he had received a call from Hans Groothuis. O'Donnell says that he said to the Applicant that in view of the seriousness of what had been happening, the Respondent had tightened security and had taken keys off 3 people. He also said that he analysed the invoices, that in view of the Applicant's conduct, which was very serious, that it was only fair to tell him that a complaint had been made to the police. The Applicant then asked if he was being accused of stealing and O'Donnell said, yes, he was. The Applicant demanded to see proof. O'Donnell said that they had been through the print out with him when he denied selling at less then price code 5 until he had come up with "a cock and bull story. It was now a Police matter". He cannot recall the Applicant's response but he says that he asked him to clear his desk. He asked the Applicant if he had samples at home and the Applicant said yes and he asked him to return those samples. It is agreed between the Applicant and O'Donnell that the Applicant said to O'Donnell that "You can't sack me, you have to give me 3 warnings", that the discussion between them had become heated and the Applicant left the premises.

The letter of dismissal dated 2 June 1998 was then sent to the Applicant. This says—

> "Dear Sir
>
> I confirm the following discussion with you on 26th and 29th May 1998.
>
> A check of our records pertanent(sic) to dealings with customer 593606, MASS technologies revealed consistent and continued pricing of goods significantly lower than our scheduled selling prices. In some instances goods were invoiced at a fraction of our cost.
>
> **1A** When questioned you admitted you entered the invoices for Mass Technologies, you could not satisfactorily explain your conduct in this regard.
>
> **1B** The minimum price that may be charged for goods sold is "Computer Price level 5" or scheduled bulk prices where allocated by senior management. The prices billed on invoices since 1/7/97 amount to under pricing of several thousand dollars.
>
> **1C** All such underpriced transactions were conducted by yourself eg operator 25.
>
> **2** On at least one occasion you despatched goods via courier to MASS without charge.
>
> **3** You admit having Sundry stock items of ours in your possession.
>
> In view of the seriousness of your conduct, I confirm your employment terminated as of close of business 29/5/98.
>
> I further confirm that a complaint has been lodged with the WA Police on this matter.
>
> To take such action gives me little pleasure and does you even less credit.
>
> You are formally requested to return all company stock items under your control to us within 24 hours. Our Mr Brian Sorensen will arrange for courier pick up if necessary.
>
> Termination payment to you is currently on hold pending further developments.
>
> Yours faithfully
>
> Signed
>
> Jack O'Donnell"

(Exhibit 5)

I have observed the witnesses as they gave their evidence and I make the following observations. The Applicant's evidence was clear and not undermined in any significant way. I found him to be a credible and reliable witness. The same could not be said of Groothius whose evidence was vague, contradictory and he recanted on a number of significant matters when challenged. I found his evidence to be so unreliable as to be of no assistance. Deacon-Fobister's evidence was somewhat inconclusive as to some important aspects with which I will deal later. I found O'Donnell and Sorensen to be credible witnesses in so far as their recollections were clear.

I have considered all of the evidence in this matter. That evidence leads me to a number of significant findings—

1. That there is no written, clear and definitive pricing policy within the Respondent's wholesale business. Deacon-Fobister was the only one of the witnesses who mentioned a 40 per cent profit margin being a condition of sales representatives going below price code 5. He said that a sales representative intending to go below price code 5 would get authorisation from the senior sales person, or assistant manager or manager, or would let them know that it had been done.

   In his evidence, Sorensen did not mention 40 per cent gross profit margin, but said there were no circumstances where there could be sales below price code 5 without his authority.

   The Applicant said that on 26 May 1998, in his discussion with O'Donnell and Sorensen, the latter told him that the gross profit margin should not go below 38 per cent "but that was only at that time". The Applicant says he was never told at any time before, that he had to work to a particular gross profit margin when overriding the computer to give a better price than the price code allocated to the customer.

2. There is no evidence to clearly demonstrate that the Applicant was properly trained or instructed as to the limits on his discretion to alter the prices. The Applicant says that when he first started in the wholesale division, Deacon-Fobister showed him how to override the price code allocated by the computer to provide a better price for a customer to match the competition. He says that Deacon-Fobister told him to use his initiative and discretion, provided that he did not give ridiculous prices. He says that he was told by Sorensen that "forcing" the computer was at his discretion, and gave him a number of examples. Further, the Applicant says he learned the approach to be taken by working with the other sales representatives. He says that from his first day, he was told to match competitors' prices, and, on more than one occasion, Sorensen told him he would rather have the business for the Respondent, than have it go elsewhere.

   Deacon-Fobister, who says he trained the Applicant, says the pricing policy was discussed, that it

"would've been explained" (Transcript page 145), but he does not recall what was said.

Accordingly, I find that the Applicant was not instructed on the limits of his discretion in reducing prices to match competitors' prices or to keep the business. In observing the Applicant as he gave his evidence it was clear to me that during the course of cross examination it occurred to him that the way in which he had given excessively favourable prices to MASS had been naive. It would seem that it was only during the course of this evidence that he realised that in providing such prices he was acting foolishly. However, this does not derogate from my conclusions that the Applicant was not properly trained as to the application of the pricing policy, and that the policy itself was not clear and consistent.

I am satisfied that the Applicant was told to look after MASS and to ensure that its business was retained. He did this by providing very favourable prices, and he overrode the computer in the way he had been trained, to enable him to give those prices. The Applicant drew up a price quotation for MASS which was approved by Sorensen, however that quotation covered only particular goods identified at the time. It did not cover all of the items which MASS subsequently purchased. Further, there is no evidence that the Applicant was prohibited from going below those prices to match competitors' prices, or in other circumstances. If one accepts that the Respondent had in place a clearly defined policy of which the Applicant was aware, then this conduct in breaching that policy would have been unreasonable. However, as I have noted, there was no such policy and due to a lack of proper training, what the Applicant did was in accordance with the instruction to look after the customer, to meet the competitor's prices, to keep the customer's business. He had been trained and instructed on how to override the computer to achieve this. Therefore his conduct was not unreasonable. The appropriate action on identifying this undercharging would have been for the Respondent to properly instruct and counsel the Applicant.

3. The Applicant was not made aware of the effect on his employment of implications being drawn by the Respondent from the low prices noted on 26 May 1998. He was asked what prices he had charged and why, but it was not made clear to him why the Respondent viewed his conduct in the way it did, or that, apart from it "not looking good for him" that his job was in jeopardy.
4. The Respondent did not put to the Applicant, at any time, the second ground of dismissal on which it relied, relating to the goods being despatched by courier without charge.
5. The Respondent says that it does not rely on any allegation of theft by the Applicant in the justification of the decision to dismiss, yet O'Donnell told the Applicant on Friday 29 May 1998, that in view of the Applicant's conduct, which it viewed seriously, a complaint had been made to the Police, and acknowledged when asked by the Applicant, that the Applicant was being accused of theft. I am satisfied that the Applicant was being accused of theft, and that at the time of his dismissal, that was the basis of O'Donnell's decision to dismiss. In light of O'Donnell's acknowledgment to the Applicant's question about allegations of theft, the Applicant was entitled to believe that was the basis of his dismissal. The allegation of theft is not diminished or negated simply because O'Donnell acknowledged that the Applicant was being accused of theft in response to a question put to him.

   In his evidence, O'Donnell made clear that he still believes that the Applicant was stealing but he had "no proof of him actually stealing." (Transcript page 217)

   There was no evidence before the Commission of the Applicant stealing from his employer. There is no evidence of an improper relationship between the Applicant and Groothius. At best, there is evidence of the Applicant giving Groothius very favourable treatment. He may have been naive and he may have gone beyond his employers' intentions in giving MASS such favourable treatment. However, there is no evidence that this was contrary to any clearly defined policy or instruction, or contrary to his training.
6. There were a number of flaws exposed in the Respondent's investigations and in the documentation relied upon by it. The print out date contained on the invoices which O'Donnell says he had audited by Thursday, 28 May 1998, brings that aspect of the investigation into question. There is also conflict in the evidence called for the Respondent as to the operative date of the prices it used to assess the prices charged by the Applicant to MASS. There is also some question as to whether some of the prices charged by the Applicant were prices charged to MASS prior to his taking MASS over as a client, ie those prices may have been set by others.

In all of these circumstances, I find that the Respondent's decision to terminate the Applicant's employment was harsh, oppressive and unfair. It is not justifiable to dismiss an employee for a breach of policy when the policy is not clear and is not known to the employee because he has not been clearly instructed about it. Further, it is unfair to dismiss where theft is alleged, but where there is no reasonable basis for the employer to make the allegations. It is also unfair to rely on a ground of dismissal not put to an employee.

Having found that there were flaws in the Respondent's investigation, I must also note that there seems to be no dispute between the parties that the Applicant did charge some very low prices to MASS, however there is dispute about the degree and frequency of that occurring.

Having found that the Applicant was harshly, oppressively and unfairly dismissed, the Commission is to consider the remedy to be applied. In light of the evidence I have heard, it is clear that reinstatement would not be practicable. O'Donnell does not trust the Applicant. The Applicant has sought to prepare himself for a new career following his experiences in this matter. I do not believe that a proper and productive working relationship could be re-established between the parties. Accordingly, I find that reinstatement would not be practicable.

The Commission is then required to assess the Applicant's loss or injury and award appropriate compensation. The evidence of his loss was that the Applicant has tried to obtain employment since 29 May 1998 but, as at 20 January 1999, had not been successful. He says that he has now decided to pursue a different field of endeavour because he does not "want to do sales any more", he had lost heart because he was accused of something he had not done. He commenced studying 5 months prior to his giving evidence, which would make it around August 1998. I have no other evidence of his loss or that he has sought employment since August, 1998. The onus is on the Applicant to demonstrate his loss. From the evidence before me, I am able to conclude that after a number of years with the Respondent, the Applicant, having been unfairly dismissed was not employed from 28 May 1998 until at least some time in August 1998 when he commenced studying, and that in the period 28 May to sometime in August, he attempted to mitigate his loss. This would be for a period of between 2 and 3 months. Following his termination, the Applicant was paid two weeks pay in lieu of notice.

In light of the length of service and the circumstances of his dismissal which includes an unsubstantiated allegation of theft, I assess that the Applicant's loss and injury is appropriate to be compensated by an award of 10 weeks pay. The only information before me as to what constituted the Applicant's usual pay is contained in the schedule to his application, which says that he was paid $30,000 per annum. The parties are to put to me in writing any matter regarding the rate of pay appropriate for consideration, within 14 days.

I propose to issue an order that the Applicant be paid $5,751.50 unless I hear from the parties that this is based on a wrong pay rate.

APPEARANCES: Mr C Fayle on behalf of the Applicant
Mr R Lilbourne (of Counsel) on behalf of the Respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

David Robert Warren

and

Altronic Distributors Pty Ltd.

No. 968 of 1998.

COMMISSIONER P E SCOTT.

15 April 1999.

Order.

HAVING heard Mr C Fayle on behalf of the Applicant and Mr R Lilbourne (of Counsel) on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

1. DECLARES that the Applicant was harshly, oppressively and unfairly dismissed from his employment with the Respondent; and
2. ORDERS that the Respondent shall pay to the Applicant within 21 days of the date of this Order the amount of $5,751.50.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Calvin Wood

and

Alan Marsh.
First Respondent.

Surface Coating Corporation (Australia) Pty Ltd.
Second Respondent.

No. 18 of 1999.

COMMISSIONER A.R. BEECH.

14 April 1999.

Reasons for Decision.

The claim before the Commission is a relatively simple one. Mr Wood claims he is owed $230.00 by the respondent as commission payable to him for concluding a contract between the respondent and a client. The respondent has not filed a Notice of Answer and Counterproposal. On that basis, the Commission is entitled to form the conclusion that the claim is not opposed by the respondent. There is nothing which has happened to suggest that the respondent does oppose the claim.

Prior to the Commission convening a conference in this matter the Commission received correspondence from Mr Alan Marsh. Mr Marsh is the natural person who is cited as first respondent. Mr Marsh's letter, the content of which is not disputed by Mr Wood, states that Mr Marsh is neither a shareholder or director of Surface Coating Corporation (Australia) Pty Ltd, nor does he now have any business association with the directors of that company. Indeed, the letter states that the company has ceased to operate and that he believes it is in the process of being wound up. Whether or not a receiver has been appointed at this stage is unknown to Mr Marsh. His letter does confirm, however, that Mr Calvin Wood, the applicant, "operated within" the respondent company as an independent commission agent. As a result of that information, the Commission forms the conclusion that Mr Marsh was not Mr Wood's employer. Therefore, Mr Wood was in error in citing Mr Marsh as a respondent to this application. He will be struck out as a respondent to this application. Rather, the correct identity of Mr Wood's employer is the company cited as the second respondent to the application: Surface Coating Corporation (Australia) Pty Ltd. Accordingly, that company is now the sole respondent to this application.

Upon the receipt of Mr Wood's letter the Commission wrote to the parties indicating that, given the lack of opposition to the claim, the Commission may place itself in a position to determine Mr Wood's claim at the conference. When the conference proceedings convened on 1 April 1999 there was no appearance on behalf of the respondent. There is, therefore, nothing before the Commission to dissuade it from its view as expressed in its correspondence to the parties that the Commission may proceed to decide Mr Wood's claim.

The Commission spoke to Mr Wood at length. As a result of his responses and the written information from Mr Marsh, I find that Mr Wood was employed by the respondent. He was employed on a commission-only basis in order to sell contracts on behalf of the respondent to repair or renovate the rooves of houses. It was a term of his employment that he would be paid a commission at the rate of 10% for each contract signed.

Mr Wood, with the assistance of Mr Marsh, secured a contract with a client, Mr Birkin, for the repair of Mr Birkin's roof and the value of the contract was $3,300.00. On the terms of the contract of employment as I have found them to be, Mr Wood is, therefore, entitled to a 10% commission. Mr Wood states that, at that time, Mr Marsh had said "you have earned yourself $330.00" and I accept Mr Wood's statement.

I also accept Mr Wood's statement that he subsequently approached Mr Marsh and asked for an advance on the commission. Mr Marsh, apparently, spoke to the directors of the company who refused the advance on commission. Mr Marsh paid the advance on commission of $100.00 to Mr Wood from Mr Marsh's own monies. Mr Wood, therefore, claims an amount of $230.00 is still owed to him. Mr Wood has determined that the contract with Mr Birkin was completed and, although there might be some suggestion that the company lost money on that particular contract, there is nothing in the material before the Commission to suggest that the commission was payable to Mr Wood on the basis of the profit made on the contract. Rather, Mr Wood's entitlement depended upon the value of the contract when it was signed.

I see no reason why an order should not issue in Mr Wood's favour requiring the respondent company to forthwith pay Mr Wood the sum of $230.00.

Accordingly, at the conclusion of the proceedings on 1 April 1999, the Commission indicated that an Order would issue that the respondent forthwith pay to Mr Wood the sum of $230.00 by way of a benefit denied him under his contract of employment. Mr Wood agreed with that wording and did not wish to speak further to the terms of the Order.

Accordingly, an Order will now issue in those terms, together with an Order striking out Mr Marsh as a respondent to this application.

Appearances: Mr C. Wood on his own behalf as the applicant.

No appearance on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Calvin Wood

and

Surface Coating Corporation (Australia) Pty Ltd.

No. 18 of 1999.

14 April 1999.

Order.

HAVING HEARD Mr C. Wood on his own behalf as the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

1. THAT Alan Marsh be struck out as a respondent to this application.
2. THAT Surface Coating Corporation (Australia) Pty Ltd forthwith pay Calvin Wood the sum of $230.00 by way of a benefit denied him under his contract of employment.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

SECTION 29 (b)—Notation of—

APPLICANT	RESPONDENT	NUMBER	COMMISSIONER	RESULT
Abdoo NL	Pollux Pty Ltd ACN 008 954 318 T/A Burswood Car Rentals	91/1999	Cawley C	Discontinued
Anderson G	Nuford	2152/1998	Beech C	Discontinued
Andrews M	KBE Contracting Pty Ltd	137/1999	Beech C	Struck Out
Arangio D	BSD Consultants Pty Ltd	368/1999	Cawley C	Discontinued
Archer NB	PJ McLoughlins "Your Quality Butcher"	145/1999	Gregor C	Dismissed
Ashworth KF	Mend-a-Bathroom International	102/1999	Cawley C	Discontinued
Ballantyne P	Wenmar Pty Ltd ATF Jon Godfrey Family Trust t/a Executive Transport	104/1999	Scott C	Dismissed
Bell RJS	Lanier (Australia) Pty Ltd	262/1999	Gregor C	Consent Order
Bird SA	State School Teachers' Union of Western Australia Inc	65/1999	Scott C	Dismissed
Blair J	Skywest Airlines	2064/1998	Beech C	Discontinued
Blake P	Veritas DGC Australia Pty Ltd	364/1999	Fielding SC	Discontinued
Bovis N	WA Salvage	127/1999	Scott C	Withdrawn
Bracey RK	Microfusion Pty Ltd	1440/1998	Gregor C	Dismissed
Brown JM	Auto One	424/1999	Fielding SC	Dismissed
Cavanagh M	Mr G Boros of Mondo's Coffee Lounge	175/1999	Cawley C	Discontinued
Chape DL	Cape East Limited and Modern Industries (WA) Pty Ltd t/a Cape Modern Joint Venture	1925/1998	Beech C	Dismissed
Colangelo B	Trustek Australia Pty Ltd	471/1999	Scott C	Withdrawn
Comito MM	Totaki Holdings Pty Ltd and MCMC Pty Ltd and Toesa Shelf Co (No. 10) Pty Ltd t/a 2 Much Fun	142/1999	Beech C	Discontinued
Connelly TJ	Burswood Resort (Management) Ltd t/a Burswood International Resort Casino	2188/1998	Parks C	Discontinued
Dagnone M	Property Trust Real Estate ACN 009 367 613 t/a Property Plus Real Estate	2140/1998	Scott C	Dismissed
Dellaca R	Moda Cabinets	241/1999	Beech C	Discontinued
Di Toro AM	Home Building Society Ltd	912/1998	Scott C	Dismissed
Dielenberg K	Eldercare Pty Ltd	125/1999	Cawley C	Discontinued
Ellis K	Western Mining Corporation & Pacrim Pty Ltd	108/1999	Gregor C	Dismissed
Fraser K	Community Policing Crime Prevention Council Incorporated t/a Constable Care	1669/1998	Beech C	Discontinued
Furness PW	Westrac Equipment Pty Ltd	69/1999	Scott C	Dismissed
Gates M	Busy Cards	215/1999	Cawley C	Discontinued
Green VA	Bassendean Market Fresh Produce	177/1999	Scott C	Dismissed
Hansen CJ	Searle Mobile Vet Service	222/1999	Fielding SC	Dismissed
Healy MR	The King & I Pty Ltd	2243/1998	Parks C	Discontinued
Jacobs IR	Crossman Village Roadhouse	77/1999	Beech C	Discontinued
Jones C	Graham Byard Roundel Company Limited	41/1999	Cawley C	Discontinued
Lanyon MW	Rock Engineering (Aust) Pty Ltd	1710/1998	Beech C	Discontinued
Martin N	Rohanna Pty Ltd as trustee for the Skipper Unit Trust t/a John Hughes Skipper Mitsubishi	1284/1998	Gregor C	Discontinued
Mason RA	Symbols Business Wear	2075/1998	Fielding SC	Withdrawn
Mather BJ	Iona Technologies Asia Pacific Pty Ltd	84/1999	Scott C	Dismissed
Meredith J	DPH Nominee Pty Ltd & Westside Developments t/a Ausmic Pest Control	249/1999	Cawley C	Discontinued
Murphy JM	PB Foods Ltd	119/1999	Beech C	Discontinued
Outram W	Norwest Seafoods	1539/1998	Fielding SC	Dismissed
Owen MJ	Nationwide Environmental Management Pty Ltd	12/1999	Scott C	Dismissed
Page TJ	Glazewell Pty Ltd	285/1999	Gregor C	Consent Order
Palmer G	Paul Copeland FV Conca/Dora C/O Vinci Seafoods	124/1999	Gregor C	Dismissed
Petchell G	Lancelin Shearing Service	194/1999	Scott C	Dismissed
Podgorny J	John H Garnett Nominees Pty Ltd trading as Garnett Property	2207/1998	Kenner SJ	Dismissed
Primrose W	Shoures Pty Ltd T/A Fasta Couriers & Taxi Trucks	1782/1998	Cawley C	Discontinued
Rapinet P	WOMA (Australia) Pty Ltd	2193/1998	Scott C	Dismissed
Rees DF	Red Meats WA	2125/1998	Beech C	Discontinued

APPLICANT	RESPONDENT	NUMBER	COMMISSIONER	RESULT
Rose LA	Dolpag Pty Ltd (ACN 054 277 744) T/As Credit Force	296/1999	Cawley C	Discontinued
Slater ML	Lynfield Pty Ltd as trustee for the Ridgeview Motors Unit Trust t/a Midland Chrysler Jeep	34/1999	Scott C	Dismissed
Smith T	Blacklaw Pty Ltd t/a LJ Hooker Karratha	1956/1998	Beech C	Discontinued
Spink P	Comba Pty Ltd t/a Kimbers Towing	1613/1998	Parks C	Discontinued
Stone D	North East Equity Pty Ltd	152/1999	Scott C	Withdrawn
Timmins DG	Joburne Pty Ltd t/a Blackburne Real Estate	1764/1998	Beech C	Dismissed
Timmins M	Joburne Pty Ltd t/a Blackburne Real Estate	1765/1998	Beech C	Dismissed
Trotman L	Homestart	93/1999	Scott C	Dismissed
Ugle AJ	Family and Children's Services	32/1999	Beech C	Discontinued
Vershaw JB	Advanced Furniture Polishers	174/1999	Cawley C	Discontinued
Vos R	Mister Minit Australia	2233/1998	Beech C	Discontinued
Waterhouse P	Skywide Nominees Pty Ltd Trading As Ray White Rockingham	625/1998	Cawley C	Discontinued

CONFERENCES—
Matters arising out of—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Forest Products, Furnishing and Allied Industries Union of Workers, WA

and

Wesfi Pty Ltd.

No. C 95 of 1999.

COMMISSIONER S J KENNER.

23 April 1999.

Direction.

HAVING heard Mr M Llewellyn on behalf of the applicant and Mr J Uphill as agent 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 applicant file and serve further and better particulars of its claim by 28 April 1998;

(2) THAT the respondent file and serve particulars of its answer by 5 May 1999.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division Western Australian Branch

and

Ray Mullins and Sons Pty Ltd.

No. C 113 of 1999.

6 May 1999.

Interim Order.

WHEREAS on 27 April 1999 the application cited herein was filed in the Commission; and

WHEREAS on 29 April 1999 a conference was held pursuant to section 44 of the Industrial Relations Act, 1979 (the Act); and

WHEREAS on 4 May 1999 a further conference was held pursuant to the Act;

AND WHEREAS the parties have been unable to completely resolve the dispute between them;

NOW THEREFORE the Commission being satisfied that it is necessary to prevent a deterioration of industrial relations between the parties until the dispute between them has been resolved by arbitration, pursuant to the power conferred upon it under s44(6)(ba) of the Act, hereby orders—

THAT Ray Mullins and Sons Pty Ltd and Ms Anita Ghavani observe the Adjusted Roster contained in Schedule A hereto; and

THAT notwithstanding Ms Anita Ghavani be rostered to work on a Thursday, Ray Mullins and Sons Pty Ltd shall, subject to cost and practicability, endeavour to roster her off duty after 5pm on a Thursday.

(Sgd.) C.B. PARKS,
[L.S.] Commissioner.

SCHEDULE A

ADJUSTED ROSTER

	First Shift			Shift Hours	Second Shift			Shift Hours
	Staff	Start	Finish		Staff	Start	Finish	
Fri								
Sat	Anita	9am	3pm	6				
Sun								
Mon					Anita	3pm	10pm	7
Tue					Anita	3pm	10pm	7
Wed					Anita	3pm	10pm	7
Thu	Anita	11am					10pm	11
Total Hours 38								

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch

and

The Western Australian Government Railways Commission.

No. C 22 of 1999.

11 May 1999.

Order.

WHEREAS at a conference held in accordance with s.44 of the Act an agreement was reached between the parties regarding the conditions of employment of Help Telephone Operators to operate pending either the registration of an industrial agreement or a variation to the Railway Employees Award;

AND WHEREAS the parties requested the Commission to make an order in the terms of that agreement binding the parties;

AND HAVING HEARD Mr R. Wells on behalf of the applicant and Mr A. Hassell on behalf of the respondent the Commission, being of the opinion that the agreement applies the State Wage Principles, and pursuant to the powers conferred on it under s.44(8) of the *Industrial Relations Act 1979*, and by consent, hereby orders—

1. THAT the conditions of employment of Westrail Help Telephone Operators be as set out in the schedule attached hereto;
2. THAT this Order shall operate on and from 28 April 1999.

(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

Schedule.

1.—TITLE

This order shall be known as the Westrail Help Telephone Operator Interim Terms and Conditions of Employment Order 1999.

2.—ARRANGEMENT

3.—APPOINTMENT

An appointment to the position of Help Telephone Operator shall not take effect until the appointee has successfully completed all the required training.

4.—CONTRACT OF EMPLOYMENT

(1) Probation—Current employees appointed/promoted.

(a) An employee's appointment to the position of Help Telephone Operator will be subject to a probationary period of three months.

(b) Subject to satisfactory performance an employee's appointment will be confirmed at the conclusion of the probationary period.

(c) During the probationary period, if the employee's performance is not satisfactory, the employer may give the employee one week's notice and return the employee to the classification held immediately prior to the employee's appointment to the Help Telephone Operator position.

(2) Probation—New employees

(a) A new employee's appointment to the position of Help Telephone Operator will be subject to a probationary period of six months.

(b) Subject to satisfactory performance an employee's appointment will be confirmed at the conclusion of the probationary period.

(c) During the probationary period, if the employee's performance is not satisfactory, the employer may terminate the contract of employment by giving the employee one week's notice or payment in lieu of notice.

(3) Except as provided in subclauses (1) and (2) of this clause, the contract of employment may be terminated by—

(a) the employee, by giving four weeks' notice in writing, or forfeiting four weeks' pay in lieu of such notice; or

(b) the employer, by giving four weeks' notice in writing, or paying four weeks' pay in lieu of such notice, provided that where the employee is aged over 45 years and has more than two years' continuous service, the period of notice shall be five weeks;

provided that where mutually agreed a shorter period of notice may be given without payment or forfeiture of pay in lieu.

(4) In the case of misconduct which contravenes the employer's rules or regulations, or misconduct which at law would justify summary dismissal, the contract of employment may be terminated without notice and without payment or forfeiture of pay as provided elsewhere in this clause.

5.—HOURS OF DUTY

(1) The ordinary hours of duty shall be as shown on the Help Telephone Operator Roster and may be worked over any days of the week Sunday to Saturday inclusive.

(2) Rostered shifts—

(a) Up to 12 ordinary hours may be rostered in any one shift.

(b) No rostered shift shall be less than four hours.

(c) The maximum number of ordinary rostered shifts in any 28 day rostered cycle shall be 20.

(3) An employee will be entitled to a minimum of a 10 hour break between any two shifts set out under the roster.

(4) Meals—

(a) An employee will be permitted to take a paid meal break at an appropriate time during any shift that exceeds five hours.

(b) The timing of meals will be such as to cause the minimum of disruption to the service provided.

(5) While the number of hours in each shift and group of shifts may vary, an employee will be expected to work an average of 40 ordinary hours per week over the roster cycle.

(6) Where, at the end of a roster cycle an employee has been required to work fewer ordinary hours during the cycle than the total number of rostered ordinary hours in the cycle, then to the extent that the shortfall in hours is not caused by employee initiated unpaid absence from duty (either with or without approval) the employee will be deemed to have worked the rostered ordinary hours.

6.—ADDITIONAL HOURS

(1) An employee may be required to work additional hours immediately before or immediately after the employee's rostered ordinary hours. An employee shall not be required to work more than 12 hours continuously.

(2) An employee may be required to work additional shifts and will be paid the additional hours rate per hour as shown in clause 8—Wages, for all such hours worked. Where an employee is unable to work additional hours due to sickness, no sick leave will be payable for such hours.

(3) In the event that an employee is required to work an additional shift as specified in subclause (2) and the shift is cancelled within 2 hours of its starting time the employee will be compensated by payment of two ordinary hours' pay.

7.—STAND DOWN

(1) Where on any day or part of a day, the employer is unable to provide useful work for the employee as a result of—

(a) industrial action, whether or not on the part of the employees; or

(b) any cause outside of the employer's control,

the employer is entitled to stand down the employee and not pay the employee for the day or part of a day.

(2) The employee may elect to have the day or part of a day on which the employee is stood down paid as annual leave if the employee has an entitlement to such leave.

(3) If the employee is stood down, the employee will not be entitled to payment for any public holiday occurring during the period of stand down.

(4) Any period for which the employee is stood down under the provisions of subclause (1) of this clause will count as service for the accrual of leave to which the employee would otherwise be entitled under this Agreement, provided that the employee resumes work as required at the end of the stand down period.

8.—WAGES

(1) Each employee will be paid wages as shown in the table below which, other than as expressly set out in this agreement, include all allowances, penalties and special rates whatsoever.

	Wages per fortnight $	Ordinary Rate per hour $	Additional hours rate per hour $
Wage rate	1463.29	18.29	27.44

(2) Except as provided in subclause 5(5) ordinary time payment each fortnight shall be for eighty (80) hours irrespective of the rostered hours.

9.—PAYMENT OF WAGES

(1) Wages shall be paid fortnightly.

(2) All wages shall be paid into accounts (nominated by the employee) with a bank, building society or credit union.

(3) If an employee is required to repay an amount to the employer, the amount to be repaid from any fortnightly pay will not exceed 10% of the employee's base pay unless another arrangement has been agreed to between the employer and employee. The repayment may be for, but not limited to, overpayment of base rate, additional shifts, or allowances.

10.—SICK LEAVE

(1) In the event of an employee being sick, the employee may be paid up to 80 hours sick leave each completed year of service for ordinary time lost from duty as a result of such sickness.

(2) Sick leave will be paid for the actual rostered time lost due to sickness.

(3) The employer may request a medical certificate for

(a) any absence due to sickness which occurs after two separate absences without a certificate in any one year; or

(b) absences due to sickness for two (2) or more consecutive days.

(4) Notwithstanding any other provisions of this clause, the employer may at any time request the employee to provide evidence that would satisfy a reasonable person of the authenticity of any absence claimed to result from illness. Evidence may be required regardless of whether or not the employee claims payment for the absence.

(5) Any unused sick leave will accumulate from year to year.

11.—ABSENCE FROM DUTY

(1) Any employee who is absent from duty due to illness or injury, shall, as soon as possible, advise the supervisor in sufficient time to permit arrangements to be made for the performance of the employee's duties.

(2) Any employee absent from duty, shall notify the supervisor of the date on which the employee will be able to resume duty in sufficient time to enable the necessary arrangements to be made.

12.—PUBLIC HOLIDAYS

(1) "Public holiday" means any of the following days which are proclaimed to be public holidays in the State of Western Australia—

- New Year's Day
- Australia Day
- Labour Day
- Good Friday
- Easter Monday
- ANZAC Day
- Foundation Day
- Celebration Day
- Christmas Day
- Boxing Day

(2) An employee rostered to work but not required to work on a day solely because it is a public holiday—

(a) will be paid at the employee's ordinary rate of pay for the time that the employee would have worked on the day had it not been a holiday.

(b) will be paid at the employee's ordinary rate of pay for all hours the employee is not required to work in a shift that commences on the night before and extends into a public holiday or the finish time of the shift extends into the morning following the public holiday.

(3) Where an employee is required to work ordinary hours on December 25 or on Good Friday, the employee will be paid an allowance of 50% of the ordinary hourly rate of pay for each ordinary hour worked on the day.

(4) Except as provided in subclause (3) of this clause, where an employee is required to work on a day that is a public holiday, the employee will not be entitled to receive any additional payment or to receive a day off in lieu because the day is a public holiday.

13.—ANNUAL LEAVE

(1) Each employee is entitled to 200 hours paid leave per year for each completed year of service.

(2) A minimum of one hundred and twenty (120) hours' leave must be taken each year at a time or times acceptable to the employer and the employee, provided that where agreement cannot be reached the employer shall determine when the leave is to be taken.

(3) An employee may request, and subject to mutual agreement may be permitted, to accrue leave up to a maximum of 320 hours.

(4) Annual leave shall be paid at the ordinary rate of pay provided in clause 8—Wages, of this Agreement.

(5) For the purpose of debiting annual leave, a day's leave shall be deemed to be eight hours and a week's leave shall be deemed to be 40 hours.

(6) Employees resuming from annual leave will work the next rostered shift as shown on their roster on the day following the completion of the leave.

14.—LONG SERVICE LEAVE

(1) After each ten years' continuous service with the employer, the employee shall be entitled to 13 weeks' long service leave. The rate of pay for the employee on long service leave shall be the ordinary rate of pay provided in clause 8—Wages.

(2) An employee will be entitled to pro rata long service leave only if employment is terminated—

(a) by the employer for other than disciplinary reasons;

(b) due to the retirement of the employee on the grounds of ill health; or

(c) due to the death of the employee, in which case the payment shall be made to the employee's estate.

(3) For the purpose of this clause—

(a) service shall include any period of leave approved by the employer except any form of leave without pay which exceeds two weeks, in which case only the first two weeks of such leave shall count as service.

(b) continuity of service shall not be broken by the absence of the employee on any form of approved leave or by the standing down of an employee under the terms of this agreement.

15.—BEREAVEMENT LEAVE

(1) On the death within Australia of —

(a) the spouse, father, mother, brother, sister, child or stepchild of an employee;

(b) father, mother, brother or sister of the spouse of an employee; or

(c) any other person who, immediately before that person's death, lived with an employee as a member of the employee's family,

that employee shall be entitled on notice, to leave of absence without deduction of pay.

(2) Such leave of absence, up to and including the day of the funeral, shall be for a period up to but not exceeding the number of hours worked by the employee in three ordinary working days, having regard for the circumstances of the case.

(3) Proof of death shall be provided by the employee to the satisfaction of the employer.

(4) Payment in respect of bereavement leave shall be made only where the employee otherwise would have been on duty and shall not be granted in any case where the employee concerned would have been off duty in accordance with the roster, or on annual leave, long service leave, sick leave, workers' compensation or leave without pay.

16.—TRAINING

(1) The employer may establish a joint employer/employee committee to assess training requirements to enable employees to carry out their role in a professional manner.

(2) Training may be delivered on—or off-the-job.

(3) Provided the employer determines the training required, the employer will meet all reasonable costs associated with the training.

(4) Each employee must be prepared to undertake whatever training is necessary and qualify to carry out the employee's role to the required standard.

17.—INFORMATION ACQUIRED DURING EMPLOYMENT

(1) Except as expressly authorised by the employer and required by the employee's duties, an employee shall not directly or indirectly reveal to any third party any confidential dealings, finances, transactions or affairs of the employer or any of its clients which may come to the employee's knowledge during the course of employment.

(2) The obligation imposed under subclause (1) of this clause shall continue to apply after the termination of employment without limits in time.

(3) All records, documents and other papers, together with any copies or extracts thereof, made or acquired by an employee in the course of employment, shall remain the property of the employer and must be returned to the employer on demand or otherwise no later than upon termination of employment.

(4) Any changes, innovations and ideas initiated by an employee during the course of employment with the employer, shall belong to the employer and the employee shall do all such things as are necessary to completely vest ownership of such matters in the employer.

18.—HEALTH AND FITNESS

(1) To ensure that an employee is medically fit to carry out the duties in a satisfactory and safe manner the employee will, if required, undergo a medical examination with the employer's Occupational Physician.

(2) The employer will pay the costs of any medical examination conducted by the employer's Occupational Physician. However, subject to any policy to the contrary, the employee is responsible for any costs associated with any treatment of a condition identified by the employer's Occupational Physician.

(3) The employee will, as required, undergo drug and alcohol testing in accordance with the employer's policies on the safety of personnel working on or about the railway system.

19.—DISPUTES SETTLEMENT PROCEDURE

In the event of any questions arising between the employer and its employees about the meaning or effect of this agreement, including any provisions implied in the agreement by the Minimum Conditions of Employment Act, or any dispute arising during the term of this agreement, the following procedure will apply—

(1) The employer and the employee will make every attempt to resolve the issue amicably and internally.

(2) Reasonable time limits will be allowed to resolve any issue but it must be within 14 days of the dispute arising.

(3) If the matter cannot be successfully resolved, the employee may refer the matter to the union and the union and the employer will attempt to resolve the issue.

(4) If the matter is still not resolved, either party may refer the question or dispute to the Western Australian Industrial Relations Commission, provided that persons involved in a question, dispute or difficulty are to confer among themselves and make reasonable attempts to resolve those matters before taking those matters to the Commission.

(5) The parties covered by this Agreement will maintain and will not disrupt the provision of services to the public while disputes are being dealt with under this procedure.

CONFERENCES—
Matters referred—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

and

Brown & Root A.O.C.

No. CR 347 of 1998.

COMMISSIONER S J KENNER.

10 May, 1999.

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.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

and

Cape Modern Joint Venture.

No. CR 27 of 1999.

COMMISSIONER S J KENNER.

10 May, 1999.

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.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

and

Clyde Services.

No. CR 348 of 1998.

COMMISSIONER S J KENNER.

10 May, 1999.

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.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

and

Garrigan T Structural Steel Pty Ltd.

No. CR 331 of 1998.

COMMISSIONER S J KENNER.

27 April 1999.

Order.

HAVING heard Mr G Sturman on behalf of the applicant and Mr M Darcy on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT this application be and is hereby discontinued by leave.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

and

Metalcorp Recyclers.

No. CR 269 of 1998.

COMMISSIONER S J KENNER.

10 May, 1999.

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.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

and

Picton Steel Pty Ltd.

No. CR 191 of 1998.

COMMISSIONER S J KENNER.

10 May, 1999.

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.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

and

Riverton Engineering Co.

No. CR 48 of 1999.

COMMISSIONER S J KENNER.

10 May 1999.

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.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch.

and

TVT Engineers Pty Ltd.

No. CR 322 of 1998.

COMMISSIONER S.J. KENNER.

28 April 1999.

Order.

HAVING heard Mr C Saunders as agent on behalf of the applicant and Mr M Borlase as agent on behalf of the respondent, and by consent 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.] Commissioner.

CONFERENCES—Notation of—

	Parties	Number Commissioner	Date	Matter	Result
Australian Railways Union	Western Australian Government Railways Commission	Beech C C358 of 1998	23/12/98 22/1/99	Dispute re Discrimination	Concluded
Australian Workers Union	St Barbara Mines Ltd	Fielding SC C32 of 1999	23/4/99	R & R Leave Cancellation	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	AMCOR Beverage Cans	Kenner C C92 of 1999	—	Application of the provisions of the gain sharing system (AG 121/1997)	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Healthcare Linen Pty Ltd	Kenner C C55 of 1999	8/3/99	Safety Net Adjustments	
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Landfill Gas & Power Pty Ltd	Kenner C C71 of 1999	8/4/99 30/3/99	Alleged Unfair Dismissal	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Northern Star Maintenance t/a Dirty Stinks Contractors	Kenner C C86 of 1999	—	Deduction of Monies	Withdrawn
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Prok Group Limited	Kenner C C64 of 1999	23/3/99	Non-Payment of Redundancy & Severance	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Rock Engineering (Aust) Pty Ltd	Kenner C C329 of 1998	—	Industrial Dispute on Award Matters	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Simto Australia	Kenner C C13 of 1999	5/3/99	Replacement of Personal Tools	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Stalker Pumps	Kenner C C97 of 1999	—	Termination of Employment	Discontinued

	Parties	Number Commissioner	Date	Matter	Result
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Technifire 2000	Kenner C C65 of 1999	—	Threatened Termination & Victimisation	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	WA Access Pty Ltd	Kenner C C50 of 1999	19/3/99	Alleged Unfair Dismissal	Referred
Builders' Labourers, Painters and Plasterers Union	Kerry Patrick Cova & Jamie Mark Schoen trading as K & J Plastering	Kenner C C94 of 1999	—	Time and Wages Records	Discontinued
Civil Service Association	CEO Board of WA Centre for Pathology & Medical Research	Fielding SC PSAC4 of 1999	4/2/99	Salary Entitlements	Withdrawn
Civil Service Association	Chief Executive Officer, Department of Education Services	Scott C PSA C12 of 1999	9/3/99	Recompensed for Overtime Worked	Concluded
Civil Service Association	Commissioner For Health	Fielding SC PSAC88 of 1998	18/2/99	Enterprise Bargaining Agreement	Discontinued
Civil Service Association	Director General Education Department of WA	Scott C PSAC72 of 1998	19/3/99	Leave Without Pay	Concluded
Communications Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Workers Union	National Mine Management Pty Ltd	Fielding SC C68 of 1999	26/3/99	Validity of WPA	Discontinued
Communications Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Workers Union	Stalker Pumps	Kenner C C73 of 1999	25/3/99	Employment Status	Discontinued
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	Pace & Brine Master Builders	Kenner C C359 of 1998	27/1/99	Time and Wages Records	Concluded
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	United Construction	Kenner C C25 of 1999	1/2/99	Right of Entry	Concluded
Federated Brick, Tile and Pottery Industrial Union	Australian Fine China	Kenner C C91 of 1999	13/4/99	Alleged Unfair Dismissal	Discontinued
Forest Products, Furnishing and Allied Industries Industrial Union	Wesfi Pty Ltd	Kenner C C95 of 1999	21/4/99	West Australian Particleboard Manufacturing Award	Referred
Liquor, Hospitality and Miscellaneous Workers' Union	Director General Education Department of WA	Beech C C138 of 1998	—	Termination Dispute Pursuant to S.44	Concluded
Liquor, Hospitality and Miscellaneous Workers' Union	Ballajura Veterinary Hospital	Scott C C72 of 1999	19/3/99	Reduction of Wages	Concluded
Liquor, Hospitality and Miscellaneous Workers' Union	Director General Education Department of WA	Scott C C375 of 1998	—	EBA Negotiations	Concluded
Liquor, Hospitality and Miscellaneous Workers' Union	Istana Restaurant	Gregor C C160 of 1998	13/4/99	Unfair Dismissal	Discontinued
Liquor, Hospitality and Miscellaneous Workers' Union	Zoological Gardens Board	Cawley C C56 of 1999	7/5/99	Alleged Misconduct	Discontinued
Liquor, Hospitality and Miscellaneous Workers' Union	Activ Foundation	Fielding SC C93 of 1999	5/5/99	Unfair Dismissal	Withdrawn

PROCEDURAL DIRECTIONS AND ORDERS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Anthony Maurice Batista

and

York Grove Holdings Pty Ltd t/a Rockingham Landscape Supplies.

No. 1860 of 1998.

22 April 1999.

Order.

HAVING HEARD Mr A. Batista on behalf of himself as the applicant and Mr J. Uphill on behalf of the respondent, I the undersigned, pursuant to the powers conferred on me under *The Industrial Relations Act 1979*, hereby order—

THAT York Grove Holdings Pty Ltd pay to Anthony Maurice Batista within 14 days the sum of $115.00 by way of costs thrown away by the adjournment of the hearing of this matter.

(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Darren Renton

and

Trevor David Hoffman.

No. 2164 of 1998.

29 April 1999.

Order.

WHEREAS an application was lodged in the Commission pursuant to regulation 80 of the Industrial Relations Commission Regulations 1985;

AND WHEREAS the application was heard in chambers on 27 April 1999;

AND HAVING HEARD Mr D. Renton on behalf of himself as the applicant and there being no appearance on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order —

THAT the respondent, Trevor David Hoffman, produce forthwith for inspection to the applicant, Darren Renton, the following documents in his possession, custody or power—

(a) All computer records relating to the matter of Curtis v. SGIC ("the Curtis matter") identifying the total time worked on the file by the fee-earner, in particular the applicant;

(b) All correspondence between TD Hoffman & Co and the SGIC in relation to the Curtis matter relating to the question of costs and the amount thereof paid after 1 January 1997;

(c) Any and all accounts or bills of costs rendered to SGIC in the Curtis matter; and

(d) Any and all receipts of monies received from the SGIC in settlement of the Curtis matter.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Kerrianne Mills

and

Hamersley Iron Pty Ltd.

No. 130 of 1999.

COMMISSIONER P E SCOTT.

21 April 1999.

Direction.

HAVING heard Mr D Schapper of counsel on behalf of the Applicant and Ms E Hartley 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 Applicant shall file and serve upon the Respondent particulars of the basis upon which it says that the Applicant's dismissal was unfair no later than 10 May 1999.
2. THAT the Respondent shall file and serve upon the Applicant a reply to the Applicant's particulars no later than 7 June 1999.
3. THAT the parties shall provide mutual discovery within 21 days of the Respondent's reply. Documents discovered shall not be used for any purpose other than the hearing and determination of this matter.
4. THAT the Applicant shall file and serve statements of evidence of each witness no later than 21 days after discovery.
5. THAT the Respondent shall file and serve statements of evidence of each witness no later than 7 days after the Applicant has filed its statements of evidence.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Paul Bortolotti

and

Country Tel Pty Ltd.

No. 219 of 1999.

COMMISSIONER S J KENNER.

14 April 1999.

Direction.

HAVING heard Mr P Hardie of counsel on behalf of the applicant and Mr J Long 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 any request by the applicant and respondent for particulars be filed and served by 16 April 1999.

(2) THAT the applicant and the respondent as the case may be shall respond to the requests by 23 April 1999.

(3) THAT each party shall give an informal discovery by serving its list of documents by 30 April 1999.

(4) THAT inspection of documents shall be completed by 7 May 1999.

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

(6) THAT the matter be listed for hearing for one (1) day.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Teresa Brewer

and

Morowa Golf and Bowling Club Incorporated.

No. 348 of 1999.

7 May 1999.

Order.

WHEREAS the applicant has made an application for an Order under s.27 of the Act for the production of documents in this matter;

AND WHEREAS the Commission heard the application at the conclusion of the conference convened in this matter in Geraldton on 6 May 1999;

AND HAVING HEARD the applicant on her own behalf, and with her Mr P. Nock, and there being no appearance on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act, 1979*, hereby order —

1. THAT UPON Teresa Brewer presenting herself at the Morowa Golf and Bowling Club Incorporated during ordinary office hours within 21 days of the date of this order, Morowa Golf and Bowling Club Incorporated shall produce for her inspection—
   (a) the minutes of all meetings and special meetings of the Committee of the Morowa Golf and Bowling Club Inc for the period between March/April 1997 to the date of this order;
   (b) the time and wages record relating to her employment between the dates August 1997 to December 1998.
2. THAT Teresa Brewer, or her authorised agent, shall be allowed to make photocopies of any such minutes or the time and wages record relating to her employment.

(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Kenneth Charles Landwehr

and

Wynne's Pty Ltd.

No. 366 of 1999.

COMMISSIONER P E SCOTT.

7 May 1999.

Order.

WHEREAS this is an application pursuant to Section 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979; and

WHEREAS the Commission convened a conference for the purpose of conciliating between the parties on the 7th day of May 1999; and

WHEREAS at that conference the Applicant sought to amend the Application by seeking to name a further Respondent being "Milne Feeds Pty Ltd"; and

WHEREAS at that conference the Respondent agreed that the Application be amended to include "Milne Feeds Pty Ltd" as a Respondent;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, by consent, hereby orders—

THAT "Milne Feeds Pty Ltd" be added as a Respondent.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mark Leonard Peterson

and

Wynne's Pty Ltd.

No. 367 of 1999.

COMMISSIONER P E SCOTT.

7 May 1999.

Order.

WHEREAS this is an application pursuant to Section 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979; and

WHEREAS the Commission convened a conference for the purpose of conciliating between the parties on the 7th day of May 1999; and

WHEREAS at that conference the Applicant sought to amend the Application by seeking to name a further Respondent being "Milne Feeds Pty Ltd"; and

WHEREAS at that conference the Respondent agreed that the Application be amended to include "Milne Feeds Pty Ltd" as a Respondent;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, by consent, hereby orders—

THAT "Milne Feeds Pty Ltd" be added as a Respondent.

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

NOTICES—
Cancellation of Awards/ Agreements/Respondents—
Under Section 47—

A.W.U.—BUNBURY HARBOUR MAINTENANCE AND SERVICES AGREEMENT 1971.

No. AG21 of 1971.

NOTICE

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends by order, to cancel out the following agreement, namely the—

A.W.U.—Bunbury Harbour Maintenance and Services Agreement 1971, No. AG21 of 1971

on the grounds that there are no longer any persons employed under the provisions of that agreement.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to the Commission making such order.

Please quote File No. 686 of 1977 Part 100 on all correspondence.

Dated 9 May 1999.

J. SPURLING,
Registrar.

BUILDING TRADES AWARD.
No. 31 of 1966.

NOTICE

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends by order, to strike out the following party/respondent to the Building Trades Award 1968 No. 31 of 1966, namely—

Cockburn Cement Ltd

on the grounds that the respondent is no longer operating in the industry or employing persons in the industry to which the award applies.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to the Commission making such order.

Please quote File No. 76 of 1980 Part 247 on all correspondence.

Dated 9 May 1999.

J. SPURLING,
Registrar.

CATERING EMPLOYEES AND TEA ATTENDANTS (GOVERNMENT) AWARD 1982.
No. A34 of 1981.
ENGINE DRIVERS (GOVERNMENT) AWARD 1983.
No. A5 of 1983.

NOTICE

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends by order, to strike out the following party/respondent to the Catering Employees and Tea Attendants (Government) Award 1982, No. A34 of 1981 and the Engine Drivers (Government) Award 1983, No. A5 of 1983, namely—

Port Hedland Port Authority

on the grounds that the respondent is no longer operating in the industry or employing persons in the industry to which the awards apply.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to the Commission making such order.

Please quote File No. 76 of 1980 Part 249 on all correspondence.

Dated 9 May 1999.

J. SPURLING,
Registrar.

PUBLIC SERVICE APPEAL BOARD—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mia Mary Wood

and

The Director General of the Western Australian Education Department.

No. PSAB 17 of 1998.

PUBLIC SERVICE APPEAL BOARD.

4 May 1999.

Order.

WHEREAS this is an application pursuant to the Industrial Relations Act 1979, filed on the 27th day of July 1998; and

WHEREAS on the 19th day of March 1999 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties agreed to have further discussions; and

WHEREAS on the 4th day of May 1999 the Applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby dismissed.

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