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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.

The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch

and

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

and

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers
(Appellants)

and

RGC Mineral Sands Limited

and

Westralian Sands Ltd
(Respondents).

No 345 of 1999

and

No 398 of 1999.

BEFORE THE FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
COMMISSIONER P E SCOTT.

10 November 1999.

Reasons for Decision.

INTRODUCTION

THE PRESIDENT: These are two appeals by the abovenamed appellants against the whole of the decisions of the Commission, constituted by a single Commissioner, given on 22 February 1999 and 15 March 1999 respectively. The two appeals were heard together by consent.

The order made in matter No 2178 of 1998 on 22 February 1999, formal parts omitted, was an order that the interlocutory application for injunctive relief be and is hereby dismissed. That order, it was alleged, was a "finding", as that term is defined in s.7 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the IR Act").

By the second order, made on 15 March 1999, it was ordered, recitals omitted, as follows—

> "NOW THEREFORE the Commission, being satisfied that the grounds upon which the beforementioned application for an interim injunction has been dismissed apply equally to the substantive application and hence the Commission is without jurisdiction to hear and determine the substantive application and therefore further proceedings in relation to that application are not necessary or desirable in the public interest and pursuant to the power conferred on it under the Act, hereby orders—
>
> THAT this application be and is hereby dismissed."

Appeal No 345 of 1999 relates to the finding and it is asserted that it is in the public interest that an appeal should lie, within the meaning of s.49(2)(a) of the IR Act.

Appeal No 398 of 1999 is an appeal against the final decision.

Leave was given to the appellant, AWU, to extend time within which to file and serve the appeal book, the application for such leave not being opposed.

GROUNDS OF APPEAL

It is against the whole of those decisions that the appellants now appeal on the following grounds, respectively—

Appeal No 345 of 1999

"1. The Commissioner erred in holding that he did not have jurisdiction to hear and determine the application.

2. The Commissioner erred in determining the issue of jurisdiction when he should only have determined whether the application raised a serious issue to be heard.

3. The Commissioner failed in his duty in failing to attempt to conciliate or continue to conciliate the issue between the parties.

4. The Commissioner failed to determine whether conciliation would or may be availing or useful, alternatively erred in determining that conciliation would not or may not be availing or useful."

Appeal No 398 of 1999

"The Commissioner erred in holding that he did not have jurisdiction to hear and determine the application."

BACKGROUND

There was an application filed in the Commission by the abovenamed organisations of employees, as applicants, on 9 December 1998, seeking variations to the Mineral Sands Industry Award 1991 (No A3 of 1991) (hereinafter referred to as "the award") and naming Westralian Sands Ltd (hereinafter referred to as "WSL") and others as respondents. Another respondent was RGC Mineral Sands Ltd (hereinafter referred to as "RGC").

It is necessary to consider the terms of the application at first instance. I therefore reproduce the relevant parts hereunder for convenience.

The grounds on which the application was made were as follows—

> "Proposed subclauses 1-4 seek to give effect to freedom of choice in relation to employment within the award system and pursuant to a workplace agreement. The clause is necessary because the employer respondents are employing labour only on the basis of workplace agreements thereby depriving prospective employees of the right to choose employment on the award system.
>
> Proposed subclause 5 is required because workplace agreements offered by RGC do not contain an effective dispute settlement procedure."

The terms of the proposed clause, and thus the proposed variation to the award, are as follows—

> "Clause [x].—Freedom of Choice
>
> Preamble
>
> The intention of this clause is to allow future employees of the companies to which this clause applies to decide whether they will be employed on a workplace agreement registered under the Workplace Agreements Act or on a contract of employment to which this award applied.
>
> Operative provisions
>
> 1. This clause shall apply to RGC Mineral Sands Ltd and Westralian Sands Ltd and to each subsidiary, whether direct or indirect, and each holding company, whether direct or indirect, of each of them and to each of their successors, assignees or transmittees, whether immediate or not, to or of the whole of(sic) part of either of any of their business ("the employer")
> 2. Whenever the employer proposes to engage any natural person to perform work which is referred to in, or covered by, or wholly or in part, a classification contained in this award the employer shall offer to engage that person pursuant to a contract of employment the terms and conditions of which shall be those on which persons already employed by RGC Mineral Sands Ltd to perform like work are employed. The offer shall not include any requirement that there be a registered workplace agreement.
> 3. Nothing herein shall prevent the employer from also offering to engage the persons referred to in 2 hereof pursuant to a workplace agreement provided that the offer of employment that shall be made to that person pursuant to clause 2 hereof shall be made at the same time as any offer to engage pursuant to a workplace agreement.
> 4. Where the employer offers employment on the basis of a workplace agreement as well as on the basis set out in clause 2 hereof the employer shall, at the same time, provide a written statement to the person as follows—
>
> Important Notice to Prospective Employee
>
> You are being offered employment with [insert name of employer] on 2 alternative bases. You have the choice as to which basis upon which you will be employed.
>
> The first choice is employment under a contract of employment to which the Mineral Sands Industry Award applies. The WA Industrial Relations Commission can make orders affecting this type of employment.
>
> The second choice is pursuant to a workplace Agreement to which no award applies. The WA Industrial Relations Commission cannot make orders affecting this type of employment.
>
> This is an important decision for you to make. Your decision will irrevocably affect many matters in your employment for a long as that employment lasts and afterwards.
>
> You should take expert advice as to these 2 different forms of employment before you decide which one to take.
>
> You can obtain advice from any of the following—
>
> The Australian Manufacturing Workers Union
> Telephone: 9481 1511
> The Australian Workers Union
> Telephone: 9221 1686
> The Construction Forestry Mining Energy Union of Australia
> Telephone: 0897345600
>
> 5. Where the employer offers employment pursuant to a workplace agreement the agreement offered shall contain a dispute settlement clause which provides for—
>
> 5.1 representation of the employee, at the employee's option, throughout the procedure by a person or union of the employee's choice; and
>
> 5.2 determination, after no more than a reasonable number of intermediate steps, of any dispute between the employer and employee by an arbitrator constituted by a Commissioner of the WA Industrial Relations Commission appointed by the Chief Commissioner."

The Commission held (and this finding was not challenged) that the clause was intended to have a limited scope of operation, the immediate effects of which would be limited to RGC and WSL and to any other subsidiary or holding company of each, presently operating.

The respondents opposed the variations sought. The answers and counterclaims on behalf of each company in the matters were filed on 4 January 1999 and contain seven paragraphs, six of which are common to them. The six paragraphs are reproduced hereunder—

> "1. The Commission is without jurisdiction to grant the award variation sought as it seeks to apply to offers of employment to future potential employees.
> 2. In enacting the Workplace Agreements Act 1993 (WA)("**the WA Act**") and the Industrial Relations Amendment Act 1993, which varied the Industrial Relations Act 1979 (WA), the Western Australian Parliament established two distinct and alternate forms of workplace regulation—
>
> (a) the award stream; and
>
> (b) the workplace agreement stream.
>
> 3. The award variation sought seeks to merge the two streams. Parliament never intended the Commission to interfere with the workplace agreement stream.
> 4. The WA Act is a complete code in relation to the offering, registering and operation of workplace agreements. In particular, it sets out the requirement for provisions for dealing with any questions or dispute that arises between the parties about the meaning or effect of the agreement; and prior to registration, the Commissioner of Workplace Agreements must be satisfied that, amongst other things, each party appears to understand his or her rights and obligations under the agreement and that they genuinely wish to have the agreement registered.
> 5. The variation sought does not comply with the current State Wage Fixation Principles.
> 6. To(sic) variation sought is without merit."

Paragraph 7 of RGC's answer reads as follows—

> "7. In relation to the proposed subclause 5—
>
> (a) RGC denies the allegation that its fair treatment procedure is not an effective dispute settlement procedure;

(b) to the extent that the variation sought seeks to stipulate the contents of the dispute settlement clause in a workplace agreement, it is not within the jurisdiction of the Commission."

Paragraph 7 of WSL's answer is as follows—

"7. It is beyond the jurisdiction of the Commission to stipulate the provisions to be inserted in workplace agreements."

The matters came before the Commission by way of s.32 of the IR Act. On 12 February 1999, there was a conference conducted by the Commission, pursuant to s.32, at which the applicant unions and RGC and WSL were each represented.

The Commission was advised that it was imminent that employees of RGC would be made redundant and that WSL had notified that it had 35 vacant employee positions to be filled.

It was the policy of WSL to offer prospective employees engagement on the condition that they enter into a workplace agreement regulating their terms and conditions of employment. Hence, each person so employed would become bound by such an agreement, the effect of which would be to cause the employment relationship to be so regulated and not to be covered by the award. Those persons would, by entering into such an agreement, also be removed from the usual jurisdiction of the Commission.

Counsel for the appellants made an oral application to the Commission at first instance in conference for an interim injunction directing that RGC and WSL be required to include in any future offer of employment the alternative to a workplace agreement of the nature expressed in the claimed award variation where such an offer is made prior to the disposition of the substantive application by arbitration.

Counsel for the appellants produced to the other parties and to the Commission at first instance a draft interim order. The application was said to raise a serious issue to be tried and the balance of convenience was said to favour the applicant unions.

On behalf of RGC and WSL, it was submitted that the matter raised by the application for relief did not have the character of an industrial matter, as defined by the IR Act (s.7) and that, therefore, there was no jurisdiction to hear the matter. The Commission ruled that it did not have the necessary jurisdiction, and that it was assisted by RRIA v ADSTE 68 WAIG 11 (IAC) (Pepler's Case), in so deciding.

The Commission referred to s.23 of the IR Act, which, in its first two lines, reads as follows—

"Subject to this Act the Commission has cognisance of and authority to inquire into and deal with any industrial matter"

and to s.7 of the IR Act, which reads (in the parts material to these appeals) as follows—

"… subject to section 7C, any matter affecting or relating to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter relating to—

(a) …

(b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;

(c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;"

It was not in issue before the Commission, at first instance, that RGC and WSL were "employers", as defined, engaged in an industry, for the purposes of the definition of "industrial matter" in s.7 of the IR Act.

The Commission referred, also, to the definition of "employee" in s.7, which reads as follows—

"(a) any person employed by an employer to do work for hire or reward including an apprentice or industrial trainee;

(b) any person whose usual status is that of an employee;

...."

It was submitted on behalf of the respondents that the two respondent employers, given the terms "industrial matter", "employee" and "employer" defined in s.7 of the IR Act, have a meaning that is subject to s.7C and 7B of the IR Act, and that, together with the operation of s.7A, ousts the jurisdiction of the Commission to make an order which affects their right to follow the separate lawful stream of employment regulation provided by the Workplace Agreements Act 1993 (hereinafter referred to as "the WA Act").

S.7A and s.7B and s.7C of the IR Act, as they are quoted at page 21 of the Appeal Book (hereinafter referred to as "AB"), read as follows—

"7A. Without limiting the other provisions of this Part, this Act has effect subject to the Workplace Agreements Act 1993."

"7B. Where any employer and any employee are parties to a workplace agreement, they are not, in relation to one another, within the definitions of "employer" and "employee" respectively in section 7(1)."

"7C. (1) Where any employer and any employee are parties to any workplace agreement, a matter that is part of the relationship between that employer and that employee—

(a) is not—

(i) an industrial matter; or

(ii) capable of being agreed to be an industrial matter,

for the purpose of the definition of "industrial matter" in section 7(1);

(b) is not capable of being determined under section 24(1) to be an industrial matter; and

(c) ...

(2) ...

(3) ..."

The Commission also referred to RRIA v MEWU 75 WAIG 2478 (IAC) and RRIA v ADSTE 68 WAIG 11 (IAC).

The Commission also referred to the WA Act. S.6 of that Act provides as follows—

6. (1) Where a workplace agreement—

(a) has been made between—

(i) an employer and an employee under a contract of employment; or

(ii) an employer and employees under contracts of employment;

and

(b) has come into force,

no award, whether existing or future, applies to—

(c) that contract or those contracts of employment; or

(d) the employer or any such employee as a party to any such contract,

so long as the workplace agreement remains in force.

(2) Where a workplace agreement has been made as mentioned in subsection (1) (a), in relation to any contract of employment, and has come into force, any award provision that applied to that contract immediately before that coming into force is not to be implied into, or in any way read as being part of, the workplace agreement unless the agreement expressly so requires.

(3) A workplace agreement also has the effects described in sections 7B, 7C, 7D and 7E of the *Industrial Relations Act 1979*.

(4) A workplace agreement does not displace the contract of employment between an employer

and an employee but while it is in force it has effect—

(a) as if it formed part of that contract; and

(b) regardless of any provision of that contract.

(5) ....."

The Commission concluded that the WA Act provides a stream of employment regulation separate to that provided by the IR Act, and where employer and employee parties enter into workplace agreements, they are no longer an "employer" and an "employee", and the terms of their relationship do not fall within the definition of an "industrial matter". That they are no longer employer and employee and that their relationships do not fall within the definition of "industrial matter" when a "workplace agreement", as defined, is entered into, is plainly evident from the extracts of s.7A, s.7B and s.7C of the IR Act.

The Commission also found that the provisions of the WA Act, which prohibit certain conduct by an employer in relation to the procurement of a workplace agreement, do not preclude an employer from offering a prospective employee employment conditional upon such being regulated by a workplace agreement.

The Commission also concluded that, since the IR Act has effect subject to the WA Act, and this last mentioned statute allows an employer to so engage a new employee, the IR Act is to be read and to be applied as having no effect in relation to a matter authorised by the WA Act. Of course, for reasons which I will express later, questions concerning what conditions should apply to a contract of employment are not at all matters "authorised by the WA Act".

The Commission then quoted, at page 23(AB), s.6(1),(2) and (3) of the WA Act. In that Act also, s.3 defines an award as follows—

"(a) an award under the Industrial Relations Act 1979, and includes any industrial agreement or order under that Act; and

(b) an award under the Coal Industry Tribunal Western Australia Act 1992 ..."

The Commission also held that embarkation upon the alternate stream commences at the time when an employer and an employee enter into a workplace agreement and when that has effect, according to the WA Act. It is only then that the jurisdiction of the Commission is ousted. With that proposition, for reasons which I express hereinafter, I respectfully agree.

The Commission has the power to make mandatory and prohibitive orders of an injunctive nature, but the same are restricted to assisting the process of conciliation (see RRIA v AMWSU 66 WAIG 1553 (IAC)), so the Commission held. In this case, the Commission concluded that there did not exist a basis for making such an order.

Those reasons for decision issued on 22 February 1999 in matter No 2178 of 1998 and were applied to the final decision in the matter by the recitals to the order appealed against.

ISSUES AND CONCLUSIONS

The primary question in this matter was whether the Commission had jurisdiction to entertain the application at first instance and to make the orders sought.

The matter before the Commission was an application to have inserted in the award a provision to allow future employees of the respondents, to whom the award applied, to decide whether they would be employed on a workplace agreement registered under the WA Act or on a contract of employment to which the award applies, and to be notified of the alternatives available of workplace agreement and award coverage.

This matter should be approached with the well known principle firmly in mind that an organisation registered under the IR Act is not a mere agent of its members, it stands in their place, acts on their account and is a representative of the class associated together in the organisation (see Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association [1924-5] 35 CLR 528 at 551 per Starke J). That is, the "organisation" (as defined in the IR Act) and not the individual members, are the persons with which the Commission deals for the purposes of conciliation and arbitration (s.29(1)(b)(i) and (ii) of the IR Act provide specifically legislated exceptions).

An award which embraces future employees (and employers) is one made within power. Indeed, s.37 of the IR Act envisages that that will be the case.

Whilst the important dicta of Isaacs J relate to the term "industrial disputes", since disputes are at the heart of the arbitration and conciliation of industrial matters under the IR Act, then the dicta of Isaacs J remain pertinent. I quote Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association (HC) (op cit) at pages 538-539—

> "The term "industrial disputes" cannot by any possibility be limited to disputes between persons standing in the actual present contractual relation of employer and employee. Such a limited construction would in effect exclude demarcation disputes, which are substantially between different classes of employees, and would exclude all disputes by organizations, which *ex natura rerum* can never be employees. It is no answer to say that an organization could represent its members for the purpose of litigating the dispute, for that would still exclude the organization as a party to the dispute *before* litigation, and would exclude as principals all present members of the organization who were not actually employed by the respondents and would further exclude all future members of the organization. In the case of an organization of employers, the doctrine would similarly exclude employers. And, to be consistent, the doctrine based on the notion that an employer cannot be in dispute except with his own employees would as to each employer exclude all employees of other employers at the time of the dispute, even though they were members of the organization and afterwards entered the service of the first mentioned employer.
>
> The construction contended for as adverse to the jurisdiction, is therefore impossible, inconsistent and, as applied to the well-known subject of "industrial disputes," absurd. If adopted in this case as a basis of decision and consistently applied, it would reduce Federal arbitration to futility."

(I would observe that the definition of industrial matter is wider than the definitions in the federal Acts).

The employees who would be the subject of the variation are future employees. The variation would operate to impose obligations on the employer and rights in the prospective employees before they entered into the contract of service.

The jurisdiction of the Commission in this matter depended upon the matter before it being an "industrial matter", as defined. It was common ground that the employees, the subject of the variation, were future employees. The question is whether this could be an "industrial matter". An "industrial matter", as defined in s.7 of the IR Act, is defined in wider terms than similar definitions in the federal legislation over the years.

Reliance, for the appellants, was placed on three authorities—

> The Board of Management, Princess Margaret Hospital for Children v HSOA 55 WAIG 543 (IAC) ("the Princess Margaret Case"). That case is authority for the proposition that the dismissal of or refusal to employ an employee is within the general words of the definition of "industrial matters", as being a matter "affecting or relating to the work, privileges, rights and duties of employers or workers in any industry". As Burt J, expressing the unanimous reasons for decision of the Industrial Appeal Court, said at page 545—
>
> > "...refusal to employ a worker is within the general words of the definition of "industrial matters"... the employment or reinstatement of the worker becomes an industrial matter and if it be the subject of a dispute between an industrial union of workers and an employer it is then an industrial dispute, and an order to reinstate or to employ as the case may be is then seen to be an order within power, being an order made "determining" the industrial matter in dispute."

In the definition presently contained in the IR Act, a refusal to employ is specifically prescribed to be an "industrial matter". Mr Le Miere, on behalf of the respondents, submitted

that it had to be read within the context of an "employer", as defined, and an "employee", as defined. However, the current definition of industrial matter which relies on the definition of "employer" and "employee", to which I have referred, specifically prescribes in the same manner as Burt J observed was the effect of the IR Act in the Princess Margaret Case (op cit), that a refusal to employ is a matter affecting or relating to the rights of employers in any industry or of any employer or employee therein.

This is supported by the plain words of paragraph (c) of the definition of "industrial matter" in s.7 of the IR Act, which reads—

> "the dismissal of or refusal to employ any person or class of persons therein" .

The plain meaning of those words is that a refusal by an employer to enter into a contract of employment or an employer/employee relationship with a person or any class of persons is an industrial matter. The word "employee" is not used. The word "person" is used.

It is to be noted that the "industrial matter", in that respect, is not defined by reference to employees. It is defined, inter alia, to include a refusal to employ a person, not yet an employee, or who has never been an employee. That refusal could be a refusal by an employer only. That is a recognition by those specific words that an "industrial matter" exists where an employer refuses to employ a person or class of persons and where, by clear implication, no contract of employment exists when the refusal occurs. Of course, where there is a refusal to employ, no contract of employment does or will exist; except where a contract is ending and there is a refusal to offer a new one.

Again, for those reasons, those rights may be the rights of any employer or employee, not the rights, etc of both employer or employee, not necessarily mutual as paragraph (c) of the s.7 definition reads. Further, an employer is a person, firm, company, corporation, the Crown or the Minister of the Crown or any public authority who employs one or more employees. An employee, too, is not only a person in current employment (see definitions (a), (c) and (d) in s.7 of the IR Act), "an employee is a person whose usual status is that of an employee". The employer does not have to be the current employer of the employees about whom the dispute exists. Accordingly, the provisions sought to be added can relate to the rights, principles, etc, of "employees" and "employers" as defined.

It was submitted that that is a definition which is apposite to particular sections of the IR Act such as those which relate to membership of organisations. However, that is not apparent from the IR Act, reading the definition in the context of the whole of the IR Act and having regard to the objects of the IR Act as signposts (see, particularly, s.6(a), (b) and (c)).

It reduces that interpretation or construction on the ratio of the Princess Margaret Case (op cit) that Burt J was referring to a matter where employment was offered then sought to be revoked. His Honour referred specifically to dismissals and specifically to refusals to employ.

Further, in that case, the "relationship of master and servant had never arisen" (see per Brinsden J, with whom Smith J agreed, in Totalisator Agency Board and Others v FCU and Others 60 WAIG 624 at 627 (IAC) ("the Totalisator Case"), where Brinsden J identified that the relationship had not arisen in the Princess Margaret Case (op cit)). The foundation of the operation of the clause was an existing "master and servant relationship" in the Totalisator Case (op cit), but Brinsden J referred to the clause which was sought to be added to the subject award in that case. That clause prescribed that any employer bound by the award who had an alternative position available must offer that position to an employee affected by the redundancy order of another employer bound by the award. That clause did not relate to the employment relationship existing between the employer offering employment and the retrenched or about to be retrenched employee.

Brinsden J held that that matter related to the rights or privileges of a worker in an industry. What the clause purported to do was to require an employer of other employees bound by the award to offer employment upon the termination of an employee's employment by another employer bound by the award to the retrenched employee. In other words, it imposed an obligation to offer re-employment upon an employer who had no employer/employee relationship with the retrenched employee (see also The Master Builders & Contractors Association of Western Australia v Wolff and Others (1938) 41 WALR 59, where the Full Court of the Supreme Court of this State upheld as valid the exercise of jurisdiction by the Arbitration Court of this State in relation to providing preference to unionists in an award).

Those cases are not overruled or said to be wrong in any of the cases in the Pepler line of authorities cited to us, nor in any case to which the Full Bench has been referred. Those cases are authority, too, for the proposition that it is not to the point that an industrial matter related to prospective employment. (see Re Cram and Others; Ex parte NSW Colliery Proprietors' Association Limited and Others (1987) 163 CLR 117). In any event, the words prescribing a refusal to employ a person or persons (who are not "employees", as defined) as an industrial matter are plain and clear. There is no reference to those matters in the Pepler line of cases which dealt with remedies and jurisdiction in unfair dismissal matters.

Further, there is jurisdiction if an employee is, as defined, a person whose usual status is that of an employee. That was the case here because the persons concerned were employees who had been or were about to be retrenched. Further, of course, the industrial matter arose here between an organisation of employees and employers concerning an award which would and did regulate relationships between employers and employees.

In any event, if it were necessary to say so, there is logical similarity between reinstatement, which revives an employment relationship, and provisions such as these which regulate the creation of an employment relationship and the rights and obligations, or at least some of them, which apply. The question of any temporal link, for those reasons, is not material, having regard to those cases. In any event, RRIA v MEWU (IAC) (op cit) was concerned with events long after the termination of the employment relationship and is, for that reason, distinguishable. The distinction also applies having regard to the reasoning in both the Princess Margaret Case (op cit) and the Totalisator Case (op cit). To make it clear, these authorities have not been overruled and with respect form a line of authority outside the temporal connection referred to in RRIA v MEWU (IAC) (op cit).

This was, for those reasons, clearly an "industrial matter", as defined, and within jurisdiction. However, the matter does not end there.

INDUSTRIAL MATTERS AND WORKPLACE AGREEMENTS

By virtue of s.4 of the WA Act, that Act has effect despite any provision of the IR Act.

An "award" is defined in s.3 to mean an award under the IR Act and any industrial agreement or order under the IR Act.

An "employee" means a person who is an employee within the meaning of the IR Act and a person to whom s.43 applies. "Employer" has the same meaning as in the IR Act except that, for the purposes of giving effect to Part 3, it has the meaning given by s.44 of the WA Act. A "workplace agreement" is defined in s.7 of the IR Act to mean "a workplace agreement that is in force under the Workplace Agreements Act 1993".

To be in force under the WA Act, the agreement must be a "workplace agreement", as defined in s.5 of the WA Act; that is an agreement of the kind described in s.5 and where the context so requires, means an agreement of that kind that is in force (my underlining). An agreement is in force only when it is registered pursuant to s.40I of the WA Act.

By virtue of s.7A of the IR Act, the IR Act has effect subject to the WA Act. However, in matters of jurisdiction, there are specific provisions of the IR Act which restrict the jurisdiction of the Commission in precise terms. That restriction of jurisdiction is no wider than those terms. A fortiori would there be jurisdiction where an employee or employer negotiating for a workplace agreement or a contract covered by an award alleges duress or unfairness in relation to that process. Further, where an employer and an employee are parties to a workplace agreement, they are not, in relation to one another, within the definitions in s.7(1) of the IR Act of employer and employee, i.e. if the workplace agreement is in force.

Similarly, matters which are part of a relationship between parties to a workplace agreement are not and cannot be industrial matters under the IR Act. Powers under s.44 of the IR Act are excluded where a collective agreement has been lodged for registration, and a workplace agreement is in force under the Act.

An industrial matter as defined includes any matters which are within the definition of "industrial matter" which include questions of negotiations for an industrial agreement, the replacement of and obligations by the same and the fairness of the process, because they do not relate to a workplace agreement, as defined, but to the rights, privileges and obligations of parties before one is entered into.

Of course, this would most clearly be seen to be the case where these questions arise in relation to an employee actually in employment and his/her employer.

For all of those reasons, however, I am of opinion that these matters would fall within the definition of industrial matter where persons are not currently employed. That would include the refusal to employ someone who would not sign a workplace agreement or a provision such as this, requiring advice to employees as to what terms were available, something which seems to me elementary.

In my opinion, there was jurisdiction. This was an industrial matter.

THE INTERIM ORDERS

I now turn to the question of the interim orders. Because the question of jurisdiction raised in this matter has been determined on this appeal against the final orders, it is in the public interest that an appeal lie. Those orders were within jurisdiction.

The injunctive orders under s.32 of the IR Act are restricted to assisting the process of conciliation (see RRIA v AMWSU (IAC) (op cit)).

However, the orders, as the Commission found, were sought by oral application because the respondents, particularly WSL, were not prepared to consider any alteration to their employment practice. That a party refuses to be involved in conciliation is not necessarily a reason why injunctive orders could not be made. Such might well have the effect of assisting the process. It is in the public interest that appeal No 345 of 1999 lie.

For the reasons expressed above, I would uphold appeal No 398 of 1999. I would suspend the orders made at first instance, remit the matter back to the Commission to deal with it according to those reasons for decision and according to law, it being clear to me that there was jurisdiction to hear and determine the application.

I would uphold both appeals.

CHIEF COMMISSIONER: I have had the advantage of reading the reasons for decision of the President. I agree with him that these appeals should be upheld.

The question whether a matter in issue is an "industrial matter" does not in the first instance require the identification of whether the matter goes to or is within the sphere of the relations of employers and employees as such. Rather, as Franklyn J. points out in the Minister for Police and the Commissioner of Police –v- Western Australian Police Union of Workers (75 WAIG 1504 @ 1508) ("the Police case"), the question is directed at whether the matter affects or relates to the work, privileges, rights or duties of employers or employees or an employer or employee in any industry. This requires the initial identification of what the matter is within the description of "work, privilege, rights or duties" of the employer or employee or employers or employees that is said to be affected by or related to the claimed industrial matter. If that cannot be identified, then the issue does not concern an industrial matter. On the other hand if it does, the next step is directed at establishing whether the matter in issue does, as a matter of fact, affect or relate to the identified "work, privilege, right or duty" as specified in the definition of "industrial matter" under the Act.

The matter the subject of the appellant's award application and the terms of the proposed interim order was, in substance, a claim that any offer of employment must be made on certain terms and conditions. This affects the employer's rights relating to the employment of persons or the refusal to employ any person or class of person. The fact of this affect on the right of the employers to offer employment was made clear in proceedings in the first instance. Identification of an industrial matter does not in my view excite consideration of a temporal connection or mutuality in the first instance. Again as Franklyn J. points out in the Police case—

> "Whilst it is implicit in the wording of the definition in s7 that the "matter" must be connected with the relationship between the employer and employee in their respective capacities as such, to determine the issue on the further requirement expressed in the Manufacture Grocers Employees case (Manufacture Grocers Employees Federation of Australia (1986) 160CLR 341) that the matter must not only be so connected but must also be 'direct and not merely consequential' diverts from the necessity of determining whether the matter in fact affects or relates to the identified work, privilege, right or duty. The test in the Manufacturing Grocers Employees case concentrates on the nature and degree of the "connection" between the "matter" and the employer and employee relationship rather than the test provided for by the definition in s7." (op cit at 1508)

The connection between the claim to impose conditions upon which employment may be offered by the employer and those seeking employment is covered within the definition of the Act whereby an "employee" is any person whose usual status is that of an employee. It is not necessary for the determination of an "industrial matter" that the connection to be based on an established employment relationship. (See the Board of Management, Princess Margaret Hospital for Children v the Hospital Salaried Officers Association of W.A. (Union of Workers) (1975) 55 WAIG 543 and Totaliser Agency Board v Federated Clerks Union of Australia, Industrial Union of Workers, W.A. Branch (1980) 60 WAIG 624).

The Commissioner at first instance erred in holding that in the absence of an employment relationship in the industry at the time the claim was not an industrial matter.

I agree that in upholding the appeals that orders made in first instance be suspended and the matter be dealt with pursuant to the finding of jurisdiction.

COMMISSIONER SCOTT: I have had the benefit of reading the reasons for decision of His Honour the President, which set out the grounds of appeal and the background to this matter.

The claim before the Commission at first instance sought to amend the award to require that the Respondents make certain offers to prospective employees, and supply those prospective employees with certain information. Although the circumstances giving rise to the applications were said by the parties to relate to impending redundancies and hiring by the Respondents the terms of the clause sought to be inserted into the award are far broader than those circumstances. They refer to "Whenever the employer proposes to engage any natural person to perform work" (subclause 2) and "Where the employer offers employment" (subclauses 4 and 5). The offer required to be made by the clause was to engage the person pursuant to a contract of employment, the terms and conditions of which were to be those on which persons already employed by one of the Respondents to perform like work were employed (ie a contract of employment which sits on top of the award). The claim also provided that, whilst there was nothing to prevent the employer from offering to engage the persons under a workplace agreement pursuant to the Workplace Agreements Act 1993 ("WA Act"), the offer to engage on conditions applicable to other employees was to be made at the same time as any offer made to engage pursuant to a workplace agreement. Where the employer offered employment on the basis of a workplace agreement as well as in accordance with the conditions which apply to others, then the employer was to provide a written statement setting out certain information about awards, workplace agreements and associated matters.

The definition of industrial matter is set out in s.7(1) of the Industrial Relations Act 1979 ("the IR Act"). The relevant parts are—

> ""industrial matter" means, subject to section 7C, any matter affecting or relating to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting

the generality of that meaning, includes any matter relating to—

(a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;

(b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;

(c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;

(d) … ;

(e) … ;

(f) … ;

[(g) and (h) deleted]

(i) …;

but does not include—

(j) compulsion to join an organization of employees to obtain or hold employment;

(k) preference of employment at the time of, or during, employment by reason of being or not being a member of an organization of employees;

(l) non-employment by reason of being or not being a member of an organization of employees; or

(m) any matter relating to the matters described in paragraph (j), (k) or (l);"

Section 7(1a) of the IR Act provides—

"(1a) A matter relating to –

(a) the dismissal of an employee by an employer; or

(b) the refusal or failure of an employer to allow an employee a benefit under his contract of service,

is and remains an industrial matter for the purposes of this Act even though their relationship as employee and employer has ended."

Sections 7B and 7C of the IR Act deal with the impact on of the WA Act on the definition of industrial matters. They provide—

"7B. Definitions of "employer" and "employee" limited

Where any employer and any employee are parties to a workplace agreement, they are not, in relation to one another, within the definitions of "employer' and "employee" respectively in section 7 (1)."

7C. Definition of "industrial matter" limited

(1) Where any employer and any employee are parties to any workplace agreement, a matter that is part of the relationship between that employer and that employee—

(a) is not—

(i) an industrial matter; or

(ii) capable of being agreed to be an industrial matter,

for the purpose of the definition of "industrial matter" in section 7 (1);

(b) is not capable of being determined under section 24 (1) to be an industrial matter; and

(c) cannot be referred to the Commission under section 80ZE.

(2) Subsections (3) and (4) of section 34 do not apply to a determination that is made contrary to subsection (1) (b) or to any proceeding based on that determination, and in the determination of any application for a prerogative writ or declaratory judgment no regard shall be had to the existence of any right of appeal under this Act.

(3) Subsection (1) also applies where—

(a) a workplace agreement has expired; and

(b) an arrangement is in force between the parties to that agreement of the kind referred to in section 19 (4) (b) of the *Workplace Agreements Act 1993*,

except to the extent that the employer and any employee agree that any matter is to be treated as an industrial matter between them."

In the *Minister for Police and The Commissioner of Police v Western Australian Police Union of Workers* (1995) 75 WAIG 1504 Kennedy J. who agreed with Franklyn J, noted that the definition of industrial matter in the Western Australian legislation "remains very much concerned, as the long title indicates, with the mutual rights and duties of employers and employees as such. And the work, privileges, rights or duties spoken of in the definition of "industrial matter" are those of employers and employees." (underlining added)

At page 1508, His Honour Franklyn J. says—

"In my opinion, the general words of the definition "industrial matter" in s 7 of the Act provide a definition considerably wider in its coverage than that of "industrial matters" in the Commonwealth Act. Unlike the Commonwealth definition, its terms are not directed initially to the question whether the matter in issue "pertains" (ie belongs to or is within the sphere of) the relations of employers and employees as such. Rather, it is directed to the question whether the matter in issue affects or relates to the work, privileges, rights or duties of employers or employees or an employer or employee in any industry. It seems to me that this requires initial identification of what it is, within the description of "work, privilege, rights or duties" of the employer or employee or employers or employees (as the case may require), that is said to be affected by or related to the claimed industrial matter. If that cannot be identified, then the issue does not concern an industrial matter. If, however, it can be identified, then the inquiry is next directed to establishing whether the matter in issue does, as a matter of fact, affect or relate to the identified "work, privilege, right or duty". Only if it can be found so to do can it be an "industrial matter" within the meaning of the Act. In my opinion, to approach the question in reliance on authorities based on the definition in the Commonwealth Act is to distract from the true question. Whilst it is implicit in the wording of the definition in s 7 that the "matter" must be connected with the relationship between the employer and employee in their respective capacities as such, to determine the issue on the further requirement expressed in the *Manufacturing Grocers Employees* case that the matter must not only be so connected, but must also be "direct and not merely consequential", diverts from the necessity of determining whether the matter in fact affects or relates to the identified work, privilege, right or duty. The test in the *Manufacturing Grocers Employees* case concentrates on the nature and degree of the "connection" between the "matter" and the employer and employee relationship rather than the test provided for by the definition in s 7." (underlining added)

In *Robe River Iron Associates v Metals and Engineering Workers Union WA Branch* [(1995) 75 WAIG 2478], Franklyn and Murray JJ agreed with the reasons of Scott J. At page 2479, Murray J also added—

"It is argued for the respondent that the subject matter of the appellant's claim against its member relates directly to the work, rights and duties of the employee concerned.

In my opinion, a fallacy in the argument is that it ignores the temporal connection between the definition of an industrial matter and the occasion said to require the exercise of jurisdiction by the Commission. In other words, when the matter which comes before the Commission arose, having regard to the part of the definition relied upon, it is necessary that the matter be one of the defined type relating to persons or entities who were then employers or an employer or employees or an employee in any industry. That was self-evidently not the case here.

That view of the legislation is, in my opinion, consistent with the approach which has been taken by this Court in a series of cases referred to and discussed at more length by Scott J, concerned with the power of the Commission

to award compensation on a finding of unfair dismissal in the absence of any order for the reinstatement of the employee concerned. The cases have consistently affirmed the need for the existence of the employee/employer relationship before compensation could be awarded: see Robe River Iron Associates v Association of Drafting, Supervisory and Technical Employees of WA (1987) 68 WAIG 11; Coles Myer Ltd v Coppin (1993) 73 WAIG 1754 and Sakal v T O'Connor & Sons Pty Ltd, unreported; Industrial Appeal Court; Library No 950156; 27 March 1995.

…

… The matter in dispute, being the employer's capacity to recover damages for negligence at common law, was not an industrial matter as defined because it did not affect or relate to the work or the rights or duties of this employer and employee as such, that relationship having been terminated when the employer's claim was made and, in any event, because I consider that the appellant's claim against its former employee, whether or not the relationship of employer and employee was subsisting, was not one which in any meaningful way affected or related to the work, rights or duties of employer and employee in an industrial sense, but to the liability of the employee if found to be in breach of a duty of care owed to his employer. …"

Commencing at page 2481, Scott J noted—

"The first question that has to be answered is whether the dispute between the appellant and Coombes was an industrial matter within the meaning of the Industrial Relations Act.

In dealing with that issue it is to be noted that Coombes was dismissed as an employee of the appellant shortly after the incident concerned and that this application has nothing to do with the reinstatement of Coombes as an employee. In Robe River Iron Associates v Association of Drafting, Supervisory and Technical Employees of WA 68 WAIG 11 (Pepler's case) Kennedy J, the Deputy President, held at 20—

"In my opinion there is nothing in the Act to justify the exercise of a jurisdiction to award a dismissed employee compensation or any other money payment except as an incident to an order for reinstatement or re- employment. And an examination of the authorities over a period in excess of 30 years does not lead to any other conclusion."

In the same case, at 22, Rowland J said—

"... I can see no charter to extend the power of the Commission to make an order directing a former employer to make payments to an ex-employee where no order for re-employment is made simply because it may be thought to follow from the reasoning in such earlier decisions that it arises from an industrial dispute between the parties.

...

And once the finding is made that the employee shall not be reinstated, then it seems to me that, even if the matter started off being an industrial dispute in the sense that it was a matter affecting or relating to the rights of the employer and employee, the matter is no longer an 'industrial matter' as defined because the termination of that employment has not been confirmed by the Commissioner's finding that he be not re- employed.

...

In my view, there is simply no nexus between an employer and a union, concerned for an employee wrongly dismissed who is not reinstated, whatever the reason for the failure to direct re-employment, so as to say that an industrial matter still exists to found an order for the payment of anything, call it what one likes, to such an ex-employee where there is nothing else involved in the dispute. There is simply no live 'industrial matter' to condition the making of such an order. There is no express power in the Act to justify such an order. Nor can I find any power by necessary implication."

If that reasoning is applied to this case then it follows that the action by the appellant against Coombes is also not an industrial matter within the definition.

As set out by Kennedy J in Pepler's case, that follows a long line of authority to which his Honour referred.

In a later case of Sakal v T O'Connor & Sons Pty Ltd, unreported; IAC SCt of WA; Library No 950156; 27 March 1995 the Industrial Appeal Court comprising of Kennedy J (President), Rowland and Franklyn JJ had occasion to look at those earlier decisions, including the case of Coles Myer Pty Ltd v Coppin 73 WAIG 1754

His Honour Rowland J dealt with the earlier cases, including Pepler's case, and refused to overturn that earlier decision.

His Honour, in conclusion, said—

"Although some members of this Court have expressed doubts, the principle has been followed in this Court since Pepler, and this Court, differently constituted, has not been prepared to overrule Pepler."

In the result, the court was not prepared to hold that the claim for entitlements under a contract of employment after dismissal was an industrial matter so as to attract the jurisdiction of the Commission.

If those cases are accepted as correct then, in my opinion, it can equally be said that the present Local Court action is equally not an industrial matter within the definition."

In these decisions, the Industrial Appeal Court found that it is necessary for there to be a temporal relationship between employer and employee for an industrial matter to arise. In the matter before the Full Bench, is an application which seeks to place a duty on the Respondents, to make certain offers and provide certain information to prospective employees, but it is not a duty in relation to a person who is at that time, in relation to one of the Respondents, an employee. It is a duty in relation to a prospective employee, a possible future employee. However, there is no industrial relationship between the Respondents and the persons who are prospective employees. Although the Respondents may be employers of other employees, and the prospective employees may be employees of other employers, they are not employer and employee, as such, in relation to one another. The issue before the Commission at first instance and now before the Full Bench does not relate to the relationship of the Respondents as employer of other employees and to the prospective employees as employees of other employers. It relates to them in a relationship of prospective employer and prospective employee. It is true to say that there may, at some time in the future, be a relationship of employer and employee between one of the Respondents and any of the persons who are offered contracts of employment referred to in the application. But that is not necessarily so. They may be offered contracts of employment but those offers may be accepted or rejected. If the offer is rejected, no employment arises. If the persons accept employment on the basis of a workplace agreement and that agreement comes into force, then those persons would not then be "employer" and "employee" as defined within the IR Act because of the terms of s.7B of the IR Act.

The application seeks to regulate not the employment but the process by which the Respondents and persons who may or may not become employees of the Respondents establish the terms of any possible employment. Accordingly, this does not provide the necessary temporal relationship and there is not necessarily a future relationship of employer and employee between one of the Respondents and the persons to whom the Appellants sought the clause to apply.

Accordingly, I find that the Commission at first instanced did not err in finding that there was no jurisdiction upon which the matter could rely. I would dismiss the appeals as they both relate to a matter where no jurisdiction resides in the Commission.

THE PRESIDENT: For those reasons, appeals No 345 and 398 of 1999 are hereby upheld.

Order accordingly

Appearances: Mr R D Farrell (of Counsel), by leave, on behalf of the appellants.

Mr R L Le Miere (of Queens Counsel), by leave, and with him Mr F Gaffney (of Counsel), by leave, on behalf of the respondents.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch

and

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

and

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers
(Appellants)

and

RGC Mineral Sands Limited

and

Westralian Sands Ltd
(Respondents)

No 345 of 1999

and

No 398 of 1999.

BEFORE THE FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
COMMISSIONER P E SCOTT.

10 November 1999.

Order.

These matters having come on for hearing before the Full Bench on the 19th day of August 1999, and having heard Mr R D Farrell (of Counsel), by leave, on behalf of the appellants and Mr R L Le Miere (of Queens Counsel), by leave, and with him Mr F Gaffney (of Counsel), by leave, on behalf of the respondents, and the Full Bench having reserved its decision on the matters, and reasons for decision being delivered on the 10th day of November 1999, it is this day, the 10th day of November 1999, ordered and directed as follows—

(1) THAT appeals No 345 of 1999 and No 398 of 1999 be heard together.

(2) THAT the applications herein by the appellant to extend time to file and serve the appeal book out of time and to make application to extend time in which to apply to extend time be and are hereby granted.

(3) THAT appeal No 345 of 1999 be and is hereby upheld.

(4) THAT appeal No 398 of 1999 be and is hereby upheld.

(5) THAT the decisions of the Commission in matter No 2178 of 1998 given on the 22nd day of February 1999 and the 15th day of March 1999 be and are hereby suspended and the application remitted to the Commission to hear and determine according to law in accordance with the reasons for decision.

By the Full Bench

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Churches of Christ Homes and Community Services Inc
(Appellant)

and

Eric Harold Davey.
(Respondent)

No FBA 25 of 1999.

BEFORE THE FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY.
CHIEF COMMISSIONER W S COLEMAN.
SENIOR COMMISSIONER G L FIELDING.

23 November 1999.

Order.

THE Notice of Appeal herein, having been filed in the Registry of the Commission on the 20th day of October 1999, and Counsel for the abovenamed appellant, on the 11th day of November 1999, having advised the Commission, in writing, that the appellant no longer wished to proceed with the appeal, and Counsel for the abovenamed respondent, on the 12th day of November 1999, having advised the Commission, in writing, that the respondent did not object to the appeal being withdrawn by the appellant, and the parties herein, on the 19th day of November 1999, having consented, in writing, to the withdrawal of appeal No FBA 25 of 1999 and the Full Bench having decided that the consent to the withdrawal of the appeal constituted special circumstances so as to exempt the parties and each of them from further compliance with Regulation 29 of the Industrial Relations Commission Regulations 1985 and having so exempted them, it is this day, the 23rd day of November 1999, ordered by consent as follows—

(1) THAT there be leave for appeal No FBA 25 of 1999 to be withdrawn.

(2) THAT the application seeking extension of time for lodging appeal book be and is hereby withdrawn.

(3) THAT the Full Bench refrain from hearing the said appeal further.

By the Full Bench.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Quinns Baptist College Inc
Appellant

and

Kevin Wayne Clarke
Respondent.

No FBA 7 of 1999.

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

2 December 1999.

Reasons for Decision.

THE PRESIDENT: This is an appeal, brought under s.49 of the Industrial Relations Act 1979 (as amended), against the decision of a single Commissioner by the abovenamed appellant employer.

The appeal is against the decision of the Commissioner contained in an order made on 8 June 1999 (see page 22 of the Appeal Book (hereinafter referred to as "AB")), which, formal parts, omitted, reads as follows—

"1. DECLARES that Kevin Wayne Clarke was unfairly dismissed from his employment with the Respondent.

2. ORDERS that upon presenting himself for work no later than the start of Term 3, the Applicant shall be reinstated in employment with the Respondent as the teacher of Year 4, or some comparable class, but not the class which in 1998 was year 4, and, save for the period 18 April to the end of Term 2 1999, his contract of employment shall be treated as if it had not been determined.
3. ORDERS that the Respondent pay to the Applicant the sum of $10,498.84 as reimbursement of the numeration(sic) lost by his unemployment, such payment to be made no later than 21 days from the date of this order."

GROUNDS OF APPEAL

The grounds of appeal are as follows—

1. The learned Commissioner wrongly concluded that the applicant was unfairly dismissed, in that she—
   (i) found incorrectly that it was unfair to have expected the applicant, as an inexperienced teacher, to bring his class under control, by failing to take account of the position faced by other equivalently inexperienced teachers at the College.
   (ii) found incorrectly that the suggestions made by the applicant concerning the management of the control problem were reasonable by failing to take account of the School Board Chairman's evidence concerning the suggestions.
   (iii) found incorrectly that the applicant was neither reassured nor put on notice concerning the College's intentions at the end of the year, when it was open to draw from the evidence that both parties understood that the contract would not proceed beyond the end of the year.
2. The learned Commissioner further erred in failing to attribute any benefit in favour of the applicant, by the College ultimately agreeing to continue the contract beyond the 8 May 1998, initially until the end of Term 3, and later, until the end of the year, when it was open for the contract to be terminated at 8 May 1998.
3. The learned Commissioner was wrong in finding that the applicant was entitled to conclude that he might have an ongoing contract with the College, with the College no longer being entitled to rely on any fixed term contract, by—
   (i) treating the 'disregarding' by the College of the end of Term 3 termination date, as constituting evidence supporting that conclusion.
   (ii) not expressly relying upon any evidence from the applicant suggesting or implying that such a conclusion was open.
   (iii) failing to treat the fixed term nature of the contract as a continuing, although implied, term of the final contractual terms.
4. The learned Commissioner, in any event, ought not to have declined to make a finding upon the validity of the fixed term nature of the contract.
5. The learned Commissioner accordingly ought to have found that the contract was not one capable of providing ongoing employment and that it was at all times subject to a fixed term expiring at the end of the year. Further, there could not have been a reasonable expectation on the applicant's part of employment continuing into the next school year such as to warrant reinstatement, with a consequent determination that the applicant had suffered a loss, equivalent to income that would otherwise have been earned.
6. In the alternative, the learned Commissioner erred in concluding that the applicant had mitigated his loss to the extent of justifying the ordering of the full loss of income sought, when limited action was taken by the applicant in this respect.
7. The College seeks by this Appeal application, the quashing of the learned Commissioner's Order."

BACKGROUND

The respondent, Mr Kevin Wayne Clarke, claimed that he had been harshly, oppressively or unfairly dismissed from his employment with the appellant, he having been dismissed with effect from 31 December 1998.

Originally, the appellant intended to effect termination in May 1998, but did not do so in the belief that it was contractually bound to observe the terms of a "one year contract". The decision to terminate was made on the basis of the unsatisfactory teaching performance of Mr Clarke in the Year 4 class up to May 1998 and, in particular, his inadequacies relating to (but not confined to) discipline measures in his class, and also with student supervision. The appellant had put in place in respect of such matters a range of measures to assist in the overcoming of these inadequacies. No satisfactory resolutions were, however, effected.

The appellant was, therefore, obliged to remove Mr Clarke of the responsibility of the Year 4 class. Ultimately, a support position was created within the college until the end of the year. Such position was not in existence in 1999.

The Commission heard evidence from Mr Clarke, from Ms Karry Margarette Olsen, who was employed by the appellant in 1998, from Ms Nicola Claire Susan Keary, who was employed as a teacher by the appellant between 1996 and 1997, from Ms Anne Geraldine Ford, the parent of a pupil attending the appellant college, Mr Russell Robert George Hunt, a teacher employed by the appellant, Ms Lucy Leonie Twining, the appellant's Principal and Mr Christopher Gerald Robinson, the Chairman of the Board of the appellant.

Mr Clarke commenced his employment at the beginning of 1998, having applied for, being interviewed, and then engaged in the position of teacher by the appellant college.

A letter dated 21 November 1997 contained an offer of employment under certain conditions which, in its relevant parts, is reproduced hereunder (see pages 10-11(AB))—

"Dear Kevin

The Board of the Quinns Baptist College wishes to extend to you an offer for the appointment as the Year 4 teacher. The potential for this College as a Christian ministry depends in a large part on our faithfulness, perseverance and prayer. We trust that the vision which led you to apply for this position will be sustained and realised.

We would like you to commence this position as of 21st January, 1998 which is one week prior to the school year beginning, under the following conditions.

1. Salary is paid according to the Independent School Teachers' Award as supplemented by enterprise bargaining, with a base annual salary of a Bachelor of Arts (Education).
2. Staff and students attend in accordance with the published Association of Independent Schools of Western Australia dates as modified by this College.
3. Staff are initially appointed on a one year contract. During the year, the Principal will conduct term reviews and face to face conferences to ascertain personal performance levels for staff. At the end of the year, the contract may be terminated, renewed, or a permanent position offered.

Our decision to invite you to this appointment follows our consideration of your professional qualifications and Christian life. It is also a condition of your employment that each of these is suitably maintained as seen in formal association, and in your personal life and growth.

I trust that this offer is acceptable and request that you sign one copy of the acceptance and return it to me as soon as possible."

The letter, dated 21 November 1997, refers to staff being initially appointed on a one year contract, during which time, performance would be reviewed. It also provided for the contract to be terminated or renewed or a permanent position offered. Mr Clarke commenced employment on 21 January 1998. It was his first employment as a teacher. He commenced employment as the Year 4 teacher.

The Commissioner found, on the evidence, particularly that of Mr Robinson, that if the performance of a teacher was satisfactory at the completion of the year, then a permanent position would be offered.

In 1997, Year 3 had been a difficult class, if not the most difficult class in the school. There was a good deal of concern by parents about the level of noise, the amount of disruption and lack of control of the class. There was sufficient parental concern for matters to have been raised with the appellant before 1998. There was ample evidence that the teacher of the Year 3 class, a Mr Dungey, in 1997 had experienced real difficulties in managing that class.

When Mr Clarke commenced teaching the Year 4 class at the beginning of 1998, the problems experienced in the previous year still existed because the Year 3 class from 1997 became a difficult Year 4 class for 1998.

During Mr Clarke's job interview, it was put to him that the class which was proposed to be allocated to him was a difficult one.

Mr Clarke gave evidence that of the 28 or 29 students within the class, 7 had learning difficulties. Two of these had Attention Deficit Disorder and had to take medication. Ms Twining's evidence, amongst other things, was to the effect that a number of these students had failed in previous years because of problems experienced. Although Mr Clarke was a newly qualified and inexperienced teacher, the appellant allocated him to this difficult class.

The Commissioner found that Mr Clarke had problems in managing and controlling the class. During the first term, the Principal, Ms Twining, attempted to assist him to identify and implement strategies to overcome these problems. There were informal discussions between Mr Clarke and Ms Twining during this period about the difficulties which she had observed in his attempts to control the class.

The formal assessment of his performance of 9 April 1998, undertaken by Ms Twining, raised issues of this nature but did so in an encouraging and helpful manner. The evaluation showed that a vast majority of the ratings of Mr Clarke were either average or fair with punctuality, general room appearance and classroom control being rated as "poor". Friendliness, co-operation and health were rated as "good", and there were no categories in which Mr Clarke was rated as "excellent" (see exhibit A1 (KC3) see pages 64-69(AB)).

Mr Clarke was to discuss the report and evaluation with the Principal, however, no such discussion occurred and each party blamed the other. During the first couple of weeks of the second term, a number of parents raised concerns with Ms Twining about control of the Year 4 class. Ms Twining was also gravely concerned about what she saw as an explosive situation and discussed the matter with Mr Robinson.

On Friday, 8 May 1998, Mr Robinson spoke to Mr Clarke and it was Mr Robinson's evidence that, during the discussion, Mr Clarke became distressed and started to cry. Mr Robinson did not raise with Mr Clarke the prospect that the appellant would terminate Mr Clarke's employment, but encouraged him to think about his career choice.

Exhibit R7 (see page 190(AB)) was said by Mr Robinson to be a list of the matters he discussed with Mr Clarke during that meeting, but the Commissioner had serious reservations as to whether this was the case. The Commissioner was of the opinion that it was unlikely that a person in Mr Robinson's position would, in the circumstances of his discussion with Mr Clarke, discuss the re-allocation of particular teachers to particular classrooms as a means of resolving the difficulty and that it was more likely that the list was drawn up during discussions with Ms Twining or at some time other than in discussions with Mr Clarke.

On Monday, 11 May 1998, Mr Robinson spoke to Mr Clarke again and suggested that he resign. The appellant contended that, during this discussion, Mr Clarke indicated an intention to resign but no resignation was tendered.

The appellant said that an inference was clear in the discussions between Mr Robinson and Mr Clarke that, if Mr Clarke did not resign, then he would be dismissed upon six weeks' notice. This was confirmed in evidence by Mr Robinson. Options were discussed for Mr Clarke to continue teaching and he suggested eight different options. Ms Twining rejected the option of splitting the class and of the option of Mr Clarke swapping classes with another teacher, in the latter case, because she thought he had to deal with the class where his classroom management was the problem.

On 11 May 1998, Mr Clarke was removed from teaching the Year 4 class, and Ms Twining restructured the teaching allocation to combine two small Year 1 classes. Other classes were reorganised so that Mrs Robinson, an experienced teacher, took over Year 4. It was proposed to allocate Mr Clarke to other duties. Ms Twining gave him work to perform in the library, allocated to him the work of teaching computing to small groups, to undertake testing and, eventually, also, to undertake some classroom teaching relieving other teachers on DOTT time. He was also to take Ms Twining's classes except for the Year 4 handwriting class.

These teaching duties were allocated to Mr Clarke, partly because Mr Robinson was concerned that he should not simply be put away in the library but should also have some teaching so that he could be properly assessed and, also, so that he could continue to be seen to play an active role in the life of the school. The need to continue to assess him had been raised by Mr Clarke's union in its dealings with the appellant.

A notice was sent to parents to say that Mr Clarke would be leaving at the end of Term 2, but he did not resign.

After Mr Clarke's failure to resign, the appellant intended to dismiss him and, in relation to this proposed course, Mr Robinson had discussions with the union, The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers (hereinafter referred to as "the ISSOA").

After the discussions with the ISSOA, the appellant decided to follow the induction policy contained in the Independent School Teachers' Award 1996 (hereinafter referred to as "the award").

Between 11 May and mid-June 1998, a good deal of correspondence was exchanged between Mr Clarke and Ms Twining. Some of this correspondence was directed at addressing Mr Clarke's "strategies" for classroom management. However, two of the pieces of correspondence emanating from Ms Twining were official warnings.

Ms Twining denied that the purpose of the correspondence between her and Mr Clarke in May and June 1998 was to pressure him to resign, after she believed that he was going to resign but failed to do so.

The Commissioner was not satisfied that the warnings were of a serious nature, but, in any event, Mr Clarke did not rely on those warnings as specific justification for the termination of employment.

On 12 June 1998, Mr Clarke received a letter from Mr Robinson advising him that, following discussions with the ISSOA, his employment would continue until the end of Term 3. Some time early in Term 3, Ms Twining undertook a further report and evaluation of Mr Clarke's performance in relation to Term 2 and early Term 3 (exhibit A1 (KC27) see pages 104-107(AB)). That report was far more positive in its comments about his performance and is outlined at page 15 (AB). The Commissioner found correctly that there was a real improvement in his performance.

Mr Clarke had received a letter dated 12 June 1998 advising that his employment would be terminated at the end of Term 3. However, according to Mr Robinson, at around the end of Term 3, being unable to contact the ISSOA representative who had been involved in discussions with him, because she was unavailable, Mr Robinson decided not to take any action to terminate the employment of Mr Clarke at that time. Thus, the employment simply continued into Term 4 without any discussion with or written advice to Mr Clarke about the appellant's intentions. There were no further formal assessments of his performance either.

Mr Clarke was never warned that, if things did not improve, his job would be in jeopardy. The last warning recorded in writing was in June 1998.

As the end of Term 4 approached, Mr Robinson discussed with Ms Twining whether or not to confirm the re-appointment of three other teachers who had been new to the school in 1998. Mr Robinson said that they would need to do something about Mr Clarke and it was decided that his employment

had come to an end. Mr Robinson said, in evidence, that he did not believe that Mr Clarke's performance had improved since his removal from the Year 4 class. The reason for dismissal, according to Mr Robinson's evidence, was Mr Clarke's unsatisfactory teaching performance up until May 1998. He said that he had discussed a number of options, but the only real option was to terminate his employment. The matter was not discussed with Mr Clarke. Mr Robinson then delivered to Mr Clarke a letter dated 30 November 1998 (exhibit R8 see page 190(AB)) and signed by Ms Twining stating as follows—

> "On the 21st November 1997 we offered you a position at Quinns Baptist College for a one year period. You accepted that letter and its contents as conditions of your employment on 1 December 1997.
>
> On the basis of these letters and ongoing discussions with Teresa Howe of ISSOA on your behalf we have to advise that your one-year contact will be terminated on 31 December 1998."

The letter gave notice purporting to terminate the contract of employment as at 31 December 1998.

The Commissioner found that Mr Clarke was not competent in controlling the Year 4 class in Term 1 and during the first weeks of Term 2. The Commissioner held that there was clearly a problem in his performance in that regard and there were also other problems with his performance. However, the Commissioner concluded that he was unfairly dismissed because—

1. The Applicant was an inexperienced, new teacher, put into a class known from the previous year to be difficult, with a relatively high proportion of students having problems. Even if he had been an average performer, as an inexperienced teacher, it is likely that the Applicant would have had difficulties in bringing this class under control. By the second week of Term 2, he appears to have been demoralised and under a good deal of stress. I believe that it was unfair to have allocated this class to him, and then expected him, as an inexperienced teacher, to have brought it under control when it had not previously been unable to be brought under control. To have based his dismissal on this failure was unfair.
2. When the Applicant made reasonable suggestions to manage the problem or which would have given him an opportunity to gain some confidence and some experience, such as splitting the class or swapping him with another teacher, these were rejected, the first on the basis that there was no spare classroom and no spare teacher. Yet, the actions of the Respondent in restructuring the school by combining the two Year 1 classes created the spare teacher and the spare classroom. It created a spare teacher in the form of the Applicant who was initially put into non-teaching duties. Further, his suggestion of being swapped with an experienced teacher may well have given the Applicant the opportunity to gain the experience and confidence which may have resulted in his being able to perform at an adequate level. An experienced teacher was allocated to the Year 4 class on his removal. There seems to be some lack of logic in refusing to swap the Applicant with another teacher on the grounds that the Applicant had to deal with the issue of classroom management with the class in which he was having trouble. Yet he was removed from that class.
3. Following the discussions with the ISSOA, Mr Robinson wanted the Applicant given some teaching duties so that he could be assessed. However, this assessment (and his improvement) were irrelevant because the Respondent terminated the employment due to the Applicant's failure up until May 1998 to control the class to which he was allocated for Term 1 and some of Term 2.
4. Although the Applicant had been told, after some inquiries on his part, following some period of uncertainty after his removal from his class, that his employment would terminate at the end of Term 3, nothing happened—he was neither reassured nor put on notice about any intentions on the part of the Respondent. At the end of the year, without any discussion or forewarning, the Respondent terminated the Applicant's employment, relying on matters some six months old."

The Commissioner also noted that, on 11 May 1998, the appellant unilaterally changed the contract to remove Mr Clarke from his Year 4 classroom role to which he had been contracted, allegedly, for one year. The contract was further amended to say that his employment was terminated at the end of Term 3. This was not, of course, done. She did not conclude whether or not the terms of the contract, which was initially entered into by the parties and said to be for one year, was either valid or an arrangement available in accordance with the award, because that finding was not necessary.

The Commissioner did find that the contract did not exist at the time the appellant brought about the termination at the end of 1998. It had been superseded by the appellant changing both the basis on which Mr Clarke was employed, that is as a Year 4 teacher, and his termination date, firstly, to make that termination date at the end of Term 3 and, secondly, to disregard that termination date. That finding was not challenged upon appeal.

The Commissioner accordingly concluded that Mr Clarke was entitled to conclude that he might have ongoing employment with the appellant. The Commissioner also found that the appellant was no longer entitled to rely on any fixed term contract if one had been established at the beginning of 1998, and concluded that Mr Clarke had been placed in an unfair situation at the commencement of his employment; that reasonable and possible suggestions which would have given both parties an opportunity to recover the situation were not taken up; that there was a failure to take account of the significant improvement in his performance between May and approximately October 1998; there was a failure to consider the prospects of his future employment in any meaningful way, but a simple reliance on his failure to deal with the Year 4 class up until 8 May 1998. This constituted unfairness, the Commissioner concluded, which required the Commission's intervention.

As to the question of loss, the Commissioner found that Mr Clarke had attempted to mitigate his loss by applying for other positions which he was qualified to fill, but he had suffered a loss of $10,498.84.

ISSUES AND CONCLUSIONS

This was a discretionary decision, as that is defined in Norbis v Norbis (1986) 65 ALR 12. Accordingly, on the authority of House v The King [1936] 55 CLR 499 (HC) (see also Gromark Packaging v FMWU 73 WAIG 220 (IAC)), unless the appellant established that the discretion miscarried, then the Full Bench may not, as a matter of law, interfere with the exercise of the discretion by the Commissioner at first instance.

Further, insofar as findings of fact were made, based on the advantage enjoyed by the Commissioner in seeing and hearing the witnesses at first instance, then those findings should not be overturned unless the Full Bench finds that the advantage was misused (see Devries and Another v Australian National Railways Commission and Another [1992-1993] 177 CLR 472 (HC)).

The application herein was filed, according to the stamp it bears, on 22 December 1998. By the application, Mr Clarke alleged that he commenced employment on 21 January 1998 and that his employment terminated on 31 December 1998. He received notice dated 30 November 1998 that his employment would be terminated to take effect on 31 December 1998.

Grounds 1 and 2

Grounds 1 and 2 go to the merit of the finding that the dismissal was unfair. First, the Commissioner, it is submitted, found incorrectly that it was unfair to have expected Mr Clarke, as an inexperienced teacher, to bring his class under control because the Commissioner failed to take account of the position faced by other equivalently experienced teachers at the college. It should be observed that there were four inexperienced teachers at the college, one of whom experienced difficulties and one of whom, Mr Clarke, was given a difficult class. One was said, in evidence, to be of exceptional ability. It is an important fact that Mr Clarke had just graduated, that

this was his first teaching appointment, and that these difficulties were experienced by him in his first term as a teacher.

It is a fact that the Year 3 class of 1997, which became Mr Clarke's Year 4 class of 1998, had had complaints about noisy and unruly behaviour in 1997. It is a fact that there remained a number of difficult students in Year 4, as it became. That it was a difficult class was conceded by Ms Twining and by Mr Robinson. Ms Twining put the class on a par with Year 6. That it was difficult was the evidence of Mr Ford and Mr Clarke. When an experienced teacher, Mrs Robinson, was put in charge, she was able to, after a fortnight, control the class.

There is no evidence that other new teachers were put in charge of such difficult classes. The authorities knew that the class was a difficult one. They knew that Mr Clarke was a novice. They knew that the state of the class had drawn complaints from parents the previous year. Mr Clarke was permitted only one term to learn to control a difficult class when he was manifestly inexperienced and was known to be.

The appellant also complained that the Commissioner found incorrectly that the suggestions made by Mr Clarke concerning the management of the control problem were reasonable and failed to take into account Mr Robinson's evidence concerning the suggestions. It is apparent that the Commissioner made the finding notwithstanding Mr Robinson's evidence, some of which, on a fair reading, revealed that he was reluctant to admit the full extent of the Year 4 class problems. Mr Clarke's suggestion that the class be split was rejected, but was not unreasonable.

The later appointment of an experienced teacher, Mrs Robinson, to teach the Year 4 class is, of course, an admission that the earlier approach that "if he couldn't get his act together in that room, he wasn't going to go to another room" was wrong (see page 200 of the transcript at first instance (hereinafter referred to as "TFI") (Ms Twining's evidence)). When it was adjudged that "he could not get his act together", he was moved from that room.

In any event, the fact that suggestions were made for control of the class (emanating from Mr Clarke) could not detract from and is not relevant to the correctness of the finding that an inexperienced teacher was put in charge of a class which was known to be difficult and which only ceased to be difficult when an experienced teacher was put in charge.

There was also evidence of assertions by parents that the problem would not be solved merely by Mr Clarke's removal. It was the final allegation in Ground 1 that the Commissioner found incorrectly that Mr Clarke was neither reassured, nor put on notice concerning the college's intentions at the end of the year, because it was open to infer that the contract would not proceed beyond the end of the year.

The Commissioner correctly found (on the basis of Mr Robinson's evidence in particular (see pages 239-240(TFI)) that the employment of Mr Clarke simply continued onto Term 4 without there being any discussion with him or written advice to him about the appellant's intentions. That was certainly the case.

Mr Clarke's evidence was that he was confused about his contractual situation. That reflects the more objective evidence. His initial contract had ended. He was given different work which continued through Term 3 into Term 4 and continued notwithstanding a letter saying that his employment would cease at the end of Term 3. That finding was open. There was no indication after Term 3 that he was appointed for a fixed term or that his employment would end that year. The original contract was a fixed term, but that, and it has not been seriously challenged, ended (see pages 53-54, 57-58, 62-63, 63-64(TFI)). It was open to find from that evidence as the Commissioner did.

I find it unnecessary to consider Mr Robinson's claim to be a qualified teacher. Certainly, he was not formally trained as such, although he had seven years' service as a teacher.

As to Ground 2, that was not argued. It is not a matter of great weight in any event. The fact of the matter is that, because parents came and complained, the situation, in Ms Twining's view, was explosive and she was of opinion that someone else should take over the class immediately (see pages 133-137(TFI)); so Mrs Robinson did.

Ground 3

As to Ground 3, that ground was conceded in effect as having no force. For the reasons which I have stated above, it was open to the Commissioner to find as she did. The evidence clearly was that the contract was continued for an indeterminate period. Whatever Mr Robinson's view of its duration, that was not communicated to Mr Clarke. The fixed term contract that he had entered into to teach Year 4 was, as the Commissioner found, clearly at an end. A new position was created with new duties which, after Term 3, was not for a fixed term.

Ground 4

As to Ground 4, the first contract was terminated by an accepted repudiation, or by an agreed termination and a new contract which continued indefinitely into Term 4. There was no fixed term contract remaining in existence. The Commissioner actually made a finding that the fixed term contract had ended and a new one was in place. The indefiniteness of the duration of the contract is emphasised by the fact that Mr Robinson's evidence was that he allowed the contract to continue because he was unable to locate Ms Theresa Howe of the ISSOA to resolve the question of the contract. In fact, he never did, but in the end the appellant purported to revoke the contract.

Ground 5

As to Ground 5, that is in fact a statement of proposition. The fact of the matter is not whether there was a reasonable expectation of continuing employment. The fact of the matter was that there was a contract of indeterminate length in existence, that its termination was part of and occurred in the circumstances of continuing unfair treatment dating from April 1998, that the termination was unjustified on the grounds of unfairness and, that there should be a reinstatement of the contract. It was open to the Commissioner to so find.

Ground 6

As to Ground 6, I did not fully understand that ground. The Commissioner correctly found that Mr Clarke had mitigated his loss and ordered reinstatement. There is no appeal against the reinstatement, nor against an order for re-employment, if that is what the order is.

For those reasons, I find that no appeal ground is made out. I am not satisfied that the exercise of discretion miscarried. I have considered all of the evidence and all of the submissions.

I would, for all of those reasons, dismiss the appeal.

SENIOR COMMISSIONER G L FIELDING AND COMMISSIONER S J KENNER: These are the joint Reasons for Decision of Senior Commissioner Fielding and Commissioner Kenner. The grounds of appeal and the facts and circumstances giving rise to the proceedings the subject of the appeal are set out in detail in the Reasons for Decision of the President. We need not therefore repeat them. It is sufficient for our purposes to observe that the Respondent was engaged by the Appellant as its Year 4 teacher expressly on a condition that he was "initially appointed on a one year contract".

The learned Commissioner found that the original contract of appointment was not in existence at the time the Appellant terminated the Respondent's employment. As the learned Commissioner found "it had been superseded by the Respondent changing both the basis on which the Applicant was employed (i.e., as the Year 4 teacher) and his termination date, firstly to make that termination date the end of the year Term 3, and secondly to disregard that termination date". From this the learned Commissioner concluded that the Respondent "was entitled to conclude that he might have ongoing employment with the" Appellant, and "was no longer entitled to rely on any fixed term contract (if one had been established at the beginning of 1998)".

With all respect to the learned Commissioner in our view there is no basis for holding that the original contract was not in existence at the time the Respondent's employment was terminated and still less, any basis on the evidence to hold that the Respondent was entitled to conclude that he might have ongoing employment with the Respondent. True it is that the Respondent was engaged as the Year 4 teacher and that he was unilaterally removed from the classroom early in the school year. However, there is nothing to suggest that he treated the contract as at an end by reason of that conduct but rather he

appears to have been content to act in accordance with the new work arrangements proposed for him. Indeed, when asked to suggest solutions to the problems he faced with the Year 4 class, amongst the alternatives he proposed was that he be given other teaching duties. Moreover, there is no evidence to suggest that the Appellant purported to vary the original term of the appointment so that it ended with the end of Term 3. At the most the Appellant indicated that the Respondent's employment would be terminated then but in the end that did not occur. The Respondent was, as he admits, not told that his employment was terminated until towards the end of 1998. Furthermore, the payment of his salary continued without reduction or interruption. The fact that the Respondent waited until he was formally notified that his employment would end on 31 December 1998 before instituting these proceedings is sufficient testament to the fact that he did not regard his employment as having been terminated earlier. Were it otherwise it might be argued that he is out of time to complain as he did that his employment as the Year 4 teacher was unfairly terminated.

In summary, there is no evidence to suggest that the parties entered into a new contract. There is nothing to suggest, for example, that the Respondent was appointed to a new position or that there was to be any change in his level of remuneration. In our assessment all that the evidence discloses is that the Respondent was relieved of the teaching duties normally associated with the Year 4 teacher and given alternative duties including, but not exclusively, teaching duties, a change in which he acquiesced. Certainly, there is nothing to suggest that the arrangements under which the new duties were to be performed by the Respondent was to be on any basis other than that which had originally been agreed.

The Appellant advised the Respondent on 30 November that his employment was to terminate on 31 December 1998, being one calendar year from the date he was said to have entered into the contract of employment. However, what the contract provided was that the appointment was to be for one year. Under the terms of the contract the Respondent was to take up his appointment as the Year 4 teacher on 21 January 1998. Under the circumstances we would have thought that the earliest his employment could come to an end was to 20 January 1999. In taking steps to terminate the employment the Appellant was obliged to comply with the provisions of the *Independent Schools' Teachers' Award 1976.* Clause 7(2) of that Award provides that termination of employment requires at least six weeks' notice to take effect from "the close of business". The evidence indicates that school year for the Appellant concluded on 11 December 1998. Assuming that to be the "close of business" the earliest the Respondent's employment could have been terminated lawfully was therefore 22 January 1999. Thus whether or not the dismissal from employment was unfair and whether or not the contract was for a fixed term, in the sense that it expired with the effluxion of time, the Respondent would be entitled to remuneration to that date.

We are not convinced that the learned Commissioner erred in finding that the dismissal was unfair. Essentially, that was a matter of judgement for the learned Commissioner. The termination of employment was not effected in accordance with the provisions of the contract and for that reason alone it may well be open to hold that it was unfair. However the Respondent could not be heard to say that there was an entitlement for ongoing employment beyond 22 January 1999. The original term of the appointment was, as mentioned, on the basis of "a one year contract". Although the contract provided for performance reviews to be made throughout the year, the Appellant did not promise any further employment beyond that year. The Respondent's contract of employment expressly provides that "at the end of the year the contract may be terminated, renewed, or a permanent position offered." In the circumstances the Respondent could not have any legitimate expectation to be employed beyond that year, in the absence of some clear indication by the Appellant to the contrary. For the reasons mentioned above there is no warrant to find that the Appellant made such an indication. Accordingly, in our assessment the learned Commissioner erred in ordering that the Respondent be reinstated in employment beyond that date and in compensating the Respondent as if he had an entitlement to employment beyond that date.

We would therefore uphold the appeal and vary the decision of the learned Commissioner by revoking the order for reinstatement and payment for lost remuneration in the interim and by substituting an order for compensation in favour of the Respondent in the sum of $2,099.76 being a further three weeks salary from 31 December 1998 until 22 January 1999.

PRESIDENT: For those reasons, the appeal is upheld and the decision at first instance varied.

Order accordingly

APPEARANCES: Mr R H Gifford, as agent, on behalf of the appellant

Mr D Howlett (of Counsel), by leave, on behalf of the respondent

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WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Quinns Baptist College Inc
Appellant

and

Kevin Wayne Clarke
Respondent.

No FBA 7 of 1999.

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

2 December 1999.

Order.

This matter having come on for hearing before the Full Bench on the 24th day of September 1999, and having heard Mr R H Gifford, as agent, on behalf of the appellant, and Mr D Howlett (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 2nd day of December 1999, it is this day, the 2nd day December of 1999, ordered and directed as follows:—

(1) THAT the applications herein by the appellant to extend time to file the appeal book out of time be and is hereby granted.

(2) THAT appeal No FBA 7 of 1999 be and is hereby upheld.

(3) THAT the decision of the Commission in matter No 2240 of 1998 made on the 8th day of June 1999 be and is hereby varied by revoking orders 2 and 3 and by substituting for the orders made, the following order:—

"2. ORDERS that Respondent pay the Applicant, as and by way of compensation, the amount of $2,099.76."

By the Full Bench

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gregory Oates
(Appellant)

and

Sanders Executive Pty Ltd
(Respondent)

No. 507 of 1999.

and

Sanders Executive Pty Ltd
t/a L J Hooker Morley
(Appellant)

and

Gregory Oates
(Respondent)

No. 512 of 1999.

BEFORE THE FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
SENIOR COMMISSIONER G L FIELDING.

9 November 1999.

Reasons for Decision.

Introduction.

THE PRESIDENT: These were two appeals.

Appeal No 507 of 1999 is an appeal by the abovenamed appellant, Mr Gregory Oates, against the decision of the Commission, constituted by a single Commissioner, given on 23 March 1999 whereby, formal parts omitted, it was ordered—

"(1) THAT the respondent pay to the applicant the sum of $1078.42 as a contractual benefit within 14 days of the date of this order less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid.

(2) THAT the applicant pay to the respondent costs in the sum of $900.00 within 14 days of the date of this order."

Appeal No 512 of 1999 is an appeal by Sanders Executive Pty Ltd t/a L J Hooker Morley, the respondent at first instance, (hereinafter referred to as "Sanders Executive") against the decision of the Commission, constituted by a single Commissioner, given on 10 February 1999.

GROUNDS OF APPEAL NO 507 OF 1999

The grounds of appeal in appeal No 507 of 1999, as amended, are as follows—

"1. The learned Commissioner was wrong in law in awarding costs in the sum of $900, found that portion of the claim for $1078.42 was made out and that the balance of the claim was dismissed under circumstances whereby for extreme reasons the award of costs were payable.

2. That the learned Commission was wrong in fact and law that the Appellant was not in any cause for the sale of King William Street claim for commission."

GROUNDS OF APPEAL NO 512 OF 1999

The grounds of appeal in appeal No 512 of 1999 are as follows—

"The Commission erred in fact and law in deciding that the applicant was not an employee for the purposes of the Minimum Conditions of Employment Act (@13)(sic). In deciding the matter the Commissioner failed to, or failed to give sufficient weight to—

(a). The abandonment of the claim by the applicant for the payment of a Letting Fee.

(b). The provision of the Employment Agreement that—

(i) "RENTAL—One hundred (100) dollars per introduction for full twelve (12) months management", provides for commission payment;

(ii) As a matter of law, the distinction between commission and wages; and

(iii) The weight of evidence that the applicant, Mr Oates, was a commission only salesperson."

In short, the second appeal alleges that Mr Oates was not an employee for the purposes of the Minimum Conditions of Employment Act 1993 (hereinafter referred to as "the MCEA"). This is because of the abandonment of the claim by Mr Oates for a payment of letting fees.

BACKGROUND AND FINDINGS AND CONCLUSIONS OF THE COMMISSIONER AT FIRST INSTANCE

There was an application by Mr Gregory Brian Oates under s.29(1)(b)(ii) of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act") against Sanders Executive Pty Ltd t/a L J Hooker Morley, being a claim for contractual benefits.

Sanders Executive, at all material times, conducted the business of a real estate agent. Mr Oates was employed by Sanders Executive as a real estate salesperson from 1 October 1997 to 23 January 1998.

After the termination of his employment, Mr Oates made a claim, amended by leave of the Commission, to claim payment of commissions for real estate sales commission, superannuation contributions and pro-rata annual leave, which he said were contractual benefits to which he was entitled and was not paid. It is material that the claim did not seek the sum of $100.00 in relation to the alleged introduction of a tenant for premises at 19 Bay View Street, Bayswater. Mr Clohessy acknowledged that that amount was not part of his client's claim.

A preliminary issue was raised before the Commission as to Mr Oates' claim in respect of superannuation and annual leave.

The superannuation entitlement had as its source the Superannuation Guarantee (Administration) Act 1992 (Cth) (hereinafter referred to as "the SGA").

Sanders Executive said that the limbs of Mr Oates' claim were not contractual benefits for the purposes of s.29(1)(b)(ii) of the Act and accordingly were beyond the jurisdiction of the Commission. It is unnecessary to go into this issue in any detail upon this appeal.

The Commissioner held that, in relation to a contractual entitlement (as this was claimed to be) to superannuation which does no more than oblige the employer to contribute an amount equivalent to the amount prescribed by the SGA, a claim in respect of that entitlement pursuant to s.29(1)(b)(ii) intrudes into the field covered by the Commonwealth law and is inoperative.

The Commissioner referred to Keane v Lomba Pty Ltd (1998) 78 WAIG 810 (FB). The Commissioner dismissed that claim for want of jurisdiction.

There was a claim, too, for annual leave pursuant to the MCEA. Again, for the purposes of background, it is not necessary to deal with this issue.

For the purposes of enforcement only, once deemed to be an award, industrial agreement or order for the purposes of s.83 of the Act, then s.83(1a) of the Act has application to confer exclusive jurisdiction in relation to such matters on an Industrial Magistrate. This includes the exclusion of other remedies.

Thus, the claims in relation to superannuation and pro-rata annual leave were held to be beyond the Commission's jurisdiction, and a further hearing occurred in relation to the other proceedings, that is the claim for contractual benefits or commission.

178/181 KING WILLIAM STREET, BAYSWATER

The King William Street property was referred to Sanders Executive by another L J Hooker Real Estate office, one at Midland. The referral was made through the L J Hooker customer service centre, and the referral form, evidencing the referral to Sanders Executive, was tendered as exhibit R3. A 20 per cent referral fee was payable to the referring L J Hooker office in the event that the property sold. Mr Oates said that he signed the Multilist Selling Agency Agreement in respect of this property, once it was referred to Sanders Executive. Subsequently, the King William Street property was sold by Home Start Realty in conjunction with Sanders Executive. Mr Oates signed the original Multilist Selling Agency Agreement

(exhibit R2), but there was no evidence that he did anything else in respect of facilitating the sale of the property.

It was also Mr Oates' evidence that never whilst employed by Sanders Executive did he receive a 50 per cent commission or any other amount for merely listing property. In his present employment, too, he received no such commission. To his knowledge, no such payment was generally made in the real estate industry.

Those facts were not challenged on appeal and were properly found.

The Commissioner also held that the relevant terms of the MCEA are in issue. By s.17C of the MCEA, an employee is required to be paid his/her wages/salary in full without deduction unless there was authorisation by the employer (and in cases of express rights under s.17D of the MCEA). "Employee" for the purposes of the MCEA excludes those persons who are wholly remunerated by commission payments (Schedule 1 Minimum Conditions of Employment Regulations 1993) (hereinafter referred to as "the MCER"). Thus, if Mr Oates is not an employee for the purposes of the MCEA, then there is no statutory prohibition on the deduction of an amount from Mr Oates' remuneration, (as was the case in Conti Sheffield Real Estate v Brailey (1992) 72 WAIG 1965 (FB) and in Day v Atlanta Nominees Pty Ltd (1989) 69 WAIG 2156).

The terms of the contract in Clause 9 provided that Mr Oates should be remunerated in accordance with the provisions of Schedule A, and Schedule A provides for a commission payment structure. There is no reference to any other form of payment in Schedule A. However, the contract also refers to a payment of $100.00 in the event a rental property is introduced for a full 12 month period.

The Commissioner went on to hold that the question was whether Mr Oates could be remunerated by commission or not and held that he was an employee within the meaning of the MCEA.

ISSUES AND CONCLUSIONS

No. 178/181 King William Street, Bayswater

The Commissioner at first instance found no case to answer on the claim for commission at the rate of 50 per cent of the commission paid to Mr Oates.

First, the employment agreement (exhibit R1) between Mr Oates and Sanders Executive contained no express term of the contract.

The employment agreement refers only to Mr Oates' commission split being 45 per cent rising to 50 per cent depending upon the value of the property sold. It was not submitted to us that the Commissioner erred in finding that it was not in dispute that the transaction did not involve an "internal office sale" or "bonus dollars" which entitled Mr Oates to any payment by way, for example, of "selling fees".

Further, the Commissioner was entitled to find, and did find, that Mr Oates, during his employment with Sanders Executive and his subsequent employment and indeed within the industry, there was no commission payment for merely listing a property with his employer as the agent. The Commissioner correctly found that, in order to be entitled to receive commission, the agent or sales representative must be the "effective cause of the sale" of the property in question (see Royal International (WA) v Valli 78 WAIG 1110 (FB) and the cases cited therein). There was no evidence that, apart from signing the Multilist Selling Agency Agreement on behalf of Sanders Executive as agent when the other L J Hooker agency referred it to Sanders Executive, Mr Oates did anything in relation to the property, let alone introduce the property to a prospective purchaser or to a person ready or willing and able to purchase the property. In short, there was no evidence at all that Mr Oates was the effective cause of any sale of that property.

It was not contended before us that the Commissioner's finding that, as a matter of law, no term could be implied to the effect that Mr Oates was entitled to a commission was in error.

Reliance was placed on the employment agreement between the parties dated 16 December 1997 (see pages 38-46(AB) No 507 of 1999). (I am not certain that such an agreement attracts stamp duty. If it does, it bears no evidence of payment of the same).

There is nothing in that agreement which supports any claim for commission on that transaction for the following reasons.

The agent for Mr Oates relied on (see exhibit R2, page 53(AB) No 507 of 1999) the Multilist Selling Agency Agreement in relation to the property at 178/181 King William Street, Bayswater, dated 26 November 1997 and signed by Mr Oates as the listing agent's representative. The listing agent is designated as "L J Hooker Morley", Sanders Executive's business name (Mr Oates was not the listing agent). The listing agent is, inter alia, granted selling rights to the property for 90 days and there are prescriptions as to a selling fee. The Multilist Selling Agency Agreement is precisely that. It binds agents and makes no prescription for commission for employees of those agents. There is no document or no express or implied condition or custom which required the payment of any commission to Mr Oates in relation to the abovementioned property, nor did he establish any entitlement to commission. The Commissioner at first instance rightly held that there was no case to answer in relation to that claim.

No. 22 Satellite Retreat, Kiora

The Commissioner at first instance decided that the sum of $1,078.42 payable to Mr Oates, as a result of the sale of the premises at 22 Satellite Retreat, Kiora, for advertising was wrongly withheld. Advertising costs were incurred and the vendor had not paid those costs and the Commissioner concluded that these were to be borne by Mr Oates. By virtue of the MCER, it was submitted by Sanders Executive, the "employment agreement" referred to (supra) contains a provision that, if a vendor does not pay for any advertising, then Mr Oates shall pay it. The terms of the MCEA are in issue and were held to be in issue. Sanders Executive submitted that this question was not raised and s.26(3) of the Act, which reads as follows, was not complied with—

> "(3) Where the Commission, in deciding any matter before it proposes or intends to take into account any matter or information that was not raised before it on the hearing of the matter, the Commission shall, before deciding the matter, notify the parties concerned and afford them the opportunity of being heard in relation to that matter or information."

The Commissioner held that, by s.17C of the MCEA, an employee is required to be paid money in full without deduction unless authorised under s.17D. If Mr Oates were not an employee, then there is no prohibition in the deduction of the amount.

Much was sought to be made of an amount of $100.00 claimed for a rent introduction fee. That amount was not claimed before the Commission and no finding was made as to the entitlement. Any reliance on that fact would constitute error. However, it is unnecessary to decide that ground.

I say that because of the effect of s.26(3) of the Act to which I now turn.

By Regulation 3 of the MCER, the classes of persons prescribed in Schedule 1 are not treated as employees for the purposes of the MCEA. If that is so, then there is no term implied into the contract prohibiting deduction of pay from remuneration. It is quite clear that commission is remuneration (see Gilmore and Another v Cecil Bros and Others 76 WAIG 4434 (FB) and the cases cited therein). It is also quite clear, and it was not argued otherwise, that Mr Oates was an employee of Sanders Executive, employed pursuant to an employment agreement.

The only question is whether Mr Oates could rightly be held to be, within Clause 1 of Schedule 1 of the MCER, a person whose services were wholly remunerated by commission or percentage reward. In my opinion, since his remuneration could rightly be held, on the authorities, to include superannuation contributions and long service leave entitlements, then Mr Oates was remunerated wholly by commission and was not subject to the withholding of his pay, however constituted, without his authority.

It was, therefore, open to find that Mr Oates was not a person whose services were wholly remunerated by commission or percentage reward, even if the matter were before the Commission at first instance. As a result, the finding was not in error insofar as it should have been made.

S.26(3) of the Act is a provision couched in mandatory terms by the use of the word "shall" (see s.56 of the Interpretation Act 1984 (as amended)). It is a provision which exists to ensure that a matter is not decided without a party being heard on a particular issue.

Pantorno v The Queen [1989] 166 CLR 466 prescribes a similar common law requirement. This is a statutory provision which is "mandatory", and a failure to comply strictly with its prescriptions will result in some action being invalid (see Public Prosecutor v Oie Hee Koi [1968] AC 829, see also Hatton v Beaumont (1978) 52 ALJR 589 and National Mutual Fire Insurance Co Limited v Commonwealth of Australia [1981] 1 NSWLR 400 and Clayton v Heffron (1960) 105 CLR 214 at 247 per Dixon CJ, McTiernan, Taylor and Windeyer JJ).

Failure to comply with s.35 of the Act renders a decision invalid and liable to be quashed (see Mt Newman Mining Co Pty Ltd v AMWSU and ETU 61 WAIG 1043 per Nicholson J, see also RRIA v AMWSU and Others 69 WAIG 990 at 996-999 (IAC) per Nicholson J).

I am of opinion that there is nothing in the words of s.26(3) of the Act, read in the context of the statute and given the nature of the duty imposed on the Commission, to treat that provision any differently. In any event, the Full Bench is bound by that view of s.26(3), which is expressed in Stamco Pty Ltd and Others v SDA 72 WAIG 1279 and the cases cited therein.

It follows that, in deciding the matter by reference to s.17C and D of the MCEA, without giving the parties an opportunity to be heard, the Commissioner failed to comply with his mandatory duty pursuant to s.26(3) of the Act, and a decision was reached without statutory validity (or ultra vires, as Mr Taylor submitted), regrettably giving the Full Bench no alternative but to quash the decision.

COSTS

The application for costs was on strong grounds. This claim was doomed to fail in the Commissioner's view, and in mine. The only basis for the claim was advanced on the evidence as being the advice of Mr Oates' agent that the claim was supported by authority. It was not. There was obviously no term, express or implied, in the contract between Sanders Executive and Mr Oates which could be said to find a claim by Mr Oates for commission.

Within the meaning of the principle in Brailey v Mendex Pty Ltd trading as Mair and Co Maylands 73 WAIG 26 (FB) and Re an application by CMETSWU 78 WAIG 1581 (FB) ("The RGC matter"), this was manifestly an extreme case. There was no submission that the policy in those cases should be departed from. There was no miscarriage of discretion.

The Commissioner then fixed a quantum of $900.00 applying the Supreme Court scale which quantum was not appealed against.

CONCLUSIONS

There was no error, discretionary or otherwise, established on the grounds of appeal in relation to appeal No 507 of 1999 (see the principles often expressed in this Commission and see Norbis v Norbis (1986) 65 ALR 12, House v The King [1936] 55 CLR 499 (HC) and Gromark Packaging v FMWU 73 WAIG 220 (IAC)). I would dismiss that appeal.

Error was established in relation to appeal No 512 of 1999. I would uphold that appeal and quash the decision appealed against.

CHIEF COMMISSIONER W S COLEMAN: I have had the advantage of reading the President's reasons for decision in draft form.

I agree that the appeal in matter No 507 of 1999 should be dismissed. The appellant failed to establish that there was any error in fact or law which would have given cause for the payment of commission for the sale of the property at King William Street. The determination of that matter in the first instance then attracted an order for costs of $900.00. Indeed, as noted by the Commissioner, without any contractual basis to support the claim for payment of commission for merely listing the property and, in the absence of any evidence that the appellant in any way facilitated or was an effective cause of the sale, the claim was doomed from the outset. It is not an answer to cite the merit or even success of another claim pursued at the same time to avoid the imposition of costs when an element of the application is without foundation.

The order for costs should be dismissed.

As to matter No 512 of 1999, I would dismiss the appeal. The Commissioner established the respondent's liability to the appellant for advertising costs not paid for by a vendor or authorised by the appellant company. The plain terms of the employment agreement made this clear. In the absence of specific terms within the agreement for deductions to be made from the respondent's entitlements, the question necessarily attracted consideration of the statutory basis upon which this could be done. The issue then was whether or not the respondent was an "employee" for the purposes of the Minimum Conditions of Employment Act 1993. Here, the Commissioner found that the respondent was not wholly remunerated by commission payments under the terms of the employment agreement. This was open to the Commissioner, given the basis upon which the respondent was to receive payment in the event of a rental property being introduced to the appellant company. That payment was not related to the value of the account nor that of the property and as such was not commission. In my view, there was no error in the finding as a matter of law.

From this, the Commissioner determined that he could not conclude that the respondent was paid wholly by commission and was not an employee for the purposes of the Minimum Conditions of Employment Act 1993. However, in the absence of the respondent's authority, pursuant to s.17D of the Minimum Conditions of Employment Act 1993, the deduction effected by the appellant was unlawful. A payment of $1,078.42 was ordered in favour of the respondent. While I would not disturb this determination, I consider that, on the terms of the agreement between the parties when looked at as a whole, it was open to the Commissioner to find that the respondent was nevertheless responsible for meeting the costs of advertising and in equity should do so. In matter No 512 of 1999, the appeal should be dismissed.

THE SENIOR COMMISSIONER: I have had the benefit of reading in draft the reasons to be published by the President. I agree with the orders he proposes in each case, but in respect of Appeal 512 of 1999 for different reasons. I briefly state my reasons for each Appeal as follows.

Appeal No. 507 of 1999

I agree with the President that this Appeal should be dismissed and essentially for the reasons he has expressed. I have nothing further to add.

Appeal No. 512 of 1999

In my opinion, the learned Commissioner erred in holding that money payable to the Respondent for rental introduction was not a commission and furthermore that the Respondent was not renumerated wholly by commission for the purposes of the *Minimum Conditions of Employment Act 1993*.

The terms of the Respondent's employment contract are clear and unambiguous. The payment prescribed by the relevant parts of the contract is dependant upon results: those results being "per introduction" of a rental management arrangement. The basis on which the payment is earned has none of the characteristics of a wage salary or even remuneration on the basis of piece rates. The entitlement to remuneration is not dependant upon the hours spent or the amount of work performed but irrespective of how much work is done, the payment is the same—it is in essence a fixed commission. As counsel for the Appellant correctly observed, a commission can take a variety of forms. It does not have to be a payment calculated on an ad valorem basis (see too: *Fitzpatrick v Hennebery & Associates Pty Ltd*, Industrial Magistrates' Court, No. 226 of 1995 [unreported] 22 December 1995).

The agent for the Respondent argues that because the Respondent had a statutory entitlement to both superannuation and to long service leave he could not in any event, be characterised as a person whose services were remunerated wholly by commission or percentage reward. Whilst for some purposes superannuation and leave might be regarded as remuneration, in my opinion that is not the case for the purposes of the *Minimum Conditions of Employment Act 1993*. The *Interpretation Act 1984* by section 18 requires that interpretation of a provision of a written law "a construction that would promote the purpose or object underlining the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to construction that would not promote that purpose or object." Furthermore, section 19

of that Act provides that in interpreting ambiguous written laws regard may be had to any relevant material in any official record of proceedings in either House of Parliament. As counsel for the Appellant mentioned, the official record of proceedings in the Legislative Assembly when the Bill, which ultimately led to the Act, was being considered in Committee revealed that the Minister responsible for the legislation intimated that the Act was intended to exclude by way of regulation "those people working on a commission basis, for example, real estate agents and those working on piece work rates." (Western Australia, *Parliamentary Debates*, Legislative Assembly, 1993-94, Vol 305, 19 August 1993, p. 3067). That object would not only not be achieved, but would be totally undermined if simply by having a statutory entitlement to superannuation and to long service leave and no more, as was said to be the case for the Respondent, an employee was not to be regarded as being remunerated wholly by commission or percentage reward. In general, all employees have a statutory entitlement to superannuation of the kind said to apply to the Respondent and in the circumstances the relevant provisions of the Regulations would be rendered nugatory. Much the same considerations apply with respect to the statutory entitlement the Respondent was said to have to long service leave. That entitlement which is, in any event, a conditional one arises under and by virtue of legislation of the State Parliament which was in force long before the Regulations now in question were made. It would be odd indeed if, in the circumstances, Parliament was not taken to have intended to exclude that entitlement from the concept of remuneration for the purposes of the *Minimum Conditions of Employment Act 1993*. Indeed, there is long standing authority for the proposition that the purpose of leave is to provide a period of recreation and refreshment and "is not part of the purpose to provide a vehicle for achieving an increase in salary, or a long-service benefit" (see: *Gordon v Carroll & Ors (1975) 27 FLR 129 at 144*; and see too: *Lai Corporation Pty Ltd (Receiver and Manager Appointed) v Steinberg (1986) AILR 492*).

It follows in my opinion, that the Respondent was not an employee for the purposes of the *Minimum Conditions of Employment Act 1993*. Consequently, the provisions of section 17C of the *Minimum Conditions of Employment Act 1993* restricting the deduction of money from the remuneration due to an employee did not apply to the Respondent and the learned Commissioner erred to hold otherwise.

In my opinion, the Appellant ought not now be heard to say, as it did, that it was wrong for the learned Commissioner to have dealt with the status of the Appellant under the *Minimum Conditions of Employment Act 1993*. It was a matter raised, albeit cursorily, by the Appellant in the proceedings before the learned Commissioner. Furthermore, the meaning and effect of the terms of the Respondent's contract of employment was a live issue before the Commission. The meaning and effect of those terms, and in particular, the terms relating to rental introductions as set out in that agreement, is a matter of interpretation and eventually a question of law, not a question of fact. The proper interpretation to be placed on the agreement does not depend upon any question of whether or not a payment was made in purported reliance on those or any other provisions of the agreement but rather on an examination of the words used in the agreement. Moreover, I do not read the provisions of section 26(3) of the *Industrial Relations Act 1979* upon which the Appellant relies, as prohibiting the Commission from ruling on a point of law not taken by the parties. The subsection really gives statutory force to the audi alteram partem rule and that does not require that the Commission, before ruling on a point of law, invite submissions from the parties on the point, although in most cases might be prudent to do so.

I would uphold the Appeal and quash the order made by the learned Commissioner.

THE PRESIDENT: For those reasons, appeal No 507 of 1999 is dismissed. Appeal No 512 of 1999 is upheld and the decision made by the Commissioner at first instance quashed.

Order accordingly

APPEARANCES: Mr R Clohessy, as agent, on behalf of Mr G Oates

Mr D Taylor (of Counsel), by leave, on behalf of Sanders Executive Pty Ltd t/a L J Hooker Morley

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gregory Oates

(Appellant)

and

Sanders Executive Pty Ltd

(Respondent)

(No 507 of 1999)

and

Sanders Executive Pty Ltd
t/a L J Hooker Morley

(Appellant)

and

Gregory Oates.

(Respondent)

No. 512 of 1999.

BEFORE THE FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
SENIOR COMMISSIONER G L FIELDING.

9 November 1999.

Order.

These matters having come on for hearing before the Full Bench on the 24th day of August 1999, and having heard Mr R Clohessy, as agent, on behalf of Mr G Oates, and Mr D Taylor (of Counsel), by leave, on behalf of Sanders Executive Pty Ltd t/a L J Hooker Morley, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 9th day of November 1999, it is this day, the 9th day November of 1999, ordered and directed as follows:—

(1) THAT the applications herein by the appellant in appeal No 507 of 1999 to extend time to file the appeal book out of time be and is hereby granted.

(2) THAT leave be and is hereby granted for the appellant in appeal No 507 of 1999 to amend the grounds of appeal in appeal No 507 of 1999 by deleting the existing grounds of appeal which are contained in the Notice of Appeal at page 2 of the Appeal Book and substituting the following grounds:—

"1. The learned Commissioner was wrong in law in awarding costs in the sum of $900, found that portion of the claim for $1078.42 was made out and that the balance of the claim was dismissed under circumstances whereby for extreme reasons the award of costs were payable.

2. That the learned Commissioner was wrong in fact and law that the Appellant was not in any cause for the sale of King William Street claim for commission."

(3) THAT appeal No 507 of 1999 be and is hereby dismissed.

(4) THAT appeal No 512 of 1999 be and is hereby upheld and the decision of the Commission in matter No 474 of 1998 made on the 10th day of February 1999 be and is hereby quashed.

By the Full Bench,

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.
Industrial Relations Act 1979.
Old Ferry Company Pty Ltd
(Appellant)
and
Mario Gino Bertelli.
(Respondent)
No FBA 10 of 1999.

BEFORE THE FULL BENCH.
HIS HONOUR THE PRESIDENT P J SHARKEY.
COMMISSIONER P E SCOTT.
COMMISSIONER S J KENNER.
17 November 1999.

Reasons for Decision.

THE PRESIDENT: This is an appeal against the decision of a single Commissioner in application No 1808 of 1998, being an order made on 24 June 1999 (misdescribed in the Notice of Appeal as 23 June 1999) and deposited in the office of the Registrar on 25 June 1999, which, formal parts omitted, reads as follows (see page 25 of the appeal book (hereinafter referred to as "AB"))—

"1. ORDERS THAT Old Ferry Company Pty Ltd be substituted as the respondent in this application.
2. DECLARES THAT the dismissal of Mario Gino Bertelli by the respondent was unfair towards him.
3. ORDERS THAT Old Ferry Company Pty Ltd forthwith pay to Mario Gino Bertelli the sum of $5,400.00 as compensation for the unfairness of that dismissal."

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

"1. The learned Commissioner erred in law in finding that the Western Australian Industrial Relations Commission had jurisdiction to deal with an application pursuant to Section 29(1)(b)(i) of the Act in circumstances where the Applicant cites a separate and incorrect legal entity as employer on the Notice of Application.
2. Further, and in the alternative, the Commissioner erred in law pursuant to Section 29(2) in hearing and determining the Applicant's claim, such claim having been more than 28 days after the termination of the Applicant's employment.
3. Further, and in the alternative, the learned Commissioner erred in law and his discretion miscarried in substituting the Old Ferry Company Pty Ltd as the Respondent in application No 1808 of 1999 more than 28 days after the day on which the Applicant's employment terminated."

BACKGROUND

At all material times the respondent, Mario Gino Bertelli, was an employee of a company engaged in running ferries, cruises, etc. He claimed that his dismissal by "Boat Torque 2000 (formerly Boat Torque Cruises Pty Ltd)" was unfair and sought reinstatement.

The application was filed in the Commission on 1 October 1998 naming the abovenamed respondent as applicant and Boat Torque 2000 (Formerly Boat Torque Cruises Pty Ltd) of Pier 4, Barrack St Jetty, Perth WA as respondent.

An answer was filed on 4 November 1998 specifically denying that Mr Bertelli had ever been an employee of Boat Torque 2000.

When the matter was heard by the Commission at first instance on 12 May 1999 appearances were entered on behalf of two companies, Banwell Pty Ltd and Old Ferry Company Pty Ltd. Banwell Pty Ltd trades as Boat Torque 2000. On its behalf it was submitted to the Commission that it was never the employer of Mr Bertelli, and, accordingly, given that the application in the Commission was directed to "Boat Torque 2000", the Commission was without jurisdiction to deal with Mr Bertelli's claim.

Old Ferry Company Pty Ltd is the new name of the company "Boat Torque Cruises Pty Ltd", and the name change was effected on 29 April 1998. That company states that it was Mr Bertelli's employer.

The Commission at first instance found as follows.

When Mr Bertelli commenced work on the 28 February 1989 his employer was Boat Torque Cruises Pty Ltd. At the time of his dismissal, namely 11 September 1998, Boat Torque Cruises Pty Ltd no longer existed by that name. The Commission held that because of the documentary evidence and the evidence of Ms Michelle Leanne Marley, that on 29 April 1998 Boat Torque Cruises Pty Ltd changed its name to Old Ferry Company Pty Ltd. Old Ferry Company Pty Ltd was merely a name change and it has the same ACN as Boat Torque Cruises Pty Ltd. The Commission held, and held rightly, that they are one and the same company and only the name changed. The Commission found that Mr Bertelli was unaware of the name change. He was never told of it, and Mr Trevor Alan Kitcher, a director of Boat Torque Cruises Pty Ltd and the person who was effectively running the company on a day to day basis, did not believe that there was any obligation on him to notify his employees of Boat Torque Cruises Pty Ltd of the name change.

When Mr Bertelli was dismissed, his employer was Old Ferry Company Pty Ltd. His letter of dismissal (exhibit 4) is on the letterhead of Boat Torque Cruises Pty Ltd, but this does not change the Commission's conclusion. It merely meant that the letterhead used was incorrect, as Ms Marley, who gave evidence, conceded. Ms Marley, at the time of the hearing of the matter on 12 May 1999, worked on a casual basis as the Boat Torque 2000 accountant, but prior to that was the accounting manager full-time, commencing employment on 20 April 1998.

Mr Kitcher wrote to all staff on 7 April 1998 stating that Boat Torque Cruises Pty Ltd would cease to trade on or before the end of April 1998. All staff, however, were given a minimum of 30 days' notice as from 7 April 1998, advising that most staff would be taken on by the new identities, but should this not transpire then the redundancy offers made to previous employees would be the same.

Boat Torque 2000 is the trading name of a company called Banwell Pty Ltd, which came into existence in 1989, but did not start trading as Boat Torque 2000 until 9 April 1998. Mr Kitcher is also a director of Banwell Pty Ltd.

The Commission at first instance found from his evidence that the directors of Boat Torque Cruises Pty Ltd believed that it was absolutely necessary for this operation to survive for it to cease trading and for Banwell Pty Ltd trading as Boat Torque 2000 to commence trading. Boat Torque Cruises Pty Ltd in practice ceased to trade. Employees were either terminated, by way of redundancy, or resigned at different times. Ex-employees were able to apply for jobs in Boat Torque 2000 although there was no guarantee of employment and the ex-employee would be treated by Banwell Pty Ltd as a "new" employee with a three month probationary period.

Mr Bertelli's employment continued as before and he continued to be based at Mulberry Farm. He alone received a memorandum from Boat Torque Cruises Pty Ltd which stated that he did not need to apply for a new position with Boat Torque 2000 and that his employment would merely continue on with Boat Torque 2000. Both companies denied, in their evidence, that such a memorandum was ever issued, and Mr Bertelli did not produce the memorandum.

The Commission held that Mr Bertelli, on the basis of the group certificate and payroll advice, was not employed by Banwell Pty Ltd trading as Boat Torque 2000. Banwell Pty Ltd argued that, upon the finding, the Commission was not able to deal with Mr Bertelli's claim because he named Boat Torque 2000 as his employer in his application.

Boat Torque Cruises Pty Ltd and Banwell Pty Ltd are two separate legal entities according to law, the common links between the two companies being such that the Commission held, if only for the purposes of jurisdiction, that the legal difference was immaterial. It set out a number of reasons for that which appear at pages 18-19 (AB) and are as follows—

"1. that Mr Kitcher was, or is, a director of both companies; in fact, both companies have the same two directors;
2. both operate from the same registered office: Pier 4, Barrack Street Jetty, Perth, WA, 6000;

3. that address is also the principal place of business of both companies;

4. Mr Kitcher and Ms Marley were both instrumental in the dismissal of Mr Bertelli. It was Mr Kitcher's direction to Ms Marley, and Ms Marley's implementation of that direction, which resulted in Mr Bertelli's dismissal;

5. that, on the evidence of Ms Marley, the computer payroll system operated by her on behalf of Banwell Pty Ltd was such that Banwell Pty Ltd made payments on behalf of Boat Torque Cruises Pty Ltd on the basis that some reimbursement would subsequently occur from Boat Torque Cruises Pty Ltd. Indeed, Ms Marley operated the computer payroll account on behalf of both Boat Torque Cruises Pty Ltd and Banwell Pty Ltd at least for the period from when her employment commenced on 20 April 1998;

6. mention in the evidence to "the Kitcher group" of which both companies are part;

7. Mr Bertelli's duties and work did not change despite Boat Torque Cruises Pty Ltd ceasing to trade."

The Commission at first instance also held on the authority of Adelaide Timber Company Pty Ltd v WA Timber Industry Union of Workers, South-West Land Division (1990) 71 WAIG 325 at 331 and 333) that the corporate veil should be pierced.

Accordingly, Old Ferry Company Pty Ltd was held to be his employer and the Commission did not uphold the submission made by Banwell Pty Ltd that the Commission did not have the jurisdiction to entertain Mr Bertelli's claim.

The Commission therefore substituted the name "Old Ferry Company Pty Ltd" as the respondent. The Commission, being a tribunal created by Parliament to decide industrial matters in accordance with the principle of fairness and without regard to technicalities or legal form, it held, should be slow to rule against Mr Bertelli's claim on a technical point when in good faith, he brought the claim to the Commission.

Mr Kitcher's evidence was that he did not think that it was necessary for Mr Bertelli to know of the name change. That being so, Mr Kitcher, according to the Commission, could hardly then complain about Mr Bertelli mis-naming his employer, nor about the Commission being prepared to amend the name of the respondent. The Commission then said that it could find no prejudice which would be suffered by Old Ferry Company Pty Ltd by the substitution, and, indeed, it defended itself on the merits of the case.

ISSUES AND CONCLUSIONS

The crux of this appeal was really that the Commission was precluded after 28 days had elapsed from the date of the dismissal from substituting one company for the other as respondent when they were separate legal entities. Reliance for this proposition rested mainly if not solely on s.29(2) of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act"). That section prescribes that a referral under s.29(1)(b)(i), which is a claim that an employee has been harshly, oppressively or unfairly dismissed from his employment, "cannot be made more than 28 days after the day on which the employee's employment terminated". It is common ground that the substitution of one employer for another occurred by an order made more than 28 days after the day of the dismissal.

It is an industrial matter as this was which is referred to the Commission. The industrial matter was a claim that the respondent had been harshly, oppressively or unfairly dismissed from his employment. A "referral" is not defined in the Act, but a referral occurred within 28 days. It was common ground that the matter was referred within 28 days of the day of dismissal. What occurred subsequently was not a referral (see Swan Television and Radio Broadcasters Ltd t/a STW Channel 9 Perth v Satie 79 WAIG 1863 (IAC)).

Once an industrial matter is before the Commission, it may be dealt with in accordance with s.27 of the Act. The powers prescribed in s.27(1) of the Act may be exercised, except as otherwise provided in this Act. S.27(1) does not provide for a power to substitute parties in specific terms. S.27(1)(j) empowers the Commission to direct parties to be struck out or persons to be joined. However, s.27(1)(v) reads as follows—

"(v) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter."

The provision confers a general power which is a catch all for all matters which have not been expressly included. However, it is not to be read in isolation, but in the context of the specific powers which precede it (see RRIA v FEDFU 67 WAIG 315 (IAC)).

The powers exercisable under s.27 of the Act are discretionary powers and in reaching a conclusion whether to strike out or join or substitute one party for another, the Commission is bound by s.26(1)(a), (b) and (c) of the Act.

Further, s.29(1)(b)(i) of the Act does not "otherwise provide" for the exclusion of the s.27 powers or deny their general applicability. If, as Brinsden J, with whom Kennedy J agreed, in Australian Bank Employees Union v FCU and Others 70 WAIG 2086 at 2089-2090 (IAC) held, s.27(1) could be applied in order to permit an amendment so as to convert proceedings into an industrial matter, then, in a claim alleging a harsh, oppressive and unfair dismissal where there is no exclusion, diminution or prohibition of the use thereof, once a referral was made, then an order which could be made in any other industrial matter could properly be made within power under s.27(1)(v) in this case. Further, it was made when one company "volunteered" itself as a party.

It is quite clear that, once there was a referral, there was no provision in the Act which prohibited the use of the powers conferred by s.27 of the Act. There seems to have been a hearing based on a defacto joinder as a party of the respondent. In any event, it was within power for such a joinder to occur and for the application against one respondent to be dismissed.

Given that the Act is entitled the "Industrial Relations Act 1979" and given the provisions of s.6(b) and (c), s.26(1)(a) and (c) and s.27(1)(m) and (v) of the Act, such an approach should have been taken by the Commission. There was no error and the order was within power.

In my opinion assistance is not derived from Fernance v Nominal Defendant and Another (1989) 17 NSWLR 710 (CA), Australian Coastal Shipping Commission v Curtis Cruising Pty Ltd and Others (1989) 17 NSWLR 734 (CA) and Seas Sapfor Ltd and Another v Far Eastern Shipping Co (1995) 39 NSWLR 435 because of the rules of the New South Wales Supreme Court, and/or because, if that is wrong, I would also apply Seas Sapfor Ltd and Another v Far Eastern Shipping Co (op cit) and say that the matter was remediable by an amendment of the name, pursuant to s.27(1)(m) and s.27(1)(v) of the Act because there was an irregularity in the name of the party correctable by amendment or substitution under s.27(1)(l) or s.27(1)(m). I say that because it was clear that Mr Bertelli was claiming against his employer and merely had the wrong name.

Even if that were wrong, then the first named respondent was liable even though it was a separate entity as part of a group. The corporate veil should not be allowed in a tribunal such as this acting pursuant to s.26(1)(a), and having regard to the objects of the Act, to enable a party to escape liability. Such a view, as a matter of pure law, too, is supported by the Full Bench of this Commission in Adelaide Timber Co Pty Ltd v WA Timber Industry Industrial Union of Workers, South-West Land Division (FB)(op cit) and the cases cited therein at page 331 (which was binding upon the Commission at first instance) (see also Jones and Another v Lipman and Another [1962] 1 All ER 442, Smith, Stone and Knight Ltd v Lord Mayor, Aldermen and Citizens of the City of Birmingham [1939] 4 All ER 116 (KBD) and Pioneer Concrete Services Ltd v Yelnah Pty Ltd and Others (1986) 5 NSWLR 254).

For that reason, notwithstanding that the employer was misdescribed, then the referral was in time and was remediable by amendment. I would also refer to the dicta of Scott J (with whom Anderson J and Parker J agreed) in Swan Television and Radio Broadcasters Ltd t/a STW Channel 9 Perth v Satie (IAC)(op cit) at page 1866 as to the nature of the Act.

For all of those reasons given, as the Commissioner found and which was apparent from the evidence, Mr Bertelli was not really aware, nor had he been properly informed who his

employer was, it could not be fatal to his claim, nor could he be expected to understand from a mere letterhead, or even from his Group Certificate, who his employer was. If that is a wrong view, then the remedies which I have outlined were available.

For those reasons, I am not persuaded that the Commission acted without jurisdiction or power. For those reasons, the appeal is not made out and I would dismiss it.

COMMISSIONER P E SCOTT: I have had the benefit of reading the reasons for decision of His Honour the President and I agree that the appeal should be dismissed. What the Commissioner at first instance did was to ascertain who had been Mr Bertelli's employer. It had been Boat Torque Cruises Pty Ltd, which changed its name to Old Ferry Company Pty Ltd. The Applicant competed the Form 1 – Notice of Application by naming the Respondent as "Boat Torque 2000 (Formerly Boat Torque Cruises Pty Ltd)". Clearly, based on the information before the Commission, that represented the trading name of one business and the company name of another. Boat Torque 2000 is the trading name of a company which was never Mr Bertelli's employer. In the original Form 1, Mr Bertelli clearly identified the former company name of his former employer. His intentions were clear in the filing of the application.

The name of the Respondent is not changed significantly by the decision of the Commission at first instance such as to constitute a different identity being named as Respondent. The Commission simply corrected the misdescription and properly named the Respondent by its new name. As noted by the Industrial Appeal Court in *The Owners of Johnston Court Strata Plan No. 5493 and Anna Dumancic* (1990) 70 WAIG 1285 at 1287, this was not a case of the Applicant naming the wrong Respondent but rather was a case of getting the proper Respondent's name right. Accordingly, I am satisfied that to amend the name of the Respondent by deleting the trading name of a different company, and by updating the name of the employer, the Commission did not err.

On this basis, it is not necessary to address the question of whether it was appropriate or necessary for the Commission to either add or join another Respondent to the application. I do not intend to deal with that matter in any detail except to say that, with respect to His Honour the President, I do not agree that such a change is allowable. This is because the terms of s.29(2) are clear that a claim of unfair dismissal cannot be referred more than 28 days after the dismissal. The terms of s.27(1), read in context, do not allow any extension to that time limit such as to enable what is effectively, the referral of a claim against a new Respondent, one not named within 28 days. In such a case, there would be no referral of a claim of unfair dismissal made against the newly named party within 28 days.

COMMISSIONER S J KENNER: The grounds of appeal, background and issues arising on the appeal have been set out by the President in his reasons for decision and I need not canvass them further.

Substitution of Name of Appellant

The Commission at first instance concluded that the respondent was never an employee of Banwell Pty Ltd trading as Boat Torque 2000 ("Banwell"), despite "Boat Torque 2000" being cited, at least in part, in the notice of application commencing the proceedings. The Commission further held that Old Ferry Company Pty Ltd ("Old Ferry") (formerly named Boat Torque Cruises Pty Ltd), the appellant in this appeal, was at all material times the respondent's employer.

The Commission, given the nature of the relationship between Banwell and Old Ferry, and that the respondent had also cited Boat Torque Cruises Pty Ltd in the form "formerly Boat Torque Cruises Pty Ltd" on the notice of application, was persuaded to substitute Old Ferry as the proper employer for the purposes of the proceedings. This was based upon the view by the Commission at first instance that the respondent had misdescribed the proper name of the employer in the notice of application. Also, the Commission concluded that in any event, the corporate veil should be pierced, given the relationship between Banwell and Old Ferry on the evidence before the Commission.

It is trite to observe that in proceedings such as those before the Commission at first instance, there is an onus on an applicant to cite the proper employer. In my opinion, this matter is not one of mere technicality, but goes fundamentally to the Commission's jurisdiction to enquire into and deal with such industrial matters.

Undoubtedly, there is within the Commission's procedural powers pursuant to s 27(1) of the Industrial Relations Act, 1979 ("the Act"), subject to what I further say about this below, a power to correct or amend any process before the Commission. What I apprehend to be the relevant principles in that connection were set out in my reasons for decision in *Denver Wilcox v Antonio D'Angelo* (1999) 79 WAIG 300. I need not repeat what I said in that case as to the relevant principles, suffice to say that I refer to and rely upon what I said in that decision.

Whilst not without some oscillation, having regard to the evidence and circumstances before the Commission at first instance, I am prepared to accept that there was, at least, some doubt and confusion as to the proper identity of the respondent's employer at the material times, given the circumstances that occurred between April 1998 and September 1998, when the respondent's employment came to an end. In particular, I am prepared to accept that by reason of the change of name of the corporate entity which traded as Boat Torque Cruises, from Boat Torque Cruises Pty Ltd to Old Ferry (which appears on the evidence to not have been announced to employees), the subsequent cessation of trading by Old Ferry and the resumption of the conduct of the Boat Torque Cruises business by Boat Torque 2000 trading as Banwell, there was created some confusion in the mind of the respondent as to who was his employer as at the termination of his employment and its proper description.

Given that in the notice of application, the respondent named both Boat Torque 2000 (which of course was only a trading name for Banwell) and also referred to Boat Torque Cruises Pty Ltd (which was in fact the corporate entity that was his employer, albeit being renamed Old Ferry), I am prepared to accept that the respondent made all reasonable attempts to name the proper employer on the notice of application and the circumstances of this case are such that the respondent misdescribed the name of the employer, thereby enabling the Commission to correct that error using its procedural powers pursuant to s 27 of the Act.

Therefore, to the extent that the Commission at first instance concluded that the respondent's error was one of misdescription, the respondent having at least cited "formerly Boat Torque Cruises Pty Ltd", and the Commission exercising its procedural powers to correct the name of the respondent's employer, no error was made.

Whilst it was permissible for the Commission to correct the name of the employer as a matter of misdescription in the circumstances of this case, it is not in my opinion open for the Commission, in the exercise of its powers pursuant to s 27 of the Act, to substitute one legal entity for another as employer, notwithstanding the expiry of the 28 day time limit imposed by s 29(2) of the Act. To the extent that the President expresses the opinion that this is permissible, with respect, I have a different view as to the operation and effect of the relevant provisions of the Act.

By the terms of s 29(1)(b)(i) of the Act, an "industrial matter" may be referred to the Commission by an employee, alleging that he/she has been harshly, oppressively, or unfairly dismissed from his/her employment. It is clear that by the terms of s 29, what must be referred to the Commission is an "industrial matter". The "industrial matter", in the case of an application referred under s 29(1)(b)(i), is a claim by a former employee that his/her former employer has harshly, oppressively or unfairly dismissed him/her from that employment.

Furthermore, by the terms of s 29(2) of the Act such a "referral" under s 29(1)(b)(i) of the Act, cannot be made more than 28 days after the day on which the employee's employment terminated. There is no ability to extend that time pursuant to s 27(1)(n) of the Act, because s 29(2) "otherwise provides".

In my opinion, the "referral" to which these provisions are directed, is the referral of the claim by the former employee that his or her employment has been terminated unfairly by his or her former employer. That is, for there to be a referral in this way, there needs to have been at a point prior to the referral, an employee/employer relationship in existence such as to

constitute an industrial matter for the purposes of ss 7 and 29 of the Act. The statutory limitation of 28 days as prescribed by s 29(2), is a provision which is directed to the termination of that former employee/employer relationship as it expressly only relates to matters referred under s 29(1)(b)(i) of the Act and not industrial matters that may be referred to the Commission under other provisions of the Act. When read in this way, the undoubtedly very broad definition of "industrial matter" in s 7 of the Act is to be read down to cover a specific employment relationship that formerly existed prior to the application under s 29(1)(b)(i) being made.

If this view is correct, as a consequence, if the "referral" pursuant to s 29(1)(b)(i) is not in respect of the former employee/employer relationship, in the sense that the party against whom the claim is commenced was never the former employee's employer, there has been no "referral" within 28 days as required by s 29(2) of the Act because there was never any employment relationship and thus there can never have been any "dismissal" from employment. Arguably further, there would be no industrial matter before the Commission for the purposes of ss 7 and 29 of the Act. To the extent that there is a challenge by a party to a proceeding before the Commission that it was not the employer of a former employee, s 24 of the Act enables the Commission, if necessary, to determine whether the matter is an industrial matter for the purposes of jurisdiction.

Alternatively, if there is a "referral" before the Commission in such circumstances, the effect of substituting a new entity would constitute a fresh referral to the Commission against that entity, outside of the 28 day time limit and therefore statute barred by s 29(2) of the Act.

It follows in my view, that the effect of substituting one legal entity for another, in these circumstances, is to purport to refer an industrial matter to the Commission as to an allegation of unfair dismissal, more than 28 days after the day on which the actual employment terminated, contrary to the mandatory requirement of s 29(2) and such a claim would be statute barred.

Corporate Veil

The Commission at first instance also concluded that for reasons set out at AB 18 and that also Mr Kitcher was a director and the effective controller of both Banwell and Old Ferry, it was appropriate to pierce the corporate veil such that Old Ferry should be regarded as having been the respondent's employer. For the follow reasons, in my opinion, the Commission erred in so concluding.

It was common ground in the proceedings before the Commission at first instance that Banwell and Old Ferry were separate legal entities. This is not disturbed by the fact that Mr Kitcher is a director of both companies (see company extracts AB 130-153). Furthermore, it would appear from the company extracts before the Commission, that Banwell and Old Ferry are not both subsidiaries of a common parent company. Old Ferry has as it ultimate holding company, Trevor Kitcher Pty Ltd (see AB 142) whilst Banwell appears to have no ultimate holding company relationship but its shares are held beneficially by Mr Kitcher as a natural person (see AB 132). The fact that a person holds beneficially all of the shares in a company does not, by that fact alone, equate the business of the company with that of the controller or otherwise create a relationship of agency: *Gramophone and Typewriters Ltd v Stanley* (1908) 2 KB 99.

It is trite to observe that on and upon incorporation, a company is a separate legal entity from its members and controllers: *Salomon v Salomon and Co. Ltd* (1897) AC 22; *Lee v Lee's Air Farming Ltd* (1961) AC 12. There has been a general reluctance both in Australia and the United Kingdom, for courts and tribunals to pierce the corporate veil, unless good reason is shown. Whilst it appears that in Australia there is not any discernible broad principle indicating the circumstances under which the corporate veil may be pierced, the preponderance of authority suggests that it occurs in circumstances including sham arrangements; where a company acts as trustee or agent for another; where a clear agency or partnership relationship is implied or imputed between companies; and where it is apparent that the corporate form is used to avoid an existing legal obligation (see generally *Ford's Principles of Corporations Law*, 9th Ed at paras 4.350-4.420). (See also: *Adelaide Timber Company Pty Ltd v WA Timber Industry Union of Workers, South West Land Division* (1990) 71 WAIG 325 at 331 and 333).

In the circumstances the subject of this appeal, from all of the evidence and materials before the Commission at first instance, it could not be concluded in my opinion, that the activities of either Banwell or Old Ferry and the relationship between those entities, could be characterised as satisfying any of these general indicia of circumstances in which a court or tribunal should pierce the veil of incorporation. The mere fact, for example that Banwell provided in effect payroll services to Old Ferry would not infringe upon the separate entity doctrine. Furthermore, there was nothing before the Commission at first instance to indicate that the commercial structures in place involving Banwell and Old Ferry were mere alto egos of Mr Kitcher or otherwise that the conclusion was open that the commercial arrangements within and between those entities were other than bona fide.

Accordingly, for the above reasons, I would dismiss the appeal.

Order accordingly.

APPEARANCES: Mr A N Mackey (of Counsel), by leave, on behalf of the appellant.

Mr M G Bertelli on his own behalf as respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Old Ferry Company Pty Ltd

(Appellant)

and

Mario Gino Bertelli.

(Respondent)

No FBA 10 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY.
COMMISSIONER P E SCOTT.
COMMISSIONER S J KENNER.

17 November 1999.

Order.

THIS matter having come on for hearing before the Full Bench on the 28th day of September 1999, and having heard Mr A N Mackey (of Counsel), by leave, on behalf of the appellant and Mr M G Bertelli on his own behalf as respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 17th day of November 1999 wherein it was found that the appeal should be dismissed, it is this day, the 17th day of November 1999, ordered that appeal No FBA 10 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.

Frederick John Rogers
Appellant

and

Leighton Contractors Pty Ltd
Respondent.

No 549 of 1999.

BEFORE THE FULL BENCH.

1 November 1999.

HIS HONOUR THE PRESIDENT P J SHARKEY
COMMISSIONER A R BEECH
COMMISSIONER C B PARKS.

Reasons for Decision.

THE PRESIDENT: This is an appeal 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, made on 7 April 1999 in application No 1678 of 1998.

The appeal appears to be made against the whole of the decision. The order made on 7 April 1999, formal parts omitted, is as follows—

"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 $2,403.80."

GROUNDS OF APPEAL

The grounds of appeal are as follows—

"1. The Commissioner erred in holding that the employer had paid 4 weeks in lieu of notice and 6 weeks by way of redundancy payment and thereby exercised her discretion on a wrong basis. The respondent paid no redundancy payment and 10 weeks in lieu of notice.

2. The Commissioner's determination that she was unable to conclude that the payment offered to the Applicant by the Respondent was an inadequate redundancy payment ("the determination") was a discretionary determination which was wholly unreasonable and which was manifestly unsupportable such that the exercise of the discretion completely miscarried.

Particulars

No fair minded person could possibly come to the conclusion that a payment for redundancy calculated at no more than 1 week per year of service was a reasonable redundancy payment in all of the circumstances of the case.

3. The exercise of the Commissioner's discretion further miscarried in that the Commissioner sought a standard for comparison by which to judge the adequacy of the redundancy payment when the proper exercise of the discretion simply required the Commissioner to determine whether the amount of the payment was such that the employee had been given a fair go, which he had not.

4. In awarding 2 weeks pay for the various incidents to the termination the Commissioner failed to award a reasonable sum by way of compensation

Particulars

In having regard to—

1. the failure of the respondent to pay correct pay in lieu of notice and the delay in subsequently complying with its legal obligations
2. the brutal manner of effecting the termination including the failure to warn or discuss
3. the failure to consider or offer job seeking assistance until asked
4. the failure to pay what it proposed to pay by way of redundancy

the Commissioner could only bring herself to say that the respondent had not treated the appellant as well as it might and thereby completely failed to properly or at all appreciate or understand the gravity of the respondent's conduct and its impact on the appellant which in turn led to a wholly and manifestly inadequate award of 2 weeks pay.

5. The Commissioner erred in making an order allowing the respondent 21 days to pay the sum of 2 weeks pay to the appellant when—

1. the respondent had not sought time to pay
2. even if the respondent had sought time to pay no proper basis for such time could have been demonstrated
3. the question of time to pay was not raised in the hearing and the order made did not reflect the decision of the Commission."

BACKGROUND

The background of the matter is as follows. The appellant claimed that his dismissal by the respondent company was harsh, oppressive or unfair and brought an application to the Commission pursuant to s.29(1)(b)(i) of the Act. The appellant was employed by the respondent for over ten years as plant foreman, although he undertook a number of other tasks, within the plant and machinery supply area of the respondent's business at Welshpool in the State of Western Australia. The plant and machinery is used in mining contracting and civil engineering. At the time of his dismissal, he was master of apprentices.

It was not in issue that the appellant's position was abolished and he was made redundant on 6 August 1998 when he was aged 55 years. He was the first of a number of employees made redundant on that date, having been called into the respondent's board room to meet Mr Stephen Nicholas McDonald, the plant manager for the respondent and Mr Keith Bethel, the operations manager; and having been informed that he had been made redundant.

The appellant was told that the company had been unsuccessfully trying to win additional work for some time and needed to reduce its overheads. He was also informed that the company would need to do without his position and, although that it appreciated the work which he had done for the company, there would be no work available to him in the future. He was given a letter to that effect. At the time of his dismissal, his salary was $62,000.00 per annum, his salary having been increased at the end of 1997.

The appellant, on his evidence, was bewildered and shocked. (Mr McDonald, in evidence, described him as "upset".) He responded that he recognised that something had to happen, although he was set back by what was said to him. He was told that he could leave that day. He asked if he could take his personal effects and was told that he could. The appellant was advised, too, that he could leave when he liked, that day, and that he would be paid up until the end of work that day. He then left the board room and went back to his office.

On termination of employment, the appellant was paid his entitlements together with an amount which his "Termination Payment Details" referred to as "Ten week's pay in lieu of notice", but which the respondent said was more properly described as four weeks' pay in lieu of notice in accordance with his contract of employment and six weeks' redundancy pay.

In his terms of appointment dated 17 July 1988 (see pages 68-70 of the appeal book (hereinafter referred to as "AB")), notice of termination was provided to be by the giving of one month's notice by either the employer or the employee, with a provision for the ability to make payment of one month's pay in lieu of notice.

On 17 August 1998, the appellant wrote to the respondent indicating that he did not accept the termination payment made to him on 6 August 1998. He asked the respondent to assist him in arranging retraining programmes and counselling, assisting with a resume and with re-employment. He also asked to be given a "suitable redundancy package" to reflect his years of service and his age, because age might prove to be the cause

of difficulties in obtaining suitable positions with other companies. The appellant proposed a further twenty weeks' payment to assist in his redundancy situation (see page 74(AB)).

On 3 September 1998, the respondent replied by letter that it was prepared to offer a further four weeks' redundancy pay which it said would then equate to one week's pay for each year of service, and to provide access to an "outplacement" service to assist him to secure another position (see page 76(AB)). The additional redundancy pay offered to the appellant, he declined, on the basis that it was inadequate. The respondent said that the amount is still to be paid to the appellant, regardless of the outcome of the claim.

On 4 December 1998, the appellant was made aware that a further week's pay in lieu of notice was due to him, saying that this was according to the provisions of the Workplace Relations Act 1996 (Cth), and this was paid to him on 29 January 1999.

The appellant gave evidence of his unsuccessful attempts to find work over the period from his dismissal to the date of the hearing at first instance, which evidence was not disputed. He called evidence of the quantum paid to other employees dismissed by other employers.

For example, there was evidence from Mr Paul Sims that he had been an employee at MacMahon Contractors (WA) Pty Ltd as a field service purchasing officer. He was made redundant pursuant to a restructuring of the plant department and the downturn in work. He received five weeks' salary in lieu of notice and severance entitlements in accordance with company policy. His company's policy provided for a severance entitlement of twenty weeks' pay. Mr Sims had been employed by MacMahon for ten years and one month at the time of his redundancy.

Whilst there was some dispute as to whether Mr Sims and the appellant were employed in the same industry, his evidence was relied by the appellant at first instance.

In addition, there was reliance by counsel for the appellant on a South Australian case, Wynn's Wine Growers v Foster (16 IR 381 at page 381). The essence of that decision was that "an employee selected for redundancy on valid grounds may still be dismissed unfairly if the employer's payment to him is inadequate" (at page 392).

There was evidence, at first instance, from Mr Stephen Nicholas McDonald of his discussions with the respondent's manager for Western Australia that the business could not afford the overheads being incurred and that he, McDonald, was to decide how to reduce those overheads. This state of affairs led to the appellant being made redundant.

The respondent said that the Termination, Change and Redundancy Principles fit the description of a contemporary industrial standard, although it is not recognised for staff personnel, nor has the Commission itself dealt with the principle of a general contemporary industrial standard.

The Commissioner held that the amount paid did not itself constitute an unfairness warranting the Commission's intervention. The Commissioner found unfairness on other bases. The Commissioner then went on to find that an amount equal to two weeks' pay was appropriate compensation.

ISSUES AND CONCLUSIONS

The decision appealed against was a discretionary decision, as that kind of decision is defined in Norbis v Norbis (1986) 65 ALR 12. The Full Bench, therefore, cannot substitute the exercise of its discretion for that of the Commission at first instance unless the appellant establishes that the exercise of the discretion miscarried, and so establishes, in accordance with the principles in House v The King [1936] 55 CLR 499 (HC) and Gromark Packaging v FMWU 73 WAIG 220 (IAC).

By Ground 4 of the Grounds of Appeal, there was a claim that two weeks' pay for the injury aspect of the claim was manifestly inadequate, having regard to "the brutal circumstances and primitive manner in which the employer terminated an older supervisory employee of ten years' unblemished service". The submission was that compensation in the sum of $5,000.00 should be ordered to compensate for that injury. What, of course, was paid was an amount equal to ten weeks' pay in the end, consisting of four weeks' in lieu of notice and six weeks' severance pay. This was later increased to five weeks in lieu of notice and ten weeks' severance pay.

Injury

The claim alleging injury was based on the following: that the appellant was a 55 year old supervisory employee with ten years' service who experienced shock and bewilderment and was upset upon his dismissal.

The Commissioner decided that the lack of warning was inconsiderate and that the dismissal was therefore unfair. The Commissioner did not consider, however, that the appellant had suffered injury and made no finding that he had suffered injury. It was a submission for the appellant that the treatment of the appellant, in fact, was that, having received no notice, no counselling and received no assistance, the dismissal was brutal and primitive and, therefore, injured him and he suffered upset, shock and bewilderment. The evidence of Mr McDonald was that the appellant was upset, and of the appellant as to bewilderment and shock.

On any objective view of what occurred, the only reasonable conclusion which could have been reached on the evidence was that the appellant was shocked and humiliated and that was the injury which he suffered. The circumstances of the dismissal, its arbitriness and suddeness after ten years service could reasonably be held to have caused such an injury. As a result, the Commissioner should have so found, which the Commissioner did not, and awarded fair compensation. In the circumstances, $2,000.00 would be an appropriate amount and I would substitute the exercise of my discretion for that of the Commission at first instance to order accordingly.

The Dismissal—Loss and Compensation

I now turn to Grounds 1, 2 and 3. A termination for redundancy which is not accompanied by a reasonable redundancy payment is harsh, unjust and unreasonable (see Wynn's Winegrowers v Foster (op cit), Westen v Union des Assurances de Paris (No 2) (1996) 88 IR 268 per Madgwick J and Leddicoat v Schiavello Commercial Interiors SA (Federal Court) (unreported) No SI 1153 of 1995 (delivered 18 October 1995) per Von Doussa J). That was accepted by the Commissioner as a principle. I apply those cases and agree that that is a principle to be applied in this Commission.

The appellant complained that the termination was unfair in that the redundancy payment was inadequate. The Commissioner at first instance held that she was unable to find that this aspect of the claim constituted an unfairness warranting the Commission's intervention and decided the case on the basis that five plus ten weeks were to be paid.

It was submitted that the Commissioner erred in failing to determine whether the redundancy payment paid was reasonable or not and, hence, failed to determine whether the termination was unfair or not.

It was also submitted that the Commissioner erred in seeking a standard for comparison. In the end, the Commissioner found that an amount equivalent to two weeks' pay was "appropriate compensation". The Commissioner reached that conclusion in error, in any event. She did so because she failed to make a finding as to the loss suffered, failed to follow authorities and misunderstood what Kenner C said in Bogunovich v Bayside Western Australia Pty Ltd 79 WAIG 8 (FB).

The Commissioner also failed to follow the ratio in Bogunovich v Bayside Western Australia Pty Ltd (FB)(op cit). The reasoning of the majority of the Full Bench which failed to take any note of the decisions of the Full Bench in Gilmore and Another v Cecil Bros and Others 76 WAIG 4434 (FB) and Capewell v Cadbury Schweppes Australia Ltd 78 WAIG 299 (FB), means that the decision of the majority in Smith v CDM Australia Pty Ltd 78 WAIG 307 (FB) was manifestly wrong and should not be followed.

The majority in Smith v CDM Australia Pty Ltd (op cit) ignored the previous decisions of the Full Bench, by which the Full Bench was bound, and fell into serious error deciding the matter per incuriam, as a result. It was erroneous for the Commission to apply Smith v CDM Australia Pty Ltd (op cit), in the face of the Full Bench decisions in Gilmore and Another v Cecil Bros and Others (FB)(op cit), Capewell v Cadbury Schweppes Australia Ltd (FB)(op cit), Bogunovich v Bayside Western Australia Pty Ltd (FB)(op cit), Tranchita v Wavemaster International Pty Ltd 79 WAIG 1886 (FB) and the cases cited therein, by which she was bound.

Kenner C in Bogunovich v Bayside Western Australia Pty Ltd (FB)(op cit), if one reads all of his reasons for decision in context, recognises that, in cases where loss is claimed, there is a duty to find what the loss is as established by the appellant and he adopts what was said by the President in Bogunovich v Bayside Western Australia Pty Ltd (FB)(op cit) and the cases cited therein. It is wrong to say, as the Commissioner did, that whether loss has been established and what is the quantum of loss is one of a number of considerations. The establishment of loss is a matter of proof, and the compensation assessed according to Gilmore and Another v Cecil Bros and Others (FB)(op cit), Capewell v Cadbury Schweppes Australia Ltd (FB)(op cit), Bogunovich v Bayside Western Australia Pty Ltd (FB)(op cit), and the cases cited therein.

By way of illustration, a similar approach to that which the Full Bench has unmistakably laid down has been adopted by the Full Bench of the Australian Industrial Relations Commission in Sprigg v Paul's Licensed Festival Supermarket (1998) 88 IR 21 at 29, although the approach is not and could not be identical to that of the Full Bench and does not bind this Commission.

The reasons for reaching any decision which she did as to quantum are not at all apparent, the decision as to the amount to be paid must be regarded as arbitrary. In that sense, the Commissioner erred in law.

It was the case for the respondent that the appellant should establish an industrial standard by which to measure the adequacy of a redundancy payment. The appellant's case was that an amount equivalent to two weeks' wages for every year worked should be paid by way of redundancy payment.

The Commissioner held that she was unable to find that this aspect of the claim constituted an unfairness warranting the Commission's intervention and ordered that an amount equal to five weeks plus ten weeks was appropriate, although she did not order that it be paid.

The Commissioner adverted to a number of examples including the Termination, Change and Redundancy Case ("TCR Case") (1984) 294 CAR 175, which she held could never be more than a guide. Further, she observed that this Commission had not adopted a TCR standard. That was correctly observed.

The Commissioner then considered a number of awards and agreements and the evidence of the McMahon case of Mr Sims (see page 22 (AB)) and held that the payment of six weeks plus four weeks was not an inadequate payment of redundancy to an employee in a supervisory position in an industry which included providing plant and equipment to the mining and construction industry.

The Commissioner accepted that an inadequate payment for redundancy could render a dismissal unfair. I agree that that is the case.

In addition, it is also the law in this Commission that it is an implied term of a contract of employment that there is an obligation to make payments in redundancy cases such as this (see Coles/Myer Ltd t/a Coles Supermarkets v Sweeting and Others 73 WAIG 225 (FB) and Lawson & Others v Joyce Australia Pty Ltd 76 WAIG 20 (FB)). As to implication of terms, see also The Hospital Laundry and Linen Service v FMWU 74 WAIG 45 (FB). Curiously, counsel for the appellant seemed to be unaware that that was the case.

In any event, the Commissioner, having found that the appellant was harshly treated because of the respondent's lack of consideration, found that the dismissal itself was wholly unfair. That having been done, it was not open to the Commissioner to find that there was an element of the dismissal which was not unfair, as she purported to do in finding that the payment made was not inadequate. Having found that the dismissal was unfair, the Commissioner was then required to find whether the appellant had suffered loss or injury and make a finding as to what was the loss or injury, if any. It was open to the Commission to have found, and it should have found, that the appellant had established that he had suffered the loss, inter alia, of a fair redundancy payment, namely two weeks' wages for each year worked less six weeks already paid.

I agree with Mr Schapper's submission that it was open to determine, having regard to the examples provided, and generally, whether the redundancy payment in the circumstances of this particular case, was fair. I agree, also, with the authorities cited above which say that, in each individual redundancy case, it would be oppressive to require an applicant to prove what an industry standard for redundancy payments was by calling a mass of witnesses (see Leddicoat v Schiavello Commercial Interiors SA (Federal Court) (unreported) (op cit) per Von Doussa J). That approach, in any event, flies in the face of the unanimous decision of the Full Bench in Coles/Myer Ltd t/a Coles Supermarkets v Sweeting and Others (FB) (op cit) at page 231—

> "It is fair to say that, in the case of an employee such as Mr Coppin or Mr Ryan, a reasonable notice implied upon termination could easily be a period of some months. So far as it was necessary to assess the benefit, the Commission at first instance was entitled to find that any amount payable upon redundancy by any implied term was required to be greater than that paid for award employees and certainly not less. A parallel is the implication of reasonable notice for management or non-award employees where no notice is provided for in the contract (see Tarozzi v WA Italian Club (Inc) (op cit) and the authorities therein cited). Matters such as quantum of salary, period of service, position in the hierarchy of the employer etc, are reasonable matters to consider in fixing quantum of a redundancy payment. The Metal Trades Award was not apposite. Indeed, exhibit L3 recognises that fact."

In particular, having regard to his age, his ten years of service, likely difficulty in obtaining employment, his place in the employer's hierarchy, and his annual salary of $62,000.00, such a sum is justified. Because of the time which has elapsed since the TCR Case (op cit) was decided, I do not find it to be of cogent assistance in the face of what I have said.

It follows that, also, the dismissal was unfair for the reason that an inadequate payment for redundancy was paid. For all of those reasons, I find that the exercise of discretion miscarried. I would, therefore, substitute the exercise of my discretion for that of the Commissioner at first instance to order payment equal to twenty weeks' wages by way of redundancy payment, which was similar to what Mr Sims, in a similar occupation, gave evidence that he earned, and which, having regard to the "Coles Myer" factor to which I have referred, is a fair figure. That is also, for the purposes of an award of compensation, an established loss requiring to be compensated in full subject to the amount equivalent to six weeks' wages already paid. That amount, so calculated, is a total of $16,692.31.

TIME TO PAY

There was a complaint in the grounds of appeal that the Commissioner erred in allowing time, namely 21 days, within which to pay. That point is now moot and it is not necessary to determine it, save and except to observe that time to pay should not be allowed without giving the parties an adequate opportunity to be heard.

BIAS

The appellant, through his counsel, attempted to adduce a record of previous decisions of the Commissioner in applications where unfair dismissal was claimed. This was sought to be introduced to establish a course of conduct in findings of the Commissioner leading to a conclusion as to the attitude of the Commissioner to these claims.

The evidence did not relate to any ground of appeal.

The material unmistakably was to be used to found a plea of bias, however styled. Further, this material was excluded by the operation of s.49(4) of the Act as having not been raised at first instance and not having been established to be fresh evidence. In addition, since the question of bias was not raised at first instance, then the appellant had waived the right to make such submissions (see Vakauta v Kelly 87 ALR 633 (HC)).

CONCLUSIONS

Finally, I would uphold the appeal. I would vary the decision at first instance by ordering the payment of the following amounts—

1. $2,000.00 compensation for injury.
2. $16,692.31 redundancy payment.

Total $18,692.31.

I would issue a minute of proposed order to reflect those findings.

COMMISSIONER A R BEECH: The essential facts of the matter before the Commission at first instance are that Mr Rogers was made redundant on 6 August 1998. At the time he was made redundant he had been employed for just over 10 years and he was aged 55 years. The position he held was plant foreman although he undertook a number of other tasks. His employment was terminated on 6 August 1998 without any prior warning to him. He was advised that he could leave that same day. He was paid his entitlements plus an amount of 10 weeks' salary. He lodged a claim in the Commission that his dismissal was unfair.

The Commission at first instance noted that there was no challenge to the genuineness of the reason Mr Rogers was dismissed from his employment. It was not challenged before the Commission at first instance that the selection of Mr Rogers' position to be made redundant was not genuine. What was challenged was the fairness or otherwise of Mr Rogers' dismissal on the grounds of the inadequacy of the redundancy payment made to him. The Commission at first instance therefore considered whether or not dismissal by reason of redundancy where the redundancy payment made to the employee is inadequate could constitute a harsh, oppressive or unfair dismissal applying the test set out in the *Undercliffe* case. The Commission, citing *Wynn's Wine Growers v. Foster* (1986) 16 IR 381 found that it could. The Commission at first instance was not wrong to reach that conclusion. It can be said that at least since the since the well-known termination change and redundancy case in this country ((1984) 8 IR 34 at 73; 9 IR 115), it has been recognized that the redundancy of an employee inherently involves hardship. It involves in particular financial hardship or fear of it caused by an interruption to employment, the disruption to an employee's routine and society, social contact and the competitive disability of long term employees as a result of opportunities foregone in the continuous service of their employer (*Food Preservers' Union v Wattie Pict Ltd* (1975) 172 CAR 227; *CMETSWU and others v RGC Mineral Sands* (1998) 79 WAIG 27 at 30). Therefore, the dismissal of an employee for redundancy without the payment of a redundancy payment sufficient to compensate the employee for such matters as the employee's age, length of service, seniority, period of notice, availability of alternate employment, benefits foregone and the reason for the retrenchment, may, depending on the circumstances, be harsh upon the employee (*Wynn's Wine Growers* op. cit; *Leddicoat v Schiavello Commercial Interiors*, Industrial Relations Court of Australia, Von Doussa J, No SI 1153 of 1995, 18/10/95; *Westen v Union des Assurances de Paris*, Industrial Relations Court of Australia, Madgwick J, 419/96, 28/8/96; *Fryar v System Services* (1996) 137 ALR 321 at 331 – the subsequent appeal against this decision was upheld but only on jurisdictional grounds: 5/9/96, unreported).

The Commission at first instance then moved to consider whether the payment made to Mr Rogers constituted an adequate redundancy payment. In doing so the Commission at first instance sought a standard for comparison. The Commission considered that there is no test case standard in this State and that the 1984 Termination, Change and Redundancy cases could be no more than a guide. The Commission concluded that a "contemporary industrial standard" could not be found and applying her general knowledge of these matters concluded that the payments made to Mr Rogers did not constitute an "unfairness warranting the Commission's intervention". The Commission at first instance went on to conclude that Mr Rogers' dismissal was nevertheless unfair for procedural reasons.

On appeal Mr Rogers alleged that the Commission erred in holding that the respondent had paid 4 weeks' salary in lieu of notice and six weeks' salary by way of redundancy payment and thereby exercised her discretion on a wrong basis. In fact, the Commission at first instance noted that Mr Rogers had been paid 10 weeks' salary on termination. The period of notice required under Mr Rogers' contract of employment to lawfully bring the contract to an end was one month or the payment of one month's salary in lieu of notice. However, the Commission at first instance concluded that in considering whether the payments made to Mr Rogers constituted an adequate redundancy payment it was appropriate to take into account an additional 4 weeks' salary subsequently offered to Mr Rogers on 3 September after he queried his termination payment. The task before the Commission at first instance was to decide whether the dismissal of Mr Rogers on 6 August 1998 was harsh, oppressive or unfair. It is the dismissal which actually occurred which is to be assessed (*TWU v. Eastern Goldfields Transport Board* (1989) 69 WAIG 1895). Mr Rogers was dismissed with 10 weeks' salary paid to him. The mere fact that 3 or 4 weeks after the dismissal the respondent offered to pay a further 4 weeks' salary, whether or not it was offered on the basis of a "full and final settlement", is irrelevant to the circumstances of the dismissal which actually occurred. Therefore, in taking that subsequent offer into account the Commission, with respect, fell into error.

Mr Rogers also appeals on the ground that the proper exercise of the Commission's discretion simply required the determination of the Commission. That does not require the establishment of a standard for comparison. The existence of a standard may assist in deciding whether a particular redundancy payment is adequate for the purpose. However, the absence of a standard does not mean that the Commission's discretion is not able to be exercised. This ground has substance. Whether or not the employer's legal right to dismiss an employee has been exercised so harshly towards that employee as to amount to an abuse of that right is to be judged according to contemporary standards. It necessarily involves an individual assessment, for what may be harsh or unfair towards one employee may not, in different circumstances, be harsh or unfair to another. It follows that a redundancy payment made to one employee is not necessarily the appropriate redundancy payment to be made to another. As observed in *Wynn's Wine Growers v. Foster*, where appropriate redundancy benefits have been determined by an industrial tribunal, the adequacy of the payment made to an employee may properly be judged against that determination. However, in the absence of such a determination by a tribunal, and that is the case in this State, the task of the Commission is "to set the bounds of a reasonable ultimate payment" (*Wynn's* case op. cit. at pp. 392/393).

The facts before the Commission at first instance are relatively straightforward. The payment made to Mr Rogers on termination was 10 weeks' salary. The assessment of whether the dismissal was fair or unfair by reference to that payment requires that the package be considered as a whole (*Leddicoat* op.cit. at p. 11). There was some issue at first instance whether the payment made should be characterised as 10 weeks' salary in lieu of notice or 4 weeks' salary in lieu of notice and 6 weeks' redundancy pay. Two issues arise. Firstly, for an employer not to differentiate between payment in lieu of notice and a redundancy payment disadvantages an employee because the nature and purpose of a redundancy payment in the current taxation regime is that a redundancy entitlement is taxed on the more favourable terms which apply to an eligible termination payment. It is inconsistent with that approach to characterise a severance payment as the payment made to an employee to terminate the contract of employment by way of weeks of notice.

Second, in considering the package as a whole, it is still important to determine what was required under Mr Rogers' contract of employment to validly bring it to an end. Any additional payment paid to Mr Rogers upon his dismissal but to which he was not entitled under his contract of employment may then be regarded as a payment made to him *ex gratia*. The period of notice set out in the contract of employment was 4 weeks' notice, or payment in lieu thereof. That is a lesser period of notice than required by section 170CM of the *Workplace Relations Act 1996*. In fact, 5 weeks' notice or payment in lieu thereof was required to validly terminate the contract of employment. The respondent evidently characterised the 10 weeks' salary it paid Mr Rogers upon his dismissal as containing only four weeks' salary in lieu of notice. It decided that it had not given the required period of notice. More than 6 months after his dismissal it paid Mr Rogers a further "one week's salary in lieu of notice". It was not necessary for the respondent to do so because it had paid Mr Rogers 10 weeks' salary when it dismissed him and in doing so had paid him at least the salary in lieu of notice that it had been obliged to pay to validly terminate the contract. However, the fact that the respondent concedes that in its own view, it did not even pay Mr Rogers the statutory minimum period of notice to

terminate his employment is not an irrelevant consideration in deciding whether a dismissal was harsh, oppressive or unfair.

The Commission at first instance subsequently found that Mr Rogers' dismissal was "harsh" due to the manner of the dismissal, a conclusion which was undoubtedly correct on the evidence before the Commission at first instance. The Commission at first instance referred to the respondent's "general lack of consideration of Mr Rogers during the process" and concluded that constituted harsh treatment of him. In concluding that the respondent could reasonably have provided fairness by properly preparing for, and dealing with the matters concerned, such as consulting the applicant and identifying means of alleviating the difficulties which would arise for him following dismissal, the Commission was undoubtedly correct. Given that Mr Rogers, with his length of service, had no forewarning or any inkling as he reported for duty on 6 August 1998 his dismissal was harsh (*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)).

That conclusion is reinforced by the fact that it was an implied term in his contract of employment that as soon as practicable after the respondent had made its decision to make his position redundant it would inform Mr Rogers and discuss with him measures to lessen the effect of that decision on him (*Minimum Conditions of Employment Act*, ss 5, 41). On the evidence before the Commission, Mr Rogers was simply brought in to the office and informed that he had been made redundant. He was informed of the reasons for the redundancy, the payments to be made to him and that he was required, at his convenience, to leave that day. Mr Rogers' dismissal therefore also breached that implied term in his contract of employment.

In conclusion, the Commission at first instance fell into error in not considering the dismissal and the payments made at the time of the dismissal in that she took into consideration the stated preparedness of the respondent to pay a further 4 weeks' salary to Mr Rogers. The Commission further fell into error in not making an assessment whether the payments made to Mr Rogers were adequate for the dismissal which occurred. This materially affected the Commission's consideration of the appropriate compensation to be ordered.

In the circumstances of this case, the Full Bench is in as good a position to determine the matter as was the Commission at first instance. That may not have been the case if issues arose from the evidence of witnesses which required an assessment of credibility. The package paid to Mr Rogers of 10 weeks' salary, including as it does, a necessary period of 5 weeks' salary to validly terminate the contract of employment, could hardly be described as adequate for an employee of 10 years' service who is aged 55 years and was in a supervisory position. While the facts of both *Westen* (op. cit.) and *Jager v Australian National Hotels* (Supreme Court of Tasmania, Slicer J, 54 of 1998, 12/5/98) are not similar to the facts of this matter the recognition in those cases given to two weeks' salary and four weeks' salary respectively for each year of service support that conclusion. The evidence of the redundancy payment made in the case of the McMahon Contractors' employee of two weeks' salary for each year of service is further support. I find that Mr Rogers' dismissal was harsh due to the inadequacy of the payments made to him as well as the manner of his dismissal.

The Commission found, and this finding is not challenged, that reinstatement of Mr Rogers was impracticable. Where the job held by an employee no longer exists, it will only be in unusual circumstances where reinstatement will be found to be possible.

The issue to be decided therefore, given that reinstatement is impracticable, is the compensation to be ordered. Compensation is to be assessed according to the loss or injury suffered by Mr Rogers. However, the assessment of loss in this case is not the assessment which occurs in the case of an employee found to have been unfairly dismissed and who, but for the dismissal which occurred, would have remained in employment. It is not relevant to take into consideration the salary which would have been earned had the dismissal not occurred. Nor is the concept of ongoing loss of assistance. Rather, the loss to be assessed in the case of an employee whose position was made redundant, but whose dismissal was nevertheless unfair, is the loss of a reasonable payment in compensation for the loss of non-transferable credits and entitlements that have been built up through length of service and for inconvenience and hardship imposed by the termination of employment through no fault of the employee (*Westen, Leddicoat* op.cit.). That will be a matter of assessment in each case. As previously referred to in these reasons, such an assessment does not require the ascertaining of some standard. In the absence of a standard, the compensation to be ordered is a matter for the proper exercise of the judgment of the Commission. In the exercise of that judgment, evidence of payments made to other employees, or to employees in other industries, will be no more than a guide. Not only was there the evidence of two weeks' salary per year of service in the McMahon's example provided to the Commission at first instance, but also that measure has some wider recognition: see *Leddicoat* at p. 10. That evidence shows that the ceiling on redundancy payments which had its origins in the TCR cases is disregarded. In this regard, I regard the submissions of Mr Schapper as sound. Mr Rogers held a supervisory position within the respondent for a period of 10 years. He had a very good work record. He was aged 55 and was not as assured of finding equivalent alternative employment as would an employee of less senior years. The period of notice to terminate his contract of employment cannot be considered long in those circumstances. I assess that a reasonable redundancy payment to Mr Rogers to take account of all of his circumstances would be 20 weeks' salary. By the time of the hearing he had been paid 11 weeks' salary. A redundancy payment is a payment in addition to the notice, or payment in lieu thereof, required to be given to terminate the contract: see the TCR case, op. cit. Of the 11 weeks' salary already paid to Mr Rogers, only 6 weeks' salary may be reasonably regarded as compensating him for his redundancy. Mr Rogers' loss therefore is 14 weeks' salary and I would therefore order the payment to Mr Rogers of a further 14 weeks' salary.

Mr Rogers also appealed on the ground that compensation should have been awarded for the injury suffered by him in the sense of his shock and distress at the suddenness of his dismissal. In circumstances where an employee's position is to be made redundant, the consultation which is to occur pursuant to the term implied in the employee's contract of employment by virtue of the *Minimum Conditions of Employment Act* will largely remove the shock or distress which would otherwise occur. A certain level of shock and distress on the part of an employee is to be anticipated in any dismissal. However, I find that ground to have been made out. The lack of consultation and the fact that Mr Rogers was required to leave that same day in the circumstances of this case warrant payment for the injury which occurred (*Gilmore v Cecil Bros*, op. cit.). I concur with the sum assessed by His Honour the President.

Mr Rogers also challenged the provision in the order of the Commission at first instance which gave the respondent 21 days to pay the sum ordered. I also agree with His Honour that providing 21 days for the respondent to pay the sum ordered by the Commission at first instance constitutes time to pay. Given that time to pay was not requested by the respondent, the order to issue should merely have operated from the date it came into effect.

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 upheld and the decision at first instance varied.

Order accordingly

APPEARANCES: Mr D H Schapper (of Counsel), by leave, on behalf of the appellant

Mr R H Gifford (of Counsel), by leave, on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Frederick John Rogers
Appellant

and

Leighton Contractors Pty Ltd
Respondent

No 549 of 1999.

BEFORE THE FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY
COMMISSIONER A R BEECH
COMMISSIONER C B PARKS.

1 December 1999.

Supplementary

Reasons for Decision.

THE PRESIDENT: This matter came on for a speaking to the minutes at the request of the agent for the respondent, on 12 November 1999.

Minutes of Proposed Order had been issued by the Full Bench dated 1 November 1999.

Counsel for the appellant and the agent for the respondent had filed written submissions, and the agent for the respondent had filed a minute of amendment to the Minutes of Proposed Order.

The crux of the submissions was that Order 3 should be amended to substitute the figure of "$9,615.35" for the figure of "16,692.31".

I make the following observations and reach the following conclusions—

1. At the heart of the respondent's submissions was a submission that a sum equal to four weeks' pay had been paid by the respondent by way of redundancy payments after the order of the Commission at first instance appealed against upon this appeal had been made.
2. It was submitted that such an order would reflect the reasons for decision of the President and Commissioner Parks, although it is clear, on a reading of it, that this amount was found to be required to be taken into account. Indeed, it was, by reading final conclusions, not to be taken into account.
3. (a) Commissioner Beech, in his reasons, was of opinion that a sum equal to four weeks' pay should not be taken into account.
   (b) The final order reflected calculations made by all three members of the Full Bench.
4. It was also submitted that the amount of $2,403.80 had been already paid by the respondent and required to be offset against the payments ordered by the Full Bench.
5. I am not of opinion that a sum equal to four weeks' pay referred to should, by amendment to the Minutes of Proposed Order, be taken into account or, as a consequence that the Minutes should be amended, because—
   (a) Commissioner Beech expressly decided that the additional payment of an amount equal to four week's pay should be disregarded.
   (b) The President and Commissioner Parks implicitly made the same decision.
   (c) As Mr Schapper, for the appellant, submitted, that being the decision, the order should be made in terms of the Minutes.
   (d) (i) Put shortly, submissions to the effect that the twenty week redundancy payment assessed by the Full Bench should be reduced by a further four weeks' payment, made unilaterally by the respondent after the order was made at first instance and before the appeal was heard, is not a submission which should be made upon a speaking to the minutes.
   (ii) It is, put at best, for the respondent, a submission that there was an error in not making a further reduction of an amount equal to a payment of four weeks' wages.
   (e) For that reason alone, I was not persuaded that the Minutes of Proposed Order should be amended.
   (f) (i) In any event, since the case for the respondent before the Full Bench upon the speaking to the minutes rests upon evidence that the payment of an amount equal to four weeks' wages was made by the respondent to the appellant after the order at first instance was made and before this appeal was heard.
   (ii) There was no application to the Full Bench to admit that evidence as fresh evidence, so that the Full Bench could not have regard to that evidence, having regard to s.49(4) of the Industrial Relations Act 1979 (as amended), because it was patently not before the Commission at first instance.
   (iii) What was before the Commission at first instance was a mere expression of intention to pay. For those reasons, also, the matter could not be entertained upon a speaking to the minutes.
   (g) As to the submission that there should be a crediting of the amount of the order at first instance, which was said to have been paid, that evidence is inadmissible before the Full Bench upon this appeal for the same reason. Further, that matter in any event is totally irrelevant to whether the order at first instance was an order made in the proper exercise of the Commission's discretion, which was the question before the Full Bench on this appeal.
   (h) The respondent's remedy, in relation to the sum of $2,403.80 paid, was either to seek to stay the order at first instance, pending the hearing and determination of the appeal, or to deal with the matter otherwise upon any application to enforce the order of the Full Bench which varies the order made at first instance. That question is totally irrelevant to these appeal proceedings and totally irrelevant to a speaking to the minutes.

I was not persuaded that the order to issue should be amended. For those reasons, I joined with my colleagues in issuing the order in terms of the Minutes of Proposed Order by the Full Bench.

COMMISSIONER A.R. BEECH: The respondent raises two matters. The first matter is that it has complied with the order of the Commission at first instance and already paid the sum of $2,403.80 to Mr Rogers. It asks the Full Bench to discount the sum determined by the Full Bench accordingly. The difficulty facing the respondent in its request is that this was not a matter before the Full Bench and further, as His Honour the President indicates, it is a matter for which the remedy lies elsewhere. It is not a matter which is able to be raised at a speaking to the minutes.

The second issue raised by the respondent faces a similar difficulty. The respondent attempted to inform the Full Bench that it has since paid Mr Rogers a further 4 weeks' salary. It asks the Full Bench to discount the sum determined by the Full Bench by that sum also. The issue before the Full Bench was only that 3 or 4 weeks after the dismissal the respondent had offered to pay a further 4 weeks' salary. Not that it had paid it. As I made clear in my reasons, it is the fact of the offer that was irrelevant to the circumstances of the dismissal which actually occurred. Section 49(4) precludes consideration of the issue and it is not a matter which can be raised at a speaking to the minutes.

The simple fact is that the Minute of Proposed Order accurately reflects the decision of the Full Bench and the Order should issue in the terms of the Minute.

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 Full Bench issued an order in terms of the Minutes of Proposed Order which issued to the parties on 1 November 1999.

Appearances: Mr D H Schapper (of Counsel), by leave, on behalf of the appellant.

Mr R H Gifford (of Counsel), by leave, on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Frederick John Rogers
Appellant

and

Leighton Contractors Pty Ltd
Respondent.

No 549 of 1999.

BEFORE THE FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY
COMMISSIONER A R BEECH
COMMISSIONER C B PARKS.

12 November 1999.

Order.

This matter having come on for hearing before the Full Bench on the 16th day of August 1999, and further for a speaking to the minutes hearing on the 12th day of November 1999, and having heard Mr D H Schapper (of Counsel), by leave, on behalf of the appellant and Mr R H Gifford, 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 1st day of November 1999 and supplementary reasons for decision to be delivered at a later date, it is this day, the 12th day of November 1999, ordered and directed as follows—

(1) THAT the appellant be and is hereby granted leave to amend the last line of the Notice of Appeal by inserting, the words " plus $5,000.00 for compensation for injury caused by the termination" after the words "already paid".

(2) THAT appeal No 549 of 1999 be and is hereby upheld.

(3) THAT the decision of the Commission in matter No 1678 of 1998 made on the 7th day of April 1999 be and is hereby varied by deleting order 2 thereof and inserting the following orders:—

"2. ORDERS that the respondent shall pay to the applicant the sum of $2,000.00 as compensation for injury; and

3. ORDERS that the respondent shall pay the applicant the sum of $16,692.31 as a redundancy payment."

By the Full Bench

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Bernard Smith
(Appellant)

and

Nulsen Haven Association (Inc).
(Respondent)

No 1843 of 1998.

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

10 November 1999.

Reasons for Decision.

THE PRESIDENT: This is an appeal by the abovenamed appellant against the decision of the Commission, constituted by a single Commissioner, made on 18 September 1998 in application No 558 of 1998, which formal parts omitted, reads as follows—

"1. THAT Bernard F Smith pay Nulsen Haven Association (Inc) the sum of $2,940.99 for costs within fourteen (14) days of the 15th day of September 1998.

2. THAT the record of the proceedings on the claim of unfair dismissal on the 3rd day of August 1998 and any witness statements or records relating to those proceedings to be closed to public scrutiny unless otherwise authorised in writing by the Registrar of the Western Australian Industrial Relations Commission.

3. THAT the application of Bernard F Smith in Matter No. 558 of 1998 be dismissed."

GROUNDS OF APPEAL

It is against the whole of that decision that the appellant now appeals on the following grounds—

"1. The Learned Commissioner erred in fact and law in denying the Appellant (Applicant) natural justice in that—

a. whilst the Commission is not bound by the rules of evidence it has been its constant practice to adopt for convenience procedures in respect to the taking of evidence which are analogous to those in ordinary courts from which the Learned Commissioner departed by requesting the Respondent (Respondent) put its case first;

b. the Respondent (Respondent) was requested to "put its case first' when having regard to the below mentioned circumstances it was neither just nor expedient to do so;

i. the Appellant (Applicant) bore the burden of proving his case;

ii. the Appellant (Applicant) was calling considerably less witnesses than the Respondent (Respondent).

c. the Appellant (Applicant) was denied a reasonable, or any, opportunity of presenting his case;

d. failed to inquire of the unrepresented Appellant (Applicant) of his intentions with respect to the calling of witnesses;

2. The Learned Commissioner erred in fact and law in failing to consider the contents of the Appellant's (Applicant's) letter to the Commission dated 4 August 1998 in reaching a decision with respect to the Respondent's (Respondent's) Application dated 19 August 1998.

3. The Learned Commissioner, in finding for the Respondent (Respondent) with respect to the Application dated 19 August 1998 failed to have any or any sufficient regard, contrary to law, that the Appellant (Applicant) was un-represented at all proceedings the subject of Application number 558 of 1998.

4. The Learned Commissioner erred in law when determining the test to be applied with respect to the exercise of the discretion conferred by Section 27(1)(a) of the Industrial Relations Act 1979 in that the Learned Commissioner found that—
    a. the Appellant (Applicant) has seriously abused the process;
    b. that oppression of the Respondent (Respondent) and its employee outweighed the right of the Appellant (Applicant) to have his case heard and determined.
5. The learned Commissioner erred in fact and law in closing the record of proceedings with respect to the Appellant's (Applicant's) claim as such closure affects the ability of the Appellant (Applicant) to prepare for and present an Appeal against the aforementioned decision of the Learned Registrar."

BACKGROUND

The applicant at first instance (the appellant in this appeal), Mr Smith, had applied to the Commission claiming that he had been unfairly dismissed and applied under s.29(1)(b)(i) of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act").

There was a detailed answer filed in the matter (see pages 9-24 of the Appeal Book (hereinafter referred to as "AB")). Mr Smith was given notice of termination by the respondent pursuant to a letter of 13 March 1998 written to him (see page 15(AB)). In fact, he was summarily dismissed.

Mr Smith was employed by the abovenamed respondent as a Residential Care Assistant. The termination of his employment occurred with payment in lieu of notice, but it was denied that the dismissal was unfair.

The dispute was the subject of extensive conciliation proceedings but no resolution was reached.

The respondent intended to call a significant number of witnesses, and the Commissioner requested the respondent put its case first, although this did not shift the onus. This course was not demurred from by Mr Smith.

The matter was heard on 3 August 1998, at which time the respondent had called six witnesses, but had not completed its case. Various documents were also tendered. A notice listing the matter for a further two days of hearing in September 1998 was given.

On 19 August 1998, however, the respondent applied to have Mr Smith's claim dismissed pursuant to s.27(1)(a) of the Act and sought an urgent hearing of the application, the grounds being as follows—

"1. The Applicant has contacted several of the respondent's witnesses by mail and telephone both before and after the initial hearing on 3 August 1998 and attempted by threat and duress to get those witnesses to change their evidence;
2. Applicant has written letters to the Commission and the Respondent's witnesses which indicate that the Applicant is prosecuting the application for the collateral purposes of instituting proceedings in the Supreme Court against the Respondent's employees and pursuing a personal vendetta against [A] and [B].
3. Applicant has wilfully misled the Commission during the cross-examination of [C], since he suggests he did not prepare the "wanted poster" of [C], having now admitted to [C] in a telephone conversation, that he was responsible.
4. Course of proceedings on 3 August 1998 showed that the Application has no merit and is deemed to fail."

The matter then came on for hearing on 28 August 1998, with the respondent to this appeal pursuing that application and seeking costs.

A number of sworn affidavits by employees of the respondent who had either already given evidence or were intended to be called to give evidence were tendered. Mr Smith was not given an opportunity to cross-examine the deponents of those affidavits. An affidavit was tendered by Mr Randles describing a conversation which he said he had with a witness who was very distressed at a perceived threat by Mr Smith raised in a letter to her.

Mr Smith acknowledged, on 28 August 1998, in open court that he had sent letters to each of the persons, witnesses or intended witnesses named. He also wrote to the Commission, but the Commission did not entertain that letter which was dated 4 August 1998.

The Commissioner also held that the letters disclosed an intent to intimidate the persons contacted, for the purposes of either getting them to change evidence already given or "shape" evidence to be given.

It was found that Mr Smith had offered no significant explanation in mitigation of his conduct. Further, on 3 August 1998, his conduct of cross-examination was dishonest and misleading, the Commissioner found. He also continued to assert conspiracy by management in relation to the evidence of employees in his claim of unfair dismissal, but did not pursue that line of questioning.

The Commissioner found that, by his conduct, Mr Smith was demonstrably a discreditable person. The Commissioner also found that the process had been seriously abused and that, under s.26 of the Act, there should be a dismissal of his application. Otherwise, the Commissioner held, there would be a condonation of a serious abuse of the process and oppression of the respondent and its employees. Mr Smith was not given the option of giving evidence in the matter, and the application was dismissed before the respondent's case was completed.

COSTS

The Commissioner ordered that costs be paid, having assessed them.

ISSUES AND CONCLUSIONS

S.27—A Discretionary Decision

This was a decision made under s.27(1)(a) of the Act and, it would seem, although not expressed, under s.27(1)(a)(i) and (iv). Those provisions read respectively as follows—

"27. (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —

(a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —

(i) that the matter or part thereof is trivial;

.....

(iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

The decision was a discretionary decision, as that is defined in Norbis v Norbis (1986) 65 ALR 12. The well known principles which bind the Full Bench upon the hearing and determination of this appeal are those laid down in House v The King [1936] 55 CLR 499 (HC) (see also Gromark Packaging v FMWU 73 WAIG 220 (IAC)).

The Full Bench may not substitute the exercise of its discretion for the exercise of discretion at first instance unless it has been established to the satisfaction of the Full Bench that the Commission erred in the exercise of discretion at first instance, applying the principles in House v The King (HC)(op cit) at page 505.

S.27(1) of the Act (and it is not provided otherwise) operated in this matter to enable the Commission to dismiss the application or any part thereof at any stage of the proceedings. The application was dismissed before the respondent's case was completed.

FINDINGS

The Commissioner dismissed the application because—

(a) Mr Smith wrote letters to witnesses and persons whom it was intended would give evidence, which, the Commissioner held, were damning to his position in that there was sufficient in them to constitute an attempt to intimidate the recipients of those letters.

(b) The letters were attempts to intimidate the persons contacted for the purpose of either getting them to change evidence already given or to shape evidence to be given.

(c) On 28 August 1998, Mr Smith admitted that his cross-examination of Ms C, a witness, was dishonest and misleading.

(d) Mr Smith offered no significant explanation in mitigation of his misconduct and sought to justify it.

(e) Mr Smith continued to assert conspiracy by management in relation to the evidence of former fellow employees called or to be called on behalf of the respondent at first instance.

(f) Even though he was given every opportunity to pursue that line of questioning, Mr Smith failed to do so with any of the six witnesses called by the respondent on 3 August 1998.

(g) No question hung over the credibility of those witnesses.

(h) By his conduct, Mr Smith was demonstrably a discreditable person and, if the Act contained the powers to deal with contempt, this case most surely would have attracted the exercise of those powers.

(i) Parliament has conferred a right for an individual claiming unfair dismissal to apply to the Commission to have such a claim determined. It is not an unfettered right, and where it is demonstrably the case as it was here, that the individual exercising that right has seriously abused the process, then the Commission is bound by s.26 of the Act to exercise its powers in remedy.

The Commissioner concluded that she should exercise the power under s.27(1)(a) to dismiss Mr Smith's claim forthwith, otherwise the Commission would be condoning the serious abuse of the process and oppression of the respondent and its employees.

(j) Having regard for the nature of some of the threats to witnesses in the letters sent by Mr Smith after the hearing of 3 August 1998 and a comment made by him in the course of the hearing that he would sue those employees who signed a document stating that they did not want to work with him, there was reason to conclude that he was using the action for a collateral purpose, namely to ford an action in the Supreme Court.

The Respondent Going First

One element of Mr Smith's case upon appeal is that he was denied natural justice in that he was not given a reasonable opportunity to be heard. The fons et origo of this denial of natural justice was said to be the decision of the Commissioner that the respondent serve copies of its witness statements on Mr Smith and that the respondent should conduct its case first. This decision was also submitted to be contrary to Regulation 77(1)(a) and 77(2) of the Industrial Relations Commission Regulations 1985, which read—

"**77. Procedure before Commission**

(1) Subject to subregulations (2) and (3), the procedure before the Commission, except upon an appeal to be heard by the Full Bench or the Commission in Court Session, shall be as follows –

(a) the applicant shall state his case and then call his witnesses;

.....

(2) The procedure in subregulation (1) may be modified or varied by the Commission where the Commission considers it just or expedient so to do."

The answer to that is that it was implicit in the Commissioner's decision that the Commission was invoking Regulation 77(2). Further, the decision in itself did not cause procedural unfairness or a denial of natural justice. Indeed, the unrepresented applicant at first instance was enabled, by that decision, to know the respondent's case in advance of the hearing and before he came to conduct his own case. This advantage was enhanced by the fact that the respondent proposed to adduce evidence from a number of witnesses. In any event, there was nothing said which might persuade the Full Bench that, by this decision, the Commissioner deprived the appellant of the possibility of success (see Stead v State Government Insurance Commission [1986] 161 CLR 141 (HC)).

THE EXERCISE OF THE DISCRETION

The crux of the appeal was, in fact, not a complaint of a denial of natural justice or procedural unfairness, but a complaint that the exercise of the Commissioner's discretion, exercised under s.27 of the Act, had miscarried. It was actually the Commissioner's exercise of her discretion to dismiss the application which deprived Mr Smith of the opportunity to adduce evidence and to otherwise conduct his case.

One ground for the dismissal of the application was, as I have observed, a finding that Mr Smith was discredited by his conduct. By his conduct, I assume that the Commissioner meant his inability or refusal to cross-examine as he was prompted or directed by the Commissioner to do. This inability or refusal to cross-examine as prompted was not a matter which could or should go to his credit when he was not in the witness box, nor a matter which formed a basis for the exercise of discretion. It was not a proper basis to justify the Commissioner not considering the substantial merits of the case. All it represented was previous ineptitude or mala fides in the conduct of his case.

I infer that the Commissioner also meant that Mr Smith's conduct in writing letters to witnesses and prospective witnesses which might, on a fair reading, be read as intimidating or having the capacity to be intimidating, was discreditable. That is a matter which the Commissioner rightly characterised as contempt. However, an act of contempt is not necessarily at all relevant to the determination of the substance of the matter before a court or tribunal.

As to the finding that the purpose in bringing the application was collateral to an action in the Supreme Court, that is not how I read the correspondence. There is reference in Mr Smith's letters to both success and failure of the application.

Mr Smith's conduct was, on the face of it, serious. However, it did not warrant the Commissioner refusing to give the applicant the opportunity to be heard on his merits. Statements in his letters that he conceded that, in his position, it would be difficult to be believed should not have been permitted to be a bar to his prosecuting his case if he wanted to. In other words, the turpitude of Mr Smith's conduct did not justify the Commissioner, having regard to s.26(1)(a) and (c) of the Act, to allow Mr Smith to permit his case, if that is what he wanted to do and that included permitting him to cross-examine the deponents of the affidavits to which I have referred.

There is an unfettered right, subject to the time limit, to bring a claim of unfair dismissal in the Commission and to have it dealt with in accordance with the Act, which includes the application of s.26 and s.27.

It was open to the Commissioner to find, having seen the witnesses give evidence, that they were credible, but not to find that Mr Smith was not credible until the Commissioner saw and heard him in the witness box. The Commissioner found that, by his conduct outside the witness box, Mr Smith was a discreditable person.

With respect, that judgment could not be made without seeing him in the witness box, or if he did not enter the witness box, on the strength of his letters which were in evidence, although I note that he was not afforded an opportunity to cross-examine the deponents to whose affidavits his correspondence was exhibited.

It is the case that the intimidation of a witness is a very serious matter and constitutes contempt. It is gross contempt to endeavour to induce a witness who is to give evidence to give false evidence or to suppress the truth (see Ex parte Attorney-General; Re Kennedy (1938) 55 WN (NSW) 243 at 245).

It is also contempt to victimise a witness for having given evidence (see Attorney-General v Butterworth [1962] 2 All ER 513 at 517, 526) or to threaten one who is attending court to give evidence (see Balogh v Crown Court at St Albans [1975] QB 73 at 84, 90, 93; [1974] 3 All ER 283 at 288-289).

Communications to a judge with the purpose of influencing her/him, whether or not they actually interfere with the due course of justice, have the tendency to interfere and are contempt (see Attorney-General v Soundy and Others (1938) 337 Tas LR 143 at 148).

That he might have been guilty of acts which might well constitute contempt, if a Commissioner had powers in contempt, was not the point. Contempt is one thing. The determination of a matter is another. Overall, the Commissioner exercised a discretion to dismiss, having regard to

irrelevant considerations, which resulted in the appellant suffering the severe disadvantage of not having every opportunity to present his case.

The Commissioner did not hear the substantial merits of the case when she should have. The Commissioner erred in so failing and her discretion miscarried since it did not, in the circumstances of the case, advert to the substantial merits of the case, nor was it equitable to dismiss the case.

I have some sympathy for the Commissioner in circumstances where no power in contempt exists. The views expressed were not sufficient views to dismiss at that time, having regard to the objects of the Act, s.6(d) and (e), and did not, having regard to constitute sufficient reasons within the meaning of s.27(1)(a)(i) or (iv) of the Act.

I would therefore uphold the appeal and quash the decision at first instance.

CHIEF COMMISSIONER W S COLEMAN: The appellant's claim alleging unfair dismissal was dismissed by the Commission before the hearing pursuant to the application under s29(1)(b)(i) of the Act was concluded. This came about as a result of the respondent's application under s 27(1)(a) of the Act. The grounds of that application were as follows—

> "1. The applicant had contacted several of the respondent's witnesses by mail and telephone, both before and after the initial hearing on 3 August 1998 and attempted by threat and duress to get those witnesses to change their evidence;
>
> 2. Applicant has written letters to the Commission and the Respondent's witnesses which indicate the Applicant is prosecuting the application for the collateral purposes of instituting proceedings in the Supreme Court against the Respondent's employees and pursuing a personal vendetta against [A] and [B];
>
> 3. Applicant has wilfully misled the Commission during the cross examination of [C] to suggest that he did not prepare the "wanted poster" of [C] having now admitted to [C] in a telephone conversation that he was responsible;
>
> 4. Course of proceedings on 3 August 1998 shows that the application has no merit and is doomed to fail".
>
> (Appeal Book at 26)

In support of this application the respondent employer produced to the Commissioner a number of sworn affidavits by employees who had either already given evidence or were to be called in the hearing of the appellants claim of unfair dismissal. Sworn evidence was also tendered by the respondent's counsel attesting to the conversation he had had with a witness who, he said, was very distressed at a perceived threat from the appellant which had been set out in a letter to her. Letters from the appellant were attached to the other affidavits. Each letter was addressed to the witness or intended witness of the respondent by the appellant. Each was dated after the 3rd August, the date on which evidence had commenced for the respondent in proceedings before the Commissioner.

When proceedings under the application pursuant to s27(1)(a) commenced on 28th August, the appellant acknowledged that he had sent the letters to each of the witnesses or intended witness concerned. A letter had also been sent to the Commissioner but her reasons for decision record that the letter dated 4th August had been returned to the appellant unread. Previously the appellant had been advised by the Commissioner's Associate that it was inappropriate to communicate with the Commissioner outside proceedings.

In her reasons for decision the Commissioner states;

> "I turn now to the letters Smith sent to witnesses and intended witnesses. Smith says that he sent the letters with "good will" and had the interests of these former work colleagues in mind doing so. But the letters speak for themselves. They are damning to Smith's position. There is sufficient in these letters, in my view, to disclose an intent by Smith to intimidate the persons contacted for the purpose of either getting them to change evidence already given or to shape evidence to be given.
>
> Further it is quite clear from the admittances of Smith on 28 August 1998 that his conduct of cross examination of witness C on 3 August 1998 was dishonest and misleading. Despite many exhortations from the bench to get to the point he persisted in a course of questioning which, now, is quite clear, involved veiled threats to the witness.
>
> Smith offered no significant explanation in mitigation for his conduct. Indeed he sought to justify it. In this respect Smith's protestations that he was motivated at all times by concern for the well being of his former work colleagues in insincere and rejected.
>
> Further, he continued to assert conspiracy by management in relation to the evidence of employees in his claim of unfair dismissal but, despite promptings from the bench and every opportunity, failed to pursue that line of questioning with any of the six witnesses called by the respondent on 3 August 1998.
>
> So far as the evidence of those witnesses is concerned, I have no reason to conclude that any of them set out to mislead the Commission or to obscure the truth. No question hangs over them as to their credibility. By his conduct, however, Smith is demonstrably a discreditable person. If the Industrial Relations Act, 1979 ("the Act") contained the powers to deal with contempt, this case most surely would have attracted an exercise of such powers"
>
> (Appeal Book at 28)

The Commission went on to say—

> "Where it is demonstrably the case, as here that the individual exercising that right has seriously abused the process then the Commission is bound by section 26 to exercise its power in remedy. In this case it is quite clear that the Commission should exercise the power in section 28(1)(a) to dismiss the claim forthwith. To do otherwise would be to condone serious abuse of the process and oppression of the respondent and its employees".
>
> (Appeal Book at 29)

The grounds of appeal against the Commissioner's dismissal of the unfair dismissal pursuant to the application under s 27(1)(a) of the Act go to—

- A denial of natural justice in the first day of the substantive application when the respondent was required to present its case first. The appellant was thereby denied the opportunity to establish his case (and his credibility); and
- The Commissioner's discretion miscarried in determining the application to dismiss the claim for unfair dismissal pursuant to s27(1)(a) without further hearing.

With respect to the first ground of appeal whereby procedures were varied to provide that the respondent presented its case first, that order was accompanied by the requirement for the respondent to file witness statements prior to the hearing. No such demand was imposed on the appellant. The arrangement was not objected to by the respondent and although the appellant was not asked whether he agreed, the Commission made it clear that the arrangement would expedite proceedings without disadvantaging the parties. Indeed as noted by the respondent in the appeal some advantage devolved to the applicant in having not only all the statements before the hearing (save that from one witness Mr Lappen) but also being provided with access to all the documents the respondent intended to adduce as evidence. It was available to the appellant to photocopy everything he thought relevant. (Appeal Book at 34).

As I understand it the thrust of the submission is that the change in procedure was not expedient. The appellant was his only witness and by denying him the opportunity to present his case first, the subsequent developments forced the Commissioner to rely on an assessment of him from his performance in cross examining the respondents witnesses. Matters of merit, it was argued, were determined without hearing from him. By departing from the standard procedure the rest of the proceedings were said to have been tainted.

It would seem to be the case that the appellant was placed in an advantageous positions in being given the witness statements and access to the respondents documentation. The case involved allegations of sexual harassment against the appellant and while it was to his advantage to know what he had to confront, the Commissioner had determined that the arrangement whereby the respondent went first was expedient. That it would seem to me to have been reasonable. Any disadvantage

would have been against the respondent. After assuring herself that there was no objection from that party, proceedings commenced on that basis.

It could only have been subsequent events ie the application and disposal of the matter under s27(1)(a) of the Act that had the potential to conspire to deny the appellant natural justice, not the decision made by the Commissioner at the outset of proceedings; but that is not the basis of this appeal. What was done on the grounds of expediting proceedings to hear the claim did not deny the appellant natural justice in the substantive matter.

In my view Ground 1 has not been made out.

The appellant acknowledges that it was within the discretion of the Commissioner to find that on the basis of Mr Smith's actions following the first day of the hearing, that there had been an abuse of process. However it was submitted that the Commissioner failed to take into account or give sufficient weight to the fact that the appellant was unrepresented in proceedings initiated by the respondent to have the matter dismissed without further proceedings. His actions in contacting witnesses reflected his own naivety in the conduct of the law and his frustration in not being able to effectively cross examine the witnesses in proceedings the day before. It was further submitted that he had acted in the belief that the witnesses were making an error of judgment and had been coerced into their testimony by the respondent. This it was submitted would have been apparent if the Commissioner had read the appellants letter to her dated 4th August. Instead, it was submitted, she took a step reserved for only the most extreme cases. She dismissed Mr Smith's application. It was argued that in making a determination under s27(1)(a) the Commissioner is obliged to act in accordance with the dictates of s26(1) of the Act. In this respect the merits of the appellant's case could not be assessed without hearing from him. Furthermore under s26(1) of the Act as a party directly affected, the detriment to the appellant was so much greater to him than to the respondent employer. The appellant was being denied the opportunity to have his claim heard.

The findings made by the Commissioner followed detailed submissions by the respondents counsel. The appellant made his submissions in reply from the bar table. He confirmed that he was the author of the letters sent to witness. He was given the opportunity to explain his "rationale" in communicating with witnesses. This he attributed to frustration out of their responses to his cross examination; his concern about being able to project himself in a favourable light and to point out the vulnerability of witnesses. All this was said to have been done in "good faith" and out of a sense of frustration at not being able to break down the "commonality of feeling" that the witnesses had said the same story. He admitted that he had made the poster which had been the subject of extensive inquiry under the appellants cross examination of witnesses.

The appellant did not present evidence under oath in the hearing pursuant to the application under s27(1)(a) of the Act. However, it is clear that every opportunity was afforded him to respond to the serious allegations raised against him.

The letters sent to witnesses and prospective witnesses did not disclose a degree of good will. Rather, the Commissioner found them to disclose an intent to intimidate witnesses to change or re shape their evidence. As a result of his disclosures in the letters and admission to the Commission, the Commissioner found that the thrust of his cross examination dishonest and misleading. In all she concluded that he was a discreditable person.

These findings were open to her on what was before her. The opportunity to submit the merit of his position in response to the application was raised a number of times. In all, the seriousness of the appellants actions weighed heavily against him. The finding that he had seriously abused the process was inevitable.

The failure to read the appellants letter of 4th August was not an error of law. He had an opportunity to present his position before the Commissioner. She rejected the sincerity of his submission and made an assessment of the merit of his position.

I my view the discretion did not miscarry. I would dismiss the appeal.

COMMISSIONER A.R. BEECH: The Commissioner's decision, as recorded in the Reasons for Decision at AB 29, was that in accordance with the powers of the Commission under s.27(1)(a) an order would issue dismissing Mr Smith's claim forthwith. The Commission noted that to do otherwise "would be to condone serious abuse of the process and oppression of the respondent and its employees." The power of the Commission to issue an order prior to the completion of the proceedings is set out in s.27(1)(a). It is not doubted that the Commission had the power to do as it did.

The circumstances of the matter before the Commission were that the respondent was required to present its evidence first and, prior to the completion of the respondent's case, and prior to the applicant then giving evidence as to the merit, events occurred which caused the Commission to reach the conclusion which it did. I am not persuaded that Mr Smith suffered any disadvantage whatsoever in the Commission requiring the respondent to present its evidence first. By the respondent presenting its evidence first, Mr Smith was in the advantageous position of knowing precisely the case that is to be made against him prior to him presenting his own case. That hardly puts him at a disadvantage. Indeed, given that Mr Smith was representing himself in the proceedings, the advantage to him in knowing the case against him prior to him presenting his own case is significant.

Nor am I persuaded that it could be held that the Commission denied Mr Smith natural justice in not hearing from him as to the merit of the matter. The decision of the Commission at first instance did not go to the merit of the matter. Rather it went to what the Commission perceived as a serious abuse of the process and oppression of the respondent and its employees. Those findings refer to the letters that Mr Smith had sent to witnesses and intending witnesses part-way through the proceedings. Those letters purported to tell the witnesses and intending witnesses that their positions were precarious and that Mr Smith would be in a position to sue each of them individually "in the Supreme Court" for the evidence which they gave. That conduct is certainly sufficient in my view to support the finding of the Commission at first instance that the letters disclosed an intent by Mr Smith to intimidate the persons contacted for the purpose of either getting them to change evidence already given or to shape evidence to be given.

The Commission provided an opportunity to Mr Smith to provide an explanation for his conduct. His explanation was rejected by the Commission. The situation was found by the Commission as permitting the conclusion that Mr Smith always had a collateral purpose in pursuing the claim of unfair dismissal, a conclusion which the Commission found warranted a further order regarding Mr Smith's surrendering all documents and statements of evidence to the Registrar of the Commission. That conclusion is one that was reasonably open on the evidence before the Commission. Where a person pursues an application in the Commission for collateral reasons, that is an abuse of process and an abuse of process justifies the Commission exercising its powers under s.27(1) of the Act and dismissing the application (*Walker v Hussmann Australia Pty Ltd* (1991) 38 IR 180 at 186-7; 24 NSWLR 451). I have no doubt that the Commission's power under s.27(1) of the Act to dismiss an applicant's claim before she or he has an opportunity to present her or his case to the Commission is a power to be exercised with caution (*ibid.* at 196-7). However that does not mean that it cannot, and should not be exercised where the circumstances warrant the proper exercise of the power. Its use was warranted here for the reasons set out by the Commission at first instance. In exercising her discretion, the Commission gave Mr Smith an opportunity to be heard regarding the proposed course of action. His response was taken into account. In those circumstances, Mr Smith cannot be heard to complain that he has been denied natural justice as he claims in these proceedings. For those reasons I would dismiss the appeal.

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

Order accordingly.

Appearances: Mr A J Maughan (of Counsel), by leave, on behalf of the appellant.

Mr A J Randles (of Counsel), by leave, on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Bernard Smith
(Appellant)

and

Nulsen Haven Association (Inc).
(Respondent)

No 1843 of 1998.

BEFORE THE FULL BENCH

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

10 November 1999.

Order.

THIS matter having come on for hearing before the Full Bench on the 5th day of October 1999, and having heard Mr A J Maughan (of Counsel), by leave, on behalf of the appellant and Mr A J Randles (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 10th day of November 1999 wherein it was found that the appeal should be dismissed, it is this day, the 10th day of November 1999, ordered as follows—

(1) THAT the applications herein by the appellant to extend time to file and serve the appeal book out of time and to make application to extend time in which to apply to extend time be and are hereby granted.

(2) THAT the contents of or no part thereof of pages 222 to 266 is/are not to be revealed without the leave of the Commission.

(3) THAT appeal No 1843 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.

Robyn Dawn Yewdall
(Appellant)

and

McInerney Sales Pty Ltd t/as McInerney Ford
(Respondent).

No. FBA 20 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
SENIOR COMMISSIONER G L FIELDING.

2 December 1999.

Reasons for Decision.

THE PRESIDENT: These are the joint Reasons for Decision of the President and the Chief Commissioner. This is an appeal by the abovenamed appellant employee, Robyn Dawn Yewdall, against a decision of the Commission made on 25 August 1999 whereby the Commission, constituted by a single Commissioner, dismissed an application by the appellant filed in the Commission on 5 March 1999 in which she alleged that she had been unfairly dismissed by the respondent hereto and sought relief pursuant to s.29 of the Industrial Relations Act 1979 (as amended).

It is against that decision that she now appeals on the following grounds—

GROUNDS OF APPEAL

"The learnered(sic) Commissioner erred in decision by dismissing as evidence my written offer of full time employment clearly stating working hours on McInerney Ford letterhead. The transcript shows the job as defined on page 22 as 42 ½ per week. Transcript pages 29 and 29A clearly state that different hours were discussed. I wasn't offered that position.

The learnered(sic) Commissioner erred in decision in regards to genuine redundancy. Reasons for decision letter states that McInerney Ford has increased its vehicle put through by 55% and the department is still developing. A genuine redundancy normally occurs when a departments put through or work load is in decline. Was it a "fair go all round" Workplace Relations Act Division 3 170CA (1) & (2).

I am seeking 4 months salary."

BACKGROUND

The appellant was employed by the respondent from 25 November 1996 until 5 March 1999 as a receptionist/cashier on a permanent part-time basis for 31.5 hours per week. She worked from 7.00 am to 6.00 pm three days per week, and did so until her employment was terminated.

The Commissioner at first instance accepted the evidence of Mr Rodney Colin Peatey, Operations Manager of the respondent, that the respondent had been operating for 25 years and that servicing currently had become a growth area.

Between late 1996 and the middle of 1997, there was an increase of 36% in the technicians employed and there was an increase of 55% in vehicle throughput. Work also increased as Ford Australia devolved further work upon dealers such as the respondent. The service department, which was the department in which the appellant worked, grew considerably. The Commissioner so found and that was the unchallenged evidence. The Commissioner was correct in so finding.

As a result, the respondent decided that it needed the receptionist/cashier position to become a full-time position and that the part-time position, which was the appellant's, would cease. That was Mr Peatey's evidence and it was not controverted (see page 8 of the transcript at first instance (hereinafter referred to as "TFI")). The Commissioner was entitled to so find.

Mr Peatey explained the decision to the appellant and offered her the full-time position and asked her to let him know her answer. The appellant's evidence was that, in a discussion, Mr Peatey was asked by her to give her a letter as to the hours which would be required to be worked, namely 42.5 hours one week and 47.5 hours the next. Mr Peatey's recollection was that the appellant initially accepted the offer, but requested the hours to be specified in writing. The appellant agreed in evidence that the proposal was to make her position redundant and establish a full-time position (see page 8(TFI)).

There was some dispute before the Commissioner at first instance as to whether this was done or whether it was not done. However, the parties agreed that the hours that the respondent wanted the appellant to work were 42.5 hours one week, being Monday to Friday 9.00 am to 6.00 pm and 47.5 hours the other week, working every second Saturday.

By letter dated 17 December 1998, Mr Peatey wrote to the appellant advising that the respondent had no alternative but to employ a person in the receptionist position full-time and requiring her answer by 21 December 1998 (see page 22 of the appeal book (hereinafter referred to as "AB")).

The Commissioner found that the appellant knew the hours that were being offered because she referred to them in her letter of 8 January 1999 (see exhibit 3 (see page 20(AB))). She advised that she was unable to work those hours, namely 42.5 and 47.5 hours. It was accepted that she was unable to work full-time and would not have accepted the permanent part-time position if it were to become full-time because of the need to assist in the care of her father who, with her mother, lives at Mandurah.

She refused the position, but stated her preparedness to work additional hours (i.e. every second Saturday morning on top of her current 31.5 hours per week), or to work elsewhere in

the company if a position was available (see letter dated 3 January 1999 (page 18-19(AB))).

However, her offer was not acceptable to the respondent and, as a result, the respondent advised her that she would be terminated by reason of redundancy. She was given over three weeks' notice and the respondent employed a replacement for her who commenced on 15 January 1999.

The evidence was that the respondent was quite satisfied with the appellant's work and had hoped that she would accept the position. That evidence was not challenged and the Commissioner was entitled to accept it. The appellant explained her reasons for not doing so in the Commission and the Commissioner accepted that that decision was for the most genuine of reasons.

The Commissioner accepted the evidence of Mr Peatey as to the upturn in business and the consequent need for the respondent to increase the hours of work in its service area, as he was entitled to do. Indeed, on Mr Peatey's evidence, the other clerical employee, Ms Natalie Mackay, had initially been job sharing with the appellant but had since become a full-time employee. The Commissioner found that the respondent needed to have a full-time employee in the position then being held by the appellant. The Commissioner was entitled to so find.

The Commissioner also accepted that, although the appellant would have been prepared to increase her hours of work, she would not have been able to work on Wednesdays due to her commitments to her parents on that day (see her evidence page 10(TFI)). That, of course, was her evidence and it was open to the Commissioner to so find.

Whilst the appellant's evidence was that she believed that the full-time position would involve 38 hours per week, it is clear that she was informed that it was 42.5 and 47.5 hours per week alternating, and that she understood that (see page 20(AB)). That is borne out by her own letter of 8 January 1999 and, indeed, to some extent, because of her own letter of 3 January 1999 (see page 18-19(AB)), whether the hours were mentioned in the initial discussion with Mr Peatey or not.

However, Mr Peatey's evidence was that the primary reason to make the position full-time was to cover the Monday to Friday period. Accordingly, the Commissioner found that, although the appellant would have been prepared to increase her hours, that increase would not have satisfied the respondent's requirements. That, of course, was the case.

In such a circumstance, the Commissioner found that the part-time position occupied by the appellant did become redundant because the respondent did not want the part-time position performed by anyone and the position would therefore be abolished and recreated as a full-time position. The appellant was offered the full-time position but was unable to accept it. That was the correct finding on the uncontroverted evidence before the Commissioner.

The Commissioner, therefore, found, on the evidence of Mr Peatey and in the absence of any evidence to the contrary from the appellant, that there was no other position in which the appellant could be employed and that, as a result, her employment was terminated. The Commissioner found, too, that this was a genuine redundancy. Again, that was the correct finding on the evidence before the Commissioner, as we have outlined it above, and not really challenged then or on appeal.

The Commissioner found that he was unable to conclude that the dismissal was unfair, merely because the minimum provisions relating to redundancy, only, were observed.

The only oral evidence before the Commissioner at first instance was that of Mrs Yewdall (the appellant) and her husband, Mr John Yewdall for the applicant and Mr Peatey for the respondent.

ISSUES AND CONCLUSIONS

This was a discretionary decision, as that term is defined in Norbis v Norbis (1986) 65 ALR 12.

The appellant must establish that the exercise of the discretion at first instance miscarried according to the well known principles in House v The King [1936] 55 CLR 499 (HC) (see also Gromark Packaging v FMWU 73 WAIG 220 (IAC)).

The appeal seems to turn on the fact that different hours than the 42.5 and 47.5 hours, referred to in the evidence as we have outlined it above, were discussed. Further, the oral evidence of the appellant and her correspondence is unequivocally to the effect that she could not undertake a full-time job because of her commitment to her parents; she would not have taken the part-time position if she knew that it would become a full-time position.

Further, the hours per week, 42.5 and 47.5, were known to the appellant, were unacceptable to her and were expressed to the respondent in correspondence, but an alternative position was not. In any event, too, as the appellant gave evidence, she had commitments to her parents which prevented her working on Wednesdays. There was, as a matter of fact, no alternative position and the proposal to work extra hours was not acceptable. She therefore specifically rejected the offer of a full-time position.

That the redundancy was not genuine was not strongly argued by the agent for the appellant on appeal. The findings of the Commissioner were not challenged in any detail.

In any event, on the evidence which was not seriously in collision, it was open to the Commissioner at first instance to find, and the Commissioner correctly found, that there was a genuine need for the previously part-time receptionist position, accepted by the appellant, to become a full-time position, the occupant of which would work 42.5 and 47.5 hours per week in alternate weeks, because of the increase in the respondent's work.

Further, it was open to find, on the uncontroverted evidence of Mr Peatey, that the respondent wished the appellant to occupy the new full-time position, that she was offered it and that she was informed and indeed knew of the hours to be worked.

It was also open to the Commissioner to find, and it was correct for the Commissioner to find, that there was no other position in which the appellant could be employed, that the appellant's part-time position became redundant because the respondent did not require the position of part-time receptionist to be performed by anyone, and indeed did not require the position.

Further, the appellant was offered the full-time position but, for the reasons which we have already canvassed, could not and did not accept it. For those reasons, her employment was terminated, there being, as was correctly found, a genuine redundancy.

The Commissioner, for those reasons, was entitled to find that the dismissal was not unfair and not established to be unfair. As a result, the Commissioner correctly found and was entitled to find that the dismissal was not unfair.

We should add that most of the findings of the Commissioner were not challenged upon appeal and, therefore, stand. The reference to the provisions of the Australian Workplace Relations Act 1996 (Cth) in the Notice of Appeal was erroneous because this was an application at first instance under a State Act.

We have considered all of the evidence and all of the submissions. We are satisfied that the exercise of discretion at first instance did not miscarry. For those reasons, we would dismiss the appeal.

SENIOR COMMISSIONER G L FIELDING: I have had the advantage of reading in draft form the reasons prepared by the President. I agree, essentially for the reasons he has advanced, that the appeal should be dismissed. I add the following observations.

Whether the situation in which the Appellant found herself could be described as one of redundancy or not is not the point. The single issue in the proceedings was whether the Respondent acted fairly in terminating the Appellant's employment. The undisputed facts are that the Respondent, for good reason, required the job, which the Appellant was formerly performing on a part time basis, to be performed on a full time basis. At the very least the Respondent needed to restructure the job in a way which required the occupant to work considerably more hours than was previously the case. This was a substantial change which, as the Appellant was at pains to point out, did not suit her. The Respondent no longer had a need for a part time employee but rather needed a full time employee. In the absence of the Appellant being able to meet that requirement the Respondent was left with no alternative but to

terminate her employment and find a new employee who could work under the new arrangements.

The learned Commissioner found, not surprisingly, having regard to the evidence, that the Appellant was given every opportunity to continue in employment under the new arrangements. There is ample evidence to support the learned Commissioner's finding that the Appellant knew that the hours the Respondent wanted to be performed amounted to 42.5 hours and 47.5 hours in alternate weeks. The Appellant referred to those as being the reason for declining to take up the full time appointment, as the learned Commissioner mentioned. As the events have transpired the current occupant of the position works approximately 43 hours each week which the Appellant now says is materially different from the requirement put to her by the Respondent. There is nothing to suggest that the Respondent knew that would be the case when its offer was made to the Appellant. Indeed, the change has arisen by reason of arrangements made between two individuals currently in the Respondent's workforce. In any event, in her dealings with the Respondent the Appellant indicated to the Respondent that though she was prepared to work some additional hours she was not prepared to work even 42.5 hours a week. Indeed, she appears to have been concerned to make the point that she regarded full time employment as being 38 hours a week, not 42.5 or more. When the Appellant indicated that she was unable to work under the new arrangements her employment was terminated with the required statutory notice and accompanied by an offer of paid leave to attend alternative job interviews. In the circumstances, there is no warrant to conclude that she was given less than "a fair go all round".

In my opinion the decision of and the reasons therefore expounded by the learned Commissioner are not impeachable. I therefore agree that the appeal should be dismissed.

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

Order accordingly

APPEARANCES: Mr J Yewdall, as agent, on behalf of the appellant.

Mr R McPherson and with him, Mr R Peatey on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Robyn Dawn Yewdall

(Appellant)

and

McInerney Sales Pty Ltd t/as McInerney Ford

(Respondent).

No. FBA 20 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY

CHIEF COMMISSIONER W S COLEMAN

SENIOR COMMISSIONER G L FIELDING.

2 December 1999.

Order.

This matter having come on for hearing before the Full Bench on the 23rd day of November 1999, and having heard Mr J Yewdall, as agent, on behalf of the appellant and Mr R McPherson and with him Mr R Peaty on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 2nd day of December 1999 wherein it was found that the appeal should be dismissed, it is this day, the 2nd day of December 1999, ordered and directed as follows:—

(1) THAT the applications herein by the appellant to extend time to file the appeal book out of time be and is hereby granted.

(2) THAT appeal No FBA 20 of 1999 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.

The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers

(Appellant)

and

Jean Gill and Neil Gill trading as N & J Gill Plastering Company

(Respondents)

No. FBA 13 of 1999.

BEFORE THE FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
COMMISSIONER P E SCOTT.

22 November 1999.

Reasons for Decision.

INTRODUCTION

THE PRESIDENT: This is an appeal by the abovenamed appellant organisation against the decision of the Industrial Magistrate, sitting in the Industrial Court at Perth, and it is properly brought under s.84 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act").

The decision appealed against was made upon a complaint by the abovenamed appellant organisation of employees that between 7 July 1994 and 22 May 1998 at Perth the abovenamed respondents, being parties bound by award No R 14 of 1978, the Building Trades (Construction) Award 1987 (hereinafter referred to as "the award") had committed 521 breaches of the award. The breaches alleged related to the following clauses of the award—

Clause 28

(1) Clause 28.—Time Records, which reads as follows—

"(1) In accordance with, and where appropriate in addition to the requirements of the Industrial Relations (General) Regulations 1997, each employer shall keep a record (electronic or mechanical), for each employee, on a separate page for each employee, from which can be readily ascertained the following—

(a) the name of each employee and his/her classification;

(b) each day worked, the hours worked each day, including time of starting and finishing work each day, overtime hours worked and meal breaks taken;

(c) the gross amount of ordinary wages, overtime wages, special rates and specific allowances paid each pay week;

(d) the amount of each deduction and the nature thereof;

(e) the net amount of ordinary wages and allowances paid each pay week;

(f) any relevant records which detail taxation deductions and remittances to the

Australian Taxation Office, including those payments made as PAYE tax whether under a Group Employer's Scheme or not;

(g) the employer's and the employee's Construction & Building Union Superannuation number or other occupational superannuation number and the contribution returns by the employer to the Construction & Building Union Superannuation or other occupational superannuation schemes on behalf of the employee, where such benefit applies; and

.....

(3) The employer shall record the location of the job if it is outside the Perth Metropolitan area.

(4) The employer shall provide evidence of the employer's current Workers Compensation Policy or other satisfactory proof of insurance such as renewal certificate;

....."

Clause 34(1)(a)(i)

(2) Clause 34(1)(a)(i).—Payment of Wages, which reads as follows—

"(1) Pay Day and Methods

(a) All wages, allowances and other monies shall be paid—

(i) in cash; or"

Clause 34(5)

(3) Clause 34(5).—Payment of Wages, which reads as follows—

"(5) Pay Packet Details

Particulars of details of payment to each employee shall be included on the envelope holding the payment, or in a statement handed to the employee at the time such payment is made and shall contain the following information—

(a) Date of payment.

(b) Period covered by such payment.

(c) The amount of wages paid for work at ordinary rates.

(d) The gross amount of wages and allowances paid.

(e) The amount of each deduction made and the nature thereof.

(f) The net amount of wages and allowances paid.

In addition, the following details will also be included in the statement when such payments and benefits apply—

(g) The number of hours paid at overtime rates and the amount paid therefor.

(h) The amount of allowances or special rates paid and the nature thereof.

(i) Annual holiday payments.

(j) Payment due on termination, including payment for annual leave, rostered day off accumulation, and public holidays.

(k) The employer and employee's building superannuation number.

(l) The employee's long service leave registration number."

The breach of the clauses alleged all related to an employee named Sean Fort.

There are, in fact, (see page 7 of the appeal book (hereinafter referred to as "AB")) 531 complaints comprising of 521 original complaints together with 10 complaints which were added. Forty six complaints were withdrawn. Two other complaints were missing, leaving 161 complaints with respect to each type of alleged matter, as His Worship noted.

All of the alleged breaches were found proven.

PENALTIES

In relation to the breaches of clauses 28, 34(1)(a)(i) and 34(5), the following penalties were imposed—

(1) In respect of each breach of clause 28, $5.00 was appropriate, apportioned equally between the respondents.

(2) In relation to the breaches of clause 34(1)(a)(i), a caution was imposed in respect of each breach.

(3) In relation to clause 34(5), $8.00 on each count was deemed appropriate apportioned equally between the respondents.

There was an order for costs and witness fees, being $56.35 for each respondent. The total amount of costs ordered to be paid by the defendants was $112.70.

There was a consent order, which is undated (page 34 (AB)), made as follows—

"1) The total amount of the fines imposed on the defendants be amended to read $2,093.00".

2) The total amount of the fines payable by each of the defendants is $1,046.50".

Grounds of Appeal

It is against that decision that the appellant organisation now appeals on the following grounds (see page 2 (AB))—

"The learned magistrate erred in issuing the penalties that he issued in Complaint No. 24 of 1999 on 8th July 1999, in that—

1. The penalties imposed for breaches of Clause 28 were insufficient and unjust, given the nature of the offences and the period over which they occurred, and given the need for—
   a) personal and general deterrence;
   b) award compliance;
   c) the disadvantage for employees when establishing award breaches, if proper records are not kept.
2. The penalties imposed for breaches of Clause 34(5) were insufficient and unjust, given the nature of the offences and the period over which they occurred, and given the need for—
   a) personal and general deterrence;
   b) award compliance;
   c) the disadvantage for employees when establishing award breaches, if proper records are not given.
3. Breaches of Clause 34 relating to the failure to pay cash were more serious than a technical breach of the Award, and, therefore, the learned magistrate should have imposed penalties rather than a caution."

FINDINGS, ISSUES AND CONCLUSIONS

The grounds of appeal, therefore, relate only to the quantum of the penalties. The decision as to penalty was a discretionary decision, as that is defined in Norbis v Norbis (1986) 65 ALR 12. The Full Bench, however, may not interfere with the exercise of discretion at first instance unless the appellant establishes that there was an error in the exercise of the discretion in accordance with the principles laid down in House v The King [1936] 55 CLR 499 (HC).

The power to impose a penalty is exercisable pursuant to s.83(2) of the Act when, as was the penalty here, a contravention of or failure to comply with an award, industrial agreement or order is proved. There is power to issue a caution. There is power to impose such pecuniary penalty as the "Industrial Magistrate's Court considers just but not exceeding $1,000.00", in the case of an employer.

The respondents, who are husband and wife, were employers conducting, at all material times, the business of plasterers. They had employed the employee, Mr Sean Fort, as a labourer.

In relation to the complaints, the learned Industrial Magistrate made the following findings—

1. In relation to clause 28, the respondents failed to keep a record of the hours worked each day and record

details of the workers' compensation policy. (Allegations that taxation, long service leave and superannuation records were not kept were rejected.) In particular, His Worship found that there was no identification of ordinary hours worked or overtime worked where he accepted that Mr Fort did work overtime.

2. The respondents had not acted with total disregard to their obligations and had attempted to provide records. That was a finding open to be made on the evidence.

3. In relation to clause 34(1)(a)(i), the breaches by a failure to pay cash instead of a cheque without Mr Fort's permission were technical breaches. To paraphrase, the payment by cheque was by arrangement with Mr Fort, who was given time off to cash his cheque and suffered no detriment by virtue of the arrangement. His Worship "looked at" those breaches as technical breaches.

4. In relation to clause 34(5) and the duty to issue payslips as prescribed, the respondents should have been well aware of this duty and did not comply with that duty for the major part of Mr Fort's employment by the respondents. His Worship observed that this was the most serious set of breaches.

5. The respondents knew, or ought to have known that pay packet details were required, and the failure to provide them was a matter of concern. That the offence was committed over a lengthy period of time goes beyond the respondents merely being clumsy and was rather an approach which was inappropriate.

6. As to the clause 28 and clause 34(5) breaches, His Worship concluded that these required a penalty to reflect general and personal deterrence, to reflect that awards should be complied with and that employees not be put in a position of disadvantage or potential disadvantage. He concluded that the clause 34(5) (payslip) breaches should attract the highest penalty because, in the case of the clause 28 breaches, there was an attempt to record times.

7. Having apportioned individual penalties, His Worship then took into account the total culpability of the respondents, and the fact that the total penalty should bring home the importance of compliance with the award, yet not be so crushing as to overemphasise or overstate the culpability of the respondents. That approach properly reflected the principle that, in fixing a penalty for each breach, His Worship had regard to ensuring an aggregate penalty which was proportionate to the totality of the complained about behaviour (see Oliver trading as Club Sierra v ALHMWU (1994) 74 WAIG 2637 at 2638 (FB) per Fielding SC, with whom Coleman CC and Parks C agreed).

8. In addition, the learned Industrial Magistrate was entitled to and should have taken into account the length of the period of breaches, the number of them, that they occurred in relation to one employee only and that the respondents were a husband and wife firm with one labourer as an employee. Generally, His Worship took into account the conduct of the parties and did so correctly.

9. There were some admissions of breach. However, there was some attempt to comply, as His Worship found. What was serious was that the times worked were not properly recorded when, as His Worship correctly found, overtime was worked.

Conclusions

Both the clause 28 and clause 34(5) breaches were serious (see McCorry v Bolivia Nominees Pty Ltd t/a Ballajura Tavern 72 WAIG 2521 at 2524 (FB) ("the Ballajura Tavern case")). His Worship was correct to take into account the attempts to comply too. There were some admissions, but no unequivocal expressions of regret. His Worship correctly identified and had regard to the deterrent component and the seriousness of the breaches.

However, I do not agree that the clause 34(1)(a)(i) breaches were mere technical breaches. Certainly, the payment by cheque was by agreement, and no detriment was occasioned to the employee, Mr Fort. Certainly, too, he agreed to be paid by cheque. S.114 of the Act, however, forbids contracting out of the award and these were still breaches and, whilst not serious in these circumstances, were not technical.

The respondents have not previously been proven to be in breach of or penalised for any breach of an award. That was relevant. Of importance was the consideration that the maximum penalty for these breaches was $1,000.00. I should also say that, since my reasons for decision in the Ballajura Tavern case, I have great difficulty in seeing, contrary to the observations of the Federal Court in Masters v Highway One Transport Pty Ltd 32 AILR 226 (FC), how a lack of knowledge of one's obligations under an award (which is the law) could be said to be a matter of mitigation. Indeed, it is now my view that such a lack of knowledge could not be a matter of mitigation.

Notwithstanding Ms Harrison's careful submissions, I am not of opinion that there was an error committed by His Worship in the exercise of his discretion in having, or not having, regard to individual relevant considerations; or in having insufficient regard; or if that did occur, I am not satisfied that these matters were serious enough to render the exercise of the discretion exceptionable as a matter of law.

However, the question is whether His Worship's discretion miscarried in that he fixed individual penalties which were inadequate, having regard to the totality of the unlawful behaviour involved.

I must say that, given the circumstances surrounding the breaches of clause 34(1)(a)(i), that the cautions imposed were inadequate. Further, even giving the maximum penalty applicable, the lack of "a record", the length of time over which all of the breaches occurred, and the clumsy attempts to comply, I cannot say that the individual penalties imposed do not add up to an aggregate penalty (more than $2,000.00) proportionate to the totality of the unlawful behaviour involved.

For myself, I would have imposed more severe penalties, but that is not the point. I find that the exercise of the discretion, applying all of the principles in House v The King (HC) (op cit), has not been established to have miscarried. I would dismiss the appeal, for those reasons.

CHIEF COMMISSIONER W S COLEMAN: I have had the advantage of reading the President's Reasons for Decision. For the reasons set out therein I agree that the discretion has not miscarried and that the appeal should be dismissed.

COMMISSIONER P E SCOTT: I have read the reasons for decision of His Honour, the President. I agree and have nothing to add.

Order accordingly

APPEARANCES: Ms J Harrison on behalf of the appellant.

Mr A Metaxas (of Counsel), by leave, on behalf of the respondents.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers

(Appellant)

and

Jean Gill and Neil Gill trading as

N & J Gill Plastering Company.

(Respondents)

No. FBA 13 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY

CHIEF COMMISSIONER W S COLEMAN

COMMISSIONER P E SCOTT

22 November 1999.

Order.

This matter having come on for hearing before the Full Bench on the 9th day of November 1999, and having heard Ms J Harrison, on behalf of the appellant and Mr A Metaxas, (of Counsel), by leave, on behalf of the respondents, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 22nd day of November 1999 wherein it was found that the appeal should be dismissed, it is this day, the 22nd day of November 1999, ordered that appeal No FBA 13 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.

Transport Workers Union of Australia, Industrial Union of Workers, WA Branch

(Appellant)

and

Pinnacle Services Pty Ltd.

(Respondent)

No. FBA 3 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY

COMMISSIONER C B PARKS

COMMISSIONER S J KENNER.

10 November 1999.

Reasons for Decision.

INTRODUCTION

THE PRESIDENT: These are the unanimous reasons for decision of the Full Bench.

This is an appeal brought pursuant to s.84 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act") by the abovenamed appellant organisation of employees against the decision of His Worship, Mr G Cicchini IM, sitting in the Industrial Court at Perth.

EXTENSION OF TIME

The notice of appeal was lodged one day out of time because the pages of the appeal book were not numbered. There was no objection to an extension of time and no serious injustice likely to be occasioned by acceding to the application. In all of the circumstances, the Full Bench decided to grant the applications to extend time to institute the appeal and to proceed with it.

ADJOURNMENT

Mr Uphill, for the respondent, applied to adjourn the proceedings because he, on reading the notice of hearing, had thought that the notice related only to applications to extend time. He did, however, and properly, advise that on Monday, 20 September 1999, he became aware that the appeal was listed for substantial hearing. The application was made also on the basis that the appeal book was incomplete in that a number of relevant exhibits were not included in it. Later, upon Mr Uphill's application, we included copies of a number of exhibits in the appeal book. In any event, that was not a proper basis for the application because those documents would have been in copy form in the respondent's possession or were readily inspectable on file. Further, notice of the application to add them could have been given a substantial time ago and not the day before the hearing. We did not grant the adjournment for those reasons and our decision was vindicated by Mr Uphill's ability to competently conduct the respondent's case.

BACKGROUND

The appellant organisation had alleged, by complaint No CP 10 of 1999/1-246, that the respondent, Pinnacle Services Pty Ltd, being a party bound by award No R 47 of 1978, had between 13 April 1993 and 19 April 1993 at Perth, failed to keep time and wages records relating to their employee, John Downsborough, in accordance with clause 23(1) of the Transport Workers' (Passenger Vehicles) Award No R 47 of 1978 (hereinafter referred to as "the award"). The complaint alleged 246 breaches in all, including the breach referred to on the face of the complaint proper commencing on 13 April 1993 and ending on 29 December 1997.

The decision appealed against is the dismissal of the complaint by His Worship.

The defendant denied that it was bound by the award and therefore denied each of the allegations as to breach of the award. The defendant further submitted that if it were found to be bound by the award then it complied with clause 23(1) thereof in that it kept the appropriate time and wages records.

His Worship observed that the central issue in this matter was whether the defendant was bound by the award, it being common ground that the defendant was not a main party to the award.

The complainant's case was that the defendant was nevertheless bound by the award because of the scope clause and because of its applicability by virtue of the common rule principle.

Scope and Area Clauses

The scope and area clauses of the award are clauses 3 and 4 which read as follows—

"3.—SCOPE

This Award shall apply to all bus drivers (including Service, Tour, Charter and School Bus drivers) employed in the classifications described in Clause 10.—Wages of this Award, except those workers employed by the Western Australian Government Railways, the Eastern Goldfields Transport Board, and the Metropolitan (Perth) Passenger Transport Trust."

"4.—AREA

This Award shall operate over the whole of the State of Western Australia."

It was conceded by the defendant that Mr Downsborough is and has been employed in a classification covered by the award.

The classifications set out in clause 10 of the award are as follows—

"10.—WAGES

The total minimum weekly wage payable to an employee shall be the amount specified in the "Total Wage" column

in this clause for the appropriate grade or sub-grade and is payable for all purposes of the award.

(1) Bus Driver (including Service, Tour, Charter and School Bus Drivers) driving a passenger vehicle having seating capacity for—

	Base Rate $	Supplementary Payment $	Safety Net Adjustment $	Total Wage $
(a) Under 25 adult persons	329.75	47.05	60.00	436.80
(b) 25 adult persons or more	340.50	48.70	60.00	449.20

(2) A leading hand shall be paid a rate exceeding the highest rate of the workers he/she supervises by an amount of $19.26 per week."

Evidence

The only witness called in the matter was Mr Ian Atlee Dawson, the general manager of the defendant. He was called on behalf of the defendant at first instance. He, at the material time, was the director of various companies associated with the defendant, including Pinnacle Tours Pty Ltd. He gave evidence that the defendant is a service company which provided various services including employment services to other companies of which Pinnacle Tours Pty Ltd is one. The companies are related to each other. He described to the Court the association between the various companies and the existing corporate structure. His Worship found that all associated companies operate under one umbrella whilst retaining their individual and discrete entities.

In any event, the defendant does not provide employment services to companies outside what we will call the group.

Mr Dawson informed the Court that Mr Downsborough was employed as a coach driver by the defendant and was engaged in charter and tour work carried out by Pinnacle Tours Pty Ltd. He told the Court that Pinnacle Tours Pty Ltd was subject to the federal Transport Workers Award and that the defendant was "award free". Of the 37 employees employed by the defendant, Mr Downsborough is the only person who is subject to the award, the other employees being parties to workplace agreements.

As to the time and wages records themselves, Mr Dawson, up until 1995, gave evidence that it was not possible to locate them because the person in charge was deceased and it was not known where the records were.

ISSUES AND FINDINGS

His Worship held that this was a case where the common object test laid down in Parker and Son v Amalgamated Society of Engineers (1926) 29 WALR 90 was applied to identify an industry for the purpose of ascertaining the coverage of the award.

The Industrial Magistrate held that the uncontradicted evidence before the Court was that the defendant is (and was at the material times) a service company providing labour and other services to associated companies. It carried out undertakings akin to those involved in the labour hire industry and was not engaged in the bus tour, bus charter, bus service or indeed any other bus undertaking. There was no denying that Pinnacle Tours Pty Ltd operated buses and that it was clearly associated with the defendant, His Worship held. He also held that association or connection could not draw the defendant into coverage. There could not be coverage by association. Those facts were not in issue before the Full Bench.

His Worship also found that the defendant employed and continues to employ bus drivers. Hence, so the submission went, the defendant was not engaged in the bus driving industry, but in the provision of services.

There was reference to TWU v Dunhill Personnel Pty Ltd (unreported) (C No 36453 of 1998) delivered on 26 March 1999 (AIRC) which, it was submitted, was on all fours with this matter and ought to be followed. His Worship held that the scope clause there relied on the person being employed "in or in connection with the transport of goods". That clause was distinguishable from the scope clause in this award which has no similar provision. Accordingly, his Worship held that TWU v Dunhill Personnel Pty Ltd (op cit) was distinguishable.

The Industrial Magistrate also held, quite rightly, that whether the defendant was bound by the award or not was a question of law and not of fact and any admission was not relevant.

The Industrial Magistrate then went on to find that the award could not be construed so as to place an obligation on the employer requiring the employer to keep the records safe and not expose them to being lost. His Worship found that the misplacement of the records was genuine and the difficulty with the records was compounded by the fact that the person who was responsible for them was deceased.

It was not in issue that clause 23(1) of the award contemplates a record in the form of exhibit 11.

His Worship held that what was in fact kept as a record did not comply with clause 23(1) of the award. Clause 23 (1) reads as follows—

"23.—TIME AND WAGES RECORD

(1) Each employer shall provide a time and wages record to be kept in a place where it is easily accessible to both the employer and the worker. Such record shall show the name of the worker, the time he starts and finishes work each day, the number of hours worked by, and the wages and overtime paid to each worker and his signature for same. The employer and the worker shall be severally responsible for the proper posting of such record daily.

Provided that an employer may at his option in lieu of a time record provide a mechanical clock for the purpose of recording any of the aforementioned information."

As the Industrial Magistrate observed, the pivotal issue in this matter is whether the defendant is bound by the award. The defendant is not a named respondent to the award. However, it was clear on the evidence that the defendant was an employer and that Mr Downsborough was his employee.

The complainant's case was that the defendant was bound by the award by reason of the scope clause and by virtue of s.37(1) of the Act. S.37(1) prescribes that—

"An award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise it shall, subject to this section—

(a) extend to and bind—

(i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and

(ii) all employers employing those employees;

...."

"Industry" is defined in s.7 of the Act to include—

(c) any calling, service, employment, handicraft, or occupation or vocation of employees."

The scope clause is to be interpreted applying the principles laid down in Norwest Beef Industries Ltd and Derby Meat Processing Co Ltd v AMIEU 64 WAIG 2124 (IAC).

Every award must relate to an industry (see WACJBSI v Terry Glover Pty Ltd 50 WAIG 704 (IAC) at page 705 per Burt CJ).

What the industry is in every case is primarily a question of construction of the award. It may be that the question is not only primarily but finally a question of construction. Some awards, too, as a matter of construction, fail to give the final answer and requires, for that purpose, findings of fact to be made. In this case, the final answer was and is provided by the award both primarily and finally.

The award applies to an industry identified by and only by the vocation of bus drivers employed in the classifications contained in clause 10 of the award. The classifications contained in clause 10 include tour bus drivers. Mr Downsborough was undoubtably, on the evidence, a bus driver, and, indeed, a tour bus driver.

The construction, therefore, of clauses 3 and 10 of the award provide the final answer. The industry to which the award applies is bus driver. The award applied to Mr Downsborough whose vocation was bus driver in the industry of bus driver and in the classification of bus driver. The award applied to his employer pursuant to s.37(1) of the Act.

The learned Industrial Magistrate erred in not so finding.

We now turn to the question of the records. His Worship found that, had the award covered the defendant, then the complainant would have proved its case with respect to each remaining count. Mr Dawson did concede that all of the time and wages records from April 1995 to 29 December 1997 were in the same form as the sample copy before the Court (see exhibit 9).

The Industrial Magistrate also held, on Mr Dawson's admission, that the document was not a time and wages book as required by clause 23 of the award. It did not show the full name of the worker, the time of commencement and identify the defendant as the employer. It showed no amount of wages or overtime, nor was the signature of the employee in the document. Clause 23(11) prescribes a very different record. Exhibit 11 fits that model, but exhibit 9 does not. The employer is liable to keep the records, notwithstanding an employee's separate liability in that respect.

For those reasons, the Industrial Magistrate should have found the breaches proven as alleged. We would uphold the appeal and vary the decision to dismiss by substituting a finding that the breaches alleged were proven. We would remit the matter to the Industrial Magistrate's Court to consider the question of penalty pursuant to s.83(2) of the Act.

Order accordingly

Appearances: Mr G Ferguson, as agent, and with him Mr R Raven, as agent, on behalf of the appellant.

Mr J Uphill, as agent, on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Transport Workers Union of Australia, Industrial Union of Workers, WA Branch

(Appellant)

and

Pinnacle Services Pty Ltd.

(Respondent)

No. FBA 3 of 1999.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY

COMMISSIONER C B PARKS

COMMISSIONER S J KENNER

10 November 1999.

Order.

This matter having come on for hearing before the Full Bench on the 22nd day of September 1999, and having heard Mr G Ferguson, as agent, and with him Mr R Raven, as agent, on behalf of the appellant and Mr J Uphill, 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 10th day of November 1999, it is this day, the 10th day of November 1999, ordered and directed as follows—

(1) THAT the applications herein by the appellant to extend time to file the appeal book out of time be and is hereby granted.

(2) THAT the application herein by the respondent to adjourn the proceedings be and is hereby dismissed.

(3) THAT appeal No FBA 3 of 1999 be and is hereby upheld.

(4) THAT the decision of the Industrial Magistrate in complaint No CP 10 of 1999 made on the 3rd day of June 1999 be and is hereby varied by substituting a finding that the breaches of the Transport Workers' (Passenger Vehicles) Award No R 47 of 1978 as alleged are proven.

(5) THAT complaint No CP 10 of 1999 be and is hereby remitted to the said Industrial Magistrate sitting in the Industrial Court at Perth to hear and determine in accordance with the reasons for decision of the Full Bench and according to law.

By the Full Bench,

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

FULL BENCH—
Unions—Declarations Made Under Section 71—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

Applicant.

No FBM 1 of 1999.

BEFORE THE FULL BENCH.

11 November 1999.

HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
SENIOR COMMISSIONER G L FIELDING.

Reasons for Decision.

THE PRESIDENT: These are the unanimous reasons for decision of the Full Bench. This is an application pursuant to s.71 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act") by the abovenamed applicant, which is an "organisation" as that term is defined in s.7 of the Act. It is therefore a "state organisation", too, as that is defined in s.71(1) of the Act.

The "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" is an organisation of employees registered under the Commonwealth Act for the purposes of s.71(1) of the Act. There is in existence, and was at the time of the making of this application, a Western Australian Branch of the aforementioned organisation of employees registered under the Commonwealth Act. A branch therefore exists as is defined in s.71(1) of the Act.

Upon a careful examination of all of the evidence in this matter and the submissions of Mr Schapper, with particular emphasis on the regulation 101 statements and the eligibility rules of the branch of the applicant organisation and of the federally registered organisation, we concluded that the Western Australian Branch of the abovementioned federal organisation was a "counterpart federal body" as defined in s.71(1) of the Act. We were able to do so because, having perused those documents and considered that evidence, we were able to find that the rules of the branch prescribing offices which exist in the branch should be deemed to be the same as the rules of the state organisation prescribing the offices which exist in the state organisation. Further, having

carefully considered the eligibility rules of the applicant organisation and the federal organisation, which are not identical, but for the purposes of this application are substantially the same, we are satisfied that the eligibility rules in each case are therefore deemed to be the same (see s.71(3) and (4) of the Act).

We should observe that the evidence is, and we find, that as at 13 August 1999 there were 9652 financial members of the applicant who were also financial members of the federal branch in Western Australia. There were indeed, too, no persons who were members of the applicant but not members of the federal branch and also it was the case vice versa.

For those reasons, the Full Bench made the declaration sought.

Appearances: Mr D H Schapper (of Counsel), by leave, on behalf of the applicant.

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.

No FBM 1 of 1999.

BEFORE THE FULL BENCH.

8 November 1999.

HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
SENIOR COMMISSIONER G L FIELDING.

Declaration.

This matter having come on for hearing before the Full Bench on the 8th day of November 1999, and having heard Mr D H Schapper (of Counsel), by leave, on behalf of the applicant and there being no other party desiring to be heard in respect of this application, and the Full Bench being of the opinion upon the evidence that the rules of the State organisation, the applicant herein, and the Counterpart Federal Body relating to the qualifications of persons for membership of each such body are substantially the same, and the Full Bench also being of opinion that the rules of the Counterpart Federal Body prescribing the offices which exist in the Branch are the same in this respect as the rules which exist in the State organisation, the applicant herein, and the Full Bench having determined that its reasons for decision will issue at a future date, and the applicant herein having consented to waive the requirements of s.35 of the Industrial Relations Act 1979 (as amended) ("the Act"), it is this day, the 8th day of November 1999, ordered and declared as follows—

(1) THAT the rules of the applicant and of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union relating to the qualifications of persons for membership be and are deemed to be the same in accordance with s.71(2) of the Act.

(2) THAT the rules of the applicant and of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union prescribing the offices which shall exist in the applicant and the WA Branch of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union be and are deemed to be the same in accordance with s.71(4) of the Act.

By the Full Bench

(Sgd.) P. J. SHARKEY,
President.

[L.S.]

PRESIDENT—
Matters dealt with—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mark David Pedrini and Natalie Pedrini
t/as Pedrini Painting & Decorating

(Applicants)

and

The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers

(Respondents).

No. PRES 10 of 1999.

BEFORE HIS HONOUR THE PRESIDENT
P J SHARKEY.

3 December 1999.

Reasons for Decision.

THE PRESIDENT: This is an application for a stay of the decision of the Industrial Magistrate's Court at Perth, given on 24 September 1999 in Complaints No 154-162 of 1998 inclusive; in each of which a substantial number of breaches were alleged.

The application purports to be made pursuant to s.49(11) of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act").

The orders made by the Industrial Magistrate, following the delivery of his reasons for decision on 24 September 1999, were made on 13 October 1999 as follows—

1. That the sum of wages not paid, $3,452.80, be paid to the employee, Mr Vince Wray, and that the sum of $162.20 costs be paid to the complainant, The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers (hereinafter referred to as "the WABLPPU"), and a penalty of $1,890.00 be also paid to the complainant, the WABLPPU. That each of the abovenamed defendants share the costs of the orders equally, with the amounts to be paid on or before 4 November 1999.
2. That the sum of wages not paid, $8,246.02 be paid to the employee, Mr Stuart Hamilton, with costs of $162.20 and a penalty of $2,940.00, to be paid to the complainant, the WABLPPU, all amounts to be paid, shared equally by the defendants, on or before 4 November 1999.
3. That the sum of wages not paid, $5,108.52, be paid to the employee, Mr Terence Doherty, with costs of $162.20 and a penalty of $1,680.00 to be paid to the complainant, the WABLPPU, the remaining orders being the same as above.
4. That the sum of wages not paid, $540.95, be paid to the employee, Mr Peter Corlett, with costs of $162.20 and a penalty of $210.00 to be paid to the complainant, the WABLPPU, the remaining orders being the same as above.
5. That the sum of wages not paid, $8,181.19, be paid to the employee, Mr Dave Bullivant, with costs of $162.20 and a penalty of $3,080.00 to be paid to the complainant, the WABLPPU, the remaining orders being the same as above.

The Notice of Appeal was filed herein on 15 October 1999 and there is no Appeal Book filed.

The Complainant has sought a warrant of execution on 19 November 1999.

It is clear that the applicants herein, being defendants at first instance, have a sufficient interest to apply for an order.

There was a question as to whether the appeal has been instituted within the meaning of s.49 of the Act. The Notice of Appeal was served on 22 October 1999 upon the respondent

to this appeal, but this issue was not pursued upon the hearing of this application.

BACKGROUND

The respondent organisation of employees made complaints to the Industrial Magistrate, sitting in the Industrial Magistrate's Court at Perth, alleging that the applicants had employed a number of persons and, further, that they had failed to pay to them certain monies in breach of the Building Trades (Construction) Award 1987 No R14 of 1978 (hereinafter referred to as "the award").

After hearing witnesses and determining the complaint, His Worship issued reasons for decision, found that 140 breaches of the award had been committed and fixed penalties, ordered payment of amounts found to be underpaid and costs, as I have said.

PRINCIPLES

The principles for the determination of applications for a stay of orders under s.49(11) of the Act are clear—

1. The applicant must establish that—
    a) There is a serious issue to be tried; and
    b) That the balance of convenience favours the applicant;
2. The matter is to be determined in accordance with s.26(1)(a), (c) and, where relevant 1(d) of the Act.
3. The underlying principle is that a successful litigant should not be deprived of the fruits of his or her litigation (see Gawooleng Dawang Inc v Lupton and Others 72 WAIG 1310). (In WALEDFCU v Hathaway 75 WAIG 1785 (IAC), Murray J applied the principle of special circumstances.)

THE APPLICANTS' CASE

The applicants' case is as follows, summarised—

1. Special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being nugatory.
2. Generally, that will occur when, because of the respondent's financial state, there is no reasonable prospect of recovery of monies paid pursuant to the judgment in the first instance.
3. However, special circumstances are not limited to that situation and, if, for whatever reason, there is a real risk that it will not be possible for a successful applicant to be restored substantially to his former position, the judgment against him is executed, then that will constitute special circumstances.
4. In this case, Mr Vince Wray, during the hearing of the matter, gave evidence that he had travelled back to England and had been in and out of work and, therefore, the ability to recover the monies from him if the appeal were upheld, is doubtful and would make the appeal against the payment nugatory. For similar reasons, it was said that Mr Terence Doherty, Mr Dave Bullivant and Mr Peter Corlett were in same case. A similar argument applied to Mr Stuart Hamilton.

BALANCE OF CONVENIENCE

The submission for the applicants was that, if the amount of the order was paid out, it would be difficult to recover because a number of the "employees", on the evidence before the Commission at first instance, were persons from whom it would be difficult to recover the amount of any order paid, if the appeal was successful. This would, therefore, render the appeal nugatory.

It was submitted that the evidence at first instance was—

a) That Mr Vince Wray had travelled to England and been out of work.

b) That Mr Terence Doherty had been out of work and in receipt of Social Security payments.

c) That Mr Dave Bullivant had suffered a psychiatric breakdown, questioned by Mr Giffard who said that Mr Bullivant had suffered a physical breakdown.

d) That Mr Peter Corlett ran his own business and was periodically out of work.

e) That Mr Stuart Hamilton was a sub-contractor and, if the applicants succeeded on appeal, it would require expenses to be incurred to recover the monies.

The crux of the submissions was that there was a real risk that the monies would not be recoverable if an appeal was successful and, accordingly that, if an order was not granted, the appeal would be rendered nugatory.

It was not submitted or established that the amounts of costs and penalties ordered to be paid to the respondent could not be recovered, nor was Mr Giffard's assertion that the respondent complies and has complied with orders of the Court now contradicted.

It has not been established by the applicants that the balance of convenience lies with the applicants in relation to those amounts.

Further, the complaints go to periods as far back as 1996 or 1997.

The application for stays of the orders was lodged on 28 October 1999, but the applicants did not properly comply with the directions for listing and the applications then came before the Commission, as presently constituted, on 3 December 1999. There was therefore a delay.

On 19 November 1999, application was made by the respondent to enforce the orders.

There is no evidence that appeal books have been filed or served or that the listing of the appeal has been otherwise advanced.

The evidence of the inability to pay on the part of the employees concerned relates to when the evidence was given by them which, most recently, was, at least, three months ago.

I am, in any event, not satisfied, from the nature of their self employment, that the monies would not be recoverable from Mr Hamilton and Mr Corlett, both of whom even some months ago were self employed and in work, at least some of the time. In Mr Corlett's case, the sum involved, $540.95, is not that large, either.

There is no evidence that Mr Bullivant is currently not earning income, nor that Mr Doherty is not in receipt of income currently.

All of those factors, together with the delay before and after the application for a stay, lead me to the conclusion that the applicants have not established that the balance of convenience lies with them. Further, as I have observed in more detail above, there is no sufficient evidence in that context to persuade me that a successful appeal would be nugatory.

As to the amounts of penalty and costs ordered to be paid to the respondent organisation, nothing has been said to persuade me that the respondent cannot and will not refund the monies if an appeal is successful. Again, the effluxion of time is significant.

I should add, too, that I was not persuaded by the citing of any authority otherwise that incapacity to pay is a relevant factor in these proceedings.

SERIOUS ISSUE TO BE TRIED

It was submitted on behalf of the applicants that there was a serious issue to be tried because of the position of small business generally, and matters affecting small business.

However, that question did not relate to a ground of appeal and, in any event, could not constitute a serious issue to be tried as a matter of law.

It was not cogently submitted to me that the learned Industrial Magistrate had erred in finding that the individuals concerned were employees of the respondent. His Worship did not accept the evidence of the applicants as credible witnesses as against the evidence of those persons who were said to be employees.

Nothing was submitted to persuade me, having regard to the principle in Devries and Another v Australian National Railways Commission and Another [1992-1993] 177 CLR 472 (HC), that a serious issue arose in relation to that, even if it arose squarely on the grounds of appeal.

Further, it was not at all clear that His Worship had erred applying the law to determine that these individuals were employees and not individual contractors. He recognised that control was not the only relevant factor to be considered, and then considered a whole range of factors including control (see pages 30 et seq of the reasons for decision), where he referred, inter alia, to Stevens and Gray v Brodribb Sawmilling Co Pty Ltd [1985-1986] 160 CLR 16 (HC) and distinguished Commissioner of Taxation v Vabu Pty Ltd (1997) 35 ATR 340 (HC).

There were no sufficient reasons submitted to me to enable me to find that there was a serious issue to be tried on that basis.

Further, as to the question of penalty, matters such as lack of remorse are relevant to the assessment of penalty (see McCorry v Bolivia Nominees Pty Ltd t/a Ballajura Tavern 72 WAIG 2521 (FB) and Ducasse v TWU and Another 76 WAIG 330 (IAC)). That the failure to order discovery of tax documents was not supported by cogent submissions so that the same was an error before me.

CONCLUSION

The applicants, therefore, did not, for those reasons, establish before me that there was a serious issue to be tried, or that the balance of convenience favour the applicants; (or even alternatively, that there were special circumstances justifying a stay order).

Further, for those reasons, pursuant to s.26(1)(c) of the Act, the interests of the parties and the employees require, as a matter of equity, good conscience and the substantial merits of the case, that I make an order dismissing the application and leaving the respondent and through it, the "employees", with the fruits of their litigation.

I have considered all of the material and submissions. The findings which I have made and the conclusions which I have reached are obviously confined to this application and could not bind or influence me as a member of the Full Bench. I dismiss the application.

Appearances: Ms J M Stevens (of Counsel), by leave, on behalf of the applicants

Mr G Giffard on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mark David Pedrini and Natalie Pedrini t/as Pedrini Painting & Decorating
(Applicants)

and

The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers
(Respondents).

No. PRES 10 of 1999.

BEFORE HIS HONOUR THE PRESIDENT

P J SHARKEY.

3 December 1999.

Order.

This matter having come on for hearing before me on the 3rd day of December 1999, and having heard Ms J M Stevens, (of Counsel), on behalf of the applicants and Mr G Giffard on behalf of the respondent, and having reserved my decision on the matter, and reasons for decision being delivered on the 3rd day of December 1999 wherein I found that the application should be dismissed, it is this day, the 3rd day of December 1999, ordered that application No PRES 10 of 1999 be and is hereby dismissed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Burswood Resort (Management) Limited

(Applicant)

and

Federated Liquor and Allied Industries Employees' Union of Australia, WA Branch, Union of Workers.

(Respondent)

No. PRES 11 of 1999.

BEFORE HIS HONOUR THE PRESIDENT1

P J SHARKEY.

8 November 1999.

Reasons for Decision.

(GIVEN EXTEMPORANEOUSLY AND SUBSEQUENTLY EDITED BY THE PRESIDENT)

THE PRESIDENT: This is an application brought by the applicant employer pursuant to s.49(11) of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act"), whereby the applicant seeks a stay of the whole of the decision made by the Commission in application No 1545 of 1999 and dated 12 November 1999.

I am satisfied that an appeal was instituted within the meaning of s.49(11) of the Act. The Notice of Appeal was filed on 15 November 1999, as was the application for a stay and, according to the stamp, at the same time, but it was not in issue that the application was made after the appeal was instituted. I am also satisfied that the applicant is a party who has sufficient interest to bring this application because the applicant was a party to the proceedings at first instance.

BACKGROUND

It is common ground that the applicant is an employer and the respondent is an organisation of employees, as that term is defined in s.7 of the Act. Both are and were, at all material times, parties to the Burswood International Resort Casino Employees' Industrial Agreement 1997 (No AG 164 of 1997) (hereinafter referred to as "the Agreement").

Clause 37 of that agreement was at the heart of the proceedings at first instance. Clause 37 reads as follows—

" "RIGHT OF ENTRY"

(1) Subject to the provisions of the Casino Control Act and the Industrial Relations Act (1979) (W.A.), the Secretary or any other duly accredited official of the Union shall have the right to enter the Company's premises during such time when work is being performed by employees covered by this agreement, but shall not in any way interfere with the work so being performed.

(2) Such officials shall not, without permission of the Company, interview employees at any time other than recognised meal or rest breaks."

The respondent is entitled to right of entry in accordance with that clause.

On 8 October 1999, Notice of Application No 1545 of 1999 was filed in the Commission on behalf of the applicant. By that application, the applicant sought a declaration pursuant to s.49AB(3) of the Act that certain "officials" of the respondent organisation do not have a right of entry to the applicant's premises pursuant to the Agreement. The respondent opposed the application and sought orders that the Commission refrain from further hearing the application.

On 1 November 1999, Notice of Application 1675 of 1999 was filed in the Commission on behalf of the applicant. That application does not seem to have advanced much further, although there is reference to a hearing in the recitals to the orders of the Commissioner at first instance. However, that application is not relevant to these proceedings, since the order sought to be stayed is in respect of application No 1545 of 1999.

By letter dated 2 November 1999, the Acting Secretary of the respondent, Mr David Kelly, wrote to Commissioner Parks asking that he treat that letter as a formal request for the convening of an urgent compulsory conference with respect to application No 1545 of 1999, pursuant to s.32 of the Act. Commissioner Parks notified the parties that a conference would be convened pursuant to s.32 of the Act on Thursday, 4 November 1999. A conference was held. The Commissioner then made the order appealed against on 12 November 1999 after a speaking to the minutes hearing on that day. The order was deposited in the Office of the Registrar on 15 November 1999.

There were a number of recitals to the order which, in some cases, reflect findings of fact. The Commissioner found that the applicant and respondent herein are parties to the Agreement and that the applicant does not question the right of the Secretary-Treasurer of the respondent, Mr David Kelly, to exercise the right of entry pursuant to Clause 37 of the Agreement.

The Commissioner also recited in his order the request for and the holding of a conference following upon a hearing of an application for production of documents and of application No 1675 of 1999.

None of those findings were said to be in issue before me.

The Commissioner also recited in his order that the respondent had applied to the Commission to make interim orders pursuant to s.32 of the Act which required the applicant to allow right of entry pursuant to Clause 37 to forty persons appointed "temporary organisers" by the respondent and where names were notified to the applicant in writing. That was, of course, the fact before the Commission, as the Commissioner noted.

The applicant in the proceedings before the Commission complained that the Commissioner did not have power to make the interim orders sought because the Commission, constituted for the purposes of s.49AB of the Act, had no power to exercise the powers conferred by s.32 of the Act. There was also a claim that the Commissioner had no jurisdiction to enforce a prescribed right under the Agreement.

The Commissioner next recited in his order that the respondent claimed that members employed by the applicant were presently engaged upon a consideration of their terms and conditions of employment and were required to make a choice by 28 November 1999. In fact, it was common ground before me that they were offered Australian Workplace Agreements under the Workplace Relations Act 1996 (Cth).

The Commissioner also recited that the applicant's refusal to recognise any person other than the Secretary-Treasurer as having a right of entry in order to meet members pursuant to Clause 37 was "wrongful" and unreasonable, according to the respondent's complaint. The grounds of the complaint were that the availability of members for consultation and the provision of information and advice to them was (and is) controlled by the continuous shift season upon which the members were engaged, that the Secretary-Treasurer could not reasonably be available to meet members at the various times the shift concludes throughout the twenty-four hours of the day, and that the Secretary-Treasurer has other responsibilities too.

The Commissioner then, although expressing the process in the form of opinion, made a number of findings and reached a number of conclusions. These were—

(a) That the application raised pursuant to s.49AB of the Act raises a matter for consideration that is integral to the industrial relations between the parties.

(b) That, given the existence of the dispute between the parties and the extent to which it involves industrial matters, given the objects expressed in s.6 of the Act and the requirements of the Act, the Commissioner has jurisdiction and power to act pursuant to s.32 of the Act.

(c) That the industrial relations between the parties and those between each of them and the employees of the applicant, who are members of the respondent, are strained and are likely to become further strained.

(d) That persons in addition to the Secretary-Treasurer may be accredited by the respondent to exercise the prescribed right of entry and hence there is plain and long standing recognition that circumstances might occur which require an additional person or persons to be authorised by the respondent.

(e) Prima facie, the order of the President in PRES 7 of 1999 validated the accreditation of the 32 named "officials" for described purposes, i.e. "*relating to right of entry ... in relation to award and agreements*", and whom, prima facie, appear to be persons described in the phrase "*any other accredited official*" within Clause 37 of the Agreement.

(f) That, in order to limit any further deterioration of industrial relations between the parties and between them and members of the respondent, the Commission ought, temporarily, to authorise additional representatives of the respondent to exercise the right of entry prescribed by Clause 37 of the Agreement.

The Commissioner then made the following order—

> "That for the purposes of clause 37—Right of Entry of the Burswood International Resort Casino Employees' Industrial Agreement 1999, No AG 164 of 1997, the persons named in the schedule hereunder are duly accredited officials of the union party thereto.."
>
> (and he named 32 persons).

The Commissioner then went on to order that the order be interim and would operate until applications Nos 1545 and 1675 of 1999 were determined, subject to the order being subject to cancellation upon the application of either party, and that it operate from 9.00 am on 17 November 1999.

PRINCIPLES, ISSUES AND CONCLUSIONS

The principles for deciding applications for a stay are well settled (see Gawooleng Dawang Inc v Lupton and Others 72 WAIG 1310 and a number of other cases). The applicant must establish that there is a serious issue to be tried and that the balance of convenience lies with it.

Underlying the Commission's consideration of the matter is the principle that a successful "litigant" is entitled to the fruits of his/her "litigation". Further, s.26(1)(a), (c) and sometimes (d) of the Act are to be applied and the objects of the Act are signposts in the exercise of the Commission's discretion.

Mr Le Miere, who appeared with Mr Di Girolami for the applicant, submitted that there were no "fruits of litigation" because the matter had not been "litigated". However, the word "litigate" and its derivatives cannot be applied literally in this context in this Commission. The "fruits of litigation" are an interim order made at the end of a conciliation conference in the respondent's favour.

Issues to be Tried

The first ground of appeal is that the Commission, in an application pursuant to s.49AB of the Act, is without power to make interim orders on an application under s.49AB and, further and alternatively, the Commissioner erred in law in purporting to exercise powers pursuant to s.32 of the Act in application No 1545 of 1999.

There is no doubt that application No 1545 of 1999, as it is designated, is an application pursuant to s.49AB.

There is no doubt that the Commissioner, by way of conciliation, applied s.32 to the application and purported to make s.32 orders, which were interim orders. S.49AB of the Act, on its face, enables any application (see s.49AB(3)) to determine a dispute between an employer or organisation as to whether a representative of an organisation is empowered to enter the premises of an employer for a purpose specified in the application.

The Commission is then restricted to one remedy, a declaration as if the matter before it were an application for the true interpretation of an award. There is no provision in s.49AB of the Act for power to make interim orders and it is arguable that there could be none, because the only remedy is a declaration, expressly prescribed.

It is arguable, too, that s.49AB of the Act is a special provision from which general provisions do not derogate from it, and that it is a special provision for special matters, standing alone. RRIA v FEDFU 67 WAIG 315 (IAC) supports that approach. However, there is a counter argument that s.32 of the Act, read with the objects of the Act, might operate because there is a dispute having regard to s.6(a), (b), (c) and (d) of the Act.

Indeed, it is arguable that s.49AB(3) of the Act is applicable only to whether a representative of an organisation should be permitted to enter for the purpose for which she/he seeks to enter.

However, for all of those reasons, I am satisfied that there is a serious issue to be tried on that ground.

The second and only other ground is that there is a good arguable case that the 32 persons designated "temporary organisers" are not entitled to exercise the right of entry pursuant to Clause 37. In that context, I refer to the order of the Commission, constituted by the President, made pursuant to s.66 of the Act in matter No PRES 7 of 1999 on 21 September 1999, in which, by Order 3(h), I declared valid a resolution of the respondent's Committee of Management whereby it accredited the 32 persons referred to above as officials of the union for all purposes relating to right of entry, posting of notices, employee representation and dispute resolution in relation to awards and agreements to which the respondent is a party.

That means, on a reading of the words, given their ordinary meaning, that the persons are accredited as officials of the respondent (representatives within the meaning of s.49AB of the Act) by a valid resolution of the organisation, for the purposes of exercising rights of entry under the Agreement and are plainly "other duly accredited officials" within the meaning of Clause 37.

Mr Le Miere's arguments to the contrary seemed to rely on their being required to be "officers". They are not required to be. They are required to be "officials" and that is more consistent with the word "representative" in s.49AB of the Act.

There is, on what was put to me, little or no substance in that ground and it could not be found to constitute a serious issue to be tried.

As to the question of s.49(2a) of the Act, I am entitled to determine whether there is a serious issue to be tried, having regard to the fact that the interim orders constituted a "finding", as that word is defined in s.7 of the Act. Because I am of opinion that the question of the exercise of power under s.32 and s.49AB of the Act and the ability to make interim orders pursuant to s.49AB which are before the Full Bench on this appeal, these are, on the face of it, matters of such importance that, in the public interest, an appeal should lie, since the question of power and the available remedies is an important area of the Commission's jurisdiction are required to be decided.

Balance of Convenience

The balance of convenience favours the applicant by a slender margin because the order might be made beyond power because it purports to be made under s.32 of the Act. If it were made under s.49AB of the Act, as a final order, the order would seem to me to be within power, at least on what is before me on this application.

The application is listed to be heard on 24 November 1999. The matter might be completed shortly after and probably before 27 November 1999, and an order staying the operation of the order at first instance might well be of short duration. However, that is a matter for the Commission at first instance. Thus, an order which stays the order appealed against will prevent persons exercising a right of entry by virtue of an order which might be made outside power. It should be borne in mind that it was not submitted that such an order made under s.49AB would not be within power; I say that having regard to the fact that 28 November 1999 is the last day for employees to decide the terms and conditions of their employment.

For those reasons, too, I departed from the general rule that the President does not stay the operation of orders made in the course of conciliation proceedings and/or to enable or to facilitate conciliation and/or arbitration or to prevent the deterioration of industrial relations.

FINALLY

I have considered the interests of employees, the applicant and the respondent. This is a case, for the reasons expressed above, where the successful "litigant" should be deprived of the fruits of its "litigation". The equity, good conscience and the substantial merits of the case are on the side of the applicant by a narrow margin.

I have considered all of the submissions and all of the relevant material.

I should add that any findings I have made and conclusions which I have reached are findings made and conclusions reached for the purposes of determining this application. They cannot bind me otherwise and particularly as a member of the Full Bench hearing any appeal.

For those reasons, I ordered that the order of 12 November 1999 in application No 1545 of 1999 be wholly stayed pending the hearing and determination of appeal No FBA 31 of 1999 or until further order.

APPEARANCES: Mr R L Le Miere (of Queens Counsel), by leave, and with him Mr B Di Girolami (of Counsel), by leave on behalf of the applicant.

Ms S M Jackson and with her Mr D J Kelly on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Burswood Resort (Management) Limited

(Applicant)

and

Federated Liquor and Allied Industries Employees' Union of Australia, Western Australian Branch, Union of Workers.

(Respondent)

No. PRES 11 of 1999.

BEFORE HIS HONOUR THE PRESIDENT
P J SHARKEY.

17 November 1999

Order.

This matter having come on for hearing before me on the 16th day of November 1999, and having heard Mr R L Le Miere (of Queens Counsel), by leave, and with him Mr B Di Girolami (of Counsel), by leave, on behalf of the applicant and Ms S M Jackson and with her Mr D J Kelly, on behalf of

the respondent, and I 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 17th day of November 1999, ordered and declared as follows—

(1) THAT the applicant has a sufficient interest as required by s.49(11) of the Industrial Relations Act 1979 (as amended) ("the Act") and was therefore entitled to apply for the orders which appear hereunder.

(2) THAT appeal No FBA 31 of 1999 has been instituted within the meaning of s.49(11) of the Act.

(3) THAT the operation of the whole of the order of the Commission made on the 12th day of November 1999 in application No 1545 of 1999 be and is hereby stayed pending the hearing and determination of appeal No FBA 31 of 1999 or until further order.

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

AWARDS/AGREEMENTS— Application for—

ACI GLASS PACKAGING—PERTH, MAINTENANCE TRADES (ENTERPRISE BARGAINING) AGREEMENT 1999.

No. AG 165 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

ACI Glass Packaging—Perth

and

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

AG 165 of 1999.

ACI Glass Packaging—Perth, Maintenance Trades (Enterprise Bargaining) Agreement 1999.

COMMISSIONER S J KENNER.

10 November 1999.

Order.

Having heard Ms C Natta as agent on behalf of the applicant and Mr J Fiala on behalf of the respondent and Mr M Anderton on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

(1) THAT the ACI Glass Packaging – Perth, Maintenance Trades (Enterprise Bargaining) Agreement 1999 as filed in the Commission on 4 October 1999 in the terms of the following schedule 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 ACI Glass Packaging—Perth, Maintenance Trades (Enterprise Bargaining) Agreement 1999.

2.—ARRANGEMENT

The Agreement is arranged as follows—

3.—STATE WAGE PRINCIPLES

(1) It is a condition of this Agreement that there shall be no extra claims made, award or over award, for the life of this Agreement except when consistent with a national wage decision which is ultimately endorsed by the W.A. Industrial Relations Commission.

(2) The parties to this Agreement shall be bound by the terms of the Agreement for its duration.

(3) The parties to this Agreement shall oppose any applications by other parties to be joined to this Enterprise Agreement.

(4) The terms of this Agreement will not be used to progress or obtain similar arrangements or benefits in any other enterprise.

(5) No provisions in this Agreement shall operate to cause any employee a reduction in ordinary time earnings, or to cause a departure from standards of the Western Australian Industrial Relations Commission in regard to hours of work, annual leave with pay or long service leave with pay.

4.—APPLICATION OF AGREEMENT

(1) This Agreement shall apply at the establishment of ACI Glass Packaging, Baile Road, Canning Vale Perth, Western Australia, and the incidence of this Agreement shall be as prescribed by Clause 5—PARTIES BOUND.

(2) There are 29 employees employed by the Company who are members of or eligible to be members of the organisation referred to in clause 5 (1) and (2) hereof, are covered by the terms and conditions.

5.—PARTIES BOUND

This Agreement shall be binding upon—

(1) Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australia Branch.

(2) Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, Western Australia.

(3) ACI Operations Pty Ltd trading as ACI Glass Packaging—Perth—35 Baile Road, Canning Vale, Western Australia 6155 (The Company)

6.—DATE AND PERIOD OF OPERATION

(a) This Agreement shall operate from the beginning of the first pay period to commence on or after 1st July 1999 and shall continue in force until 1st July 2001.

(b) Furthermore, the parties will reconvene 4 months prior to 1st July 2001 to discuss the extension of this agreement by one (1) year if agreement can be reached on wages outcome for that year, otherwise, this agreement will expire as per point (a) above.

7.—RELATIONSHIP TO PARENT AWARD

This agreement shall be read wholly in conjunction with the Metal Trades (General) Award 1966 No.13 of 1965—Part 1. The terms of the Australian Glass Manufacturers Company Perth Maintenance Trades (Enterprise Bargaining) Agreement No. AG 10 of 1993, the Australian Glass Manufacturers Company Perth Maintenance Trades (Enterprise Bargaining) Agreement No. AG 470 of 1994 and the ACI Glass Packaging Perth Maintenance Trades (Enterprise Bargaining) Agreement 1996, No AG 78 of 1997 ("the EBA's") shall be incorporated into the terms of this Agreement.

Where there is any inconsistency between this Agreement, the Parent Award and the EBA's, this Agreement shall take precedence to the extent of the inconsistency.

The parties are committed to the Metal Trades (General) Award 1966 No. 13 of 1965—Part 1 continuing to cover the basic standard of employment in the industry.

The Company agrees to maintain existing award and over-award conditions except as provided otherwise by this Agreement.

(a) The parties will identify, document and table all local agreements over the next six (6) months from the date of certification of this Agreement.

(b) Where the local agreement conflicts with this Agreement the latter will prevail.

(c) The parties will review local Agreements and reach an agreement on amending, deleting or the continuation of such Agreement during the life of this Agreement.

(d) The parties will cooperate jointly and have access to each other's files for the purpose of identifying local Agreements.

An employee commencing his or her employment with the employer after the date on which this Agreement comes into operation shall be employed in accordance with the terms of this Agreement.

The Company and Unions agree that no employee, including apprentices and trainees, shall be employed other than under the terms of this Agreement. To avoid doubt, this means that no employee shall be offered an Australian Workplace Agreement or State Workplace Agreement.

8.—OBJECTIVES

(a) The Agreed Specific Measures To Achieve Gains in Productivity, Efficiency and Flexibility, as described in Appendix 'A' (Heads of Agreement)

(b) The objectives of this Agreement are to develop a Company that is comparable by international best practice standard of the Glass Container Industry.

(c) The performance improvement to be based on efficiency, flexibility, quality and delivery of service.

(d) The development of a flexible and skilled workforce in order to sustain more secure and meaningful jobs.

(e) The formation and maintenance of a Joint Consultative Committee that encourages all employees and management to implement productivity and work practices, change initiatives affecting the Company.

(f) Improvement of all productivity issues such as cost, quality, technology, work organisation and training through continuous learning.

(g) The continuing implementation of a training and skilling program for all levels, which enables employees to function and contribute as individuals and members of their respective work groups.

(h) Develop a culture which is compatible with an attitude of continuous improvement through the enterprise.

9.—WAGES

(a) Wages will be increased as follows—

Metal Trades (General) Award Part 1

Average 35 Hour Week

Wage Group & Classification	Column 1 %	Column 2 %
C8 Engineering Tradesperson Special Class Level 1	4.0	4.0
C6 Advanced Engineering Tradesperson Level 1	4.0	4.0

(b) The wage increases in sub-clause (a) hereof shall be payable as follows—

(i) The amount shown in Column 1 shall be payable from the beginning of the first full pay period to commence on or after 1 July 1999.

(ii) The amount shown in the Column 2 shall be payable from the beginning of the first full pay period to commence on or after 1 July 2000.

Note: The percentage wage increases described in (a) and (b) above will also be applied to all purpose hourly rate and all purpose allowances.

10.—CONSULTATION

(i) Introduction of Change—(Significant)

(a) Employer's duty to Notify

(1) Where an employer 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 employer shall notify the employees who may be affected by the proposed changes and their union.

(2) "Significant effects" include termination of employment, major changes in the composition of operation or size of the employer's workforce or in the skills required: the elimination or 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 restructuring of jobs. Provided that where the award makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

(b) Employer's Duty to Discuss

(1) The employer shall discuss with the employees affected and the State Office of the Union, inter alia, the introduction of the changes referred to in sub-clause (a) above hereof, the effects the changes are likely to have on employees, measures to avert or mitigate the adverse effects of such changes on employees

and shall give prompt consideration to matters raised by the employees and/or their union in relation to the changes.

(2) The discussions shall commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in sub-clause (a) above hereof.

(3) For the purpose of such discussion, the employer shall provide in writing to the employees concerned and the Union/s, 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 any employer shall not be required to disclose confidential information the disclosure of which would be inimical to the employer's interests.

(ii) Consultation—(General)

(a) The parties are committed to the process of genuine consultation in the workplace.

(b) During the consultation process, either party has the right to invoke the agreed dispute settlement procedure.

(iii) Consultative Committees

The establishment of a Joint Consultative Committee (J.C.C.) will continue.

11.—DISPUTE RESOLUTION PROCEDURE

Refer to Heads of Agreement, Appendix "A", Attachment 3.

12.—RE NEGOTIATION OF AGREEMENT

The parties shall continuously monitor the application of this Agreement to effect the implementation of this Agreement and further structural efficiency and enterprise bargaining. Negotiations for a new Enterprise Agreement will commence four months prior to the expiry date of this Agreement. Neither party shall take industrial action during this period in relation to the negotiation of this agreement.

13.—APPRENTICES

ACI is committed to continuing to train apprentices, preferably via Group Training Schemes, into the future.

14.—LONG SERVICE LEAVE

1. 10 Years/13 weeks

The primary principle is that you must have sufficient service accrued to achieve the 13 weeks. (It is prospective not retrospective).

Accordingly,

(a) You are eligible to take this leave once you have accrued a full 13 week entitlement.

i.e, A combination of—

Old accrual rate + new accrual rate must equal 13 weeks.

(b) Subsequent 13 week entitlements flow after the completion of an additional 10 years' service.

(c) An employee can request Long Service Leave earlier than 10 years after his or her first entitlement. Such requests will be reasonably considered by the Company.

2. 7 Years' Pro Rata Entitlement Upon Termination

Eligible for payment on termination once you have 7 years' continuous service.

Such pro rata entitlement will be paid at the old accrual rate for years up to July 1, 1996 and at the new accrual rate for 7 years after July 1, 1996 to the termination date.

3. Relevant rostered shift penalties for shift workers will apply on a prospective basis to Long Service Leave accruements operative on or from 1/7/2000.

15.—PAID TRADE UNION TRAINING LEAVE

The Company shall pay a shop steward's normal weekly wage whilst the employee is attending a trade union sponsored training course.

Provided that—

(i) payments to any one shop steward shall not exceed the equivalent of ten days' full pay including non rostered days (8 hours) in any year(cumulative up to 40 days) unless taking paid shop steward's education leave in accordance with paragraph (iv) hereof,

(ii) each request to the Company for permission to attend a training course and receive full pay for the consequent absence must be endorsed by a Staff officer of the relevant Union;

(iii) each request takes into consideration normal staffing requirements in the employee's work area;

(iv) the maximum leave periods allowable to the shop stewards of the Union may be pooled and may be utilised to allow an individual shop steward to attend courses up to a maximum of four weeks per annum, providing a State office of the particular shop steward's Union makes such a request in writing to the Company;

(v) the combining of individual union pools will in no way be permitted;

(vi) the pool of hours as pertaining to the union shall be established by fixing the number of shop stewards of the Union as at the time of making this Agreement and multiplying this number by ten;

(vii) the total paid education leave utilised by the Union shall not exceed the equivalent of ten days' full pay per shop steward as established under paragraph (vi) hereof;

(viii) for the purpose of this clause "year" means a full calendar year.

16.—RIGHT OF ENTRY

A duly accredited Union representative shall have the right to enter the Company premises in accordance with the provisions of the Act and providing they comply with the Company's Visitors Policy as summarised below—

- Visitors must report to Reception (or Security outside office hours) and register their name and details in the Visitors Book. Each visitor will be issued a numbered Visitors Pass, which must be worn at all times.
- Visitors must be accompanied at all times by an ACI Glass Packaging employee. It is the responsibility of the person accompanying the visitor to ensure that the visitor complies with ACI Glass Packaging safety (including safety glasses) and other policies at all times.
- Visitors are to return the Visitors Pass and sign out in the Visitors Book before leaving the site.

17.—EXTENDED SICK LEAVE

Extended sick leave will be offered to employees who suffer long term illness or injury outside work in order to provide employees financial stability and alleviate any hardship which may be caused as a result of such illness or injury.

Payment will be based on standard hours of work.

Relevant rostered shift penalties for shift workers will apply only upon a return to work in accordance with their return to work program.

The period of cover will be fair and reasonable depending upon the nature of the illness or injury and subject to the following conditions—

(i) Awaiting period of 27 days, or use of all accrued sick leave, whatever is the greater, from the time of absence will apply before accessing this policy.

(ii) Employees can, where available, utilise their accrued sick leave during the waiting period. However, all accrued sick leave must be utilised before accessing the policy.

(iii) Employees will fully co-operate with a return to work program approved by the treating doctor.

(iv) Employees will consent to being examined, if required, by the Company Doctor.

(v) Employees who do not accept a return to work program will not receive any payment under this policy.

(vi) Any dispute over the application of this policy will be referred to a dispute arbiter agreed to by the parties on a site by site basis.

18.—SUPERANNUATION—SALARY SACRIFICE

(a) From 1 January 2000, employees may elect to make their superannuation contributions from their "before tax" wage rate. This arrangement is known as "Superannuation Salary Sacrifice".

(b) The following provisions will apply where an employee elects to Superannuation Salary Sacrifice.

(i) Despite any other provisions of this agreement, the employees weekly rate of pay shall be reduced by the amount which an employee elects by notice in writing to ACI to sacrifice in order to enable ACI to make a superannuation contribution for the benefit of the employee.

(ii) For an employee election to be valid the employee must complete the Superannuation Salary Sacrifice Election form provided by ACI.

(iii) The reduced rate of pay and the superannuation contributions provided for in this sub clause shall apply to periods of annual leave, long service and other periods of paid leave.

(iv) All other payments, including overtime, termination and redundancy payments, calculated by reference to the pre-salary sacrifice rate of pay.

(v) Unless otherwise agreed by ACI, an employee may only revoke or vary their election once in each twelve months during the month of July. Not less than one months written notice shall be given by an employee of revocation or variation of the employees election.

(vi) If, at any time while an employee's election is in force, there are changes in taxation or superannuation laws, practice or rulings, that materially alter the benefit to the employee or cost to the employer of acting in accordance with the election, either the employee or ACI may upon one months notice in writing to the other, terminate the election.

(vii) ACI shall not use any superannuation contribution made in accordance with the employees election to meet its minimum employer obligation under the Superannuation Guarantee Administration Act or any legislation which supersedes or replaces it. (Company contributions will be based on pre-salary sacrifice rate).

(c) (a) and (b) above is subject to the following restrictions—

(i) Subject to the capacity of funds to accept "Salary Sacrifice"

(ii) Company/Fund ensuring adequate explanatory papers are drawn up and distributed to members.

(iii) It is acknowledged that on the amount salary sacrificed by the employee, the superannuation contribution tax on that amount will be born directly or indirectly by the employee/member.

19.—FACILITIES

The employer shall continue to maintain all current provided facilities to the satisfaction of the parties to this agreement including the provision of lockers, drinking and boiling water, appropriate protective clothing, heating and cooling, ventilation, dining and rest room facilities. Any disagreements about the adequacy of facilities shall be dealt with through the consultative process of this agreement and the disputes settlement procedure.

20.—ANZAC DAY

Where Anzac Day falls on a weekend, the public holiday will be substituted to the following Monday.

21.—ANNUAL LEAVE

By mutual agreement, the existing annual leave entitlement may include the taking of up to a maximum of five (5) single days.

22.—PERSONAL LEAVE

The following simplified application is agreed—

The existing Personal Leave pool (sick, carers and bereavement leave) will be split into two separate groupings i.e. Bereavement leave shall stand alone.

(i) Personal leave (Sick leave and Carers leave)

(a) Sick leave

— to be accessed in line with the current practice.

(b) Carers leave

— to be accessed as per the Federal Metal Industry Award, i.e, immediate family/household

— access to Carers leave will be via accrued sick leave to a maximum of (8) days p.a.(non cumulative)

— the following 'immediate family' definition to apply

Spouse, parent, sibling, child, grandparents, parents-in-law, sibling-in-law, grandchild

For the purpose of this clause the words 'spouse' shall include de facto spouse and the word parent shall include foster parent or step parent.

(ii) Bereavement leave

(a) Accessible on a per occasion basis, non cumulative, as follows

— Deaths within Australia

3 days per occasion

(b) Deaths outside Australia

— Attending funeral

3 days per occasion

— Not attending funeral

1 day per occasion

* Bereavement leave payment to include shift loading for shift workers.

— the following 'immediate family' definition to apply.

Spouse, parent, sibling, child, grandparents, parents-in-law, sibling-in-law, grandchild.

For the purpose of this clause the word 'spouse' shall include de facto spouse and the Word parent shall include foster parent or step parent.

23.—CONTINUOUS IMPROVEMENT

The parties recognise and accept the need for continuous improvement and change in the manufacturing process in order to remain competitive. The parties agree to consultation in accordance with Clause 10 (ii) General.

24.—PERSONAL STANDARDS AND UNIFORMS—CUSTOMER INDUSTRY STANDARDS

Customer expectations on hygiene standards are increasing yearly.

In order to meet these expectations consistent Customer Industry Standard requirements will be implemented across all operations.

This will address issues such as—

– uniforms, all aspects including buttons, pockets and caps
– safety glasses
– hearing protection
– jewellery
– finger nails and false nails
– washing hands

This will ensure an organised and disciplined approach is presented to all customers at all Plants.

All employees will be required to adopt changes in work practices, personal dress and protective clothing as determined by customer requirements into the future. Either party will not adopt an unreasonable position.

The parties are committed to the process of genuine consultation in the workplace. As per Clause 10(ii) in implementing this clause.

During the consultation process, either party has the right to invoke the agreed dispute settlement procedure.

25.—ANNUAL LEAVE ALLOCATION

A system of annual leave allocation will be implemented that provides for the taking of annual leave in the year of accrual.

An employee may defer one week of annual leave in any year for a maximum of (5) years.

During machine outages/furnace rebuilds the Company will require, subject to the appropriate skills mix remaining, employees with the largest accruals to take leave.

To be implemented on a site by site basis through a process of genuine consultation as per Clause 10(ii).

26.—NEW Y2K COMPLIANT HR/PAYROLL SYSTEM

A new Year 2000 compliant HR/Payroll system must be introduced before January 2000.

After the bedding down phase, areas where specific improvement will be sought include—

(a) replace the highly administrative manual clock card type system with a more effective automatic data capture system.

(b) provide an averaging of wages ability, ie. Avoiding high/low wages weeks.

(c) become integrated with an effective site entry/exit system for attendance and safety requirements.

The parties are committed to the process of genuine consultation in the workplace as per Clause10 (ii). During the consultation process, either party has the right to invoke the agreed dispute settlement procedure.

27.—REDUNDANCY

(i) Relevant rostered shift penalties for shift workers will apply to severance payments retrospective on or from 1/7/2000 to a ceiling of 10 years service (40 weeks) from that date. Thereafter, on or from 1/7/2001 full retrospectivety will apply.

(ii) The severance agreement which lapses on 1/7/2000 will be amended as in (i) above and recertified for a further 3 years duration from that date.

(iii) The severance agreement will also be amended to include the following—

Redundancy

Discussion before termination's

(a) Where the employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone and this is not due to the ordinary and customary turnover of labour and that decision may lead to termination of employment, the employer shall hold discussions with the employees directly affected and with the Union.

(b) The discussions shall take place as soon as is practicable after the employer has made a definite decision which will invoke the provisions of paragraph (a) above hereof and shall cover, inter alia, any reasons for the proposed termination's, measures to avoid or minimise the termination's and measures to mitigate any adverse effects of any termination's on the employees concerned.

(c) For the purposes of the discussion the employer shall, as soon as practicable, provide in writing to the employees concerned and their Union, all relevant information about the proposed termination's including the reasons fort the proposed termination's, the number and categories of employees likely to be affected, and the number of workers normally employed and the period over which the termination's are likely to be carried out. Provided that any employer shall not be required to disclose confidential information the disclosure of which would be inimical to the employer's interests.

28.—NATIONAL INDUSTRY MEETINGS

(i) Joint (Company/Union) National Meetings

The Company agrees to (3) delegates per site including, where applicable, economy class airfares on the following basis—

(a) rostered on—no loss of pay

(b) rostered off—single time, 8 hours, no shift penalty

(c) Penrith—2 Glass representatives
1 AMWU representative
CEPU representative
1 AWU Maintenance representative

(d) All meetings to occur in Sydney

(e) Maximum Delegate representation of 17

Note: Airfares/attendance is not cumulative. There will be no swaps.

(ii) Respective Unions to be reimbursed, on a lost time basis, for the last National Delegates Meeting (24/25 March) without prejudice.

Union (National) meeting must be prior advised by each union. The Company at its discretion will determine on a case by case basis the non loss of payment issue.

29.—EMPLOYMENT SECURITY

(i) The parties recognised that a stable committed and skilled workforce will assist in providing job security.

The Company undertakes that no employees will be made forcibly redundant, as a result of the implementation of workplace change items under this agreement.

In the event that redundancies are proposed by the Company due to changes in market conditions brought about by loss of contract, increased competition due to market development, change supply methods by clients or other unforeseen reasons, discussions will take place between the parties in accordance with Clause 10 of this Agreement.

(ii) Point (i) above will apply on an individual plant basis only upon satisfactory plant efficiency/flexibilty content outcome.

30.—EASTER SATURDAY

To be observed on all sites i.e., Easter Saturday to be observed as a public holiday for shift workers. If a day worker is required to work Easter Saturday, he/she shall be paid Public Holiday penalty conditions respectively however, Easter Saturday is not a designated Public Holiday entitlement to day workers.

31.—FIRST AIDERS

The parties will ensure there are enough trained first aiders to meet relevant legislative requirements.

32.—DAYLIGHT SAVING

A site issue, to be determined on a cost neutral basis (if applicable) in relevant state.

33.—OVERTIME

All overtime to be paid at double time. Except where overtime falls on a public holiday where the public holiday penalty will apply.

34.—WORK COVER MAKE UP PAY

The Company agrees to Work Cover Make Up Pay which allows for full make up pay for 100% of ordinary earnings, including the relevant rostered shift penalties for shift workers, (excluding overtime and non all purpose allowances), for a period of 52 weeks in respect of any one injury.

SIGNATORIES

For and on behalf of ACI Operations Pty Ltd trading as ACI Glass Packaging—Perth

NIGEL DART

30/9/99

For and on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Unions of Workers, Western Australia Branch

JOHN SHARP-COLLETT.

28/9/99

For and on behalf of Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, Western Australia

J. D. FIALA
Metal Trades Organiser.

24/9/99

Dated this day of 1999.

APPENDIX "A"

HEADS OF AGREEMENT

BETWEEN ACI GLASS PACKAGING—PERTH, A.M.W.U. AND C.E.P.U.

1. Shift Maintenance flexibilities

It is recognised the primary role of shift maintenance is to attend to breakdown maintenance.

Shift Maintenance Fifters and Electricians will—

(a) wear and respond to communication systems

(b) respond to Glassworker requests in line with priorities/ parameters set by the Shift Manager and Working party.

A Working party will be formed to establish overall protocols and guidelines of communication.

(c) perform required backshift repair work as allocated by Supervisor. Perform equipment fine tuning when not attending to breakdowns.

(d) complete required downtime/ production information, eg: shift log/database

In general a customer service approach will be adopted (customer = production).

Shift maintenance in conjunction with Management will work to continuously improve the operation of this function.

2. Hot End Job Changes

Machine set ups (ie, strip, set up, clean) will be shared in line with a team approach between the Fitters and appropriately trained Glassworkers on a no demarcation basis. (See identified items in attachment 4.)

eg: there will no longer be a blank side/mould side demarcation line.

Fitters and Glassworkers will jointly participate in job change continuous improvement teams.

Fitters will be trained in machine seftling down job change activity.

The parties recognise that a stable committed and skilled workforce assists in providing job security.

The Company undertakes that no employees will be made forcibly redundant as a result of the implementation of workplace change items under this clause.

In the event redundancies are proposed by the Company due to changes in market conditions bought about by loss of contract, increased competition due to market development, change supply methods by clients or other unforeseen reasons, discussions will take place between the parties in accordance with relevant Award requirements.

This clause applies to Job Change activity only.

3. Contractors

The utilisation of contractors, casuals and temporary employees will be discussed with the pertinent Delegate(s) prior to the contractor/ casual/temporary coming onto the site.

In the event of agreement not being reached in a particular situation, the parties agree to follow the disputes procedure contained in this agreement.

The parties recognise that the maintenance workforce's primary requirement is providing an effective maintenance function attending to production glass industry maintenance requirements.

4. Consultative mechanisms

A new Joint Consultative Committee charter will be developed that seeks to, in the main, exclude IR issues.

As such, Delegates will play a greater role in direct negotiation/communication with Management.

5. Payment for training and meetings

As per the industry agreement (see Attachment 1).

6. Allowance Rationalisation

The parties agree to the consolidation of allowances currently paid (ie, Heat, Special Heat, Dirt)

An average amount of $30 per week (all purpose hourly rate) is agreed effective the first pay period on or after January 1, 1999.

7. Competency Standards—Assessment

An assessment of maintenance Department/ Work area competencies will be conducted by an independent facilitator.

8. Fork Lifts

Appropriately trained tradespersons will, where required, operate Forklifts to assist with the efficient day to day operation of their functional areas.

9. Maintenance planning and communication systems

All personnel in Maintenance departments will fully utilise and participate in improved planning and communication systems (being investigated at present) as they are introduced.

These include—

– preventative maintenance systems
– downtime data entry
– attendance system
– citect interface
– plant alarm systems

10. Preventative maintenance

Maintenance employees and Management commit to the identification and implementation of preventative maintenance work and scheduling in an effort to—

(a) more effectively utilise the skills/competencies of maintenance employees,

(b) improve overall plant performance/equipment reliability.

A checklist system will be- implemented by mid 1999 focusing initially on the top 10 breakdown items

11. Mechanical & Electrical trade flexibility

Fitter and Electricians will utilise their skills/competencies to the full extent of their classification. Skill shortfalls shall be identified and addressed through the Training Committee.

Familiarisation programs, where required, will also be adopted.

Under this agreement the trade parties agree to have discussions, inconjunction with the Company, regarding shared tasks.

12. Cold End Job Changes

All Cold End changeover work is to be performed in line with a team concept utilising Fitters, Electricians and Glassworkers on a no demarcation basis as detailed in attachment 2 subject to safety and legal licensing requirements.

Fitters, Electricians and Glassworkers will participate in job change continuous improvement teams.

The parties recognise that a stable committed and skilled workforce assists in providing job security.

The Company undertakes that no employees will be made forcibly redundant as a result of the implementation of workplace change items under this clause.

In the event redundancies are proposed by the Company due to changes in market conditions bought about by loss of contract, increased competition due to market development, change supply methods by clients or other unforeseen reasons, discussions will take place between the parties in accordance with relevant Award requirements.

Electricians/Fitters will be trained in glass quality/settling down issues.

Electricians/Fitters will maintain their involvement in the Job Change.

This clause applies to job change activity only.

13. Mould Shop

The overall efficiency of the Mould Shop operation will improve through a process of continuous improvement.

Mould Shop operatives will complete required quality/ production information, eg: inspection reports

14. Review Mechanisms

In addition to the monitoring of the implementation of this agreement by Delegates and Management, a higher level review will be conducted, as required, by the pertinent organisers and a relevant head office representative.

15. Avoidance of Disputes Procedure

As per Attachment 3.

16. Relationship to the Certified Agreement

This agreement forms the specific work content objectives of the next Enterprise Agreement.

The parties recognise and accept the need for continuous improvement and change in the manufacturing process in order to remain competitive.

NIGEL DART	8/2/99
ACI Glass Packaging—Perth	Date
Joe Fiala	8/2/99
CEPU	Date
Keith Peckham	8/2/99
AMWU	Date

ATTACHMENT 1

PAYMENT FOR TRAINING AND MEETINGS

1. All training

— Single time payment to apply

Shift penalties for shiftworkers will apply in all cases but not on a penalty upon penalty basis.

Shift loading is ordinary hours, afternoon, night and weekend loading.

The Company shall make every effort, where practical, to schedule out of hours meetings/training just after the shift change over times.

2. All communication meetings

— Time and a half payment to apply

3. All other meetings

i.e. continuous improvement, union management meetings, etc.

— Penalty rates to apply

— Before or after a shift (pay for duration)

— Rostered days off (3 hours O/T minimum)

4. Meetings Prior to/after shift

Where any of the above commences and continues over 4 hours prior to the commencement of the rostered shift or over 4 hours after the completion of a rostered shift the following may apply—

(a) affected people may be excused from working the rostered shift, with pay, to attend the meeting. No payment will be made to attend the meeting.

(b) affected people may be excused from working part of the rostered shift, with pay, to attend the meeting; or

(c) By agreement, be paid at the appropriate rate until the commencement of the rostered shift to be worked or where the meeting is scheduled after the rostered shift, work the shift and receive appropriate payment from the completion of the shift to the completion of the meeting.

A "rostered shift", in this instance, is a shift scheduled immediately before or immediately after the start time of the meeting.

5. The banking of U' days, where applicable up to 10 days per year will be utilised where practical for—

— Training

— Shift meetings

— Team brief

— OH&S

ATTACHMENT 2

COLD END JOB CHANGE

WORK ITEM	Party able to perform task
Impact Simulator (ICK) electrical repairs	Elect Techs
FP/TIM job change setup	ET/Glasswkrs/Fitters
FP repairs—mechanical	Fitters/ET
FP repairs – electrical	ET
ART pressure tester job change setup—mechanical	ET/Fitters/Glasswkrs
ART pressure tester repairs—mechanical	Fitters/ET
ART pressure tester repairs—electrical	ET
Cold end bottle counter job change set up (height adjust)	ET/Glasswkrs/Fitters
Cold end spray job change adjustments (height, fans, spray pattern)	Fitters/ET/Glasswkrs
Impact simulator (ICK) job change setup	Fitters/ET/Glasswkrs
Conveyor job change guide rail setup	Fitters/ET/Glasswkrs
Elevator job change setup	Fitters/ET/Glasswkrs
Imaje inkjet printer servicing and job change setup	Fitters/ET
Palletiser job change setup	Fitters/ET/Glasswkrs

Note—

Any repair work remains with the relevant trade.

All personnel must be suitably trained.

ATTACHMENT 3

ACI GLASS PACKAGING PERTH—DISPUTE RESOLUTION PROCEDURE

Principles

This procedure is designed to promote the resolution of issues that arise at the lowest possible level and to provide a step by step process which will be accessed if the parties are genuinely unable to resolve the issue.

At each step in the procedure, reasonable time is to be allowed for the parties to resolve the matter. The parties agree not to proceed to each next step in the procedure until the previous step has been completed. Following these procedures will ensue that the dispute is resolved in the most efficient manner.

In the event of a dispute, question or difficulty arising out of this agreement effecting one or more employees, the following procedure shall apply.

Procedure

Step 1: In the first instance, the employee shall discuss his/her concern with his/her immediate Supervisor/ Superintendent with a view to resoloution of the issue.

If the parties agree on a solution, a time frame for implementation is to be agreed. If the parties cannot agree, then proceed to step 2.

Step 2: The employee and the Supervisor/Superintendent jointly document the reason for the dispute and then meet with the union Delegate to explain and attempt to resolve the issue.

If the parties agree on a solution, a time frame for implementation is agreed. If the parties cannot agree, then proceed to step 3.

Step 3: The Supervisor/Superintendent and/or the Department Manager meet with the Union Delegate with a view of resolution of the issue.

If the parties agree on a solution, a time frame for implementation is to be agreed. If the parties cannot agree, then proceed to Step 4.

Step 4: The Union Delegate and the HR Manager meet with a view to resolution of the issue. Either party has the option to seek input and assistance from ACI Perth employees or external person/s organisation, e.g.

- Union Organiser
- Union Secretary
- Employer Association
- Group Office/Head Office Representatives

All reasonable attempts must be made to resolve the dispute prior to referring to the Commission.

If the parties agree on a solution, a time frame for implementation is to be agreed. If the matter remains unresolved it will be referred by either party to the Western Australian Industrial Relations Commission

Notes—

(i) If conciliation by the Western Australian Industrial Relations Commission fails to resolve the dispute the commission is empowered, to arbitrate over the matter provided that the arbitration is limited to the interpretation, application, or process of implementation of a term or terms of this agreement.

(ii) Pending the resolution of any matter in accordance with the above procedure, work shall continue without disruption. The circumstances that exist immediately prior to the dispute arising shall apply until final resolution of the matter.

No party shall be prejudiced as to the final settlement by the continuation of work in accordance with this clause.

(iii) Step 1 of this procedure does not preclude the option of employees requesting Union representation.

(iv) This dispute resolution procedure does not apply to Occupational Health & Safety matters. It is expected that the Occupational Health and Safety Representatives will follow the relevant procedures in the resolution of any health and safety matters.

(v) In order to follow the peaceful resolution of grievances the parties shall be committed to avoid stoppages of work, lockouts or any other bans or limitations on the performance of work whilst the procedures or negotiation and conciliation are being followed.

ATTACHMENT 4

HOT END JOB CHANGE—STRIP/CLEAN/SET UP

In the context of job changes, not maintenance—

- Troughs/Deflectors
- Cartridges adjustment
- Blanks, Baffles, Plungers, Funnels
- Hangers—Standard
- Spacers
- Moulds
- Blowheads
- Takeout Head
- Distribution Plates
- Wipe out Fingers
- Neck Rings
- Neck Ring Arms
- Baffle Arms
- Funnel Arms
- Anti-Deflection Brackets
- Links & Rings
- Wind Stacks
- Shear Mechanisms
  - Shear blades
  - Drop guides
  - Shear sprays
- Feeder
  - Shear Cam
  - Plunger Cam
- Quick change Load Funnels only
- Machine Conveyor
  - Pocket Air
- Transfer Fingers
- Lehr
  - Removal/replacement of Stacker bar
  - Lehr Plates
  - Steady bar adjustment

ATLAS COPCO AUSTRALIA PTY LIMITED PERTH WA ENTERPRISE AGREEMENT 1999.
AG 166 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Atlas Copco Australia Pty Limited

and

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

AG 166 of 1999.

Atlas Copco Australia Pty Limited Perth WA

Enterprise Agreement 1999

COMMISSIONER S J KENNER.

26 November 1999.

Order.

HAVING heard Ms J Wesley 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 Atlas Copco Australia Pty Limited Perth WA Enterprise Agreement 1999 as filed in the Commission on 5 October 1999 in the terms of the following schedule 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 Atlas Copco Australia Pty Limited Perth WA Enterprise Agreement 1999.

2.—APPLICATION

This Agreement shall apply at Atlas Copco Australia Pty Limited, 222 Welshpool Road, Welshpool, Western Australia to the parties referred to in Clause 3—PARTIES BOUND, of this Agreement.

3.—PARTIES BOUND

The parties to this Agreement are—

(a) Atlas Copco Australia Pty Limited

(b) 8 metal trades personnel, whether or not they are members of the Organisation of employees specified in sub-clause 3 of this Agreement, engaged in the occupations, industries and callings specified in the Metal Trades (General) Award No 13 of 1965; and

(c) The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australia Branch (AFMEPKIU).

4. DATE AND PERIOD OF OPERATION

This Agreement shall operate from the beginning of the first pay period to commence on or after the 1st July 1999 and shall remain in force for a period of twenty-four (24) months thereafter.

5. RELATIONSHIIP TO PARENT AWARD

This Agreement shall be read and interpreted wholly in conjunction with the Metal Trades (General) Award 1966, as amended, provided that where there is any inconsistency between this Agreement and the Award this Agreement shall take precedence to the extent of the inconsistency.

6. CONSULTATION

The process for the parties to this Agreement to consult with each other and agree about matters involving changes to the Organisation or performance of work is by workplace committees consisting of employees and management from the functional areas meeting, at minimum, once per month during work hours to consider and agree on the development of systems and procedures to achieve productivity and efficiency measures such as are listed at Attachments 1 to 3 of this Agreement. It is agreed that these lists are not exclusive, and further opportunities may be identified and added by any Party to this Agreement.

7.—OBJECTIVES OF THE AGREEMENT AND MEASURES TO INCREASE THE PRODUCTIVE PERFORMANCE OF THE ENTERPRISE

The Parties to this Agreement agree to undertake to improve the effectiveness and efficiency of the operations conducted by Atlas Copco Australia Pty Limited, 222 Welshpool Road, Welshpool, Western Australia by participating in the workplace Committees to discuss, develop and implement the systems and procedures required to achieve the productivity improvements listed at Attachments 1 to 3 of this Agreement.

8.—SINGLE BARGAINING UNIT

For the purpose of negotiating this Enterprise Agreement a single bargaining unit was established with a negotiating committee.

9.—WAGES

a. Upon acceptance of this Agreement by the majority of the employees engaged at 222 Welshpool Road, Welshpool, Western Australia, wages will be increased by two 4% increments as shown at sub-paragraphs a. to b. to Attachment 4, (page 10) to this Agreement.

b. The wage increases specified in subclause (a) of this Clause, shall be payable in addition to the current agreed enterprise rates of pay and shall constitute part of the all purpose rate of pay, including Tool Allowance, in respect of employees covered by this Agreement.

c. The wage increases specified in subclause (a) of this Clause shall be payable, initially, as and from the first full pay period commencing on or after the date of acceptance and signature of this Agreement.

d. The subsequent wage increase shall be payable as and from the first full pay period commencing on or after a period of twelve calendar months from the date of effect of this Agreement.

e. The wage increases referred to in subclause (a) of this Clause, shall not be absorbed into any overaward payment.

f. There shall be no further wage increases for the life of this Agreement other than Award variations to other work related allowances.

g. The Leading Hand Allowance shall be included in, and form part of the ordinary weekly wage.

10.—COMPANY POLICIES AND PROCEDURES

a. Health and Safety

Atlas Copco Australia Pty Limited is committed to promoting a safe and healthy workplace for all employees and it is the aim of this Agreement that all parties actively support and adhere to the detail of the Company Policy. Specifically, it is agreed that all parties will utilise the Safety Conunittee as second point of contact on all health and safety matters, after first advising their Supervisor.

All parties agree to work together, through the Workplace Safety Committee, to increase the standard of safety within the workplace and encourage a more visible use of safety equipment and practices.

b. Environment

This Agreement confirms the intention of all parties to discuss and agree means of adhering to the Atlas Copco Australia Pty Limited Environmental Management policy and procedures.

c. Uniforms and Protective Clothing

Atlas Copco Australia will provide Company uniforms, cool weather and protective clothing, wet weather gear and safety boots/equipment, as follows—

(1) ACCA/HIRE: 5 shirts, 5 trousers, 5 overalls/dust coats. Weekly laundry will be provided for overalls at Company expense.

(2) CMT: 5 shirts, 5 trousers, 5 overalls. Weekly laundry will be provided at Company expense for overalls.

Cool Weather Clothing will consist of an Atlas Copco bomber-style jacket and/or a pullover.

Wet Weather Clothing will be made available to those personnel required to work out-of-doors during wet weather. It will consist of—

(1) wet weather trousers; and

(2) wet weather jacket; and

(3) wet weather hat; or

(4) wet weather jacket with hood.

Any review of uniforms policy will involve consultation and agreement with all relevant parties.

Items of uniform/protective clothing/equipment issued, will be exchanged, due to fair wear and tear, as required by company safety and presentation standards and approved by the supervisor.

d. Job Advertising

The Company policy that job vacancies be advertised internally shall continue in order that—

(1) all personnel have access to information on staffing movements and opportunities;

(2) all personnel have equal opportunity to apply for promotion; and

(3) Divisional transfers occur with no loss of benefits or conditions.

The Company policy that any person wishing to make application for a vacancy continues to apply. After notificafion to the innnediate supervisor, the interested employee is to then make formal applications through Human Resources.

e. Redundancy

The Redundancy enfitletnents and provisions applying to this Agreement are shown at Attachment 5.

Atlas Copco Australia Pty Limited is committed to conferring with the relevant personnel and their unions prior to undertaking any redundancy action.

11.—SKILLS DEVELOPMENT, EDUCATION AND TRAINING

a. Skill Competency Reviews and Training Needs

It is agreed that regular skill competency reviews will be conducted for all personnel, party to this Agreement, to identify training and personal development needs and to enable plans to be developed and implemented for the provision of appropriate, accredited training.

b. Assistance With Study

This Agreement acknowledges the Atlas Copco Australia Pty Limited Assistance With Study policy and confirms the continuation of Company encouragement and assistance to all personnel who wish to undertake external work related studies.

c. Personal Development

This Agreement confirms the intention of all parties to work towards "total development" of all personnel. This will involve training and development in technical and directly job-related areas, as well as areas of personal development such as communication skills, time management and supervisory development.

These skill areas will be identified during the Skill Competency Reviews and assessment in accordance with National Competency Standards.

d. Job Descriptions

Job descriptions, for all positions, are to be regularly reviewed, revised, agreed and documented to ensure relativity

to relevant Award Classificafions and National Competency Standards.

During the life of the Agreement a full skills audit will be conducted related to the National Competency Standards.

12.—NO EXTRA CLAIMS

It is a term of this Agreement that all parties bound by this Agreement will not pursue any extra claims, award or over award, for the life of this Agreement including increases arising from Award variations or decisions of the Conunission other than increases that are consistent with the terms and this Agreement.

13.—AVOIDANCE OF INDUSTRIAL DISPUTES

In relation to any matter that may be in dispute, the parties to this Agreement will attempt to resolve any question, dispute or difficulty at the workplace level by procedures which include, but are not limited to, the following—

(a) The employee and his/her supervisor shall meet and confer on the matter.

(b) Should the matter remain unresolved, the employee may elect to be represented by a co-worker or Delegate in discussions with management.

(c) If the matter remains unresolved after such meetings, the parties shall then arrange discussions at more senior levels of management as appropriate.

(d) The employee may elect to be represented by his/her Union.

(e) Emphasis shall be placed on a negotiated settlement. However, if the matter remains unresolved, the parties jointly or separately refer the matter to the Western Australian Industrial Relations Commission for assistance in resolving the dispute. The parties will participate in such processes in good faith.

(f) Employees agree to continue normal work while this procedure operates unless they have reasonable concerns about an imminent risk to their health and safety.

Subject to the relevant provisions of the Occupational Safety, Health and Welfare Act, even if an employee has reasonable concern about an imminent risk to health and safety, he/she must not unreasonably fail to comply with a reasonable direction by his/her employer to perform other available work that is safe and appropriate for him/her to carry out, whether at the same or another site.

The parties must co-operate to ensure the dispute resolution procedures are carried out as quickly as reasonably possible.

Nothing in these procedures shall be interpreted as the company waiving its rights under the Act where employees have commenced, are threatening to commence industrial action during the life of this Agreement.

14.—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 plant or enterprise.

15.—NATIONAL STANDARDS

This Agreement shall not operate so as to cause an employee to suffer a reduction in ordinary time earnings or in national standards such as standard hours of work, annual leave or long service leave.

16.—CONTINUOUS IMPROVEMENT

Management and its employees covered by this Agreement are committed to searching for areas where improvements can be made and implementing such improvements as part of this Agreement. This includes commitinent to, and support of, the implementation of a customer focused Quality System and achievement of Certification in accordance with the AS/NZS ISO 9000—1994 series of Standards.

17.—RENEWAL OF AGREEMENT

Negotiations shall commence no later than three months prior to the expiry of this Agreement to consider the nature of changes, if any, to the replacement Agreement.

SIGNATURES TO THE AGREEMENT

Signed at in the State of this day of , 19

SIGNED FOR AND ON BEHALF OF	SIGNED FOR AND ON BEHALF OF
Atlas Copco Australia Pty Limited	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch
.....	.....
16/9/99	23/9/99

ATTACHMENT 1

ATLAS COPCO AUSTRALIA PTY LIMITED
PERTH WA ENTERPRISE AGREEMENT 1999

ATLAS COPCO COMPRESSORS AUSTRALIA

OBJECTIVES OF THE AGREEMENT AND MEASURES TO INCREASE

THE PRODUCTIVE PERFORMANCE OF THE ENTERPRISE

The management and employees of Atlas Copco Australia Pty Limited Service Department, undertake to consider, agree upon and implement systems and procedures to—

1. establish, comply and maintain standard times for routine service jobs, tasks and functions.
2. establish methods to reduce “lost hours”.
3. reduce customer “Credits”.
4. reduce Atlas Copco hourly rate, (i.e. internal costs) e.g. housekeeping.
5. reduce Waste.
6. reduce vehicle running costs.
7. improve communication.
8. assist to ensure smooth job flow.
9. review the call out system.
10. ensure accurate and comprehensive cost recovery.
11. assist to develop the highest possible standard of Customer satisfaction.
12. permit staff “specialist technicians” to use tools and operate equipment when specific, specialised knowledge and/or experience is not readily available from Atlas Copco Award employees, (providing this such operations are incorporated into formal, “on-the-job” training of Award employees).
13. Increase the levels of efficiency of the operations and the standard of service provided to the customers by monitoring and reviewing/revising resource availability.
14. During the life of this Agreement alternative RDO systems will be trialled subject to agreement between employees and their supervisor.

ATTACHMENT 2

ATLAS COPCO AUSTRALIA PTY LIMITED
PERTH WA ENTERPRISE AGREEMENT 1999

ATLAS COPCO CONSTRUCTION & MINING AUSTRALIA (WORKSHOP)

OBJECTIVES OF THE AGREEMENT AND MEASURES TO INCREASE

THE PRODUCTIVE PERFORMANCE OF THE ENTERPRISE

The management and employees of Atlas Copco Construction & Mining Australia Workshop, undertake to consider, agree upon and implement systems and procedures to—

1. establish and maintain standard times for routine service Jobs, tasks and functions.
2. achieve a reduction in non-productive hours.
3. increase the levels of efficiency of the operations and the standard of service provided to the customers by monitoring and reviewing/revising resource availability.
4. reduce Atlas Copco hourly rate, (i.e. internal costs).
5. achieve a reduction in workshop warranty costs.

6. reduce Waste.
7. improve communication.
8. permit staff "specialist technicians" to use tools and operate equipment when specific, specialised knowledge and/or experience is not readily available from Atlas Copco Award employees, (providing this such operations are incorporated into formal, "on-the job" training of Award employees).

ATTACHMENT 3

ATLAS COPCO AUSTRALIA PTY LIMITED
PERTH WA ENTERPRISE AGREEMENT 1999

ATLAS COPCO HIRE AUSTRALIA

OBJECTIVES OF THE AGREEMENT AND MEASURES TO INCREASE

THE PRODUCTIVE PERFORMANCE OF THE ENTERPRISE

The management and employees of Atlas Copco Hire Australia, undertake to consider, agree upon and implement systems and procedures to—

1. reduce costs whilst increasing the level of service provided to the customers.
2. develop an extra concentration on housekeeping.
3. participate in regular skill performance reviews in order to identify training needs and develop internal and external training and developments programs for all personnel.
4. provide efficient manning levels to meet customer demands by staggered start and finish times, within the span of hours.
5. increase the levels of efficiency of the operations and the standard of service provided to the customers by monitoring and reviewing/revising resource availability.

ATLAS COPCO AUSTRALIA PTY LIMITED PERTH WA WORKPIACE AGREEMENT 1999
PROPOSED WAGE INCREASES

Wage Group (a)	Classification Title (b)	Current Rate July 1999 (c)	Perth Wage 1st Increase (d)	Perth Weekly Wage 2nd Increase (e)
C5	ENGINEERING TECHNICIAN Level V	$737.90	$767.40	$798.10
	ADVANCED ENGINEERING TRADESPERSON Level II			
C6	ENGINEERING TECHNICIAN Level IV	$711.85	$740.30	$769.95
	ADVANCED ENGINEERING TRADESPERSON Level I			
C7	ENGINEERING TECHNICIAN Level III	$688.30	$715.85	$744.45
	ENGINEERING TRADESPERSON SPECIAL CLASS Level II			
C8	ENGINEERING TECHNICIAN Level II	$661.00	$687.45	$714.95
	ENGINEERING TRADESPERSON SPECIAL CLASS Level I			
C9	ENGINEERING TECHNICIAN Level I	$636.20	$661.65	$688.10
	ENGINEERING TRADESPERSON Level II			
C10	ENGINEERING TRADESPERSON Level I			
	PRODUCTION SYSTEM EMPLOYEE	$617.60	$642.30	$668.00
C11	ENGINEERING/PRODUCTION EMPLOYEE Level IV	$570.50	$593.30	$617.05
C12	ENGINEERING/PRODUCTION EMPLOYEE Level III	$522.10	$543.00	$564.70
C13	ENGINEERING/PRODUCTION EMPLOYEE Level II	$475.00	$494.00	$513.75
C14	ENGINEERING/PRODUCTION EMPLOYEE Level I	$452.65	$470.75	$489.60
	4TH YEAR APPRENTICE	$543.20	$564.90	$587.50
	3rd YEAR APPRENTICE	$462.60	$481.10	$500.35
	2nd YEAR APPRENTICE	$339.80	$353.40	$367.50
	1ST YEAR APPRENTICE	$259.20	$269.55	$280.35

a. The pay rate shown in column (d) shall be paid as and from the first full pay period commencing on or after the date of Acceptance and Signature.

b. The pay rate shown in column (e) shall be paid as and from the first full pay period commencing on or after a period of twelve (12) months after the date of the pay rate increase at a. above.

21 July 1999

ATTACHMENT 5

ATLAS COPCO AUSTRALIA PTY LIMITED

REDUNDANCY FORMULA AND AGREEMENT

1. Atlas Copco Australia Pty Limited (the Company), agrees to notify employees and the Union prior to a retrenchment.

2. Whilst recognising that the Company has the right to employ and terminate, it accepts that any retrenchment be on individual merit. As the first step, volunteers will be accepted and entitled to retrenchment provisions, except for re-employment preference.

3. PAY IN LIEU OF NOTICE

T'he Company will pay—

Less than 3 Years Service:	2 weeks
3 years and Less Than 4 Years Service	3 weeks
4 Years Service or More	4 weeks

PLUS

If employee is over 45 years of age: additional 1 week

PLUS

If employee is over 55 years of age: a further additional 1 week

4. REDUNDANCY PAY

a. For service, as a permanent employee, of less than one year, the Company will pay a minimum of five (5) days pay.

b. For service, as a permanent employee, of more than one year, the Company will pay sixteen days pay for each year of service, calculated on completed years and months.

c. The Company will pay out untaken sick leave credits.

d. The Company will pay out untaken annual leave credits and include the 17.5% loading.

e. The Company will pay long service leave entitlements, on a pro-rata basis after 2.5 years service.

5. The Company will extend preference for re-employment to a retrenched employee, other than a volunteer, should a suitable vacancy for the person occur within a period of six months from the date of retrenchment. Such offer will be made in writing and must be replied to, by the person, within three days of the estimated date of receipt of the offer.

6. No retrenched employee will receive less than the relevant Award entitlement.

BHP BUILDING PRODUCTS MYAREE ENTERPRISE AGREEMENT 1999.
No. AG 129 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

BHP Steel (JLA) Pty Ltd trading as
BHP Building Products

and

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

AG 129 of 1999.

BHP Building Products Myaree Enterprise Agreement 1999

COMMISSIONER S J KENNER.

10 November 1999.

Order.

Having heard Mr M Beros as agent on behalf of the applicant and Mr J Fiala 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 BHP Building Products Myaree Enterprise Agreement 1999 as filed in the Commission on 26 July 1999 in the terms of the following schedule be and is hereby registered as an industrial agreement.

(2) THAT the BHP Building Products—Myaree Performance Related Payments Scheme Agreement 1997 No AG 84 of 1997 be and is hereby cancelled.

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

1.—TITLE

This Enterprise Agreement will be referred to as the BHP Building Products Myaree Enterprise Agreement 1999.

2.—ARRANGEMENT

3.—APPLICATION OF ENTERPRISE AGREEMENT

This agreement will apply to the BHP Steel (JLA) Pty Ltd site trading as BHP Building Products at Myaree which is covered by the John Lysaght (Australia) Ltd Award (No. 27 of 1967).

This agreement supersedes the operation of Agreement AG 84 of 1997.

4.—PARTIES BOUND

The parties to this agreement are—

a) BHP Steel (JLA) Pty Ltd trading as BHP Building Products at Myaree;

b) Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch and its members;

c) All employees of BHP Building Products Myaree, which number approximately 26, whether members of the organisations specified above or not, engaged in any of the classifications contained in the John Lysaght (Australia) Limited Award (No. 27 of 1967).

5.—DATE AND PERIOD OF OPERATION

This agreement will operate from the 1 January 1999 for period of 12 months. It will remain in force until 31 December 1999.

6.—RELATIONSHIP TO PARENT AWARD

This agreement is to be read and interpreted in conjunction with the John Lysaght (Australia) Limited Award (No. 27 of 1967) and shall prevail to the extent of any inconsistency with that Award.

7.—PURPOSE OF ENTERPRISE AGREEMENT

This agreement rewards employees for implementing projects and achieving targets to improve the Building Products business. The focus of this agreement is to protect employees' purchasing power and minimise additional costs to the business. It recognises the high level of co-operation between employees and management to improve business performance and the need to continue this co-operative relationship and do whatever is safe, efficient, logical and legal to achieve excellence in all areas of our business.

8.—WAGE INCREASE

This agreement provides for a wage increase of 3%, which will apply to award, overaward, leading hand and shift allowances. There will be a minimum increase of $20 per week for adult fulltime employees. This increase will be effective from the first full pay period on or after 1st June 1999. Refer to Attachment 2.

9.—SUPERANNUATION AND SALARY SACRIFICE OF CONTRIBUTIONS

Effective 1 January 1999 employees can make superannuation contributions before their income tax is calculated, thereby reducing their taxable income and increasing their take-home pay.

10.—CO-OPERATIVE RELATIONSHIPS WITH UNION REPRESENTATIVES

The mutual co-operation between the Company, employees and their unions has been constructive and collective arrangements have delivered benefits to employees and the Company. The Company undertakes to maintain and extend the sound

consultative arrangements which are currently in place. Constructive relationships will be continued and this includes recognising accredited delegates and allowing union organisers rights of entry in accordance with currently established site practices.

11.—LONG SERVICE LEAVE

State Long Service Leave provisions apply and these will continue. A pro rata payment for long service leave on termination of employment will be made in the following circumstances—

- — at least 5 years of continuous service as an adult
- — termination of employment by the Company for any reason other than serious or wilful misconduct; or
- — termination of employment by the employee for reasons of pressing or domestic necessity.

The amount of pro rata long service leave payable on termination will be calculated using accrual rates set out in local long service leave legislation.

12.—PERFORMANCE RELATED PAYMENT SCHEME

A Performance Related Payment Scheme will be used to promote business improvement in key areas. *For the quarter ending 31 May 1999 three local site measures will be used to drive business improvement. From 1 June 1999 a national measure based totally on errors may be introduced and paid on a quarterly basis. In accordance with the errors project, the measure will be based on those errors within the employee's (covered by this agreement) area(s) of control.*

A maximum of 6.5% of gross earnings will be payable each period. For the purposes of determining the performance related payment, gross earnings will include award and overaward payments, overtime and shift allowance earnings plus payments for paid leave. Payments not included in gross earnings are payments for periods of absence on workers' compensation where the absence has been for more than 12 months and performance related payments relating to a previous period which may have been paid during this period.

A reasonably achievable target should be set to deliver 5.5% of gross earnings, however actual payments may range from 0% to 6.5%, dependent on the achievement of set targets.

13.—UNION DELEGATE TRAINING

The Company will co-operate with Unions to facilitate release and pay ordinary wages to delegates attending agreed courses where—

a) there is prior consultation with the Company about course content and the ability to release particular employees from the job;

b) the course is aimed at improving industrial relations and deals with relevant matters in a positive and responsible manner. Relevant matters may include workers' compensation, occupational health and safety and legislative change affecting employment at the centre;

c) there is, where appropriate, an opportunity for Company participation in or contribution to the course.

14.—CONTRACTORS

BHP Building Products operates a seasonal business which is subject to significant variations in production demand. The Company reserves the right to utilise contractors where it is of benefit to the business to do so—the shop steward will be advised when contractors will be used. The use of contractors would include meeting fluctuating production demands, covering periods of annual leave, long service leave and sick leave and where projected demand is unclear or uncertain.

15.—NO EXTRA CLAIMS

The unions and employees undertake for the period to 31 December 1999 not to pursue any extra claims, award or other (including claims related to National or State Wage Case decisions). Renewal agreement discussions may commence after 1 November 1999. There will be agreed scope to resolve issues about classification restructuring or work value claims by following the Procedure for Resolving Claims and Disputes as defined in Clause 16 of this agreement.

16.—PROCEDURE FOR RESOLVING CLAIMS, ISSUES AND DISPUTES

In the event of a dispute, question, difficulty arising out of this agreement, covering one or more employees, the provision of Clause 3(5) of the John Lysaght (Australia) Award, will be used to resolve any disputes which may emerge.

It is acknowledged that genuine attempts must be made to resolve the matter(s) prior to referring to the WA Industrial Relations Commission.

17.—SIGNATORIES TO THE AGREEMENT

Signed: (Sgd.)	Signed: (Sgd.)
Name: A Pringle	Name: J D Fiala
For and on behalf of BHP Steel (JLA) Pty Ltd Service and Operations Manager Western Australia/Northern Territory	CEPU Organiser
Dated: 18/6/99	Dated: 18/6/99
Signed: (Sgd.)	Signed: (Sgd.)
Name: G R Oshea	Name: Ron Danson
For and on behalf of BHP Steel (JLA) Pty Ltd Production Supervisor	Union Delegate and Employee Representative
Dated: 18/6/99	Dated: 18/6/99

ATTACHMENT 1—SITE-SPECIFIC BUSINESS IMPROVEMENT MEASURES

The following improvements and changes to work practices have been agreed at BHP Building Products Myaree.

1. In an effort to meet fluctuating demand and delivery performance requirements, the following shift patterns will apply from Monday 28th June 1999.

Dayshift:	6.45 am to 3.20 pm	Mon, Tues, Wed, Thurs
	6.00 am to 1.00 pm	Friday
Afternoon Shift:	3.20 pm to 11.35 pm	Mon, Tues, Wed, Thurs
	1.00 pm to 8.00 pm	Friday

   A 20 minute meal break on Friday (day and afternoon shifts) will be granted and paid, without any deduction to working hours. Therefore, this shift structure allows for a 40 hour week so the RDOs will continue to be accumulated at a rate of two hours per week.

   The afternoon shift currently consists of four people. This may be increased if the needs of the business alter.

   The Stores and Fencing departments of the business will continue to operate shift patterns of 7.00 am to 3.20 pm Monday to Friday.

   An eight week trial of this system will commence on 28/6/99 to ensure this roster system is meeting the needs of the business and to ensure timekeeping is tightly managed. If timekeeping is deemed to be a problem after the eight week trial, the use of a siren may be considered.

2. In exchange for the introduction of this shift pattern, including Friday afternoons, employees will be entitled to the accrual of up to 7 Roster Day Offs (RDOs) per annum. These may be used over normal Christmas close-down or when the employee requires, provided this is suitable for the business. No more than 10 RDOs may be accrued at any one time. In a situation where more than 10 RDOs are accrued, the Company will insist that any outstanding, over and above the 7 RDOs allowed, be used as soon as possible.

3. Both parties acknowledge that payment increases due to an increase of skills will be linked to employees consistently demonstrating and applying the skills to which they have gained accreditation. The Company has the right to place an employee on any job for which he/she is trained and capable.

ATTACHMENT 2 – WAGE SCHEDULE

MYAREE

THE JOHN LYSAGHT (AUSTRALIA) LTD AWARD CLASSIFICATIONS

ADJUSTMENTS TO RATES OF PAY MADE UNDER THE BHP BUILDING PRODUCTS

MYAREE PRPS AGREEMENT 1999

ADJUSTMENTS—EFFECTIVE FIRST FULL PAY PERIOD IN—

Jun-99 3%

Classification	Pay Class	Base	Supp Pay	Award	Overaward	Tool Allow.	Total	Hourly
Probationary	1301	414.575	23.381	437.956	24.244	0	462.2	12.16316
LEVEL 1	1302	430.437	25.75	456.187	24.513	0	480.7	12.65
LEVEL 2	1303	455.672	30.3	486.881	24.819	0	511.7	13.46579
LEVEL 3	1304	467.414	38.625	506.039	24.761	0	530.8	13.96842
LEVEL 4	1305	480.186	45.526	525.712	25.188	0	550.9	14.49737
LEVEL 5	1306	494.503	48.307	542.81	25.29	0	568.1	14.95

Tool Allowance	9.4
Leading Hand Allowance	
3-10 employees	22.454
11-20 employees	33.475
20+ employees	42.333
Shift Allowance	
Afternoon Shift	77.044
Night Shift	153.985

BROWNBUILT PTY LIMITED, OSBORNE PARK WA AGREEMENT 1999.

No. AG 159 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

Brown Built Pty Limited & Others.

No. AG 159 of 1999.

Brownbuilt Pty Limited, Osborne Park WA Agreement 1999

CHIEF COMMISSIONER W.S. COLEMAN.

29th November 1999.

Order.

HAVING heard Mr Gerry Sturman on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers-Western Australian Branch and Ms Louise Avon-Smith on behalf from the Chamber of Commerce and Industry Western Australia.

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order—

THAT the agreement entitled Brownbuilt Pty Limited, Osborne Park WA Agreement 1999 in the terms of the following Schedule be registered as an industrial agreement. This Agreement replaces AG 133 of 1997 entitled Brownbuilt Metalux Industries Enterprise Bargaining Agreement 1997/1999 which is hereby cancelled.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

Schedule.

1.—TITLE

This agreement shall be referred to as the Brownbuilt Pty Limited, Osborne Park, WA Agreement, 1999.

2.—ARRANGEMENT

3.—APPLICATION OF AGREEMENT

This agreement shall apply at Brownbuilt Pty Limited, 25 Guthrie Street, Osborne Park, WA to all employees who are bound by the terms of the Metal Trades (General) Award 1966, insofar as those provisions relate to the parties referred to in Clause 4. PARTIES BOUND of this Agreement.

4.—AREA AND SCOPE AND PARTIES BOUND

4.1 This agreement shall apply to employees of Brownbuilt Metalux Industries (the company) who are, or who are eligible to be, members of the Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union of Workers Western Australian Branch, Transport Workers' Union of Australia, Industrial Union of Workers', Western Australian Branch; and The Shop Distributive and Allied Employees' Association of Western Australia.

4.2 This agreement applies to approximately 47 employees.

4.3 The parties to this agreement shall be—

Brownbuilt Metalux Industries

25 Guthrie Street

OSBORNE PARK WA 6017

Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union of Workers Western Australian Branch

111 Hay Street

WEST PERTH WA 6005

Transport Workers Union of Australia

Industrial Union of Workers WA Branch (TWU)

3rd Floor, Labour Centre

82 Beaufort Street

PERTH WA 6000

The Shop, Distributive & Allied Employees Association of WA (SDA)

2nd Floor, 256 Adelaide Terrace

PERTH WA 6000

5.—DATE AND PERIOD OF OPERATION

This Agreement shall operate from the 1 July 1999 and shall remain in force until 30 June, 2000.

6.—RELATIONSHIP TO OTHER AWARDS

6.1 This agreement shall be read wholly in conjunction with the Metal Trades (General) Award 1966 No. 13 of 1965, The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 No. R32 of 1976 and the Transport Workers' (General) Award No. 10 of 1961 with respect to those employees bound by those awards.

6.2 Where there is any inconsistency between this agreement and the aforementioned awards this agreement shall prevail to the extent of such inconsistency.

7.—OBJECTIVE OF THE AGREEMENT

The objective of the Agreement is to implement the initiatives required to achieve gains in productivity as measured by the amount of cost reduction that can be achieved through efficiency, flexibility and quality improvements which will ensure the ongoing viability of Brownbuilt Pty Limited, WA.

8.—NO EXTRA CLAIMS

It is a term of this Agreement that the Union and employees bound by this Agreement will not pursue any extra claims, award or over award, for the life of this Agreement other than increases that are consistent with Clause 12.0 of this Agreement.

9.—AVOIDANCE OF INDUSTRIAL DISPUTES

The procedure for settlement of disputes is detailed in the Metal Trades (General) Award 1966 and all parties agree to abide by its detail and intent.

The purpose of this procedure is to provide all parties with a system to discuss and resolve all matters of grievance and dispute. All parties agree to undertake all necessary steps to ensure that all issues receive prompt attention and are resolved preferably internally.

An objective of this agreement is to create an environment of mutual trust and respect between workers and management.

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 plant or enterprise.

11.—LONG SERVICE LEAVE

i) Long service will accrue at 1.3 weeks per year of service

ii) Long service 13 weeks—10 years

iii) Pro-rata after 8 years

iv) Introduction of long service leave, specified in paragraph (ii) and (iii) will commence at 1 April 1998

v) The remaining conditions of long service leave provisions set out in volume 66 of the WA Industrial Gazette pages 1 to 4 will continue to apply.

12.—WAGES

The wage increase will be paid to the schedule below and shall be payable from the beginning of the first full pay period to commence following 1 July 1999.

Current		3% Increase Paid at 1.07.99
C13	$457.29	$471.00
C12	$487.35	$501.97
C11	$515.31	$530.77
C10	$557.49	$574.22
C9	$585.80	$603.37
C8	$613.66	$632.07
Warehouse	$488.87	$503.54
Transport (Drivers)	$499.37	$514.35

13.—SUPERANNUATION

The issue of two superannuation funds being available to employees at the Osborne Park site (Brownbuilt Superannuation Fund and the Superannuation Trust of Australia) shall be discussed during the life of this agreement with the objective of resolving the matter.

14.—JOURNEY COVER

The company will cover employees for journey cover for their most direct route to and from work for the duration of this agreement. The company shall provide an insurance policy with MMI for journey cover.

15.—BEREAVEMENT LEAVE

15.1 An employee, other than a casual employee, shall, on the death within Australia of a wife, husband, father, mother, brother, sister, child or step-child, grandparents and grandparents in law be entitled, on notice, to leave up to and including the day of the funeral of such relation and such leave shall be without deduction of pay for a period not exceeding the number of hours worked by the employee in two ordinary working days. Proof of such death shall be furnished by the employee to the satisfaction of the employer.

15.2 Payment in respect of compassionate leave is to 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 any shift roster or on long service leave, annual leave, sick leave, worker's compensation, leave without pay or a public holiday.

15.3 For the purposes of this clause, the pay of an employee employed on shift work shall be deemed to include any usual shift allowance.

16.—SIGNATORIES TO THIS AGREEMENT

For and on behalf of Brownbuilt Metalux Industries

(signed indecipherable)

National Manufacturing Manager

For and on behalf of the Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union Western Australia Western Australian Branch.

(signed indecipherable)

For and on behalf of The Shop, Distributive and Allied Employees' Association of Western Australia.

(signed indecipherable)

For and on behalf of the Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch.

(signed indecipherable)

Common Seal

Dated this day of 1999

Appendix A.

1. DEFINITIONS

Employees means any person who is employed full-time or permanent part-time according to weekly contract of employment but excluding any person engaged on a casual or specific task, temporary or fixed term basis to meet seasonal or other unusual circumstances, or any person employed under the conditions of a specific contract of employment other than permanent hire.

Redundancy means termination of employment by the Company of employees—

1. brought about directly by the total closure of the plant or section of a plant or the removal of a process or products or other causes resulting from company decisions that no longer require an employee to perform those duties;
2. brought about by external causes outside the direct control of the Company, e.g. adverse business conditions;
3. but excludes the ordinary and customary turnover of labour.

Rate of Pay means the all purpose ordinary time rate of pay including any leading hand allowance but excluding shift allowance and all other loadings and allowances.

Continuous Service means continuous with the Company as defined in the Metal, Engineering and Associated Industries Award 1998.

Accrued Sick Pay means the balance of untaken sick pay at the date of termination and includes sick pay, which accrued prior to the date of this Agreement to a maximum of 8 days per year.

2. NOTICE OF INTENTION TO IMPLEMENT REDUNDANCIES

The Company will advise employees and the Unions as early as possible of the intention to implement redundancies.

The Company shall hold discussions with the employees directly affected and their Unions as soon as practicable before redundancy occurs.

For the purpose of the discussion the Company shall provide in writing to the employees concerned and the Unions all relevant information about the proposed terminations; including the reasons, the number and categories of employees likely to be affected and the period over which the terminations are likely to occur.

3. NOTICE OF TERMINATION

All employees who are to be made redundant will receive four weeks notice or pay in lieu of notice. At the discretion of the employer, such notice will be worked or paid in lieu, or part worked and part paid in lieu. Employees under notice who leave by mutual agreement during the period of notice, will be entitled to all other redundancy payments set out in this Agreement.

In addition to the four weeks notice period, employees who are aged 45 years and over, with more than two (2) years permanent service with the Company, will be paid an additional two (2) weeks pay in lieu of an additional 2 weeks notice.

4. SELECTION OF REDUNDANT EMPLOYEES

The following factors will be considered when selecting employees for redundancy—

- skills required for the ongoing viability of the Osborne Park plant.

Skill assessment and length of service criteria will be discussed by the parties of this Agreement prior to redundancies occurring.

Where a reduction of labour requirements is required the Company will consider voluntary redundancy applications in the first instance.

5. REDUNDANCY PAYMENTS

Employees who have completed at least one year's service, as a permanent employee, with the Company at the date on which they are made redundant will receive the following—

- Service related payments amounting to 3.0 weeks pay for each completed year of service up to a maximum of 52 weeks pay.
- Accrued sick pay at current rate of pay based on a maximum of 8 days per year.
- Annual leave loading of 17.5% will be paid on pro-rata annual leave entitlements.
- Pro-rata Long Service Leave will be paid after five (5) years service.

All employees will be paid all statutory entitlements, and shall be given an itemised statement of monies due to them at least thirty-eight (38) hours before termination.

6. SUPERANNUATION FUND

Redundant employees will receive their Superannuation benefits in accordance with the trust deed and rules.

7. INTERVIEWS

Time off during the notice period for the purpose of seeking other employment and attending job interviews, will be by prior arrangement with the Company. This will be paid leave.

8. CERTIFICATE OF SERVICE

Employees shall be given a Certificate of Service indicating that termination was due to redundancy.

The Certificate of Service shall list the Employee's classification at the time of termination, as well as credits toward training modules completed toward the next classification.

9. AGREEMENT NOT TO APPLY

This Agreement does not apply to any termination of employment by—

- Resignation for any reason
- Dismissal
- Termination of casual workers, and other employees as outlined in Clause 7. Definitions, of this Agreement
- Retirement
- Early retirement due to ill health
- Termination due to time limited contract of employment
- Death of an employee, except for an employee who has been issued with a notice to terminate by the company and subsequently dies within the prescribed notice period.

COM AL WINDOWS PTY LTD AGREEMENT 1999.

No. AG 175 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

Com Al Windows Pty Ltd and Other.

No. AG 175 of 1999.

Com Al Windows Pty Ltd Agreement 1999.

CHIEF COMMISSIONER W.S. COLEMAN.

2nd December 1999.

Order.

HAVING heard Mr Gerry Sturman on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers-Western Australian Branch.

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT the agreement entitled Com Al Windows Pty Ltd Agreement 1999 in the terms of the following Schedule be registered as an industrial agreement. This Agreement replaces AG 261 of 1996 entitled Com Al Windows Pty Ltd Agreement 1996 which is hereby cancelled.

(Sgd.) W.S. COLEMAN,
[L.S.] Chief Commissioner.

Schedule.

1.—TITLE

This Agreement shall be known as the "Com A1 Windows Pty Ltd Agreement 1999".

2.—ARRANGEMENT

3.—PARTIES BOUND

The parties to this Agreement are—

Com A1 Windows Pty Ltd at ats manufacturing operations, 16 Madrid Place, Maddington, W.A. (the employer).

The Automotive, Food, Metals, Engineering, Printing, and Kindred Industries Union of Workers—Western Australian Branch (hereinafter referred to as (AFMEPKIU).

Transport Workers' Union of Australia, Western Australian Branch (hereinafter referred to as TWU).

This Agreement shall be binding upon an estimated 24 employees of the Company employed in classifications covered by the AFMEPKIU and the TWU.

4.—PERIOD OF OPERATION

This Agreement shall operate for a period of 24 months from 1st September 1999.

5.—RENEWAL OF AGREEMENT

The parties shall commence negotiations to renew this Agreement three months prior to its expiration.

6.—RELATIONSHIP TO PARENT AWARDS.

(1) This Agreement shall be read and interpreted in conjunction with the Metal Trades (General) Award 1966 No. 13 of 1965 and the Transport Workers' (General) Award.

(2) Where there is any inconsistency between the Agreement and the Awards specified in subclause (1) hereof, this Agreement shall prevail to the extent of such inconsistency.

7.—PROBATIONARY PERIOD

As part of the on-going selection process, all new employees will be engaged for a one-month probationary period, during which time either the employer or the employee may terminate the contract of employment by giving one day's notice to the other party.

8.—CASUAL EMPLOYEES

(1) Due to seasonal demands of the industry, the Company will, from time to time, employ casuals.

(2) (a) The period of notice of termination by the employer shall be one working day.

(b) If the required notice of termination is not given, one day's pay shall be paid by the employer or forfeited by the employee as the case may be.

(3) On engagement, a casual employee shall be notified in accordance with subclause (6) in Clause 6.—Contract of Service of the Metal Trades (General Award) 1966 No. 13 of 1965.

(4) A loading of 20% shall apply to the hourly rate of a casual employee.

9.—SERVICE BONUS

In recognition of length of service, a 1% bonus shall be paid for each year of service, up to a maximum of 10 years based on the normal wage of the employee.

10.—PROTECTIVE CLOTHING

(1) Every two years the employer shall issue employees with a jumper or jacket which has the Company name printed thereon.

(2) Two Company tee-shirts shall be provided every six months commencing on 1st October 1999.

(3) Safety boots shall be provided as the need arises.

11.—HOURS OF WORK AND OVERTIME

(1) Ordinary hours of work shall be 38 per week, carried out between 6.00am and 6.00pm, Monday to Friday inclusive.

(2) On specific occasions starting and finishing times may be varied each day to suit requirements of customers, by arrangement between the employer and employees.

(3) Time worked outside of ordinary hours shall be paid at penalty rates as prescribed by the relevant Award.

12.—SICK LEAVE

For sick leave accrued from 1st September 1997 the following will apply—

(1) Sick leave accrued from 1st September 1997 may be used for family responsibilities. Such leave may be taken only on sickness of a de facto partner, wife, husband, father, mother, child or stepchild. A certificate from a medical practitioner will be required and must state the need for supervision of the aforementioned persons as well as the expected duration of such illness.

(2) For sick leave accrued from the 1st September 1997 employees shall have the option of converting 100% of accrued sick leave entitlements to a cash payment on termination or—

(i) 5 days of the unused accrued sick leave entitlements to be converted to a cash payment on the last pay period before Christmas each year commencing on the last pay period before Christmas 1998.

(ii) The balance of the unused portion of the same accrual to be converted to a cash payment on termination.

(iii) The balance of sick leave accrued as at 1st September shall continue to be used first in case of illness and will not affect the annual payout or the cash payment on termination until that balance is used.

(iv) Sick leave taken (after the accrual mentioned in subclause (iii) has been used up) will be taken off the annual payment of 5 days.

Examples

1. (no more sick leave accrued from 1st September 1997) Absent through illness for 2 days, annual payout for that year 3 days and accrual for payout on termination, 5 days.
2. Following year, absent through illness 7 days. No cash payment that year. Accrual for payout on termination 3 days.
3. Cash payment on termination now 8 days.

(v) Sick leave may not be substituted by rostered days off or holidays.

(vi) Sick leave paid out annually will no longer be available as accrued days for the purpose of sick leave or family leave.

13.—LONG SERVICE LEAVE

Employees who are entitled to payment of pro rate long service leave as per the long service leave provisions set out in

Volume 66 of the Western Australian Industrial Gazette at pages 1 to 4 both inclusive, shall have the option of taking that pro rata leave as paid holidays at the current rate of pay or have that same pro rata long service leave paid out on termination as per the above-mentioned provisions. Such leave shall not interfere with work load commitments and that leave taken shall be by mutual agreement.

14.—CONSULTATIVE PROCESS

(1) A consultative committee, comprising two representatives of management and two shop floor members, will be formed.

(2) Meetings shall be held on request, if there is consent by all representatives and will not be of more than one hour in duration.

15.—AIMS OF THE AGREEMENT

(1) Through new methods and approaches to work and work organisation reduction in waste and improvement to quality, timeliness, customer service and satisfaction will continue to be developed.

(2) Continual improvement—

(a) Based on Total Quality Management and Time-based Management practices, all ComA1 ventures, with the objective of continued improvement, are to be achieved.

(b) Employees shall advise the Consultative Committee of any improvements which, in their view, need to be made in production distribution, or any other measures, to reach the desired aims.

(c) The Consultative Committee shall be responsible for the collection, co-ordination and implementation of initiatives arising from this Agreement.

(d) Greater emphasis on time and quality management will be placed, to achieve the required objectives.

(e) All staff will be informed on a three monthly basis of improvements in productivity, quality and time management. Such improvements to be quantified and an appropriate level of bonus set by the Consultative Committee and management at that time.

16.—IMPROVEMENT MEASURES

In order to achieve the main aims of improved productivity, efficiency and flexibility, the following measures will be implemented.

(1) Occupational Safety and Health—

Approved safety procedures, monitoring of methods and safety inspections at regular intervals will remain in force, which will result in a further reduction of time lost through injury. With the co-operation of all employees and a determined commitment from management, greater gains will be made in this area.

(2) Sick Leave and Absenteeism—

(a) By monitoring absenteeism of employees, the employer and employees aim to reduce the number of absent and sick leave days taken.

(b) Management will make counselling available to all employees in an effort to improve performance in this area and employees will attend such counselling when so required.

17.—RESOLUTION OF DISPUTES

(1) Where a grievance arises, the employee concerned shall initially discuss the matter with his/her immediate supervisor and, if the employee so desires, his/her Union delegate.

(2) If the grievance is not resolved by discussion referred to in subclause (1) hereof, he/she or the Union delegate as the case may be, shall discuss and attempt to resolve the dispute with the Departmental Manager.

(3) Where the aforementioned discussions fail to resolve the matter, it shall be referred to Senior Management and the appropriate full-time Union official, at which stage the parties shall initiate steps to resolve the grievance as soon as possible.

(4) While steps in subclauses (1), (2) and (3) hereof are being followed, and to allow for the peaceful resolution of grievances, the parties shall be committed to avoiding stoppages of work, lock-outs or any other bans, as per subclause (2)(f) in Clause 34 of the Metal Trades (General) Award 1966 No 13 of 1965.

(5) If the grievance remains unresolved, either party may refer the matter to the Western Australian Industrial Relations Commission for settlement.

(6) (a) The parties will give each other the earliest possible advice of any problem which may give rise to a grievance or dispute.

(b) All relevant facts shall be clearly identified and recorded throughout the procedures.

18.—RATES OF PAY

(1) In accordance with the successful operation of this agreement and a continued commitment from all parties, a wage increase of 5% shall be payable on the rates existing at the commencement of this Agreement.

(2) A further increase of 5% shall be paid on 1st September 2000.

(3) (a) The rates shall not be less than those hourly rates set out in Appendix A—Wage Rates.

(b) New employees who become subject to this Agreement during its period of operation as prescribed in Clause 4.—Period of Operation shall be paid the rates of pay as prescribed in Appendix A—Wage Rates.

19.—MULTI-SKILLING

(1) Subject to Clause 35.—Training in the relevant Awards, when so directed employees will carry out duties that are within the limits of their skill and competency.

(2) (a) Management will encourage the acquisition of new skills by way of on-the-job training as prescribed in the relevant Awards.

(b) Funding for such training will be in accordance with the relevant Awards.

20.—UNION MEETINGS ON LOCAL ISSUES

(1) Meetings to report on in-house matters may be held at times convenient to the Company and the employees, with the aim of maintaining a continuous non-disruptive work pattern

(2) Discussions with management will take place if either party wishes to change the time for a meeting.

21.—NO EXTRA CLAIMS COMMITMENT

(1) The parties agree there shall be no extra claims made during the life of this Agreement.

(2) The parties shall be bound by the terms of the Agreement for its duration.

(3) The parties shall oppose any application by others to be joined to this Agreement.

(4) The terms of this Agreement will not be used to progress or obtain similar Agreements or benefits in any other enterprise.

21.—JOURNEY COVER

The Company will take out an appropriate insurance policy to cover employees travelling to and from work by the most direct route.

SIGNATORIES TO AGREEMENT

Signed for and on behalf of ComA1 Windows Pty Ltd. (sgd) G. Bolt

Signed for and on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch (sgd) _____

Signed for and on behalf of the Transport Workers Union of Australia—Western Australian Branch (sgd) J. McGiveron

APPENDIX A—WAGE RATES

	Rate per week 1/09/99	Rate per week 1/09/00
Level C13	$443.32	$465.49
Level C12	$468.12	$491.53
Level C11	$491.16	$515.72
Level C10	$526.11	$552.42
Level C9	$549.15	$576.61

CONSTRUCTION WORKER LEVEL 2 (GENERAL CONSTRUCTION) MUNGULLAH COMMUNITY ABORIGINAL CORPORATION TRAINEESHIP AGREEMENT 1999.

No. AG 170 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers

and

Mungullah Community Aboriginal Corporation.

No. AG 170 of 1999.

Construction Worker Level 2 (General Construction) Mungullah Community Aboriginal Corporation Traineeship Agreement 1999.

COMMISSIONER P E SCOTT.

16 November 1999.

Order.

HAVING heard Ms L Dowden 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) Mungullah Community Aboriginal Corporation Traineeship Agreement 1999 in the terms of the following schedule be registered on the 5th day of November 1999.

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

Schedule.

1.—TITLE

This Agreement shall be known as the Construction Worker Level 2 (General Construction) Mungullah Community Aboriginal Corporation Traineeship Agreement 1999.

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 Mungullah Community 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 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 to 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 approved 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 and shall not operate unless this condition is met.

"Traineeship Scheme" means an approved Traineeship applicable to a group or class of employees 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 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 41A(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 NE TTFORCE, 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	413.00 per week
Industry Allowance	17.40 per week
Special Allowance	7.70 per week
Total	438.10
Fares Allowance	as per the 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

Common Seal

Signed Chairperson **22/09/1999**

Signed Vice Chairperson

Signed

For and on behalf of the

Western Australian Builders' Labourers,

Painters and Plasterers Union of Workers

For and on behalf of the Corporation

Common Seal

SECRETARY Signed **7/10/1999**

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 Coperations
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 learning recognised. The program incorporates a recognition of prior learning 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.

CSR BUILDING MATERIALS (WA) ENTERPRISE AGREEMENT 1999.
No. AG 154 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

CSR Building Materials (WA),
A Division of CSR Limited ACN 000 001 276

and

The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division, Western Australian Branch & Other.

AG 154 of 1999.

CSR Building Materials (WA) Enterprise Agreement 1999.

COMMISSIONER S J KENNER.

26 November 1999.

Order.

HAVING heard Ms J Wesley as agent on behalf of the applicant and Mr D Kelly on behalf of the respondent and Mr G Ferguson on behalf of the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch

and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders —

(1) THAT the CSR Building Materials (WA) Enterprise Agreement 1999 as filed in the Commission on 13 September 1999 in the terms of the following schedule be and is hereby registered as an industrial agreement.

(2) THAT the CSR Gyprock and Bradford WA Enterprise Agreement 1997 No AG 285 of 1997 be and is hereby cancelled.

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

1.—TITLE

This Agreement shall be known as the CSR Building Materials (WA) Enterprise Agreement 1999.

2.—ARRANGEMENT

This Agreement is arranged as follows—

3.—APPLICATION

This Agreement shall apply at the CSR Building Materials WA site, 21 Sheffield Road, Welshpool, WA in respect of the employees bound by the Building Materials Manufacturers (CSR Limited Welshpool Works) Award 1982 and Transport Workers (General) Award No. 10 of 1961.

4.—PARTIES BOUND

(1) The parties to this Agreement are—

- CSR Building Materials (WA), a division of CSR Limited ACN 000 001 276;
- the Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch (ALHMWU);
- the Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch (TWU); and
- all persons employed by CSR Building Materials (WA) in its Gyprock and Bradford operations who are members of, or who are eligible to be members of, the ALHMWU and TWU.

(2) Upon registration of this Agreement, it shall cover the employment of approximately 38 persons.

5.—DATE OF OPERATION

(1) This Agreement shall operate from the beginning of the first pay period to commence on or after 23 July 1999 and shall remain in force for a period of 27 months until 23 October 2001.

(2) The parties undertake to review this Agreement and commence discussions on a replacement agreement 6 months prior to its expiry.

(3) During the life of this Agreement, there shall be no further claims to increase wages or conditions. Any increase or variation to the Awards arising out of State Wage Case Decisions shall not apply to this Agreement except for adjustments to allowances made in accordance with the State Wage Fixing principles.

6.—EFFECT ON AWARD AND PREVIOUS AGREEMENT

(1) This Agreement cancels and replaces Agreement No AG 285 of 1997.

(2) This Agreement shall be read and interpreted wholly in conjunction with the *Building Materials Manufacture (CSR Limited – Welshpool Works) Award No 10 of 1982* and the *Transport Workers' (General) Award No 10 of 1961("the Awards").*

(3) Where there is any inconsistency between the Awards and this Agreement, this Agreement shall prevail to the extent of the inconsistency.

7.—DEFINITIONS

(1) "CSR" shall mean, unless otherwise provided, CSR Building Materials (WA) located at 21 Sheffield Road, Welshpool, Western Australia.

(2) "Unions" shall mean the Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch and the Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch.

8.—SINGLE BARGAINING UNIT

(1) This Agreement has been negotiated and agreed to by the Single Bargaining Unit comprising employee representatives from each work group, CSR management and representatives from the union parties.

(2) This Agreement has been presented to employees of CSR Building Materials (WA) who have endorsed it.

9.—PROCESS FOR ONGOING CONSULTATION

(1) Introduction of Change with significant effects

(a) Where CSR has made a definite decision to introduce major changes in production, organisation, structure, or technology that are likely to have a "significant effect" upon employees, CSR will notify the employees who may be effected by the proposed changes and, if they are a member of a union, that union.

(b) "Significant effect" includes termination of employment (other than for performance or conduct related reasons), major changes in the composition, operation or size of CSR workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; a significant change to the hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs.

(c) CSR shall discuss with the employees affected and their union the introduction of changes referred to in subclauses (a) and (b), among other things, the effects the changes are likely to have upon the employees, measures to avoid or minimise any adverse effects upon employees and shall give prompt consideration to matters raised by the employees or their union in the discussions.

(d) Discussions shall commence as soon as reasonably practicable after a definite decision has been made by CSR to make the changes.

(2) Consultation Generally

(a) Consultation and communication regarding workplace issues is regarded as a responsibility of all employees, supervisors and managers at CSR. Where a specific work issue requires input from a

group of employees, a consultative committee may be established. Committee members shall consist of employee representatives from the relevant work group and management.

(b) Participation during the committee meetings shall be regarded as time worked.

(c) CSR management representatives shall be responsible for determining the most convenient time and duration of a consultative committee meeting and to establish with input from the participants, all agenda items.

(d) Consultation under this clause is distinct from established procedures for dealing with Occupational Health and Safety and negotiations of the Single Bargaining Unit.

10.—OBJECTIVES

(1) The parties agree that the CSR Building Materials (WA) site must continue to achieve real and sustained performance improvement by embracing continuous improvement.

(2) The parties recognise that—

- Our aim is to become a competitive manufacturing and distribution operation with continually improving levels of customer service, product quality, plant efficiency and employee satisfaction.
- KPI's will be used to measure, monitor and display progress in selected areas of improvement that will enable us to become the strongly competitive operation that we seek to be.

(3) The parties also recognise that dedicated effort and strong commitment from all concerned is required to achieve the above stated aims.

11.—OCCUPATIONAL HEALTH AND SAFETY

(1) In a climate of strong community emphasis on hazard reduction in the workplace, CSR is determined to reduce risks or hazards wherever practicable.

(2) This will require the full support of all employees.

(3) This support will require employee involvement in the following activities—

- Safe behaviour Involvement.
- Assist Safety Committee with Safety Audits.
- Participation in the writing and review of Safe Work Practices.
- Reporting of all hazards and incidents via appropriate documentation.
- Support all Site Safety Committee activities.
- Participation in Shift/Communication meetings.
- Providing positive reinforcement.
- Identifying solutions.

12.—EQUAL EMPLOYMENT OPPORTUNITY

The parties to this Agreement are committed to the principles of equal employment opportunity for all employees at CSR.

13.—CONSULTATIVE MECHANISM FOR IMPLEMENTATION OF INITIATIVES

The parties are committed to working together to improve business performance and the working environment at CSR. Consultation in the context of this Agreement is about sharing and exchanging information to achieve the objectives of this Agreement. Employee involvement is critical to the success at CSR.

14.—KEY PERFORMANCE INDICATORS (KPI'S)

(1) The parties agree that the KPI's listed in subclause (3) will be monitored and evaluated by the employees with the main focus being on improving performance through measurement and learning.

(2) It is recognised that appropriate training must be provided to employees in order to achieve the agreed targets. All parties are committed to supporting this process by providing the necessary resources.

(3) Key Performance Indicators — Measure

Safety & Environment	Assist in the maintenance of the Safety audit plan Develop and maintain Housekeeping to a level of excellence An active level of participation to improve safety • Hazard identification • Safety programmes Assist in the maintenance of the Environmental audit plan	Compliance to safety audit plan Agreed criteria met Reduction in injuries
Product Quality	Strong involvement to reduce customer complaints	Reduction of 5% in manufacturing complaints
Operational improvement	Highlight and recommend actions to eliminate process variation Assist to reduce wastage in all areas, eg reject, overuse of raw materials Meet product demand in cyclical housing market	Key process issues eliminated Agreed criteria met Shifts required met
Truck turnaround times	To assist with maintaining customer service satisfaction	Measurable and accurate system in place

15.—FAMILY LEAVE

(1) An employee with at least 15 days (114 hours) of accumulated sick leave may access up to 5 days (38 hours) per annum of that entitlement for absences relating to the care of a family member who is ill or injured.

(2) To be entitled to authorised leave and payment under this clause, the employee must—

(a) be responsible for the care of the immediate family member; and

(b) notify the supervisor/manager prior to (or within one hour of the commencement of) the absence of the reason for the absence, the expected duration of the absence and the name and relationship of the family member;

(c) provide reasonable proof of the need for the family members care upon return to work

(3) "Family Member" means a spouse (including defacto), child or stepchild or any other person who resides with the employee and who is dependent upon the employee for care.

(4) Any entitlement to paid leave taken under this clause shall reduce the entitlement to sick leave under the provisions of the award.

16.—WEEKLY ACCRUAL OF SICK LEAVE

The entitlement to sick leave shall accrue at the rate of 1.461 hours for each completed week of service for full time employees. Part time employees shall accrue sick leave on a proportionate basis calculated as follows—

$$\frac{\text{Ordinary hours worked per week}}{38} \times 1.461$$

17.—PARENTAL LEAVE

In addition to the benefits of Maternity Leave prescribed by the Awards, employees shall be entitled to Parental Leave benefits prescribed by the *Minimum Conditions of Employment Act 1993*.

18.—OVERTIME

(1) **"Time off instead of payment** for overtime may be granted where an employee works authorised overtime and becomes entitled to additional payments under the Awards subject to the following—

(a) The time off shall be equivalent to the overtime rate that otherwise would have been paid;

(b) The time off shall be taken at a time agreed by the employee and the Manager;

(c) Not more than 38 hours of overtime shall accumulate as time off unless prior agreement is reached with the employee and the Manager.

(2) **Reasonable Overtime**

(a) CSR may require an employee to work reasonable overtime and the employee shall work overtime with that

requirement. The assignment of overtime shall be based on specific operational requirements determined by CSR.

19.—RIGHT OF ACCESS, NOTICES

(1) Material approved by the Unions will be displayed in a notice board or a mutually agreed location, which is easily accessible by employees.

(2) Every employee shall be entitled to have access to a copy of this Agreement. Sufficient copies shall be made available by CSR Building Materials WA for this purpose.

(3) The Secretaries of the Unions or authorised representative will, on prior notification to CSR Building Materials WA, have the right to enter CSR Building Materials WA's premises during working hours, including meal breaks, for the purpose of discussing with employees covered by this Agreement, the legitimate business of the Unions or for the purpose of investigating complaints concerning the application of this Agreement but shall in no way unduly interfere with the work of the employees.

(4) Any material likely to cause concern, will be referred to the ABU for discussion.

20.—DISPUTE RESOLUTION PROCESS

The following dispute resolution process shall be used for settling any disputes, questions or difficulties including disputes or difficulties arising from this Agreement.

Stage One

The employee should contact their team leader and attempt to settle the matter at that level.

Stage Two

If the matter is not resolved at Stage One, the matter will be further discussed between the affected employee, the union delegate and the team leader and/or manger of the relevant section or department.

Stage Three

If the matter is still not resolved at stage two, the union organiser and union delegate shall discuss the matter with the manager.

Stage Four

If the matter is not settled at Stage Three, the state secretary of the union will be advised. If he or she considers it necessary additional assistance will be provided to settle the matter. CSR Building Materials WA will notify and/or involve its Industrial Relations Department at this stage.

Stage Five

If Stage Four is unsuccessful it is agreed the matter will be referred to the Western Australian Industrial Relations Commission for conciliation or arbitration.

(a) The process contained in Stage 1,2, 3 and 4 above shall be completed within seven working days to prevent escalation of the dispute.

(b) There shall be the opportunity for any party to raise the issue to a higher level at any time.

(c) Without prejudice to either party and except where a bona fide health and safety issue is involved work shall continue while matters in dispute are being dealt within accordance with these procedures.

(d) Both parties, subject to their right of appeal, agree to abide by the Western Australian Industrial relations Commission decision.

21.—TIMETABLE FOR PAYMENTS

(1) The base payment for this Agreement will be 8%, paid incrementally over the term of the Agreement.

(2) It is agreed that wage rates for all employees shall be increased as follows—

(a) By 3% from the first pay period to commence on or after 23 July 1999.

(b) By a further 2.5% from the first pay period to commence on or after 23 April 2000.

(c) By a further and final 2.5% from the first pay period to commence on or after 23 October 2000.

22.—IMPLEMENTATION OF THE ENTERPRISE AGREEMENT

Implementation of this Agreement will be monitored by the Single Bargaining Unit. The parties committee to ensure that the intent of this Enterprise Agreement is realised in the life of the Agreement.

23.—SIGNATURES

Signed for and on behalf of—

CSR Building Materials (WA)

_____

Operations Manager

_____

Date

Signed for and on behalf of—

Australian Liquor Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australia

_____

Secretary

_____

Date

Signed for and on behalf of—

Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch

_____

Secretary

_____

Date

DEPARTMENT OF LOCAL GOVERNMENT ENTERPRISE BARGAINING AGREEMENT 1999.

No. PSA AG 43 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer,
Department of Local Government.

No. PSA AG 43 of 1999.

Department of Local Government Enterprise Bargaining Agreement 1999.

PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT.

3 December 1999.

Order.

HAVING heard Ms K Franz and with her Ms R Harley on behalf of the Applicant and Ms K Woolley 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 Department of Local Government Enterprise Bargaining Agreement 1999 in the terms of the following schedule be registered on the 1st day of December 1999 and shall replace the Department of Local Government Enterprise Bargaining Agreement 1997.

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

Schedule.

1—TITLE

This Agreement shall be known as the Department of Local Government Enterprise Bargaining Agreement 1999 and shall replace the Department of Local Government Enterprise Bargaining Agreement 1997.

2.—ARRANGEMENT

3.—SCOPE

This Agreement shall apply throughout the State of Western Australia to all persons employed by the Department of Local Government who are members or eligible to be members of the Civil Service Association of Western Australia (Inc).

Officers occupying an office, post or position within the employer's staffing establishment by virtue of a secondment may also be covered by this Agreement subject to Clause 4 – Officers on Secondment.

4.—OFFICERS ON SECONDMENT

The employer shall provide officers on secondment to the Department of Local Government the option of agreeing in writing to the terms and conditions under this Agreement.

5.—EMPLOYEES COVERED

This Agreement shall apply to all employees covered by the Scope of this Agreement. Upon registration, the number of employees covered by this Agreement is estimated at 53.

6.—PARTIES BOUND

1. *The Employer*
   The Chief Executive Officer of the Department of Local Government.
2. *The Union*
   The Civil Service Association of Western Australia (Inc).

The parties bound by this Agreement will oppose any subsequent application by any other body or organisation to be joined to this Agreement.

7.—RELATIONSHIP TO PARENT AWARD

This Agreement shall be read wholly in conjunction with the Public Service Award 1992 which applies to the parties bound by this document. In the case of any inconsistencies, this Agreement shall have precedence to the extent of the inconsistencies.

8.—DURATION OF AGREEMENT

1. This Agreement shall operate from the date it is registered in the Western Australian Industrial Relations Commission and shall remain in force for a period of two years.

2. Each party to this Agreement accepts that its conditions shall be binding for its term.

3. The parties will review this Agreement six (6) months prior to the date of expiration and begin negotiations on its renewal or replacement.

4. If this Agreement is not renewed or replaced on expiry, it will continue in force until renewed, replaced, cancelled or where either party withdraws from the Agreement in accordance with the WA Industrial Relations Act 1979.

9.—PURPOSE OF THIS AGREEMENT

The purpose of this Agreement is to achieve the milestones contained in the Productivity Improvement Plan detailed at Appendix 1 of this Agreement. The benefits from those improvements will be shared by the Department, its employees and the State Government.

10.—SINGLE BARGAINING UNIT

For the purpose of negotiating this and future enterprise bargaining agreements, a single bargaining unit has been formed which is representative of all parties. The Single Bargaining Unit will continue to monitor the implementation of the Agreement and be responsible for its renewal or replacement.

11.—DISPUTE RESOLUTION PROCEDURES

1. Individual employee grievances which may arise from time to time shall be dealt with in accordance with the Department of Local Government's grievance procedures and shall not form part of this Agreement's dispute resolution process.

2. Where any question, dispute or difficulty arises between the parties about the meaning or effect of this Agreement, the parties will consult to reach a settlement in accordance with the following procedure—

Stage 1—The matter shall be discussed between the employee and the immediate supervisor. The matter need not be dealt with in writing and shall be dealt with on an informal basis. Employees may seek advice from their union or other persons. If unresolved within a time frame of three (3) working days, either party may refer the matter to the appropriate Manager (or Director) and shall advise the other party(s) accordingly.

Stage 2—The Manager (or Director) shall attempt to resolve the matter with the employee and/or other relevant parties as soon as practicable but no later than 7 days after the matter is referred to him/her.

Stage 3—If unresolved either party may refer the matter in writing to the Chief Executive Officer (CEO). The CEO or Senior Officer nominated by the CEO shall attempt to resolve the matter within ten (10) working days of the date the matter was referred to him/her.

Stage 4—If the parties are still unable to resolve the issue(s) in dispute, the Union or the Employer is free to refer any industrial matter to the Western Australian Industrial Relations Commission as appropriate. In keeping with the spirit of this procedure, this would be after the process outlined had been exhausted.

12.—SHORT LEAVE

Short Leave, as prescribed by Clause 26 of the Public Service Award 1992, shall not apply for the duration of this Agreement.

13.—BEREAVEMENT LEAVE

1. Subject to subclause (2), on the death of—
   (a) the spouse or de facto spouse of an employee;
   (b) the child or step-child of an employee;
   (c) the parent or step-parent of an employee; or
   (d) 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 be paid bereavement leave of up to 2 days.

2. The two (2) days need not be consecutive.

3. Bereavement leave is not to be taken during a period of any other kind of leave.

4. An employee who claims to be entitled to paid leave under subclause (1) is to provide to the employer, if so requested

by the employer, evidence that would satisfy a reasonable person as to—

(a) the death that is the subject of the leave sought; and

(b) the relationship of the employee to the deceased person.

14.—CARER'S LEAVE

1. An employee with responsibilities in relation to either members of his/her family or members of his/her household who need his/her care and support, shall be entitled to use up to 5 days per annum of accrued sick leave credits to provide care and support of such persons.

2. The Employee is required to produce a medical certificate if care and support requirements exceed two consecutive days.

3. Carer's Leave is not cumulative.

15.—LONG SERVICE LEAVE

Long Service Leave may be taken in minimum amounts of two weeks, provided that any remaining long service leave does not reduce to less than two weeks.

16.—TRIBAL/CEREMONIAL/CULTURAL/ COMMUNITY LEAVE

Subject to the Executive Director's approval, an employee may be allowed to use accrued annual leave for tribal/ceremonial/cultural/community purposes.

17.—PARENTAL LEAVE

1. *Eligibility for Parental Leave*

An employee is entitled to a period of up to 52 weeks unpaid parental leave in respect of the birth of a child to, or the placement of a child on adoption with, the employee or the employee's spouse/partner.

Where the employee applying for the leave is a partner of a pregnant spouse, two weeks leave may be taken prior to or at the birth of the child concurrently with parental leave taken by the pregnant employee.

2. *Other Leave Entitlements*

An employee proceeding on parental leave may elect to utilise any accrued annual leave or accrued long service leave for the whole part of the period of parental leave or extend the period of parental leave with such leave.

An employee may extend the maximum period of parental leave with a period of leave without pay subject to the approval of the employer.

An employee on parental leave is not entitled to be paid sick leave and other paid Award absences except where otherwise provided by this Clause.

3. *Notice and Variation*

The employee shall give not less than four weeks notice in writing to the employer of the date the employee proposes to commence parental leave stating the period of leave to be taken.

An employee seeking to adopt a child shall not be in breach of this clause 17(3) as a consequence of failure to give the stipulated 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. At any time during the period of leave the employee may elect, subject to approval, to reduce or extend the period of leave stated in the original application provided four weeks written notice is given.

4. *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 safe position of the same classification until the commencement of the parental leave.

If the transfer to a safe job is not practicable, the employee may, or the employer may require the employee, to take leave for such period as is certified necessary by a duly qualified medical practitioner. Such leave shall be treated as Parental Leave for the purposes of clause 17(7).

5. *Fixed Term Contract*

An employee on 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.

6. *Continuous Service*

Absence on parental leave shall not break the continuity of service of an employee but shall not count as qualifying service for leave purposes.

7. *Return to Work*

An employee on return from parental leave shall be entitled to the position which the employee occupied immediately prior to proceeding on parental leave or, if not available, a comparable position.

Where an employee was transferred to a safe job pursuant to clause 17(4), the employee is entitled to return to the position immediately prior to the transfer or, if not available, a comparable position.

18.—LEAVE IN LIEU OF PUBLIC SERVICE HOLIDAYS

One (1) day's leave in lieu to be taken in substitution of two (2) ex-Public Service holidays at New Year and Easter. This is in accordance with Circular to Ministers 1/94 issued by the Premier.

19.—LEAVE LOADING AND PERFORMANCE REVIEW

1. Payment of leave loading is subject to satisfactory performance.

2. Leave loading on leave not taken between January 1 and December 31, will be paid on the first pay period in December.

3. Leave loading payable on accrued leave will be paid at the officer's substantive rate of pay.

4. To be eligible for payment, an officer's performance must be satisfactory and supported by a current assessment made under the Department's Performance Development Program (PDP).

5. Where an officer's performance is assessed as being substandard under the existing PDP, leave loading will be withheld until such time as the officer's performance is satisfactory.

6. The officer's supervisor will determine the period of time over which the officer will be assessed for sufficient evidence of a return to satisfactory performance. The procedure adopted must comply with the procedures set out in the Management of Employee Sub-Standard Performance Manual 1992, published by the Public Service Commission of WA.

7. Where an officer has had leave loading withheld due to sub-standard performance and subsequently receives a satisfactory performance report, that leave loading will be paid at the rate of pay applicable at the date the loading was originally due.

20.—EXCESS TRAVEL TIME

The excess travelling time arrangements contained in Clause 18 (7) of the Public Service Award 1992 will no longer apply.

21.—FLEXIBLE WORKING ARRANGEMENTS

Flexible working arrangements will apply within the concept of employees being required to work on average 152 hours Monday to Friday in a four week settlement period. Employees will not be required to work in excess of 12 hours in one day without agreement from the employee, nor for more than five (5) hours without a meal break. No employee shall be required to recommence work until at least ten (10) hours have elapsed from the time the previous period of work ceased, unless the employee agrees.

22.—OVERTIME

Overtime will be paid at time and a half penalty rate for weekdays, weekends and public holidays.

23.—FLEXI—TIME HOURS

The maximum amount of hours that can be carried over from one settlement period to another for those employees working flexible hours is fifteen (15).

24.—HIGHER DUTIES ALLOWANCE

1. An employee will only be paid higher duties allowance when that employee acts in a position which is classified higher than their own for a period of ten (10) working days or more.

2. Where a period of acting higher duties equals or exceeds ten (10) working days, the higher duties allowance will be paid for the entire period of those acting higher duties.

3. Acting higher duties for lesser periods will, on application from the employee, be recorded on the official staff records as evidence for promotional or other purposes.

25.—WEEKEND ATTENDANCE AT CONFERENCES AND SEMINARS

Attendance at Local Government conferences and training seminars held on weekends will not be subject to overtime provisions. The hours so worked shall be regarded as normal hours as provided for in Clause 21 (Flexible Working Arrangements) of this Agreement.

26—HOURS

An employee will work a 38 hour week. Officers classified level 6 and above, in addition to their minimum hours will work reasonable hours required to fulfil the duties and responsibilities of his/her position including any such reasonable hours as the Executive Director requires.

27.—ENTERPRISE BARGAINING AGREEMENT PAYMENTS

1. On registration of this Agreement the salary increases are payable on the basis of continued cooperation of all parties in the implementation of the Productivity Improvement Plan and the achievement of the milestones contained in the Productivity Improvement Plan.

2. Employees will receive a 3% pay increase from the date the Agreement is registered in the Western Australian Industrial Relations Commission and a further 3% twelve (12) months after the date of registration subject to the Department achieving milestones 1 to 8 in the first twelve months of the Agreement.

3. The salary rates payable under this Agreement are included in Schedule A.

28.—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 where expressly provided for in a State Wage Case decision or a reclassification or temporary special allowance.

All arbitrated safety net adjustments are to be absorbed into the pay rates provided for in this Agreement.

29.—SALARY PACKAGING

1. An employee may, by agreement with the employer, enter into a salary packaging arrangement in accordance with salary packaging arrangements 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, less the cost of Compulsory Employer Superannuation Guarantee contributions.

The TEC for the purposes of salary packaging, is calculated by adding—

(a) The base salary;

(b) Other cash allowances, eg annual leave loading,

(c) Non cash benefits, eg superannuation, motor vehicles etc;

(d) Any Fringe Benefit Tax liabilities currently paid; and

(e) 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 separated 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 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 of additional payments of tax of 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.

8. In the event of significant increases in Fringe Benefit Tax liability or administrative costs relating to 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 of salary packaging on request from an employee

11. The Dispute Settlement Procedures contained in the 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.

SIGNATURE OF PARTIES TO THE AGREEMENT

Signed for and on behalf of the parties to the Agreement

.....Signed..... *Common Seal*

DAVE ROBINSON

GENERAL SECRETARY, CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC.)

DATE: 23/11/99

.....Signed.....

JOHN ANTHONY LYNCH

EXECUTIVE DIRECTOR
DEPARTMENT OF LOCAL GOVERNMENT

DATE: 22/11/99

SCHEDULE A

SALARIES

Level	Salary Payable from Date of Registration	Salary Payable 12 months after Date of Registration
Level 1		
under 17	12971	13360
17 years	15160	15614
18 years	17682	18212
19 years	20467	21081
20 years	22984	23674
1.1	25249	26007
1.2	26027	26808
1.3	26803	27607
1.4	27575	28402
1.5	28352	29202
1.6	29128	30002
1.7	30021	30922
1.8	30640	31560
1.9	31554	32501
Level 2		
2.1	32647	33626
2.2	33486	34491
2.3	34368	35399
2.4	35300	36359
2.5	36275	37363
Level 3		
3.1	37614	38742
3.2	38657	39817
3.3	39734	40926
3.3	40838	42064
Level 4		
4.1	42354	43624
4.2	43541	44847
4.3	44763	46106
Level 5		
5.1	47114	48528
5.2	48705	50166
5.3	50358	51868
5.4	52071	53633
Level 6		
6.1	54828	56473
6.2	56703	58404
6.3	58643	60402
6.4	60713	62535

Level	Salary Payable from Date of Registration	Salary Payable 12 months after Date of Registration
Level 7		
7.1	63889	65806
7.2	66086	68068
7.3	68476	70531
Level 8		
8.1	72362	74532
8.2	75146	77400
8.3	78597	80955
Level 9		
9.1	82907	85394
9.2	85819	88393
9.3	89139	91813

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APPENDIX 1

PRODUCTIVITY IMPROVEMENT PLAN

1999

CONTENTS

FOREWORD

This Plan has been developed as a result of ongoing negotiations to support a productivity based pay rise of 6% payable in two instalments of 3% over two years.

The principles contained in the *Public Sector Wages Policy and Workplace Bargaining Guidelines 1999/2001* have been applied in the development of this Plan.

The identified milestones will be implemented over the next two years. This Productivity Improvement Plan will complement the Department's existing Strategic Plan and set the foundation for the development of the next Strategic Plan in 2000.

The 1997 Productivity Improvement Plan contained a substantial number of initiatives which have all been implemented and have resulted in tangible and quantifiable productivity increases.

The State Public Sector has undergone many changes in recent times and there is little indication that this will abate in the near future. The Department has had to respond to many public sector reforms over the past five years. It has introduced flexibility in the use and application of its technical, financial and human resources in order to provide more effective services to its client base.

The object of this Plan is to complete the identified milestones over the next two years, all of which will deliver material productivity gains and a more diverse range of services.

MISSION AND GOALS

As detailed in the Strategic Plan, *Managing Change* the Department's mission is—

> To lead in the development and maintenance of quality local government and better communities for the people of Western Australia.

The Department's strategic goals are—

- *To enhance the capacity of local governments to operate efficiently and effectively to improve the quality of service to their communities.*
- *To promote and monitor required standards of performance by local governments.*
- *To enhance community well-being by developing and implementing effective legislation in relevant areas.*

OUTPUT BASED MANAGEMENT

In line with financial reforms adopted by Treasury the Department implemented an Output Based Management (OBM) structure in 1997/98. In 1998/99 the structure was modified to accommodate new developments in OBM. In 1999/2000 further changes were implemented which resulted in the number of outputs being refined to three.

The transition to OBM required the Department to review and restructure its performance indicators to accommodate the OBM structure. This was completed in July 1999.

The approved OBM structure for 1999/2000 is as follows—

Outcome—

> A system of local government of the highest quality for the people of Western Australia.
>
> Output 1: Development of Policy Advice to Government

Output Description—

> Research and analysis of policy issues, developing new policies and evaluating proposals for legislation. Preparation of new and amending legislation, orders and proclamations, as well as monitoring the procedure and content of local laws adopted by Local Government.

Output 2: Determination of Financial Assistance Grants to Local Government.

Output Description—

> The allocation of funds to assist local governments to provide appropriate services and infrastructure.

Output 3: Support for Local Government Operations.

Output Description—

> The provision of advice to the Minister for Local Government, other State agencies, local governments and members of the public on matters relating to local government. Monitoring the function and performance of local governments and elected members.
>
> As part of this Plan the Department will be implementing a system to facilitate the collection and compilation of work statistics for financial and performance reporting purposes.

KEY PERFORMANCE INDICATORS

The Department has developed new performance indicators which are linked to the new Output Based Management structure.

The Department is using its performance indicators and output measures to more effectively allocate resources to outputs.

The data used to compile output measures is also assisting the Department to more accurately determine its effectiveness in funding its outputs. A system to facilitate the collection and compilation of workplace statistics is being developed and will complement existing workplace management and reporting tools.

MEASURING PRODUCTIVITY

The *Public Sector Wages Policy and Workplace Guidelines 1999/2001* acknowledge that it is not possible to apply a single methodology for determining productivity measurement across government.

The methodology that has been adopted has assessed each milestone in relation to the resources deployed and outcomes achieved. The milestones must be achieved without a corresponding increase in inputs.

Where an initiative involves improved work practices or improved technology the increase in productivity whether notional or actual has been quantified.

Past productivity has not been factored into the productivity calculations.

MONITORING ACHIEVEMENT OF THE MILESTONES

The Corporate Executive will be responsible for monitoring the implementation and progress of the identified milestones.

A report on the Department's progress in implementing the Plan will be provided to the Minister after the first twelve months and again after twenty four months.

CUSTOMER FOCUS

The Department is constantly evaluating and reviewing the quality and timeliness of its service delivery and considering options for diversifying and improving it.

The Department conducted an extensive survey of local governments in July 1999 as part of the process of compiling its performance indicators. The information provided by local governments indicated strong support for the work the Department is doing to assist them.

Based on feedback received from local governments, the Department is having a positive impact on improving the levels of accountability and efficiency of local government. The Department reviews the services it provides to local government on a regular basis to ensure that they remain relevant.

The services provided by the Department contribute to a more effective and accountable system of local government for all communities in Western Australia.

PRODUCTIVITY SHARING

The achievement of the milestones contained in this Plan will provide a material return to government in the form of increased productivity, improved customer service and a more effective system of local government.

The achievement of the identified milestones will also support a pay rise for employees of the Department.

The initiatives identified in this Plan are to be developed and implemented from within existing input levels. The improvement in outputs will be achieved from within the existing levels of inputs and reflect in the Department's output based management outcomes.

With each milestone the productivity value has been costed on a notional or actual saving basis.

TECHNOLOGY

The Department is constantly reviewing its use and application of technology to improve efficiencies in the workplace. Over the past two years the Department has made significant progress in implementing web technologies to improve the dissemination of information. It has also implemented considerable improvements to its computing network to ensure that it has the capacity to accommodate new and emerging technologies.

The development of E-commerce facilities will have a significant impact on the operations of the Department. The Department is reviewing its current arrangements for collecting information from, and disseminating information to local government. Over the next two years the Department will evaluate a number of options to improve efficiencies through the use of web technology.

The Department has been actively encouraging local government to embrace web technology to improve accessibility for their clients and also to achieve improved levels of customer service.

Over the next two years the Department will be producing more publications on line rather than in hard copy format. This has the potential to generate substantial savings in the costs associated with printing, design and distribution of hard copy publications. It will also improve accessibility of information.

GOODS AND SERVICES TAX

The Goods and Services Tax (GST) will come into operation on July 1 2000.

The Department will complete a full analysis of the impact of GST on its operations by March 31 2000.

The GST will place a significant burden on existing resources and the Department must ensure that appropriate systems will be in place by June 2000 to ensure a smooth transition and compliance with the GST.

Staff are in the process of being trained on all aspects of the GST. Support systems will be developed to ensure appropriate levels of compliance.

CONTRACTING

The Department has implemented measures to ensure that staff involved in purchasing and contracting have the necessary skills to competently manage their contracting and purchasing responsibilities.

The Department has taken steps to ensure that its contracting responsibilities and obligations are dealt with in a professional and ethical manner.

MANAGEMENT COMMITMENT

The Corporate Executive has maintained a high level of commitment to the enterprise bargaining process, acknowledging that there are positive returns to the Government and the Department in respect to the milestones contained in this Plan.

The provision of a safe and secure working environment for all employees remains a priority. Management promotes ownership by the staff of the collective achievements of the Department and also the milestones contained herein.

The working environment prevailing within the Department ensures that every employee has an opportunity to contribute to the decision making process and the efficient operations of the organisation.

The Corporate Executive provides the strategic leadership and plays an important role in ensuring the transparency of the decision making process. The management processes existing in the Department ensure effective communication within the Department and this elevates staff morale and promotes effective employer/employee relations.

STAFF TRAINING AND DEVELOPMENT

Staff training and development continues to play a vital role in the Department's approach to improving the skills of its employees. Being a small agency, flexibility of resources is also essential in order to provide the level and diversity of services demanded by the local government sector.

The Department reviewed its Performance Development Program with a view to providing greater emphasis in the promotion of staff training and development.

The demands placed on the Department are significant. There is an expectation that staff will increase and diversify their skills in order to be able to respond to the complex working environment existing in the State and local government sectors.

MILESTONES

MILESTONE: 1

1. INITIATIVE

   Implement bar coding facilities on the Records Management System.

2. IMPACT ON OUTPUTS

   Substantial impact. Much of the support for local government operations involves responding to ministerials and correspondence from the public and local government. The ability to track and locate files more efficiently leads to a quicker turnaround time in processing correspondence which results in improved output performance measures.

3. PRODUCTIVITY INCREASE

   It is estimated that the implementation of bar coding will result in a time saving of twenty hours per week routing, and tracking files, performing file audits and managing retention and disposal.

4..TIMEFRAME

   The project will commence in November 1999 and will be completed by March 2000.

5. COST SAVING

   There will be no actual cost saving. The productivity increase will effectively free up .5 of an FTE which can be used to accommodate the ever increasing workload within the Records Section. Over the past three years the Department's AASL has increased 12% with no increase in

Corporate Services Staff. This does not include the additional demand associated with administering formal inquiries and consulting and contracting appointments.

6. GENERAL IMPACT

The routing and tracking of Departmental files and more efficient management of retention and disposal will result in higher levels of customer service.

MILESTONE: 2

1. INITIATIVE

Implement a new file plan for the local government files. The Department administers three separate file categories, local government files, general files and building appeal files. The Department maintains a series of files for each of the 142 local governments in Western Australia. There have been significant legislative changes over the past four years, necessitating extensive modifications to these files in order to accommodate the changes.

2. IMPACT ON OUTPUTS

The Department provides substantial written advice to local government. It maintains files on each of the local governments. The new system will reflect legislative changes that have occurred over the past four years and provide more effective file and document management.

3. PRODUCTIVITY INCREASE

The local government files have been difficult to administer since the Local Government Act was rewritten in 1995. The current structure does not adequately accommodate the significant legislative changes that have occurred over the past four years. The new system when implemented will save an estimated 5 hours per week classifying correspondence and tracking and routing files.

4. TIMEFRAME

The project will commence in October 1999 with an anticipated completion date of June 2000.

5. COST SAVING

There will be no actual cost saving.

6. GENERAL IMPACT

It is estimated that the turnaround time for processing of advice to local governments will decrease on average 1 to 2 days per item of correspondence.

MILESTONE: 3

1. INITIATIVE

Develop and implement a system for collecting and collating work statistics to assist in compiling and reporting on output measures.

2. IMPACT ON OUTPUTS

The system will not have a direct effect on outputs. It will however facilitate the compilation of output measures as part of the annual budgetary process and quarterly reporting to Treasury. The collection of the data is time consuming and adds significantly to existing workload. The system will ensure that data is relevant, timely and auditable.

3. PRODUCTIVITY INCREASE

The Department will be able to use the data generated by the system to improve strategic decision making, particularly resource allocation. The system will also provide valuable information on output resourcing.

4. TIMEFRAME

The system has been partially developed. It will be fully operational by December 1999. There is still considerable work to be done to ensure that the system effectively interfaces with the Department's financial management system. These developments will be progressed early in 2000 with completion envisaged by June 2000.

5. COST SAVING

There will be no actual cost saving.

6. GENERAL IMPACT

The system will ensure more effective reporting on outputs and facilitate more effective corporate decision making.

MILESTONE: 4

1. INITIATIVE

Complete the year 2000 compliance assessment and remediation program.

2. IMPACT ON OUTPUTS

The impact on outputs will be negligible, assuming that the project achieves its objectives. The success of the program will be measured by the degree to which operations are unaffected. If as expected, this is the outcome, there will be no effect on outputs.

3. PRODUCTIVITY INCREASE

The aim of the program is to ensure that operations and service delivery are not affected. The Department is in the process of carrying out an extensive assessment and remediation of its Y2K exposure. The entire program is being carried out in house using existing resources.

4. TIMEFRAME

The Department will have completed the program by the end of September 1999. Monitoring Y2K compliance and dealing with issues will continue well into the latter half of 2000.

5. COST SAVING

The Department has conducted the entire program in house and used existing resources. While there are no actual cost savings the Department has been able to meet its risk management obligations from within existing resources.

6. GENERAL IMPACT

The work undertaken by the Department will ensure continuity of operations and service delivery.

MILESTONE: 5

1. INITIATIVE

Develop and publish a local government local laws information facility on the Departmental web page.

2. IMPACT ON OUTPUTS

The provision of this information on the Internet will assist local governments to research information on the availability of local laws in every local government in Western Australia. This will provide a valuable management tool to assist local government.

3. PRODUCTIVITY INCREASE

The Department currently provides advice on local laws. The provision of this facility will significantly reduce the time Departmental officers spend researching and providing information. Local governments will be able to search the facility to determine the existence or otherwise of relevant local laws. Councils currently contact the Department for this information. When the information is provided on line, local governments will no longer have to contact the Department to source this information.

4. TIMEFRAME

The project will commence in October 1999 and will be completed by March 2000.

5. COST SAVING

There will be no actual cost saving.

6. GENERAL IMPACT

The Department receives a substantial number of inquiries each week from local government about local laws. The provision of this facility on the Internet will save the Legislation Section 3 hours per week dealing with local law queries.

MILESTONE: 6

1. INITIATIVE

Develop systems, processes and procedures to accommodate the Goods and Services Tax (GST).

2. IMPACT ON OUTPUTS

There will be little impact on outputs.

3. PRODUCTIVITY INCREASE

The imposition of GST will place a further burden on existing resources. The development of systems, procedures and processes will ensure appropriate levels of compliance. There is no actual productivity increase associated with the task of implementing GST other than the implementation will have to be managed from within existing resource levels.

4. TIMEFRAME

To be completed by March 31 2000.

5. COST SAVING

No actual cost saving.

6. GENERAL IMPACT

The major impact of the GST is the burden associated with managing the implementation and ongoing compliance. It will be a considerable imposition on already limited resources.

MILESTONE: 7

1. INITIATIVE

Complete the implementation of systems, processes and procedures associated with the recent changes to Fringe Benefits Tax (FBT).

2. IMPACT ON OUTPUTS

There will be very little impact on outputs.

3. PRODUCTIVITY INCREASE

The recent changes to FBT have meant changing processes and systems. The changes to FBT have impacted heavily on financial management and personnel and payroll systems.

4. TIMEFRAME

Some preliminary work has been completed. The modifications to systems to accommodate FBT will be completed by December 1999.

5. COST SAVING

No actual cost saving.

6. GENERAL IMPACT

The Department has to ensure that it has the necessary systems in place to meet the compliance requirements associated with the recent changes to FBT. The changes impact on the financial management and personnel and payroll systems to ensure compliance with the legislation. As with the GST it will impact on already limited resources.

MILESTONE: 8

1. INITIATIVE

Develop a local government statutory compliance and performance database to assist in monitoring of local government.

2. IMPACT ON OUTPUTS

The development and application of this database will have a significant impact across all outputs. The Department will be able to access current compliance and performance information on all local governments in Western Australia. There is no facility which provides such information. The Department has to research information from a number of sources to access this information. Once the information is consolidated it will provide essential information on local government compliance and performance.

3. PRODUCTIVITY INCREASE

The database will provide detailed information on all aspects of local government performance and compliance. The Department will be able to identify those local governments experiencing problems and be in a better position to take remedial action. The consolidation of this information will provide critical information about local governments. The time currently spent researching and verifying such information will be greatly reduced.

4. TIMEFRAME

Some preliminary work has already commenced. The system will be fully operational by December 1999. Further development and enhancements will occur throughout 2000.

5. COST SAVING

No actual cost saving.

6. GENERAL IMPACT

The system will provide a valuable tool for monitoring local government. The information provided by the system will have application right across the Department and provide up to date information on compliance and performance issues in local government

MILESTONE: 9

1. INITIATIVE

Undertake a review of revenue sources.

2. IMPACT ON OUTPUTS

The opportunity to access new revenue sources will have a positive impact on all outputs where potential revenue sources are identified.

3. PRODUCTIVITY INCREASE

The opportunity for the Department to increase its revenue base will provide capacity to increase outputs and hence productivity.

4. TIMEFRAME

To be completed by March 2001.

5. COST SAVING

There will be no actual cost saving. The review will be conducted by Departmental staff and not require any additional resources. Any identified opportunities will result in increased revenue.

6. GENERAL IMPACT

The opportunity to source new revenue opportunities will provide additional funding which it is envisaged will be allocated to increased inputs.

MILESTONE: 10

1. INITIATIVE

Undertake a review of the Local Government Grants Commission grants management process.

2. IMPACT ON OUTPUTS

It is anticipated that the outcome of the review will have significant impact on the efficiency of the grants management process.

3. PRODUCTIVITY INCREASE

The Department is currently using the SAS statistical package to store and manipulate data. This will be decommissioned after June 30 2000 regardless of the outcome of the review. The review will be conducted by officers of the Grants Commission and will examine the current grant management process and make recommendations for improving it.

4. TIMEFRAME

To be completed by June 30 2001.

5. COST SAVING

Approximately $12,000 per annum will be saved by decommissioning SAS.

6. GENERAL IMPACT

The review will make recommendations for improving the current grants management process. The current system uses the SAS statistical application to store and manipulate data. This is a complex package and staff require advanced user skills. Training new staff is both expensive and extremely time consuming. Major problems have been encountered when trained staff leave. The new system will be developed using Microsoft Access and Excel which are common applications.

MILESTONE: 11

1. INITIATIVE

Development of an FAQ (frequently asked questions) facility on the Department's web page.

2. IMPACT ON OUTPUTS

The Department provides advice to local government on a daily basis on all aspects of administered legislation. The FAQ facility when completed will provide on line legislative interpretations and other advice covering the Local Government Act, Dividing Fences Act, Cemeteries Act, Caravans and Camping Grounds Act and other various acts and regulations. The facility will improve local government's access to advice.

3. PRODUCTIVITY INCREASE

The on line facility will free up resources particularly in the Advisory Services Section which deals with repeated requests for legislative advice.

4. TIMEFRAME

Significant preliminary work has already started. Development and maintenance of the facility will be ongoing.

5. COST SAVING

No actual cost saving.

6. GENERAL IMPACT

The facility will provide local government and the public with legislative interpretations and advice on line. The Department will be promoting the use of this facility to local governments rather than contacting Departmental officers direct. Many requests for advice and interpretations have a recurrent theme and the development of this facility will address many of these.

MILESTONE: 12

1. INITIATIVE

Increase the availability of Departmental publications on the web.

2. IMPACT ON OUTPUTS

This will have significant impact on all outputs. The resources associated with producing and distributing hard copy publications continue to present a problem. By increasing the availability of publications on the Internet access to information is improved and costs are reduced.

3. PRODUCTIVITY INCREASE

There will be substantial time and cost savings associated with printing and distribution.

4. TIMEFRAME

This will be phased in over the next two to three years.

5. COST SAVING

In 2000/2001 the cost saving is estimated to be in the region of $20,000. In future years the cost savings will be significantly higher.

6. GENERAL IMPACT

Access to publications will improve and printing and distribution costs will decrease.

Milestone	*Narrative*	*Productivity Calculation*	*Value $*
1	The implementation of a bar coding facility on the records management system will save 20 hours per week through more effective records and correspondence processing.	There are two level one positions carrying out file tracking, routing, file audits and retention and disposal. This is predominantly a manual process. It is estimated that the bar coding will save each of these officers ten hours per week. Productivity measurement: 2 (level 1) x $28,403 x .263 (10 hours per week) = $14,939 per annum	14,439
2	The implementation of a new records plan for all local government files will reflect legislative changes that have occurred over the past four years and greatly improve file and document handling. The local government files deal with specific areas and a new plan is essential to ensure that the problems associated with correspondence indexing are removed.	The new records plan will improve the efficiency of correspondence classification and the routing and tracking of files. Productivity measurement: 1 (Level 3) x $37,531 x .052 (2 hours per week) = $1,951 per annum 2 (Level 1) x $28,403 x .078 (3 hours per week)= $4,430 per annum	6,381
3	The move to output based management requires detailed reporting and provision of data. A system has been partially developed to collect and collate data to compile and report on output measures.	The new data collection system will save time collecting and collating data for reporting purposes. Productivity measurement: 1 (Level 7) x $66,671 x .052 (2 hours per week) = $3,466 per annum 1 (Level 5) x $50,774 x .052 (2 hours per week) = $2,640 per annum	6,106

Milestone	*Narrative*	*Productivity Calculation*	*Value $*
4	The year 2000 compliance assessment and remediation program will require continuing involvement of relevant staff throughout 1999. Further monitoring and dealing with issues will occur throughout 2000.	The year 2000 program is being coordinated in house and has involved only Departmental staff. Productivity measurement: 1 (level 7) x $66,671 x .026 (1 hour per week) = $1,733 per annum 1 (Level 4) x $43,647 x .052 (2 hours per week) = $2,269 per annum 1 (Level 2) x $31,834 x .052 (2 hours per week) = $1,655 per annum	5,657
5	The local laws information facility will be published on the Internet and promoted within the local government sector. It will save the Department considerable time dealing with repeated requests by local governments for information about local laws.	The Department receives repeated requests from local government about local laws. The facility will significantly reduce the time spent by Departmental officers dealing with these queries. Productivity measurement: 1 (level 7) x $66,671 x .026 (1 hour per week) = $1,733 per annum 1 (Level 4) x $43,647 x .052 (2 hours per week) = $2,269 per annum	4,002

Milestone	*Narrative*	*Productivity Calculation*	*Value $*
6	The imposition of a Goods and Services Tax (GST) will place significant burden on staff to develop and implement systems to cope with the GST. The imposition of the GST will require significant time to ensure appropriate levels of compliance. This will be accommodated from within existing resources.	The Department will have to develop and implement systems to accommodate the GST. It will also have to deal with compliance requirements on a daily basis. Productivity measurement: Systems development and maintenance – 1 (level 7) x $66,671 x.052 (2 hours per week) = $3,466 per annum 1 (level 5) x $50,774 x .078 (3 hours per week) = $3,960 per annum Compliance – 1 (level 7) x $66,671 x .052 (2 hours per week) = $3,466 per annum 1 (Level 5) x $50,774 x .078 (3 hours per week) = $3,960 per annum	14,852
7	The recent changes to the Fringe Benefits Tax legislation have placed a further burden on the Department's resources and also its financial management and personnel and payroll systems. Ongoing compliance is another task which must be accommodated from within existing resources.	The Department is in the process of developing procedures and making adjustments to existing systems to accommodate the changes to FBT. Productivity measurement : Systems development and maintenance – 1 (level 5) x $50,774 x .052 (2 hours per week) = $2,640 per annum Compliance – 1 (Level 5) x $50,774 x .078 (3 hours per week) = $3,960 per annum	6,600

Milestone	*Narrative*	*Productivity Calculation*	*Value $*
8	The Department is in the process of developing a statutory compliance and performance database to assist in monitoring local government performance and compliance. The database will consolidate compliance and performance data which local government currently provides to the Department in compliance returns, budgets, financial statements, annual reports and other returns.	The database will save time researching information on local government performance and compliance in WA. Productivity measurement: System development and maintenance – 1 (level 3) x $39,822 x .10 (4 hours per week) = $3,982 per annum Time saved researching and sourcing information: 1 (level 7) x $66,671 x .052 (2 hours per week) = $3,466 per annum 1 (level 6) x $59,202 x .052 (2 hours per week) = $3,078 3 (level 5) x $50,774 x .052 (2 hours per week) = $7,920 1 (level 4) x $43,646 x .052 (2 hours per week) = $2,269	20,715

TOTAL	***$78,752***

Milestone	***Narrative***	***Productivity Calculation***	***Value $***
9	The Department will undertake a review of revenue sources. The review will focus on opportunities for charging local governments for services it currently provides free of charge. The review will be undertaken in house and examine all services currently provided to local government. The review will make recommendations to the Corporate Executive on service charging options. It is envisaged that the Department's revenue base will increase from July 1, 2001 as a result of the review.	The review will be undertaken by two Departmental officers and involve extensive consultation with staff in the Department. Productivity measurement: 1 (level 7) x $33.68 x 200 (hours) = $6,736 1 (level 5) x $25.62 x 150 (hours) = $3,843	10,579
10	The Department will undertake a review of the grants determination process to improve efficiencies across the board. It is envisaged that efficiency improvements identified in the review will produce further productivity improvements beyond 2000/2001.	The review will be undertaken by two Departmental officers. Productivity measurement: 1 (level 7) x $33.68 x 100 (hours) = $3,368 1 (level 4) x $22.01 x 200 (hours) = $4,402 1 (level 3) x $20.09 x 300(hours) = $6,027 There will be a saving of $12,000 in licensing fees from 1/7/2001 and beyond when the current statistical software is decommissioned.	13,797 12,000
11	Development of an FAQ facility on the Departmental web page will reduce the amount of telephone advice the Department provides in relation to legislation inquiries. The Department will be promoting the use of the facility to local government.	The facility will allow local governments to source answers to a wide range of frequently asked questions about legislation impacting on local government.	19,873

PRODUCTIVITY MEASUREMENT 2ND TIER PAYMENT

PRODUCTIVITY IMPROVEMENT %

1ST TIER PAYMENT

Milestone	Value ($)	Corporate Services (%)	Output 1 (%)	Output 2 (%)	Output 3 (%)	Total (%)
1	14,439	.7				.7
2	6,381	.3				.3
3	6,106	.3				.3
4	5,657	.3				.3
5	4,002	.2				.2
6	14,852	.8				.8
7	6,600	.4				.4
8	20,715				1.1	1.1
	78,752	3%			1.1%	4.1%

Milestone	***Narrative***	***Productivity Calculation***	***Value $***
		Productivity measurement – System development and maintenance – 1 (level 6) x $59,202 x .078 (3 hours per week) = $4,617 per annum Time saved responding to telephone calls – 1 (level 6) x $59,202 x .052 (2 hours per week) = $3,078 2 (level 5) x $50,774 x .052 (2 hours per week) = $5,280 per annum 2 (level 3) x $39,822 x .052 (2 hours per week) = $4,140 per annum 1 (level 2) x $35,371 x .0.78 (3 hours per week) = $2,758 per annum	
12	The Department will move to provide all future publications on the Internet. It currently provides substantial amounts of hard copy publications to local government. Over the next two to three years the Department will reduce the amount of hard copy publications it produces in order to reduce costs and improve access.	The Department's expenditure on printing, and distribution is approximately $100,000 per annum. Reducing the amount of hard copy publications printed and distributed will produce savings in the order of $20,000 in 2000/2001. In future years this figure will be significantly higher.	20,000

		TOTAL	***$76,249***

PRODUCTIVITY IMPROVEMENT %

2ND TIER PAYMENT

Milestone	Value ($)	Corporate Services (%)	Output 1 (%)	Output 2 (%)	Output 3 (%)	Total (%)
9	10,579	.6				.6
10	25,797	.6		2.8		3.4
11	19,873		.7		.9	1.6
12	20,000	1.0				1.0
	$76,249	2.2%	.7%	2.8%	.9%	6.6%

FREMANTLE FOUNDRY & ENGINEERING CO PTY LTD ENTERPRISE BARGAINING AGREEMENT 1999.
No. AG 163 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

Fremantle Foundry & Engineering Co Pty Ltd.

No. AG 163 of 1999.

Fremantle Foundry & Engineering Co Pty Ltd Enterprise Bargaining Agreement 1999.

CHIEF COMMISSIONER W.S. COLEMAN.

2nd December 1999.

Order.

HAVING heard Mr Gerry Sturman on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers-Western Australian Branch

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

THAT the agreement Fremantle Foundry & Engineering Co Pty Ltd Enterprise Bargaining Agreement 1999 in the terms of the following Schedule be registered as an industrial agreement. This Agreement replaces AG 301 of 1996 entitled Fremantle Foundry & Engineering Co Pty Ltd Enterprise Bargaining Agreement 1996 which is hereby cancelled.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

Schedule.

1.—TITLE

This agreement shall be known as the Fremantle Foundry & Engineering Co Pty Ltd Enterprise Bargaining Agreement 1999.

2.—ARRANGEMENT

3.—AREA AND SCOPE

The area and scope of this Agreement is the same as that prescribed in the Metal Trades (General) Award No 13 of 1965 as it applies to the Fremantle Foundry and Engineering Co Pty Ltd on the day immediately preceding the date of registration of the Agreement.

4.—INCIDENCE AND PARTIES BOUND

This Agreement shall apply to and be binding upon the Fremantle Foundy & Engineering Co Pty Ltd an estimated 35 employees at its Fremantle operations engaged in the classifications set out in Clause 12 – wages of this Agreement 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 the commencement of the first pay period beginning on or after 15 April, 1999 for a period of two years. The parties make a commitment to commence renegotiation for the replacement of this agreement three months prior to the expiry date.

6.—RELATION 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 Metal Trades (General) Award no 13 of 1965, this Agreement shall prevail to the extent of the inconsistency.

7.—SINGLE BARGAINING UNIT

(1) For the purpose of the Enterprise Agreement, a Single Bargaining Unit has been established by way of a Consultative Works Committee. The Committee shall comprise of the following members

- The Factory Manager
- The elected Shop Floor Representative of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch.

(2) The Single Bargaining Unit shall be given all relevant information to enable effective development and the implementation of measures to improve productivity, efficiency and flexibility.

8.—FLEXIBILITY

As the company is engaged mainly in ship repair activities and general engineering industries, overtime may be required to be worked for extended periods at short notice.

Restrictions will not be placed on such overtime.

9.—TRAINING

(1) The parties to this Agreement recognise that in order to increase productivity, efficiency and flexibility, a continuing commitment to multi-skill development is required.

(2) As a quality endorsed company, Fremantle Foundry & Engineering Co Pty Ltd maintains an Enterprise Training Programme. Adherence to this programme is mandatory by all employees and shall undertake and complete training as directed by the Company.

10.—PRODUCTIVITY AND PERFORMANCE IMPROVEMENT PROGRAMME

(1) The parties agree to examine a range of issues to increase productivity, efficiency and flexibility. A range of performance indicators will be developed through a consultative process during the term of this Agreement, which will include but not be limited to—

- Reduction in absenteeism
- Reduction in paid or unpaid sick leave
- Improvement in adherence to starting and finishing times and meal breaks

(2) The ongoing improvement of employees to work with the Administration requirements of the Management System are as follows—

- Sourcing of information from and the signing of Job Monitoring Cards in the designated areas
- Correct filling out of timesheets by detailing job descriptions and material usage
- Recording job numbers for work carried out
- Identifying of job and materials by marking with the correct job number

11.—RACIAL DISCRIMINATION

(1) The parties to this Agreement acknowledge that discrimination or harassment on the grounds of racial origin, as defined by State and Federal legislation, is unlawful.

(2) During the term of this Agreement, through the Single Bargaining Unit, the parties will examine ways to maintain racial harmony in the workplace.

12.—WAGES

(1) The wage rates to apply pursuant to this Agreement are as structured in the attachment – being Schedule A. These rates are calculated on two consecutive 12 monthly adjustments of 5% each.

(2) Apprentices are to be paid a percentage of the Tradesperson's C10 rate in accordance with subclause (3) in clause 31 – Wages and Supplementary Payments of the Metal Trades (General) Award No 13 of 1965.

(3) The Company reserves the right to suspend sine die the scheduled commencement date of stage b of this Agreement should the employees fail to comply with the contents of Clause 10 – Productivity and Performance improvement Programme, Parts 1 and 2 and clause 14 – Commitments, Parts 4 and 5.

13.—DISPUTE SETTLEMENT PROCEDURE

(1) Depending on the issues involved, the size and function of the plant or enterprise and the union membership of the employees concerned, a procedure involving up to four stages of discussion shall apply. These are—

(a) Discussions between the employee(s) concerned (and shop steward if requested) and the immediate supervisors.

(b) Discussions involving the employee(s) concerned, the shop steward and the employer representative.

(c) Discussions involving representatives from the state branch of the Union(s) concerned and the employer representatives.

(d) Discussions involving senior union officials (state secretary) and the senior management representative(s).

(e) There shall be an opportunity for any party to raise the issue to a higher stage.

(2) There shall be a commitment by the parties to achieve adherence to this procedure. This should be facilitated by the earliest possible advice by one party to the other of any issue or problem which may give rise to a grievance or dispute.

(3) Throughout all stages of the procedure all relevant facts shall be clearly identified and recorded.

(4) Sensible time limits shall be allowed for the completion of the various stages of the discussions. At least seven (7) days should be allowed for all stages of the discussions to be finalised.

(5) Emphasis shall be placed on a negotiated settlement. Persons involved in the question, dispute or difficulty will confer among themselves and make reasonable attempts to resolve questions, disputes before taking those matters to the Commission. However, if the negotiation 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 assistance in resolving the dispute.

(6) In order to allow for the peaceful resolution of grievances the parties shall be committed to avoid stoppages of work, lockouts or any other bans or limitations on the performance of work while the procedures of negotiations and conciliation are being followed.

(7) The employer shall ensure that all practices applied during the operation of the procedure are in accordance with safe working practices and consistent with established custom and practices and the workplace.

14.— 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.

(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 and long service leave with pay.

(3) There shall not be any further wage increases for the life of this Agreement except when consistent with a State Wage Case decision.

(4) A meaningful effort by all employees in the implementation and maintenance of a safe workplace with particular attention to good housekeeping and hygiene practices.

(5) No smoking on board ships except during meal breaks in the designated areas.

SIGNATORIES TO AGREEMENT

For and on behalf of the Automotive Food, Metals, Engineering, Printing and Kindred Industries Union of Workers Western Australian Branch —

(signed)

J Sharp-Collett

For and on behalf of the Fremantle Foundry & Engineering Co Pty Ltd

(signed undecipherable)

Dated this 22nd day of September 1999

SCHEDULE "A"

WAGE RATES

Wage Group Level	Wage Rate Per 1997 EBA	Stage A 5% Inc 15 Apr 1999	Stage B 5% Inc 15 Apr 2000
C5 Formean	$767.77	$806.16	$846.47
C7 Coded Welder	$689.40	$723.87	$760.06
C9 Leading Hand	$646.88	$679.22	$713.18
C10 Tradesperson	$617.68	$648.56	$681.00
C11 Assistant	$524.93	$551.17	$578.73
C12 Assistant	$491.33	$515.89	$541.68
Truck Driver	$585.58	$614.85	$645.59
NATA Assistant	$572.38	$601.00	$631.05
Storeperson	$558.29	$586.20	$615.51

GRAYLANDS SELBY-LEMNOS & SPECIAL CARE HEALTH SERVICES ENTERPRISE BARGAINING AGREEMENT 1999.
No. PSAAG 40 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Hospital Salaried Officers Association of Western Australia (Union of Workers)

and

Metropolitan Health Service Board at Graylands Selby-Lemnos & Special Care Health Services

and

Civil Service Association of Western Australia Incorporated.

No. PSAAG 40 of 1999.

25 November 1999.

Order.

REGISTRATION OF AN INDUSTRIAL AGREEMENT
No. PSAAG 40 of 1999

HAVING heard Mr C. Panizza on behalf of the first named party and Ms M. Hislop and with her Ms G. Monkhouse on behalf of the second named party and Ms K. Franz on behalf of the third named party; and

WHEREAS an agreement has been presented to the Public Service Arbitrator (the Arbitrator) for registration as an Industrial Agreement; and

WHEREAS the Arbitrator is satisfied that the aforementioned agreement complies with the Industrial Relations Act, 1979;

NOW THEREFORE the Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the agreement titled the Graylands Selby-Lemnos & Special Care Health Services Enterprise Bargaining Agreement 1999, filed in the Commission on 14 October 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 Graylands Selby-Lemnos & Special Care Health Services Enterprise Bargaining Agreement 1999.

ARRANGEMENT

3.—PARTIES BOUND TO AGREEMENT

This Enterprise Bargaining Agreement shall apply to government officers employed under the Graylands Selby-Lemnos & Special Care Health Services Award 1999, the Civil Service Association of Western Australia Incorporated (CSA), the Hospital Salaried Officers' Association of Western Australia (Union of Workers) (HSOA) and the Metropolitan Health Service Board (MHSB). The estimated number of employees bound by this Agreement at the time of registration is 249.

4.—TERM OF AGREEMENT

1. This Agreement shall operate from the date of registration in the Western Australian Industrial Relations Commission and shall remain in force until its expiry thirty (30) months after registration.

2. During the life of the Agreement the parties will continue to address a range of issues and reforms specifically aimed at increasing productivity.

3. This Agreement will continue in force after the expiry of the term until such time as any of the parties withdraw from the Agreement by notification in writing to the other party and to the WAIRC or replaces this Agreement with a subsequent Agreement.

4. The parties agree to commence negotiations six (6) months prior to the expiration of this Agreement for a replacement Agreement.

5.—AVAILABILITY OF AGREEMENT

Every employee covered by this Agreement will be entitled to a copy of this Agreement. In addition, copies of this Agreement will be kept in easily accessible places within the various campuses and locations which will be communicated to the employees.

6.—NO FURTHER CLAIMS

Subject to the terms and operation of this Agreement no further claims shall be made by any of the parties.

7.—RELATIONSHIP TO PARENT AWARD AND OTHER AGREEMENTS

This Agreement shall be read in conjunction with the Graylands Selby-Lemnos & Special Care Health Services Award 1999. In the case of any inconsistencies this Agreement shall apply to the extent of the inconsistencies. Where this Agreement is silent the Award shall apply.

Conditions applying as at 30 June 1997 to security officers employed at Graylands Selby-Lemnos & Special Care Health Services, as set out in the Graylands Hospital Security Officers Agreement 1995, will continue to apply, and be read in conjunction with this Agreement until the proposed Graylands Selby-Lemnos & Special Care Health Services Security Officers Agreement 1999 becomes operative and to the extent of any inconsistency between the 1997 conditions and this agreement the 1997 conditions will prevail

8.—OBJECTIVES, PRINCIPLES AND COMMITMENTS

(1) The parties agree that the objectives of this Agreement are to—

(a) improve the productivity and efficiency of the MHSB (Graylands Selby-Lemnos & Special Care Health Services);

(b) facilitate greater flexibility in the management of conditions and work arrangements across the MHSB;

(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, MHSB and its clients and the Government on behalf of the community;

(b) ensuring that the MHSB operates in a manner consistent with the principles outlined in Section 7, 8 & 9 of the Public Sector Management Act;

(c) developing and pursuing changes on a co-operative basis; and

(d) ensuring that the MHSB operates as effectively, efficiently and competitively as possible.

(3) The CSA, HSOA and the MHSB, 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) ensures 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 that 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 organisational 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 Australian Council Of Healthcare Standards (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 multi-disciplinary 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.

(4) In addition, the MHSB is committed to facilitating and encouraging the participation and commitment of employees.

9.—FRAMEWORK AND PRINCIPLES FOR IDENTIFYING PRODUCTIVITY INITIATIVES

The parties are committed to the continued development and implementation of a broad agenda of initiatives designed to increase the efficiency and effectiveness of the program and service delivery of Graylands Selby-Lemnos & Special Care Health Services.

(a) 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 the MHSB'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 safety and health risk reduction, training and rehabilitation programs.

Productivity Improvements

Productivity improvements are changes which increase the efficiency and effectiveness of the MHSB 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.

Identifying Productivity Increases

To assist in identifying and negotiating productivity improvements during the life of this agreement and in negotiating the next agreement a model for identifying productivity increases is contained in Schedule B of this Agreement.

10.—IMPLEMENTATION OF PRODUCTIVITY 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

(d) actively share information and advise of corporate strategic issues affecting Graylands Selby-Lemnos and Special Care Health Services business operation.

3. The parties to the Peak Forum will consist of senior management, employee representation, CSA and HSOA 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.

11.—RESOURCES FOR ONGOING PRODUCTIVITY IMPROVEMENT AND FURTHER ENTERPRISE BARGAINING NEGOTIATIONS

(1) It is recognised that enterprise bargaining places considerable obligations upon the parties at the MHSB.

(2) (a) To assist in meeting these obligations, the MHSB will assist by providing appropriate resources having regard to the operational requirements of the MHSB and resource requirements associated with developing productivity improvements under this Agreement and with negotiating a new agreement;

(b) It is accepted that employees of the MHSB (Graylands Selby-Lemnos & Special Care Health Services) who are involved in the productivity improvement and the enterprise bargaining processes will be allowed reasonable paid time to fulfil their responsibilities in this process;

(c) Access to resources shall be negotiated with the MHSB and shall not unreasonably affect the operation of the MHSB;

(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 improvements within the 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 14—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, this shall also apply to Clause 10—Implementation of Productivity Initiatives;

(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.—CONSULTATION

This clause shall be read in conjunction with Clause 46 Notification of Change of the Graylands Selby-Lemnos & Special Care Health Services Award 1999. The parties are committed to working together to improve the business performance and working environment in Graylands Selby-Lemnos & Special

Care Health Services. 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 significantly affect existing practices, working conditions or employment prospects of employees, the CSA and HSOA and employees affected shall be notified by the employer.
2. Consultation with employees shall occur on proposed changes that will impact directly on the employees.
3. In the context of this clause consultation shall mean information sharing and opportunity for discussion on matters relevant to the respective proposed changes and will be conducted in such a way as to enable the unions and employees to contribute to the decision making process.

13.—AGREEMENTS AND WORKPLACE AGREEMENTS

(1) 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 HSOA and CSA.

For its part, the HSOA and CSA undertakes to advise all employees on the matter of choice whether or not they are members of the HSOA or CSA.

(c) If agreement on any aspect of this clause is not able to be reached the dispute settlement procedure set out in Clause 14 of this Agreement is to be followed.

(2) 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 reconsider their respective Workplace Agreement in light of this Agreement.

(3) All staff transferred or redeployed to the MHSB 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 the MHSB.

(4) All promotional positions and new staff recruited by the MHSB from outside the Public Sector may be provided with the choice of a Workplace Agreement or this Agreement, subject to the discretion of the MHSB.

(5) In the exercising of the discretion to only offer a Workplace Agreement under subclauses (3) and (4) of this clause, the MHSB 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, the MHSB is to liaise with the CSA and the HSOA to ensure it is not done to circumvent the option of choice.

14.—DISPUTE AVOIDANCE AND SETTLEMENT PROCEDURES

(1) The objective of this Clause is to provide a set of procedures for dealing with any question, dispute or difficulty arising under this Agreement and for dealing with any question, dispute or difficulty between the parties during negotiations for amendments to this Agreement.

(2) Subject to relevant provisions within 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 a representative from the CSA and HSOA from intervening to assist in the process—

(a) The matter is to be discussed between the CSA and 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 identified in subclause 2(a) of this clause, the matter is to be discussed between the employee representative and a representative nominated by the Chairman of the MHSB (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 CSA (or his/her nominee), or a representative nominated by the Chairman of the MHSB (or his/her nominee) of the existence of a dispute or disagreement;

(e) The Secretary of the HSOA or CSA (or his/her nominee) and a representative nominated by the Chairman of the MHSB (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.

(3) 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.

15.—HOURS

This clause replaces Clause 16 – Hours of the Graylands Selby-Lemnos & Special Care Health Service Award 1999 and will take effect twelve (12) months from the date of registration of this Agreement in accordance with the second pay increase.

(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;

(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;

(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 HSOA and CSA as soon as the decision has been made and before the changes are to be introduced.

(2) Other Working Arrangements

(a) 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.

(3) 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 Graylands Selby-Lemnos & Special Care Health Services Award 1999, 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. In case of a nine-day fortnight a day shall be credited as 8 hours 26 minutes.

(iii) Maximum Daily Working Hours

Subject to subclause (1)(b), a maximum of 10 hours may be worked in any one day.

16.—PART-TIME EMPLOYEES

(1) When a part-time employee classified above the 20 years of age rate as defined by the Graylands Selby-Lemnos & Special Care Health Services Award 1999, commences employment on or after twelve months from the date of registration of this Agreement, 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. Employees employed with the Public Service prior to 12 months from date of registration shall maintain their entitlements to annual increments.

(2) 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.

(3) Part-time employees shall be paid 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.

(4) Part-Time Flexibility for Relief

(a) (i) The purpose of this provision is to provide those part time employees who wish to access it with the opportunity to work additional hours by covering short-term relief requirements of the employer.

(ii) While relief for vacancies will normally be provided from full time relief staff, where that is not possible, opportunities for relieving vacancies will be offered on an equitable basis to available, suitable qualified part time staff.

(iii) Where the numbers of suitably qualified and available part time staff warrant it, they shall form a relief pool for the purposes of this subclause.

(b) The purpose of the relief pool is to identify a pool of available and appropriately trained employees to provide staffing relief for absences of other workers while reducing the need for employers to resort to the use of casuals to provide adequate relief cover. It is envisaged relief under this subclause will be required for absences occasioned by matter such as—

- Brief periods of unplanned absence;
- Sick leave;
- Time in lieu;
- Annual leave;
- Long service leave.

(c) This provision applies to part time workers only

(d) For the purposes of this subclause, as applicable, a pool or pools of staff qualified for the work to be relieved, will be formed. This pool may adjusted in consultation between the employer and the employee.

(e) Relief will be provided for absences of both part time and full time employees.

(f) The pool will consist of only those employees who indicate their willingness to participate in the pool and to accept the modified terms and conditions applying to its operation those terms being set out in paragraph (g) below.

(g) (i) Not withstanding the provision of Subclause (1) (b) of Clause 34 Part-time Employees, of the Award, and subject to subclauses (b), (c), (d) of this clause where a part-time employee has previously indicated in writing a willingness to work extra hours and or extra shifts such employee may work up to 76 hours per fortnight at ordinary rates of pay without receiving prior notice.

(ii) The indication given by an employee of their willingness to work extra hours may be withdrawn at any time.

(iii) An indication by an employee of his/her willingness to work additional hours does not oblige the employee to work additional hours if they are offered by the employer, accordingly, the employee may refuse to work any additional hours offered to them and may not be required to give any reasons for so refusing. Any such refusal is without prejudice to the employee.

(iv) The employer may not make it a Condition of Employment that an employee agree to make themselves available to work additional hours.

(v) Consistent with the operation of this Agreement there will be no rostered split shifts.

17.—ADJUSTMENT OF ALLOWANCES

Where an employee subject to this Agreement is paid an allowance as provided under the Graylands Selby-Lemnos & Special Care Health Services Award 1999, 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 Schedule A of this Agreement.

18.—ANNUAL LEAVE

1. Provisions for annual leave entitlements will be as per Clause 19 – Annual Leave of the Award except for provisions that have been replaced by provisions within this Agreement.

2. By mutual agreement between the employer and the employee annual leave may be taken in single days to a maximum of five (5) per twelve month period.

3. An employee may submit application for annual leave to be taken at half the normal rate of pay for double the period of time which will be subject to the employers approval. Not more than twenty (20) days at half pay shall be taken within any given twelve month period.

19.—PUBLIC HOLIDAYS

This provision replaces subclause 20(1) of Graylands Selby-Lemnos & Special Care Health Services Award 1999 and will take effect twelve (12) months from the date of registration of this Agreement in accordance with the second pay increase.

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.

20.—LONG SERVICE LEAVE

1. Long Service Leave entitlements will be as per Clause 21 – Long Service Leave of the Graylands Selby-Lemnos & Special Care Health Services Award 1999 except for provisions that have been replaced by provisions within this Agreement.

2. An employee may submit application to have long service leave paid out subject to the employer's approval, which will be based on merit and subject to subclause 3.

3. Any application made under subclause 2 of this clause must meet the following criteria—

a) Ten days annual or long service leave must be taken in the calendar year an application is made.

b) Payment in lieu of leave will not exceed the equivalent of 13 weeks long service leave in any one calendar year.

c) The payment will be at the salary rate, which would have been paid if the leave had been taken.

4. If an employee cannot take Long Service Leave within the time allowed by the Award the employee, subject to the employers approval, will not be penalised and will continue to accrue entitlements toward their next entitlement.

5. Accrued Long Service Leave may be taken in periods of not less than the equivalent of one (1) week on full pay.

21.—SICK LEAVE

This provision replaces subclause (1)(a) of Clause 22.—Sick Leave of the Graylands Selby-Lemnos & Special Care Health Services Award 1999 and will take effect twelve (12) months from the date of registration of this Agreement in accordance with the second pay increase.

The basis for the cumulative accrual of sick leave shall be—

	Leave On Full Pay Working Days
On date of employment of the employee	5
On completion by the employee of six months' service	5
On completion by the employee of twelve months' service	10
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.

22.—FAMILY, BEREAVEMENT AND PERSONAL LEAVE

(1) Family Leave

(a) In this subclause "family member" means the employee's spouse, defacto spouse, child, stepchild, 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

This subclause replaces Clause 26.—Short Leave of the Graylands Selby-Lemnos & Special Care Health Services Award 1999 and will take effect twelve (12) months from the date of registration of this Agreement in accordance with the second pay increase.

(a) Without Pay

The employer may upon the request of an employee, grant 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 employee single days of annual leave for pressing personal emergencies.

(c) Use of Family 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 a maximum of three days (22.8hours) of family leave for pressing personal emergencies.

23.—DEFERRED SALARY SCHEME

1. With the written agreement of the employer, an employee may elect to receive, over a four year period, 80% of the salary they would otherwise be entitled to receive in accordance with this Agreement.

2. Should the hours or classification of the employee change prior to the completion of the fourth year the employee will be entitled to payment proportional to the hours and classification worked whilst receiving 80% of the salary they would have otherwise been entitled to receive.

3. On completion of the fourth year, the employee will be entitled to 12 months leave and will receive an amount equal to 80% of the salary they were entitled to in the fourth year of deferment subject to subclause 2.

4. Where employees complete four years of deferred salary and are not required to attend duty in the following year, the period of non attendance shall not constitute a break in service and shall count as service on a pro rata basis for all purposes.

5. An employee may withdraw from this scheme prior to completing a four year period by written notice. The employee

will receive a lump sum payment of salary foregone to that time but will not be entitled to equivalent absence from duty.

6. It is the responsibility of the employee to make themselves aware of superannuation and taxation implications resulting from the scheme before they enter into the new arrangement.

24.—EMPLOYEE FUNDED EXTRA LEAVE

1. Subject to operational requirements this clause entitles an employee to an additional four (4) weeks leave per 52 weeks worked.

2. On application an employee may be entitled to receive 48 weeks salary spread over the full 52 weeks of the year. At the completion of the specified 52 week period the employee will be entitled to take a total of 4 weeks extra leave in addition to their normal leave entitlements.

3. Payment during the 4 weeks extra leave will be adjusted to reflect the salary that was not received during the time worked for the accrual period.

4. The 4 weeks extra leave will not be accruable on an annual basis. In the event that the employee cannot take their leave, their salary will be adjusted at the completion of the 52 week period to reflect their ordinary salary and the accrued 4 weeks extra leave will be taken at a time mutually acceptable to the employee and the employer.

5. The additional 4 weeks extra leave will not attract leave loading.

6. The employee will ensure that their superannuation arrangements and taxation effects are fully explained to them by the relevant Authority.

25.—CEREMONIAL/CULTURAL LEAVE

1. An employee covered by this Agreement is entitled to time off without loss of pay for tribal/ceremonial/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/cultural leave may be taken as whole or part days off. Each day or part thereof, shall be deducted from 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/cultural purposes.

26.—PARENTAL LEAVE

Subject to the terms of this clause employees are entitled to parental leave and / or to work part-time in connection with the birth or adoption of a child.

(1) Definitions

For the purpose of this clause—

(a) "Child" means a child of the employee under the age of one year except for adoption of a child where "child" means a person under the age of five years of age who is placed with the employee for the purpose of adoption, other than a child or step-child of the employee or of the spouse of the employee or child who has previously lived continuously with the employee for a period of six months or more.

(b) "Parental leave" means maternity, paternity or adoption leave taken in accordance with this clause.

(2) Basic entitlement

(a) With the exception of casual staff, every employee, male or female, is entitled to a maximum of 52 weeks unpaid parental leave following the birth or adoption of a child.

(b) Parental and adoption leave may be accessed simultaneously by both parents subject to the employer's approval.

(3) Maternity leave

(a) An employee will provide to the employer at least ten weeks in advance of the expected date of confinement—

(i) a certificate from a registered medical practitioner stating that she is pregnant and the expected date of confinement; and

(ii) written notification of the date on which she proposes to commence maternity leave, and the period of leave to be taken.

(b) Subject to subclause (c) and unless agreed otherwise between employer and employee, an employee to give birth may commence parental leave at any time within six weeks immediately prior to the expected date of the birth.

(c) Where an employee continues to work within the six week period immediately prior to the expected date of birth, or where the employee elects to return to work within six weeks after the birth of the child, an employer may require the employee to provide a medical certificate stating that she is fit to resume her normal duties.

(d) Where the pregnancy of an employee terminates and the employee has not commenced maternity leave, the employee may take unpaid leave (to be known as special maternity leave) for such period as a registered medical practitioner certifies as necessary, except that where an employee is suffering from an illness not related to the direct consequences of the delivery, an employee shall be entitled to access paid sick leave to which she is entitled, in lieu of, or in addition to, special maternity leave.

(e) Where leave is granted under subclause (3)(d), during the period of leave an employee may return to work at any time, as agreed between the employer and the employee provided that time does not exceed four weeks from the recommencement date desired by the employee.

(f) Where the pregnancy of an employee then on maternity leave terminates other than by the birth of a living child, it shall be the right of the employee to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the employee to the employer that she desires to resume work.

(g) Where an employee then on maternity leave suffers illness related to her pregnancy, she may take such paid sick leave as to which she is then entitled and such further unpaid leave (to be known as special maternity leave) as a registered medical practitioner certifies as necessary before her return to work provided that the aggregate of paid sick leave, special maternity leave and maternity leave shall not exceed twelve months.

(4) Paternity leave

An employee will provide to the employer, at least ten weeks prior to each proposed period of paternity leave —

(a) a certificate from a registered medical practitioner which names his spouse, states that she is pregnant and the expected date of confinement, or states the date on which the birth took place; and

(b) written notification of the date on which he proposes to start and finish the period of paternity leave.

(5) Adoption leave

(a) The employee will notify the employer at least ten weeks in advance of the date of commencement of adoption leave and the period of leave to be taken. An employee may commence adoption leave prior to providing such notice where through circumstances beyond the control of the employee, the adoption of a child takes place earlier.

(b) The employer may require an employee to provide confirmation from the appropriate government authority of the placement.

(c) The employer shall grant an employee who is seeking to adopt a child such unpaid leave as is required by the employee to attend any compulsory interviews or examinations as are necessary as part of the adoption procedure. Where paid leave is available to the employee, the employer may require the employee to take such leave in lieu of unpaid leave.

(d) Where the placement of a child for adoption with an employee does not proceed or continue, the employee will notify the employer immediately and the employer will nominate a time not exceeding four weeks from the date of notification for the employee's return to work.

(6) Variation of notice period

Notwithstanding the requirement to give at least 10 weeks notice of the date of commencement of parental leave, such notice may be for a greater or lesser period, where it is necessary to vary the date of commencement of parental leave due

to a variation in the actual date of arrival of the child. Such variation does not count as a variation for the purposes of subclause (7) of this clause.

(7) Variation of period of parental leave

Unless agreed otherwise between the employer and employee, an employee may apply to their employer to change the period of parental leave on one occasion. Any such change shall be notified at least four weeks prior to the commencement of the changed arrangements.

(8) Parental leave and other entitlements

An employee may in lieu of or in conjunction with parental leave, access other paid leave entitlements which the employee has accrued, such as annual leave and long service leave, subject to the total amount of leave not exceeding 52 weeks.

(9) Transfer to a safe job

(a) Where an employee is pregnant and, in the opinion of a registered medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue at her present work, the employee will, if the employer deems it practicable, be transferred to a safe job at the rate and on the conditions attaching to that job until the commencement of maternity leave.

(b) If the transfer to a safe job is not practicable, the employee may elect, or the employer may require the employee, to commence parental leave.

(10) Entitlement to Part-Time employment

(a) Where an employee is pregnant, and has a doctors certificate advising that it would be preferable for the employee to work part-time, or where an employee is eligible for parental leave, and the employer agrees, the employee may work part-time, the terms of which are to be agreed in writing, in one or more periods at any time until the child's second birthday or until the second anniversary of the placement of the child.

(b) The work to be performed part-time need not be the work performed by the employee in his or her former position.

(11) Returning to work after a period of parental leave or part time work.

(a) An employee will notify of their intention to return to work after a period of parental leave or part-time work entered into in accordance with this clause at least four weeks prior to the expiration of the leave or part-time work.

(b) An employee will be entitled to the position that they held immediately before proceeding on parental leave. In the case of an employee transferred to a safe job pursuant to subclause (9), the employee will be entitled to return to the position they held immediately before such transfer. An employee who entered into part-time work in accordance with subclause (10) will be entitled to return to his or her former position.

(c) When such position no longer exists but there are other positions available, which the employee is qualified for and is capable of performing, the employee will be entitled to a position as nearly comparable in status and pay to that of their former position.

(12) Replacement employees

(a) Prior to engaging a replacement employee the employer 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.

(13) Not withstanding any award, agreement or other provision to the contrary—

(a) 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 of the Award or this Agreement.

(b) commencement of part-time employment in accordance with this clause, and return from part time to full time work under this clause, shall not break the continuity of service or employment.

27.—TRAVELLING ALLOWANCE

(1) At the option of the employer, which option shall be notified in writing to the employee before it is exercised and before the employee has made the travel arrangements for which the allowance is to be claimed, this clause will replace Clause 42.—Travelling Allowance to the Graylands Selby-Lemnos & Special Care Health Services Award 1999.

(2) Subject to clauses (3), an employee who is required to travel on official business outside of the metropolitan area will be reimbursed for reasonable accommodation, meals and incidental expenses based on actual reasonable costs incurred as demonstrated by the production of receipts, provided that reasonable payment will be made for incidental expenses for which receipts are not available and that the maximum amount payable will not be greater than the amounts allowed for incidental expenses and/or meal allowances, as the case may be, in the relevant area plus the amounts in Column A, Items 1 to 8 of Schedule I of the Award.

(3) The provisions of this clause do not apply to an employee who is relieving or who has been temporarily transferred to a position for a period exceeding five (5) working days.

28.—MOBILITY

(1) This clause will apply to all current and prospective employees of the MHSB.

(2) The parties agree that with the establishment of the MHSB all employees are employed by the Board and as such it is no longer appropriate that staff be appointed exclusively to individual Hospital & Health Service sites of the MHSB.

(3) The parties also agree that in order for the MHSB to provide appropriate levels of healthcare to consumers it is necessary to have a workforce which is mobile and that, managed properly, mobility has the potential to improve the employment security, career opportunity and development, and work life of employees.

(4) The parties agree that in giving effect to the mobility provisions of this clause, both the organisation's and the employee's needs are to be considered including;

(a) ensuring that the careers of employees are not disadvantaged
(b) consideration of family & carer responsibilities
(c) availability of transport
(d) matching skill level and professional suitability of any temporary job opportunity or permanent new position
(e) availability of training and support to assist the employee with any skills deficit in respect to the requirement of the temporary job opportunity or permanent new position.
(f) The classification level and relevant opportunity costs to the employee.

The parties acknowledge that the above considerations can only be properly assessed through consultation. Subject to the particular circumstances of individual employees, a greater degree of mobility may be expected in regard to higher classified employees.

(5) The parties agree that they will assist in the introduction of this initiative on the following basis—

(a) Temporary Transfer

Subject to agreement between the employer and employee, an employee may be transferred to another position within the MHSB on a temporary basis, provided that—

(i) the employer and employee mutually agree the decision to transfer
(ii) the period of time is defined
(iii) the transfer is at a comparable or higher classification level
(iv) the employee is formally notified of the agreed duties and these are commensurate with the substantive classification of the employee or at a higher level and within the competency of the employee.
(v) if the transfer is at a higher classification, the employee will be paid the salary of the higher classification for the period of the transfer.

(b) Permanent Transfer

Subject to agreement between the parties, an employee may be transferred to another position within the MHSB on a permanent basis, provided that—

(i) the employer and employee mutually agree the decision to transfer

(ii) the transfer is at a comparable classification level

(iii) the employee is formally notified of the agreed duties and these are commensurate with the substantive classification of the employee.

29.—SKILLS ACQUISITION, TRAINING AND EMPLOYEE DEVELOPMENT

(1) This clause is to be read in conjunction with Clause 28.-Mobility.

(2) The purpose of this clause is to—

(a) recognise that change is a constant factor within the work environment, that the workplace of tomorrow will not be the same workplace today, and that employees can be expected to work in several different types of job during their working life;

(b) recognise that both employees and employers share obligations to ensure that the organisation and the employees are able to adapt to continuous change;

(c) facilitate the creation of a mobile, skilled, efficient, effective and adaptable workforce;

(d) facilitate the training and development of staff so that they are best able to meet the present and future needs of the Government Health Industry;

(e) assist in ensuring that employers are able to attract, develop and retain the best possible staff;

(f) facilitate the deployment of employees within the operations of the employer to best effect; while at the same time respecting the individual needs, security, expectations and reasonable requirements of employees, and not imposing, either directly or indirectly, unnecessary or unreasonable costs on them.

(3) The parties agree that the provision of appropriate levels of health care is better able to be facilitated where the workforce is appropriately trained and skilled both for present needs and for reasonably expected future requirements including career development and opportunities within the Government Health Industry.

(4) It is agreed that skills acquisition, training and employee development;

(a) not impose unreasonable difficulties, out of pocket expenses, or otherwise impact adversely on employees;

(b) subject to the provisions of this clause, be as far as practicable, voluntary;

(5) Skill acquisition, training and employee development, administered in accordance with the standards and principles contained in this clause, within the MHSB health service region will benefit employees through providing;

(a) access to a greater variety of employment opportunities;

(b) the opportunity to develop and acquire a wide range of skills, competencies and work experience;

(c) expanded opportunity in terms of career development; and

(d) improved employment security.

(6) Employees agree to be prepared to give reasonable consideration to any proposal in regard to their skills acquisition, training and development which meets the principles and requirements of this clause.

(7) The parties agree that in giving effect to the provisions of this clause, both the organisation's and employee's needs and reasonable expectations are to be considered including—

(a) ensuring that the careers of employees are enhanced and that they are not disadvantaged;

(b) consideration of the possible impact of any course study requirements, training, training schedule, employee development and or succession plan on family and carer responsibilities;

(c) reimbursement of the employee for any reasonable costs incurred by the employee as a result of attendance at or participation in any training, course of study or development activities at the direction of the employer;

(d) the skill level, aptitude, aspirations and suitability of the employee for the proposed skills acquisition, training or development program;

(e) the relevance of any proposed skills acquisition, training or development program to the needs of the employer, and

(f) that attendance by the employee does not unduly affect or inconvenience the operations of the employer.

The parties acknowledge the above and any other reasonable considerations can only be properly assessed through consultation between the employer, employee and, where appropriate, the HSOA and CSA.

(8) For the purposes of this clause, an "approved course" or "approved training" is an accredited or industry recognised course of study, conference or workshop undertaken by the employee which in the employer's view;

(a) is relevant to the business outcomes to be achieved by the employee

(b) is relevant to the current and emerging business needs of the employer; and/or

(c) enhances the career development of the employee.

(9) The parties agree that they will assist in the introduction of this initiative on the following basis—

(10) Training and Short Courses

(a) An employee may be required to attend a training course or short course directly related to their work during ordinary working hours.

(b) Attendance at such courses shall be at no expense to the employee.

(c) An employee shall not unreasonably refuse to participate in any course of study where the subject matter is relevant to the current or emerging business needs of the employer, provided the course of study is conducted in ordinary working hours and is paid in accordance with the terms of the Agreement.

(d) The employer may grant leave with pay to participate in an approved short course or training course. The amount of leave may be up to 38 hours within a 12 month period.

(e) Where attendance is paid for by the employer;

(i) The employee may be required to provide evidence to the employer of attendance and satisfactory progress with studies.

(ii) The employee may be required to report to other employees on the course or training or to impart the knowledge gained to other employees.

(f) The employer may, where the short course or training is not an approved course or training, grant an employee leave to attend the short course or training during the employee's hours of duty and may require the employee to make up the hours or the employer may grant unpaid leave for such purpose.

(11) Multiskilling

(a) Employees agree that they will assist in the introduction of this policy on the following basis;

(i) Job Rotation

(aa) Employer and Employee mutually negotiate and agree to the decisions.

(bb) The period of time for any job rotation cycle is defined.

(cc) Prior to commencement of a job rotation arrangement, agreement is reached regarding the employee's continuity of service, tenure of employment in their substantive position or placement, at the completion of the rotation.

(ii) Job Enlargement and Enrichment

(aa) Decisions are mutually agreed by employee and supervisor.

(bb) The purpose, progression and outcomes from the enlargement/enrichment process are clearly defined.

(cc) The period of time is defined, where possible.

(dd) The employee is formally notified of the agreed duties and these are commensurate with the substantive classification of the employee.

(ee) The employee is provided with adequate support and mentoring to ensure they have an adequate opportunity to learn and become expert in the new duties and responsibilities.

(b) Any job specific training required will be provided by the MHSB. A training programme will be developed to allow employees to gain a high level of understanding of the new position and will take into account the continuity of customer service and the career development of the employee.

(c) While as far as practicable, participation in multi-skilling will be voluntary, where, subject to the considerations set out in this clause, the employee unreasonably refuses a multi-skilling opportunity, the employer may direct the employee to undertake the placement.

For the purposes of this paragraph, "unreasonably" is defined as an employee who refuses to multi-skill and the employer can demonstrate significant operational need for the employee to be multi-skilled.

(12) Staff Development Program

(a) MHSB will develop at an organisational level staff development programs.

(b) The staff development program will be directed to meeting the current and future staffing needs of the MHSB and will be based on the identified staffing needs and succession plans of the hospitals, health services, and health units, which make up the MHSB area.

(c) The staff development program(s);

(i) may be focussed at the health service or MHSB level as appropriate.

(ii) will involve staff who either nominate or are nominated to participate in the scheme, but whose participation shall be voluntary.

(iii) where, due to the number of nominations a quota is necessary selection for participation will be on merit.

(iv) will be focused on meeting the current and future staffing needs of the Health Service and Government Health Industry; and

(v) may be based either or both on the job training and formal training.

(d) All reasonable expenses incurred by an employee arising out of participation in a staff development program will, subject to the presentation of adequate proof, be reimbursed by the employer.

(13) Formal Part-time or Full-time Post Secondary Study

The provisions of this clause shall not diminish the rights of employees who undertake formal post secondary study in an approved course.

(14) Notwithstanding, any provisions contained above in this clause, the employer can limit access to training and development courses based upon financial grounds.

(15) The MHSB will review the application of skills acquisition, training and employee development programs during the life of this agreement. The parties agree to review the application of this clause as a result of that review.

30.—RATES OF PAY AND THEIR ADJUSTMENT

1. Employees will receive the salary contained in Schedule A of this Agreement.

2. This Agreement provides for the following salary increases:

(a) 4% on registration of this Agreement.

(b) 3% twelve months after the date of registration of this Agreement

(c) 3% twenty four months after the date of registration of this Agreement

31.—REVIEW OF CORPORATE AND SUPPORT SERVICES

The Civil Service Association and Hospital Salaried Officers Association acknowledge that during the life of this Agreement the MHSB may review the corporate and support services currently provided by Graylands Selby-Lemnos & Special Care Health Services. The review process may result in changes to services through a combination of rationalisation, centralisation and outsourcing of certain functions.

The Civil Service Association and Hospital Salaried Officers Association will jointly agree to work constructively with the MHSB during the course of the review process.

32.—SALARY PACKAGING

(d) An employee may, by agreement with the employer, enter into a salary packaging arrangement in accordance with the Government Health Industry Salary Packaging Arrangements covered by the Award.

33.—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.

34.—RATIFICATION

The signatories that follow testify to the fact that this Agreement shall come into effect as of the date of registration.

Michael Hartland

Common Seal

(Signed M. Hartland)

(Signature)

14.10.99

(Date)

President, for and on behalf of the Hospital Salaried Officers Association of Western Australia (Union of Workers)

Dan Hill

Common Seal

(Signed D. Hill)

(Signature)

12.10.99

(Date)

Secretary, for and on behalf of the Hospital Salaried Officers Association of Western Australia (Union of Workers)

David Robinson

Common Seal

(Signed D. Robinson)

(Signature)

13.10.99

(Date)

Branch Secretary, for and on behalf of the Civil Service Association of Western Australia Inc.

Russell McKenney

(Signed R. McKenney)

(Signature)

12.10.99

(Date)

General Manager, Graylands Selby-Lemnos & Special Care Health Services, for and on behalf of the Metropolitan Health Service Board

Schedule A—SALARIES

Levels	Pre-Agreement Rates Salary $ pa	1999 4% on registration Salary $ pa	2000 3% 12 months after registration Salary $ pa	2001 3% 24 months after registration Salary $ pa
LEVEL 1 under 17 years of age	11649	12115	12478	12853
17 years of age	13614	14159	14583	15021
18 years of age	15880	16515	17011	17521
19 years of age	18382	19117	19691	20282
20 years of age	20643	21469	22113	22776
1st year of FTE adult service	22677	23584	24292	25020
2nd year of FTE adult service	23375	24310	25039	25790
3rd year of FTE adult service	24072	25035	25786	26560
4th year of FTE adult service	24766	25757	26529	27325
5th year of FTE adult service	25463	26482	27276	28094
6th year of FTE adult service	26161	27207	28024	28864
7th year of FTE adult service	26963	28042	28883	29749
8th year of FTE adult service	27517	28618	29476	30360
9th year of FTE adult service	28339	29473	30357	31267
LEVEL 2 Year 1	29321	30494	31409	32351
Year 2	30075	31278	32216	33183
Year 3	30866	32101	33064	34056
Year 4	31703	32971	33960	34979
Year 5	32578	33881	34898	35944
LEVEL 3 Year 1	33781	35132	36186	37272
Year 2	34719	36108	37191	38307
Year 3	35685	37112	38226	39373
Year 4	36677	38144	39288	40467
LEVEL 4 Year 1	38038	39560	40746	41969
Year 2	39104	40668	41888	43145
Year 3	40201	41809	43063	44355
LEVEL 5 Year 1	42314	44007	45327	46687
Year 2	43742	45492	46856	48262
Year 3	45226	47035	48446	49899
Year 4	46766	48637	50096	51599
LEVEL 6 Year 1	49242	51212	52748	54330
Year 2	50925	52962	54551	56187
Year 3	52666	54773	56416	58108
Year 4	54528	56709	58410	60163
LEVEL 7 Year 1	57379	59674	61464	63308
Year 2	59353	61727	63579	65486
Year 3	61500	63960	65879	67855
LEVEL 8 Year 1	64989	67589	69616	71705
Year 2	67489	70189	72294	74463
Year 3	70588	73412	75614	77882
LEVEL 9 Year 1	74460	77438	79762	82154
Year 2	77075	80158	82563	85040
Year 3	80058	83260	85758	88331

Levels	Pre-Agreement Rates Salary $ pa	1999 4% on registration Salary $ pa	2000 3% 12 months after registration Salary $ pa	2001 3% 24 months after registration Salary $ pa
LEVEL 2/4 Year 1	29321	30494	31409	32351
Year 2	30866	32101	33064	34056
Year 3	32578	33881	34898	35944
Year 4	34719	36108	37191	38307
Year 5	38038	39560	40746	41969
Year 6	40201	41809	43063	44355

Schedule B—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 in consultation with the parties to meet the needs of MHSB 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 more efficient and effective work practices.
- **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 Safety and Health
- 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

HOWARD PORTER PTY LTD ENTERPRISE BARGAINING AGREEMENT 1998.

No. AG 176 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

Howard Porter Pty Ltd.

No. AG 176 of 1999.

Howard Porter Pty Ltd Enterprise Bargaining Agreement 1998.

CHIEF COMMISSIONER W.S. COLEMAN.

29th November 1999.

Order.

HAVING heard Mr Gerry Sturman on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers-Western Australian Branch and Ms Cara Natta from the Chamber of Commerce and Industry Western Australia.

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order—

THAT the agreement entitled Howard Porter Pty Ltd Enterprise Bargaining Agreement 1998 in the terms of the following Schedule be registered as an industrial agreement. This Agreement replaces AG 195 of 1996 entitled Howard Porter (1936) Pty Ltd Enterprise Bargaining Agreement 1996 which is hereby cancelled.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1.— TITLE

The Agreement shall be known as the Howard Porter Pty Ltd Enterprise Bargaining Agreement 1998.

2.— ARRANGEMENT

3.—AREA AND SCOPE

This Agreement shall apply to the O'Connor operations of Howard Porter Pty Ltd with respect to employees (approx ***30***) engaged in classifications specified in Clause 6.—Definitions ,Vehicle Builders Award No. 9 of 1971.

4.—INCIDENCE AND PARTIES BOUND

4.1 This Agreement shall apply to and be binding upon Howard Porter Pty Ltd ("the company") and all persons employed in the classifications set out in Clause 6.—Definitions of the Vehicle Builders Award No. 9 of 1971 at it's O'Connor workshops, and the Automotive Food Metals Engineering Printing and Kindred Industries Union of Workers—Western Australia Branch ("the union").

4.2 The parties to the agreement shall be the company and the union.

5.—DATE AND PERIOD OF OPERATION

This Agreement shall operate from the beginning of the first pay period after the registration of this agreement with the Western Australian Industrial Relations Commission, for a period of eighteen months, and will continue in force after this date unless cancelled in writing. All parties are committed to re-negotiating this Agreement and applying for it's continuation, replacement or cancellation before the expiry date.

6.—RELATIONSHIP TO PARENT AWARD

6.1 This Agreement shall be read and interpreted wholly in conjunction with the Vehicle Builders award No. 9 of 1971.

6.2 Where there is any inconsistency between this Agreement and the Award stipulated, this Agreement shall prevail to the extent of inconsistency.

7.—SINGLE BARGAINING UNIT

7.1 For the purpose of this Agreement and in accordance with the decision in the December 1994, Western Australian State Wage Case, a single bargaining unit has been established by way of Consultative Committee.

This Committee shall be comprised of the following members—

(i) Two representatives appointed by Management.

(ii) Two elected representatives of the workforce.

7.2 The single bargaining unit shall be given all relevant information to enable effective monitoring of the implementation progress and performance of the continuous improvement/project programme, and shall operate within the agreed parameters of the Howard Porter Consultative Committee Constitution.

7.3 Meetings of the Consultative Committee will be held every 2 months on the Second Thursday of the month at 2.15pm.

8.—TRAINING

8.1 All training should be planned and implemented in accordance with Company Training Procedure (Quality Manual Section 4:18) which includes training needs analysis, training planning and implementation. .

8.2 Where appropriate, training shall be accredited and competency based.

8.3 Company-funded training—

8.3.1 Where training is initiated and authorised by the company and leads to a recognised qualification, the company will pay the course fees. The employee will be advised the amount of the course fee before the training commences. At its discretion, the company may require the employee to refund the full amount of course fees should he/she leave within six months of that training. This amount would be deducted from the final termination payment. If the outstanding balance exceeds the termination payment, then the difference must be repaid to the company by the employee. An employee terminated due to lack of work would not be required to refund course fees.

8.3.2 An employee may elect not to proceed with company funded training.

8.3.3 Where legislation specifies the cost of particular training as being the responsibility of the employer, then an employee would not be required to refund course fees.

8.3.4 The nominated delegates for the union will be allowed up to a total of 5 days paid leave per annum to attend training courses conducted and approved by both parties to this agreement.

9.—WAGES

9.1 Wage Rate Calculation

(a) The wage paid to an individual workshop employee is calculated as follows—

i. Enterprise Agreement Classification Rate
PLUS

ii. Any over-rate payment
PLUS

iii. Tool money allowance

PLUS

iv. Leading hand allowance per award

i + ii + iii + iv = Employee Wage Rate

(b) Overtime is calculated on the Employee Wage Rate as shown in 9.1 (a) above.

(c) Superannuation is calculated on the Employee Wage Rate as shown in 9.1 (a) above.

(d) The attendance allowance is additional to above and therefore not subject to overtime rates.

(e) A first-aider allowance of $16.60 per week is payable to a qualified person who is appointed by the company and maintains a company first aid station and is not subject to overtime rates.

(f) Meal money and shift allowance are payable in accordance with the Award .

(g) No other award payments, rates, costs or allowance are payable. This includes confined space allowance, dirt money, and any other allowances, rates or costs not mentioned in this agreement.

9.2 Wage Rate Adjustments

(a) Employees wage rates were increased from July 1st 1998.

(b) Over-rate payments (Ref Clause 9.6 below) have varied due to the reclassification and/or adjustment of the over-rate payment to some employees.

(c) Employee wage rates will increase by an amount of 1.5% applied to the Enterprise Agreement Classification Rate at the first pay period after registration of the Agreement**.**

(d) Employee wage rates will again increase by an amount of 1.5% applied to the Enterprise Agreement Classification Rate at the first pay period 12 months after registration of the Agreement.

9.3 Attendance Allowance

The attendance allowance was increased on July 1st 1998 from $30 per week to $1 per hour worked, subject to the following:—

(a) The attendance incentive will not be paid for four hours when an employee arrives after their starting time on any day, or does not clock on before their start time.

(b) The attendance allowance will be paid for all work related absences of less than one day.

9.4 Tool Allowance

The tool allowance was increased on 1st July 1998 from $9.70 to $10.00 per week for all classifications.

9.5 Classification Rates

The following table shows the increases to the Enterprise Agreement Classification Rates (see 9.1 (a)i above) over the life of the agreement.

ENTERPRISE AGREEMENT CLASSIFICATION RATE TABLE

Howard Porter Reference	*Previous Howard Porter Rate*	*2.5% Increase 01/07/1998*	*1.5% Increase upon registration*	*1.5% Increase 12 months after registration*
VC6	601.45	616.49	625.74	635.12
VC7	567.33	581.51	590.23	599.08
VC8	533.10	546.43	554.63	562.95
VC9	498.98	511.45	519.12	526.91
VC10	464.85	476.47	483.62	490.87
VC11	439.57	450.56	457.32	464.18
VC12	414.50	424.86	431.23	437.70
VC13	389.42	399.16	405.15	411.23
VC14	364.76	373.88	379.49	385.18

9.6 Over-rate Payment

Nothing in this Enterprise Agreement will prevent the payment of wages above the classification rates at the discretion of the Works Management. This over rate payment may be adjusted up or down to reflect employee performance. The employee will be interviewed and advised of the reasons for changes in over rate payment at their annual appraisal.

9.7 Hours

The ordinary hours of work shall be an average of 38 hours per week may be worked on any or all days of the week Monday to Friday inclusive, and except in the case of shift employees, be worked between the hours of 5am and 8pm.

The standard hours of work will be : Monday to Thursday 7:00am to 3:15pm, Friday 6:00am to 2:15pm.

The company may alter the spread of hours by agreement with the majority of employees of the section affected.

In times of increased work availability the company may offer additional overtime which must not be unreasonably refused by employees.

9.8 Travel and training

Employees required to travel to a location outside the metropolitan area other than the normal place of work for work or approved training purposes, will be paid at the single rate of pay for the period of travel no matter what time or day of the week is involved, up to a maximum of 8 hours out of every 24 hours.

Travel time and costs to and from home to a location within the metropolitan area for work or training, is unpaid.

Employees involved in company training that might occur outside normal hours of work will be paid at the single rate no matter what time or day of the week this may involve.

Where overseas travel is required, additional information is contained in Corporate Procedure No. 1o1.

9.9 Income Protection Insurance

Income Protection Insurance for all employees will be introduced six months after registration of the Agreement. The parties will negotiate a suitable scheme and the company will pay the cost of the premium up to a maximum of one percent of the annual Employee Wage Rate.

10.—TOOL ACCOUNT

The Company makes available a facility for employer to purchase work-related items on a Company order. The cost of these items are booked against the employee's tool account which is then repaid over a fixed time period through weekly wage deductions. No interest or handling charges will be applied by the Company. Other than apprentices, there is a qualifying employment period of 3 months before an employee is entitled to this privilege.

The maximum amount to be booked to a tool account is $500 or the balance of wages and leave owing, whichever is the lesser. The rate of repayment is to be such that the initial purchase is repaid over a maximum period of 20 weeks or 5% per week of the initial total cost. Upon termination, the outstanding balance of an employee's tool account will be deducted in full from the final termination payment. If the outstanding balance exceeds the termination payment, then the difference must be repaid to the company by the employee.

11.—TOOLBOX COVER

- All tradesmen, trades assistants and apprentices must provide at their place of work a toolbox containing a minimum quantity of tools as specified in the Company's Corporate Procedure 4 E.1
- Toolbox's and tools must be well maintained.
- Employees can carry additional tools to those specified provided approval is given by the Works Management.
- It is the responsibility of the employee to maintain an up to date list of all tools in the employee's toolbox.
- New employees must have toolboxes with the minimum quantity of tools within four weeks of starting.
- Toolbox audits will be carried out to ensure that tools, quantities are as specified and well maintained.
- Employees found to have a toolbox incomplete or tools in need of maintenance will be given one week to bring them back to the required standard.
- The company provides insurance for employee toolbox's and tools while on the company premises and company vehicles, in accordance with its insurance policy and the provisions of this section 11.

- Where a claim is approved, tools and toolboxes will be replaced by the company to the value and standard of the lost items.
- Toolboxes must be locked and placed in the designated protected areas each night and outside working hours.

12.—CLOTHING

All employees listed under the Enterprise Agreement Classification for Vehicle Body Builders including any Apprentices employed directly by the company will be provided with work clothing. Clothing supplied by the company will be worn at all times during working hours.

- The Howard Porter uniform is dark blue shirts, trousers or overalls. The company name will be embroidered on the shirt or overalls above the breast pocket.
- It is the responsibility of employees to keep company supplied clothing clean and well maintained.
- Employees who do not conform to these conditions may lose the privilege of having clothing supplied temporarily or permanently.
- New employees will work one month before being eligible for company sponsored clothing.
- If the employee leaves within six months of a clothing issue, then fifty percent of the purchase price of the clothing may be deducted from the termination pay.
- Four pairs of clothing plus one jacket will be issued per employee by the company within 2 months of registration for the period of this agreement.
- The value of the jacket will not exceed the value of two shirts plus two trousers.
- Additional clothing may be ordered through the company via the tool account system and will be at the employee's expense.
- Boots will continue to be provided in accordance with existing policy.

13.—INTRODUCTION OF CHANGE

13.1 Company's Duty to Notify—

13.1.1 Where the Company has made a definite decision to introduce major changes in production, programme, organisation, structure or technology that are likely to have "significant effects" on employees, the Company shall notify the employees who may be effected by the proposed changes and the Union.

13.1.2 "Significant effects" include termination of employment, major changes in the composition, operation or size of the workforce or in the skills required; the elimination or 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 award or this agreement makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have "significant effects".

13.2 Company's Duty to Discuss Change—

13.2.1 The Company shall discuss with the employees affected and the Union, the introduction of the changes referred to in subclause (1) of this clause, among other things, the effects the changes are likely to have on employees, measures to avoid or minimise the adverse effects of such changes on employees and shall give prompt consideration to matters raised by the employees and/or the Union in relation to the changes.

13.2.2 The discussion shall commence as soon as practicable after a definite decision has been made by the company to make the changes referred to in subclause (1) of this clause.

13.2.3 For the purpose of such discussion, the Company 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 other matters likely to affect employees provided that the Company shall not be required to disclose confidential information the disclosure of which would be inimical to the Company's interests.

14.—REDUNDANCY

(1) Discussion Before Terminations—

(a) Where the Company has made a definite decision that it no longer wishes the job the employee has been doing done by anyone and this is not due to the ordinary and customary turnover of labour and that decision may lead to termination of employment, the Company shall hold discussions with the employee(s) directly affected and with the Union .

(b) The discussion shall take place as soon as is practicable after the Company has made a definite decision which will invoke the provisions of paragraph (a) of this subclause and shall cover among other things, any reasons for the proposed terminations, measures to avoid or minimise the terminations and measures to minimise any adverse affect of any terminations on the employee(s) concerned.

(c) For the purpose of such discussion the Company shall provide in writing to the employee(s) concerned and the Union, all relevant information about the proposed terminations including the reasons for the proposed terminations, the number and categories of employees likely to be affected and the number of employees normally employed and the period over which the terminations are likely to be carried out. Provided that the Company shall not be required to disclose confidential information the disclosure of which would be inimical to the Company's interests.

(2) Transfer to Lower Paid Duties—

Where an employee is transferred to lower paid duties for reasons set out in paragraph (a) of subclause (1) of this clause the employee shall be entitled to the same period of notice of transfer as the employee would have been entitled to had the employment been terminated, and the Company may at its option, make payment in lieu thereof of an amount equal to the difference between the former ordinary weekly rate of wage and the new lower ordinary weekly rate of Wage for the number of weeks of notice still owing.

(3) Severance Pay—

(a) In addition to the period of notice prescribed in the award for ordinary termination, an employee whose employment is terminated for reasons set out in paragraph (a) of subclause (1) of this clause shall be entitled to the following amount of severance pay in respect of a continuous period of service.

Period of Continuous Service	Severance Pay
Less than 1 year	Nil
1 year but less than 2 years	4 weeks
2 years but less than 3 years	6 weeks
3 years but less than 4 years	7 weeks
4 years and over	8 weeks

"Week's Pay" means the Employee Wage Rate as per subclause 9.1 of this agreement for the employee concerned. Provided that the severance payments shall not exceed the amount which the employee would have earned had proceeded to the employee's normal retirement date.

(b) For the purposes of this clause continuity of service shall not be broken on account of—

(i) any interruption or termination of the employment by the Company if such interruption or termination has been made merely with the

intention of avoiding obligations hereunder in respect of leave of absence;

(ii) any absence from work on account of personal sickness or accident for which an employee is entitled to claim sick pay as prescribed by the award or on account of leave lawfully granted by the Company; or

(iii) any absence with reasonable cause, proof whereof shall be upon the employee;

Provided that in the calculation of continuous service under this subclause any 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 award shall not count as time worked.

(4) Employee Leave During Notice—

An employee whose employment is to be terminated for reasons set out in paragraph (a) of subclause (1) of this clause may terminate employment during the period of notice and, if so, shall be entitled to the same benefits and payments under this clause had the employee remained with the Company until the expiry of such notice. Provided that in such circumstances the employee shall not be entitled to payment in lieu of notice.

(5) Alternative Employment—

The Company, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied if the Company obtains acceptable alternative employment for an employee.

(6) Time Off During Notice Period—

(a) During the period of notice of termination of employment given by the Company, an employee whose employment is to be terminated for reasons set out in paragraph (a) of subclause (1) of this clause that employee shall, for the purpose of seeking other employment, be entitled to be absent from work during each week of notice up to a maximum of eight ordinary hours without deduction of pay.

(b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the Company, be required to produce proof of attendance at an interview or the employee shall not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

(7) Employees With Less Than One Year's Service—

This clause shall not apply to employees with less than one year's continuous service and the general obligation on the Company should be no more than to give relevant employees an indication of the impending redundancy at the first reasonable opportunity and to take such steps as may be reasonable to facilitate the obtaining by the employees of suitable alternative employment.

(8) Employees Exempted—

This clause shall not apply where employment is terminated as a consequence of conduct that justifies instant dismissal including malingering, inefficiency or neglect of duty or in the case of casual employees, apprentices or employees engaged for a specific period of time or for a specific task or tasks.

(9) Incapacity to Pay—

The Company, in a particular case may make application to the Commission to have the general severance pay prescription varied on the basis of the Company's incapacity to pay.

15.—DISPUTE RESOLUTION

(1) A procedure for the avoidance of disputes, questions or difficulties shall apply in the establishment covered by this Agreement.

The objectives of the procedure shall be to promote the resolution of disputes by measures based on consultation, co-operation and discussion; to reduce the level of industrial confrontation; and to avoid interruption to the performance of work and the consequential loss of product and wages.

(2) The following principles shall apply—

(a) Depending on the issues involved,up to four stages of discussion shall apply. These are—

(i) discussions between the employee/s concerned (and shop steward if requested) and the immediate supervisors;

(ii) discussions involving the employee/s concerned, the shop steward and the employer representative;

(iii) discussions involving representatives from the state branch of the union(s) concerned and the employer representative;

(iv) discussions involving senior union officials (state secretary) and the senior management representative(s);

There shall be an opportunity for any party to raise the issue to a higher stage.

(b) There shall be a commitment by the parties to achieve adherence to this procedure. This should be facilitated by the earlier possible advice by one party to the other of any issue or problem which may give rise to a grievance or dispute.

(c) Throughout all stages of the procedure all relevant facts shall be clearly identified and recorded.

(d) Sensible time limits shall be allowed for the completion of the various stages of the discussions. At least seven days should be allowed for all stages of the discussions to be finalised.

(e) Emphasis shall be placed on a negotiated settlement. However, if the negotiation 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 and arbitration provided that the parties have made reasonable attempts to resolve questions, difficulty or dispute before taking those matters to the Commission.

(f) In order to allow for the peaceful resolution of grievances the parties shall be committed to avoid stoppages of work, lockouts or any other bans or limitation on the performance of work while the procedures of negotiation and conciliation are being followed.

(g) The employer shall ensure that all practices applied during the operation of the procedure are in accordance with safe working practices and consistent with established custom and practices at the workplace.

16.—SIGNATORIES

Signed for and on behalf of Howard Porter Pty Ltd.

Signature:	(Signed Colin Stewart)
Name:	COLIN STEWART
Position	MANAGING DIRECTOR

Signed for and on behalf of the Australian Manufacturing Worker's Union.

Signature:	(Signed Sharp-Collett)
Name:	JOHN SHARP-COLLETT
Position	STATE SECRETARY

INTERCERAMICS (AUSTRALIA) PTY LTD.

No. AG 167 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers and The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch

and

Interceramics (Australia) Pty Ltd.

No. AG 167 of 1999.

Interceramics Industrial Agreement.

COMMISSIONER P E SCOTT.

16 November 1999.

Order.

HAVING heard Ms L Dowden on behalf of the Applicants 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 Interceramics Industrial Agreement in the terms of the following schedule be registered on the 5th day of November 1999.

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

———

Schedule.

WAGE AGREEMENT

Schedule.

1.—TITLE

This Agreement will be known as the Interceramics 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 Interceramics (Australia) 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 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 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 Awards 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 the 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 allowances, 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, including fares and travel.

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 pro-rata to attend courses conducted or approved by the NBCITC. The employers 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

(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 between the parties.

21.—UNION MEMBERSHIP

The employer will encourage, as far as possible, all employees covered by the agreement, to be financial members of the BLPPU and the CMETU

22.—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: 9/9/99 .....Signed..... WITNESS
The Unions:	CMETU	Signed *Common Seal* Date: 9/9/99 .....Signed..... WITNESS

The Company: *Common Seal* Signed
Date: 13/8/99
....Angela Lali....
PRINT NAME
.....Signed.....
WITNESS

APPENDIX A—WAGE RATES

	Date of signing Hourly Rate $
Labourer Group 1	17.15
Labourer Group 2	16.56
Labourer Group 3	16.12
Plaster, Fixer	17.82
Painter, Glazier	17.42
Signwriter	17.80
Carpenter/Roofer	17.93
Bricklayer	17.75
Refractory Bricklayer	20.38
Stonemason	17.93
Rooftiler	17.62
Marker/Setter Out	18.46
Special Class T	18.69

APPRENTICE RATES

	Date of signing Hourly Rate $
Plasterer, Fixer	
Year 1	7.48
Year 2 (1/3)	9.81
Year 3 (2/3)	13.37
Year 4 (3/3)	15.69
Painter. Glazier	
Year 1 (.5/3/5)	7.32
Year 2 (1/3), (1.5/3.5)	9.58
Year 3 (2/3), (2.5/3.5)	13.06
Year 4 (3/3), (3.5/3.5)	15.33
Signwriter	
Year 1 (.5/3.5)	7.48
Year 2 (1/3, 1.5/3.5)	9.78
Year 3 (2/3. 2.5/3.5)	13.35
Year 4 (3/3, 3/5/3.5)	15.66
Carpenter/Roofer	
Year 1	7.54
Year 2 (1/3)	9.86
Year 3 (2/3)	13.45
Year 4 (3/3)	15.78
Bricklayer	
Year 1	7.46
Year 2 (1/3)	9.76
Year 3 (2/3)	13.31
Year 4 (3/3)	15.62
Stonemason	
Year 1	7.54
Year 2 (1/3)	9.86
Year 3 (2/3)	13.45
Year 4 (3/3)	15.78
Rooftiler	
6 months	10.04
2nd 6 months	11.04
Year 2	12.90
Year 3	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 persons 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 $2.17 m	$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	$2.1m 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 $2.17 m	$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	$2.17 m 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	$1 m	NIL
Above	$1 m to $2.17 m	$1.30
Above	$2.17m 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 eastern 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 contractor 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 Procedures
- 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 honored 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 to employees engaged upon projects in excess of $10 million, or such other sum as agreed. The productivity allowance may be accumulated and paid at the end of the project.

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 canteen accommodation shall be provided where a project exceeds $35 million in values 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 agree that a qualified nurse shall be engages 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%

MARINIGATE PTY LTD INDUSTRIAL AGREEMENT.

No. AG 177 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Other

and

Marinigate Pty Ltd.

AG 177 of 1999.

Marinigate Pty Ltd Industrial Agreement.

COMMISSIONER S J KENNER.

26 November 1999.

Order.

HAVING heard Mr P Joyce on behalf of the applicants 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 Marinigate Pty Ltd Industrial Agreement as filed in the Commission on 27 October 1999 in the terms of the following schedule be and is hereby registered as an industrial agreement.

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

Schedule.

1.—TITLE

This Agreement will be known as the Marinigate Pty Ltd 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 Marinigate 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") and will apply to work on sites where the unions have a registered agreement with the Principal Contractor, or has an agreement in writing with the Principal Contractor. 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% 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 allowances, 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, including fares and travel.

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, 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.

(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 between the parties.

21.—UNION MEMBERSHIP

The employer will encourage, as far as possible, all employees covered by the agreement, to be financial members of the BLPPU and the CMETU.

22.—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: / /
.....Signed.....
WITNESS

CMETU .....Signed.....
Date: / /
.....Signed.....
WITNESS

The Company:

.....
SIGNATURE
Date: / /
Company Seal
.....Signed.....
PRINT NAME
.....Signed.....
WITNESS

APPENDIX A—WAGE RATES

	Date of signing Hourly Rate $
Labourer Group 1	17.15
Labourer Group 2	16.56
Labourer Group 3	16.12
Plaster, Fixer	17.82
Painter, Glazier	17.42
Signwriter	17.80
Carpenter/Roofer	17.93
Bricklayer	17.75
Refractory Bricklayer	20.38
Stonemason	17.93
Rooftiler	17.62
Marker/Setter Out	18.46
Special Class T	18.69

APPRENTICE RATES

	Date of signing Hourly Rate $
Plasterer, Fixer	
Year 1	7.48
Year 2 (1/3)	9.81
Year 3 (2/3)	13.37
Year 4 (3/3)	15.69
Painter. Glazier	
Year 1 (.5/3/5)	7.32
Year 2 (1/3), (1.5/3.5)	9.58
Year 3 (2/3), (2.5/3.5)	13.06
Year 4 (3/3), (3.5/3.5)	15.33
Signwriter	
Year 1 (.5/3.5)	7.48
Year 2 (1/3, 1.5/3.5)	9.78
Year 3 (2/3. 2.5/3.5)	13.35
Year 4 (3/3, 3/5/3.5)	15.66
Carpenter/Roofer	
Year 1	7.54
Year 2 (1/3)	9.86
Year 3 (2/3)	13.45
Year 4 (3/3)	15.78
Bricklayer	
Year 1	7.46
Year 2 (1/3)	9.76
Year 3 (2/3)	13.31
Year 4 (3/3)	15.62
Stonemason	
Year 1	7.54
Year 2 (1/3)	9.86
Year 3 (2/3)	13.45
Year 4 (3/3)	15.78
Rooftiler	
6 months	10.04
2nd 6 months	11.04
Year 2	12.90
Year 3	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 persons 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 $2.17 m	$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	$2.1m 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 $2.17 m	$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	$2.17 m 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	$1 m	NIL
Above	$1 m to $2.17 m	$1.30
Above	$2.17m 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 eastern 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 contractor 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 Procedures
- 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 honored 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 to employees engaged upon projects in excess of $10 million, or such other sum as agreed. The productivity allowance may be accumulated and paid at the end of the project.

14. Structural Frame Allowance

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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).

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17. This agreement shall only apply to building contracts entered into on or tendered for on or after 1 January 1999.

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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%
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4th year	88%

METROPOLITAN HEALTH SERVICE ENGINEERING AND BUILDING SERVICES ENTERPRISE AWARD 1999.

No. A 1 of 1999.

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

The Metropolitan Health Service Board
and Others.

No. A 1 of 1999.

Metropolitan Health Service Engineering and Building Services Enterprise Award 1999.

23 November 1999.

Reasons for Decision.

SENIOR COMMISSIONER: As the numerical designation of the matter suggests, this is an application for a new award; that new Award is to be known as the *Metropolitan Health Service Engineering and Building Services Award 1999*. By its scope the Award is intended to apply to employees of The Metropolitan Health Service Board, and that Board only, who are engaged in the engineering and building trades.

It is said that the Award is designed to replace some 12 different industrial instruments and by doing so provide uniform conditions of employment for the engineering and building trades employees in the public metropolitan hospitals. Essentially the Award is enterprise specific, I understand that by reason of the fact that at least one of the hospitals is party to what might be described as an enterprise specific award the Board was anxious to have this instrument processed as an award rather than as an enterprise agreement.

The Award contains modern conditions of employment. It embodies the concept of structural efficiency. It meets the State Wage Fixing Principles in every respect. In particular it satisfies the minimum rates adjustment requirement in that it benchmarks classifications by reference to the C10 classification in the *Metal Trades (General) Award 1966*, as indeed is the case for many other awards. In the circumstances, I indicate to the parties that I am quite prepared to make the Award.

In doing so, I should perhaps point out that amongst other things the Award will effectively replace, as I understand it, a whole series of awards for these employees, not the least of which is the *Metal Trades (General) Award 1966*. Amongst the other awards to be overtaken by this Award are the *Engineering Trades (Government) Award 1967*, the *Building Trades (Government) Award 1968* and the *Engine Drivers (Government) Award 1983* and the *Sir Charles Gairdner Hospital Engineering and Building Services Workshops Award 1998*. In addition the Award is to replace a number of agreements which are the subject of Application 1688 of 1999.

The only issue between the parties is as to the operative date. The Respondent Board seeks an operative date from today's date, being the date on which the Award is made. The Applicant Unions seek a date, as I understand it, on and from the 1st of September 1999.

The Unions argue that earlier this year they instituted proceedings before the Commission which, as I understand it, were ultimately terminated by the Commission on or about the 10th or 11th of October, but certainly before these proceedings were instituted.

More than that, the Unions say that agreement was reached regarding the terms of the Award on the 13th of August last for making the Award in the terms in which it is now presented to the Commission. They say that thereafter the Respondent Board withheld the document from the appropriate Cabinet sub-committee for approval because the Health Department was uncertain as to whether the Award should apply to the country hospitals as well as to the metropolitan hospitals.

The agent for the Respondent Board does not seem to challenge greatly the facts as advanced on behalf of the Applicant. I consider, on balance, having regard to the history of the matter as has been outlined, that the operative date for the Award should be the first pay period commencing on and from the 12th of October 1999, that being the date on which the current Application was lodged. I read subsection 39(3) of the *Industrial Relations Act, 1979* as providing that as being the earliest date on which the Commission, as presently constituted, can award any measure of retrospectivity in that matter. The subsection provides that in dealing with contested applications for retrospectivity, the Commission is not to "go beyond the date upon which the application leading to the making of the award was lodged in the Commission".

In my view the application, which was lodged on the 12th of October 1999, is the application which leads to the making of the award now in question, not to any other application. The other applications to which the Applicant Unions refer may have been the catalyst for the agreement which led to the Award, but they did not lead to the actual "making of the Award".

I take the view that it is better to tie the wage adjustments to a pay period rather than mid-way through a pay period. Apart from any other consideration the additional administrative arrangements associated with breaking the pay period into periods with different rates of pay are in themselves sufficient to tie wage adjustments to the beginning of a pay period. In the circumstances I have seized upon the first pay period commencing on or after the date of lodgment of the application, which was the 12th of October 1999.

I readily acknowledge that from the point of view of the Respondent a time consuming process, that is, that matters are to go before a Cabinet sub-committee, must necessarily be undertaken to obtain endorsement of the Award from the Government. However, I cannot think that it is reasonable to allow almost two months for that process to be undertaken and completed. In this case the indications are that the process was unnecessarily delayed for approximately six weeks. That, together with the history of the other proceedings before the Commission, differently constituted, and in particular the recommendation made by the Commission on the 11th day of October 1999. Thus in the circumstances, I consider that it would be only fair and right if there was the measure of retrospectivity I have suggested.

I note the Respondent's argument that a number of the efficiencies said to be the subject of this Award have yet to be implemented. That presumably is because the Award itself has not been implemented. Against that I note that there are already a number of efficiencies put in place by reason of other industrial instruments. I accept what the agent for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electrical Division, WA Branch has said and I understand Ms Harrison for the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch and The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers to have said, and I am sure Mr Mossenton agrees, that in any event discussions have already been taking place as to ways and means to give effect to a number of the efficiencies in the Award.

So it is I am prepared to make the Award, as I say, effective from the first pay period commencing on or after the 12th of October.

Appearances: Mr J Murie on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electrical Division, WA Branch and The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers

Mr J E Mossenton on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch

Ms J L Harrison on behalf of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch and The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers

Ms S A Seenikatty on behalf of The Metropolitan Health Service Board

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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

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No. A 1 of 1999.

Metropolitan Health Service Engineering and Building Services Enterprise Award 1999.

23 November 1999.

Award.

HAVING heard Mr J Murie on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electrical Division, WA Branch and The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, Mr J E Mossenton on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch, Ms J L Harrison on behalf of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch and The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers and Ms S A Seenikatty on behalf of The Metropolitan Health Service Board, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, being satisfied that its terms are not contrary to any General Order or any principle formulated as a result of General Order proceedings under section 51 of the Industrial Relations Act, 1979, hereby—

MAKES an Award to be known as the "Metropolitan Health Service Engineering and Building Services Enterprise Award 1999" in terms of the Schedule hereto with effect on and from the commencement of the first pay period on or after the 12th day of October 1999.

(Sgd.) G. L. FIELDING,
[L.S.] Senior Commissioner.

Schedule.

PART 1—APPLICATION AND OPERATION OF AWARD

1.—TITLE

(1) This Award shall be known as the Metropolitan Health Service Engineering and Building Services Enterprise Award 1999 and shall replace the following awards only insofar as they apply to the Metropolitan Health Service Board—

(a) Building Trades (Government) Award 1968 No. 31a of 1966;

(b) Engineering Trades (Government) Award 1967 No. 29, 30 & 31 of 1961 & 3 of 1962;

(c) Engine Drivers (Government) Award 1983 No. A5 of 1983; and

(d) Sir Charles Gairdner Hospital Engineering and Building Services Workshops Award 1998, No. A2 of 1997.

2.—ARRANGEMENT

3.—TERM

The term of this Award shall be for a period of 1 year from the date the Award is issued.

4.—APPLICATION & PARTIES BOUND

(1) The following are parties to and bound by this Award—

(a) The Metropolitan Health Service Board.

(b) The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Workers Union of Australia—Engineering & Electrical Division—Western Australian Branch.

(c) The Plumbers and Gasfitters Employees' Union of Australia, Western Australian Branch, Industrial Union of Workers.

(d) The Automotive, Food, Metal, Engineering, Printing & Kindred Industries Union of Workers, Western Australian Branch.

(e) Construction, Mining, Energy, Timberyards, Sawmills & Woodworkers Union of Australia, Western Australian Branch.

(e) The Western Australian Builders Labourers, Painters and Plasterers Union of Workers.

5.—LIBERTY TO APPLY

(1) If the Award is deficient because of any oversight, omission or error arising in the consolidation and rationalisation of the Sir Charles Gairdner Hospital Engineering & Building Services Workshops Award 1998, the Engine Drivers (Government) Award 1983 No. A5 of 1983, the Building Trades (Government) Award 1968 No. 31a of 1966 and the Engineering Trades (Government) Award 1967 No. 29, 30 & 31 of 1961 & 3 of 1962, there shall be liberty to apply to amend the Award to correct such deficiency.

(2) There shall be liberty to apply to increase the amount of the Nominee Allowance specified in subclause (3)(e) of Clause 20.

(3) There shall be liberty to apply to vary this Award to include provisions covering work undertaken by an employee of the Employer outside the Perth metropolitan area.

6.—AREA AND SCOPE

(1) This Award shall not apply to any employer or employee in the health industry throughout the State of Western Australia other than the Metropolitan Health Service Board and its employees.

(2) This Award shall apply to employees, including apprentices—

(a) employed by the Employer and / or any facility or service managed, controlled or operated by the Employer;

(b) engaged in any of the callings specified in Appendix A.—Salaries.

(3) This Award shall not apply to the construction or maintenance of water supply, sewerage or drainage works within the area covered by the Water Supply Award No. 8 of 1956 or any award replacing that award.

(4) This Award shall not apply to work coming within the scope of the Hospital Salaried Officers Award No. 39 of 1968.

7.—DEFINITIONS

(1) "Accredited official" means a Secretary or official of a Union party to this Award. In the case of an official, he/she shall only be deemed an "accredited official" when the holder for the time being of a certificate signed by the relevant Union Secretary and bearing the Union's seal.

(2) "Construction work" means work on site in or in connection with—

(a) the construction of a large industrial undertaking or any large civil engineering project;

(b) the construction or erection of any multi-storey building; and

(c) the construction, erection or alteration of any other building, structure or civil engineering project which the Employer and the Union(s) agree or, in the event of disagreement, which the Western Australian Industrial Relations Commission declares to be construction work for the purpose of this Award.

(3) "Continuous service" shall include any period during which an employee is on annual leave and/or holidays, any approved period an employee is absent from duty through sickness, with or without pay, unless the absence exceeds three calendar months, in which case the period in excess of three months shall not be counted as continuous service. In the case of approved periods of absence from work due to workers compensation, the first six months only of any such period shall count as continuous service. This definition shall not apply to continuous service for the purpose of calculating long service leave.

(4) "Day off duty" means a day on which an employee is not rostered to work and for which the employee has no entitlement to pay.

(5) "Employer" means the Metropolitan Health Service Board (also referred to as the MHSB, in this Award).

(6) "Full-time employee" means an employee who is employed to work an average of 38 hours per week.

(7) "HCU" means health care unit as defined.

(8) "Health care unit" means the following discrete operational units of the Employer at which employees covered by this Award are engaged including—

(a) Armadale Health Service (includes Armadale Kelmscott Memorial Hospital);

(b) Bentley Health Service (includes Bentley Hospital and Mills Street Centre Outpatients;

(c) Fremantle Hospital & Health Service (includes Coonana Primary Health Centre, Fremantle Hospital, Rottnest Island Nursing Post and Woodside Maternity Hospital);

(d) Graylands Hospital & Special Care Health Services (includes Graylands Selby-Lemnos Adult & Forensic Psychiatry Services and Graylands Selby-Lemnos Old Age Psychiatry Services);

(e) Kalamunda Health Service (includes Kalamunda District Community Hospital);

(f) North Metropolitan Health Service (incudes Hawthorn Hospital and Osborne Park Hospital);

(g) Perth Dental Hospital & Community Dental Services (includes Perth Dental Hospital);

(h) King Edward Memorial Hospital for Women (includes King Edward Memorial Hospital for Women and Princess Margaret Hospital for Children);

(i) Rockingham/Kwinana Health Service (includes Rockingham/Kwinana District Hospital);

(j) Royal Perth Hospital & Inner City Health Service (includes Wellington Street Campus and Shenton Park Campus); and

(k) Sir Charles Gairdner Hospital.

(9) "Metropolitan area" means that area in a radius of 50 kilometres from the Perth Central Railway Station.

(10) "Ordinary salary" shall mean the appropriate salary rate prescribed in Appendix A.—Salaries.

(11) "Parties" means the Employer and the Unions bound by this Award.

(12) "Part-time employee" means an employee regularly employed to work less than an average of 38 ordinary hours per week.

(13) "Rostered day off" means the paid day(s) off accruing to an employee resulting from the employee working an average of a 38 hour week and taken in accordance with the agreed roster.

(14) "Union(s)" means any or all of the union organisations bound by this Award.

PART 2—COMMUNICATION, CONSULTATION AND DISPUTE RESOLUTION.

8.—COMMITMENTS OF THE PARTIES.

(1) Award Modernisation

The parties are committed to modernising the terms of the Award so that it provides for more flexible working arrangements, improves the quality of working life, enhances skills and job satisfaction.

(2) Structural Efficiency

The parties are committed to co-operating positively to increase the efficiency, productivity and competitiveness of the Employer and to enhance the career opportunities and job security of employees.

(3) The parties are committed to maintaining the integrity of competency based training, the Award classification definitions and nationally approved competency standards, within the context of the operational requirements of the Employer. In so doing the parties to this Award reaffirm their commitment to maintaining the integrity of structured trade training.

(4) Occupational Safety and Health.

The Parties are committed to continuing active participation in the Occupational Safety and Health management process which operates within the HCU and to ensuring the relevant Acts, regulations, codes of practice and standards are adhered to.

(5) Consultation

(a) Establishment of a HCU Consultative Committee

Where any party so requests, the Parties shall establish a HCU Consultative Committee as a vehicle to improve communication and genuine consultation in the workplace.

(b) Role of the HCU Consultative Committee

(i) Without limiting the range of activities and matters which the Parties may at any time agree to include in the Terms of Reference of the Committee, the Committee shall deal with any industrial matters.

(ii) The Committee shall develop and endorse its own specific Terms of Reference.

(c) Composition of the HCU Consultative Committee

(i) The Committee shall, subject to subclause (5)(c)(iii), consist of equal numbers of representatives of employees and the Employer. The Employee representatives shall be directly elected by all employees to whom this Award applies and who are engaged at that HCU.

(ii) For the purposes of the election of employee representatives to the Committee and the conduct of the business of the Committee there shall be no distinction made by the Parties between members and non-members of the Unions.

(iii) The Unions may nominate up to three additional accredited workplace representatives as members of the Committee.

(iv) Each Union may each nominate an official to attend meetings of the Committee.

(d) General

(i) Meetings of the Committee shall be scheduled to occur during the ordinary working hours of members. It is however acknowledged that some commitment of members time outside of normal working hours may be required.

(ii) The Employer shall provide Committee members with reasonable time away from their normal work to undertake the duties of members, which shall include but shall not necessarily be limited to—

(aa) Formal and informal consultation with staff in the workplace.

(bb) Participation in working parties which may be established by the Committee.

(cc) Meetings of employee representatives immediately prior to meetings of the Committee.

(dd) Participation in agreed training designed to equip members with the knowledge and skills to contribute effectively to the business of the Committee.

(iii) The Committee shall develop agreed protocols for the release of members from their normal work.

(iv) The Parties shall agree, on a HCU by HCU basis, on the resources necessary to support the functioning of the Committee.

9.—INTRODUCTION OF CHANGE.

(1) Employer's Duty to Notify

(a) The Employer shall notify the employees and the Union(s), where the Employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology, that are likely to have significant effects on the employees.

(b) "Significant effects" include termination of employment, major changes in the composition, operation or size of the Employer's work force or in the skills required; the elimination or lessening 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 re-structuring of jobs. Provided that an alteration shall not be deemed to have "significant effects" where the Award provides for such alteration.

(2) Employer's Duty to Discuss Change

(a) Discussion between the Employer and the employee(s) affected and the Union(s) shall commence as soon as possible after a firm decision has been made by the Employer to make the changes referred to in subclause (1)(a) above.

(b) Such discussions shall include: the effects the changes are likely to have on employee(s) and measures to reduce the adverse effects of such changes; and

(c) The Employer shall give prompt consideration to matters raised by the employee(s) and/or the Union(s) in relation to the changes.

(d) For the purposes of such discussion, the Employer shall provide to the employee(s) concerned and the Union(s), all relevant information about the changes, provided that the Employer shall not be required to disclose confidential information, which would be inimical to the Employer's interest.

10.—RIGHT OF ENTRY

(1) An accredited official shall, on no less than 1 days' prior notification to the Employer or a lesser period where agreed to by the parties, have the right to enter the workplace during working hours, including meal breaks, for the purpose of discussing with employees covered by this Award, the legitimate business of the Union or for the purpose of interviewing employees, checking on wage rates, investigating award breaches or complaints concerning the application of this Award, or any other industrial matter, but shall in no way unduly interfere with the work of the employees.

(2) Union Notices

Subject to the provisions of this clause, the Employer shall allow an accredited official to post a copy of this Award or any Union notice on nominated notice boards.

(3) Notice Board

Notice board(s) on which Union notices may be posted shall be provided by the Employer in suitable locations.

11.—DISPUTE RESOLUTION

(1) Dispute Procedure

In order to minimise the effect of any question, dispute or difficulty that may arise between the Parties or between the Employer and its employee(s), it is agreed that the following procedure shall be observed.

(a) Where a dispute, grievance or other question arises, the employee(s) concerned shall raise the matter with the appropriate Supervisor or other nominated representative.

(b) If not satisfactorily settled, or in cases where the matter is of such a nature as to warrant the omission of the step detailed in subclause (1)(a) hereof, the shop steward and/or the employee(s) concerned shall discuss the matter with the appropriate Employer representative.

(c) If satisfaction is not achieved, the Shop Steward of the employee(s) shall refer the matter to an appropriate full time official of the Union, who shall discuss the matter with the appropriate representative of the Employer.

(d) Each of the foregoing steps shall be followed in good faith and without any undue or unreasonable delay by any party. The parties agree that 3 working days shall normally be considered reasonable for the purposes of moving from one to another of each of the foregoing steps.

(e) This procedure shall not apply in the event of any genuine issue involving the safety of the employee(s), or other person.

(f) Throughout the foregoing procedure normal work shall continue. No party shall be prejudiced to final settlement by the continuance of work in accordance with this subclause.

(g) At the employee's option, a shop steward or another nominated person may also be present at any of the meetings held regarding the dispute, grievance or question.

(2) Disciplinary Procedure

Where the Employer seeks to discipline an employee or terminate an employee the following steps shall be observed—

(a) In the event that an employee commits a misdemeanour, the employee's immediate supervisor or any other officer so authorised, may exercise the right to reprimand the employee so that the employee understands the nature and implications of his/her conduct.

(b) The first two reprimands shall take the form of warnings and, if given verbally shall be confirmed in writing as soon as practicable after the giving of the reprimand.

(c) Should it be necessary, for any reason, to reprimand an employee in writing three times within a twelve month period, the contract of service may, subject to the principles of natural justice, upon the giving of that third reprimand, be terminable in accordance with the provisions of this Award.

(d) The above procedure is meant to preserve the rights of the individual employee, but it shall not in any way , limit the right of the Employer to summarily dismiss an employee for misconduct.

(3) Access to the Commission

(a) At any stage of these procedures, either party may refer the matter to the Western Australian Industrial Relations Commission. However, this shall not occur until such time as the persons involved in the question, dispute or difficulty have made a reasonable attempt to resolve the question, dispute or difficulty.

(4) Maintenance of Services

(a) The Union(s) recognise that the Employer has a statutory and public responsibility to provide health care services without any avoidable interruptions.

(b) The grievance procedure has been developed between the Parties to provide an effective means by which employees may reasonably expect problems to be dealt with as quickly as possible by the Employer.

(c) Accordingly, the Union(s) agree that during any period of industrial action, sufficient labour shall be made available to carry out work essential for life support within the Employer's operation's.

(d) The Parties shall agree, on a HCU by HCU basis,- in writing on guidelines on the supply of labour and circumstances in which such labour shall be called upon at each HCU.

PART 3—EMPLOYER AND EMPLOYEE DUTIES, EMPLOYMENT RELATIONSHIP, EQUIPMENT, TOOLS AND AMENITIES.

12A.—CONTRACT OF SERVICE

(1) Appointments shall be made in writing. The letter of appointment shall include the terms of the employee's appointment and shall appoint the employee to a classification under Appendix A—Salaries of this Award.

(2) The contract of service shall be by the fortnight and , except as provided in subclause (9)(b), shall be terminable by the giving of 2 weeks notice on either side or by the payment or forfeiture, as the case may be, of up to 2 weeks salary.

Provided that, by agreement between the Employer and employee, the notice or payment prescribed may be varied or waived.

(3) The contract of service for—

(a) a casual employee, shall be by the hour.

(b) a temporary employee, shall be for the term specified in the employee's letter of appointment.

(4) Employees may be directed to perform any job within their area of expertise and scope of activity up to and at the classification level to which they are appointed provided that they have the necessary skills and competencies.

(5) The Employer is entitled to deduct payment for any day or part thereof where the employee does not perform all duties as directed, consistent with the employee's classification, unless such non-performance is authorised in writing by the Employer.

(6) Provision of Work

(a) An employee, if engaged, and on presenting himself/herself for work to commence employment is not required, shall be entitled to at least 8 hours' work or payment thereof at ordinary rates and to payment of the appropriate allowance prescribed by Clause 40—Fares and Travelling Allowances of this Award.

(b) This subclause shall not apply if an employee is not required by reason of inclement weather, in which case the provisions of Clause 39—Inclement Weather of the Building Trades Award No. 31 of 1966 shall apply.

(7) An employee shall be guaranteed a full weeks work provided that the Employer is entitled to deduct payment for any day or part thereof where—

(a) an employee cannot be usefully employed due to strike action by any union or association provided that employees who are required to attend for work and do so attend as required on any day, shall be paid a minimum of one day's pay at ordinary rates.

(b) an employee is unable to work due to the breakdown of the Employer's machinery or through any stoppage of work by any cause which the Employer cannot reasonably prevent;

Provided that, in the case of wet weather, the decision as to whether it is too wet to work shall rest with the Employer, however, wet weather shall not affect an employees entitlement to payment.

(c) An employee not paid in accordance with paragraph (7)(a) or (7)(b) shall not lose benefits which the employee would ordinarily attract under this Award, provided that the employee resumes work as required after the stand down, and provided that the employee shall not be entitled to payment for any public holiday occurring during the period of the stand down where the stand down occurs under paragraph (7)(a).

(8) The Employer shall be under no obligation to pay for any day or portion of a day not worked on which the employee is required to present him/herself for duty and does not, except where the absence is due to illness and comes within the provisions of Clause 27.—Sick Leave or the absence is due to holidays to which the employee is entitled under the provisions of this Award.

(9) Termination of Employment

(a) This clause does not affect the Employer's right to dismiss an employee for misconduct and an employee so dismissed shall be paid salary up to the time of dismissal only.

(b) Period of Notice

Subject to paragraph (9)(a), the Employer must not terminate an employee's employment unless the following periods of notice are given or an employee is paid compensation in lieu of notice. This requirement to pay notice does not apply to apprentices, casuals, or persons employed for a specified period of time.

Period of continuous service with the Employer	Period of Notice
Not more than 3 years	At least 2 weeks
More than 3 years but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

(c) The period of notice prescribed in paragraph (9)(b) is increased by one week if the employee is over 45 years old and has completed at least 2 years continuous service with the Employer.

(10) Written Statements

(a) A dismissed employee may request in writing, a written statement from the Employer detailing the reason(s) for termination. The Employer shall provide such statement within 14 days of receipt of the request. Provided that in the case of dismissal for misconduct, the reason for such dismissal must be given in writing.

(b) A dismissed employee may make a written request to the Employer for a statement of service. The Employer shall provide such statement within 3 working days following receipt of the request.

12B.—MOBILITY AND DEPLOYMENT

The standards prescribed in any applicable Public Sector Standard shall apply to the application of this clause. The Employer shall ensure equity of access to deployment opportunities.

(1) Headquarters

(a) Each employee shall be assigned to a specific HCU and that HCU shall be the employee's headquarters. The headquarters of an employee as at the date of registration of this Award shall be the HCU at which the employee is working on that date.

(b) An employee may be transferred to another HCU by the giving of 3 months notice or such lesser period of notice as may be agreed with the employee. Any decision to transfer an employee to alternate headquarters shall be taken only after reasonable consultation with the employee, and in reaching such a decision regard shall be had to the—

(i) career aspirations of the employee.

(ii) family & carer responsibilities of the employee.

(iii) availability of transport.

(iv) availability of work at a level commensurate with the classification of the employee.

(v) any direct or indirect costs incurred by the employee.

(vi) the suitability of the position to which the employee is being transferred having regard to the skills, abilities and competencies of the employee.

(2) Temporary Deployment

(a) An employee may be temporarily rostered to work at another HCU for any period of not less than 1 week or more than 3 months, unless otherwise agreed.

(b) An employee temporarily rostered to work at another HCU shall be paid not less than the usual rate for the employees classification.

(c) The employee shall be advised of the terms and the duration of the temporary deployment in writing.

(d) The employee shall be reimbursed any reasonable net additional travelling costs incurred as a result of the employee being temporarily rostered to work at another HCU.

(e) Any reasonable net additional travelling time incurred by the employee as a result of the employee being temporarily rostered to work at another HCU shall be counted as ordinary working hours.

(f) The parties may from time to time agree on payment of a weekly rate in substitution for the preceding travelling costs and / or travelling time compensation arrangements.

(g) Access to temporary deployment opportunities shall as far as practicable be equitably available to all employees.

(3) Adhoc Deployment

(a) By agreement between an employee and the Employer, the employee may be rostered to work at another HCU on an adhoc basis

(b) An employee temporarily rostered to work at another HCU shall be paid not less than the usual rate for the employees classification.

(c) The employee shall be reimbursed any reasonable net additional travelling costs incurred as a result of the employee being required to work at another HCU on an adhoc basis.

(d) Any reasonable net additional travelling time incurred by the employee as a result of the employee being required to work at another HCU on an adhoc basis shall be counted as ordinary working hours.

(e) The parties may from time to time agree on payment of a daily rate in substitution for the preceding travelling costs and travelling time compensation arrangements.

(f) Access to adhoc deployment opportunities shall as far as practicable be equitably available to all employees.

(g) For the purposes of this sub-clause "adhoc deployment" means deployment for a period of less than 1 week.

(2) An employee may request regular, temporary or adhoc deployment to a HCU other than the employees headquarters for the purposes of acquiring additional competencies or experience or change in location. Where the Employer gives effect to such a request, the Employer shall not be obliged to defray any additional travelling costs or travelling time incurred by the employee. However the Employer shall provide such compensation as it deems appropriate if the acquisition of the additional competencies or experience is in the interests of the Employer.

13.—TEMPORARY, PART TIME & CASUAL EMPLOYEES.

(1) Temporary Employees

(a) A temporary employee shall be paid the rate of pay for the classification prescribed by this Award for the work performed, for the period of the employment.

(b) A temporary employee shall be entitled to all the conditions of employment prescribed by this Award provided that no provision of nor anything done pursuant to this Award, shall have the effect of extending the term of employment of a temporary employee.

(2) Part-time Employees

(a) A part-time employee shall be paid on a pro-rata basis according to the hours worked, at the rate of pay for the classification prescribed by this Award for the work performed.

(b) A part-time employee shall be entitled to the conditions of employment prescribed by this Award for the work performed, on a pro-rata basis.

(3) Casual Employees

(a) A "Casual Employee" shall mean an employee who is engaged to work for not more than 5 consecutive days.

(b) A casual employee shall be paid a loading of 20 per cent in addition to the rates prescribed by Appendix A.—Salaries.

(4) The Parties shall agree in writing, on a HCU by HCU basis, on guidelines on the ordinary use of temporary labour at each HCU.

14.—UNIFORMS, PROTECTIVE CLOTHING AND EQUIPMENT

(1) Uniforms and Protective Clothing

(a) The Employer shall supply and the employee shall wear such protective clothing and footwear as is required.

(b) The Employer may supply uniforms and may require them to be worn at all times when considered necessary by the Employer, in sufficient quantity to ensure a clean uniform per shift.

(c) Protective clothing or uniforms supplied under paragraphs (1)(a) or (1)(b) of this subclause shall remain the property of the Employer.

(d) All washable clothing forming part of the protective clothing or uniforms supplied by the Employer shall either be laundered by the Employer or in lieu thereof the employee may be paid a laundry allowance. The amount of the laundry allowance and those items of protective clothing or uniforms to be laundered by the employee shall be as agreed from time to time between the parties.

(e) The standard uniform issue may be varied by agreement between the Employer and the Union(s).

(f) By agreement, on a HCU by HCU basis, the parties may agree on alternative arrangements for the provision and laundering of uniforms and protective clothing at each HCU.

(g) HCU specific arrangements for the provision and laundering of uniforms and protective clothing as at the date of registration of this Award shall not be changed by the Employer without prior consultation.

(2) Protective Equipment

(a) The Employer shall make available a sufficient supply of personal issue protective equipment for use by employees when engaged on work for which such personal issue protective equipment is reasonably necessary, and employees shall be required to appropriately use such protective equipment, in accordance with the requirements of the Occupational Safety and Health Act 1984.

(b) An employee shall not lend another employee any personal issue protective equipment issued to the first mentioned employee.

(3) Change Room

A suitable and convenient change room shall be available for employees to use. The change room shall not be used for storing noxious materials.

PART 4—SALARIES AND RELATED MATTERS.

15A.—PAYMENT OF SALARIES.

(1) Payment of Salaries

(a) Each employee shall be paid the annual salary, proportionate to hours worked, prescribed for his or her classification in Appendix A.—Salaries.

(i) The weekly rate of pay shall be calculated by dividing the prescribed annual salary by 52.166.

(ii) The hourly rate of pay shall be calculated by dividing the weekly rate of pay by 38.

(b) Employee's annual salary shall be paid in equal fortnightly instalments by direct funds transfer into an account nominated by the employee at an approved bank, building society or credit union.

(c) Where exceptional circumstances exist and direct funds transfer is impractical, by agreement between the Employer and employee, payment by cheque may be made.

(2) Deductions

(a) Deductions for income tax, superannuation and such other purposes as may be prescribed by law, shall be made automatically from the employee's pay.

(b) Where the Employer and employee agree in writing, deductions for any other purpose may be made. The Employer may withdraw from any such agreement with four weeks notice. The employee may direct that any such deductions shall cease with one clear pay periods notice.

(3) Payment on Ceasing Employment

(a) When an employee ceases employment before the usual pay day, the employee shall be paid his / her final pay by cheque on the day he / she ceases work.

(b) Notwithstanding paragraph (3)(a), the Employer may elect to forward, at the Employers risk, a cheque by registered post to the employees last recorded home address, within seven days of the date the employee ceases work.

(c) Notwithstanding paragraph (3)(a), the Employer may elect to deposit the final pay into the account nominated pursuant to paragraph (3)(b), within 7 days of the date the employee ceases work.

(4) Recovery of Overpayments

(a) If employees are paid for work not subsequently performed or are overpaid due to administrative or similar error, the Employer shall, after consultation with the employee, make adjustments to the employees subsequent fortnightly salary payments.

(i) A one-off overpayment shall be recovered in the pay period immediately following the pay period in which it was made, or in the period immediately following the pay period in which it was discovered that the overpayment had occurred.

(ii) Cumulative overpayments shall be recovered at a rate agreed between the Employer and the employee provided that if the Employer and the employee can not agree on a reasonable recovery rate the Western Australian Industrial Relations Commission may determine what is reasonable in the circumstances.

(b) Any other arrangements for the recovery of overpayments may be agreed between the Parties.

15B.—SALARY PACKAGING

(1) An employee may, by agreement with the Employer, enter into a salary packaging arrangement.

(2) Salary packaging is an arrangement whereby the entitlements under this Award, 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.

(4) The TEC for the purposes of salary packaging, is calculated by adding—

(a) The base salary;

(b) Other cash allowances, eg annual leave loading,

(c) Non cash benefits, eg superannuation, motor vehicles etc;

(d) Any Fringe Benefit Tax liabilities currently paid; and

(e) Any variable components, eg performance based incentives (where they exist).

(5) Where an employee enters into a salary packaging arrangement they shall be required to enter into a separate written agreement with the Employer that sets out the terms and conditions of the arrangement. To the extent of any inconsistency between the separate written agreement and the provisions of this Award, the provisions of this Award shall have precedence.

(6) The salary packaging arrangement must be cost neutral in relation to the total cost to the Employer.

(7) The salary packaging arrangement must also comply with relevant taxation laws and the Employer shall not be liable for additional tax, penalties or other costs payable or which may become payable by the employee.

(8) 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.

(9) In the event of significant increases in Fringe Benefit Tax liability or administrative costs relating to arrangements under this clause, the employee may vary or cancel a salary packaging arrangement.

(10) The Employer shall not unreasonably withhold agreement to salary packaging on request from an employee.

(11) The Dispute Settlement Procedures contained in this Award 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.

(12) For the purposes of this provision, any penalty rate, loading or other wage related allowances which would ordinarily be calculated on the basis of the salary rates expressed in Clause 15—Payment of Salaries shall continue to be so calculated despite an election to participating in any salary packaging arrangement.

16.—LEADING HAND ALLOWANCE

(1) An employee placed in charge of 3 or more other employees shall, in addition to the employee's ordinary salary, be paid—

(a) Not less than 3 and not more than 10 other employees—$28.30 per week;

(b) More than 10 and not more than 20 other employees—$37.86 per week;

(c) More than 20 other employees—$47.40 per week.

(2) The rates herein prescribed shall be deemed to form part of the ordinary rate of salary of the employees concerned for all purposes of this Award.

(3) Nothing in the Award shall require payment of a leading hand allowance to an employee placed in charge of other employees if that employees classification defines the exercise of supervisory / leading hand duties.

17.—HIGHER DUTIES

(1) An employee who is required by the Employer to act in a position which attracts a higher rate of pay than the employee's ordinary rate of pay, shall be paid higher duties based on the difference between the rates of pay and the proportion of the higher classified duties which were assigned, provided that—

(a) An employee who undertakes higher duties for more than 2 hours in a shift shall in addition be paid higher duties for the whole of the remainder of the shift.

(b) No higher duties allowance is payable to an employee who is required to act in a position solely because the substantive occupant is on a single rostered day off.

18.—APPRENTICES.

(1) Apprentices may be taken in the ratio of one apprentice for every 2 or fraction of 2 (the fraction being not less than 1) tradesperson and shall not be taken in excess of that ratio unless—

(a) The Union or Unions concerned so agree; or

(b) The Western Australian Industrial Relations Commission so determines.

(2) Where an apprentice's rostered day off duty as prescribed in Clause 21.—Hours of Work and Rostering falls within a period of block release, an alternative rostered day off shall be arranged at a mutually convenient time.

(3) Salary

	Term	Percentage of Tradesperson's Rate
(a)	Four year term -	%
	First year	42
	Second year	55
	Third year	75
	Fourth year	88
(b)	Three and a half year term—	
	First six months	42
	Next year	55
	Next following year	75
	Final year	88
(c)	Three year term—	
	First year	55
	Second year	75
	Third year	88

(d) The Tradesperson's rate is the rate applicable to a Mechanical Fitter Level 10 under this Award.

(4) If, through no fault of his/her own, an apprentice fails to attend a period of training in any week, fortnight or year as prescribed that period shall be made up during the final year of the apprenticeship if the Employer and the training authority so arrange.

(5) An apprentice shall be released to attend vocational classes or classes of instruction in accordance with the Industrial Training Act 1975, the Industrial Training (Apprenticeship Training) Regulations 1981 or the Apprenticeship Agreement as the case requires. Apprentices shall be paid the ordinary salary they would otherwise have been paid during the period they are released from work.

(6) The provisions of this Award shall be read in conjunction with the Industrial Training Act 1975 and the Industrial Training (Apprenticeship Training) Regulations 1981.

19.—ACCESS TO RECORDS

(1) Inspection of Time and Salaries Records

(a) The Employer shall maintain a time and salaries record for each employee.

(b) The entries in the time and salaries records for each employee shall include—

(i) the name and details of each employee;

(ii) the employee's job classification or description and whether full-time, part-time, temporary or casual;

(iii) the hours worked each day including roster details, if applicable;

(iv) the salaries, allowances and overtime paid to each employee and any deductions made there from.

(c) Computerised time and salaries records may be kept by the Employer and shall be deemed to satisfy the requirements of this clause to the extent of the information recorded.

(d) The Employer must ensure that each entry in the time and salaries record is retained for not less than 7 years after it is made.

(e) A representative of the Union(s) shall have the power to inspect the time and salaries records of an employee or former employee.

(f) The Employer may refuse the representative access to the records if—

(i) the Employer is of the opinion that access to the records by the representative of the Union would infringe the privacy of persons who are not members of the Union; and

(ii) the Employer undertakes to produce the records to an Industrial Inspector within 48 hours of being notified of the requirement to inspect by the representative.

(g) The power of inspection may only be exercised by a representative of a Union authorised in accordance with the rules of the Union to exercise the power.

(h) Before exercising a power of inspection the representative shall give reasonable notice of not less than 24 hours to the Employer.

(i) The Employer or Union(s) bound by and party to this Award may apply to the Western Australian Industrial Relations Commission at any time in relation to this clause.

(2) Access to Employee Files

If the Employer maintains a personal or other file on an employee, the employee shall be entitled to arrange a time to examine all material maintained on that file, and may obtain excerpts/copies of material from the file.

(3) Access to the Award

An employee shall be entitled to have access to a copy of this Award. Sufficient copies shall be made available by the Employer for this purpose.

20.—SPECIAL RATES AND PROVISIONS

(1) Disability Allowances

(a) Except as otherwise provided in this clause, the annual base salaries prescribed in this Award incorporate a commuted allowance which is in full substitution for all disability allowances and other special rates and provisions which are contained in any of the awards named in Clause 1.—Title, as at the date of registration of this Award.

(b) Polychlorinated Biphenyls: Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs), for which protective clothing must be worn, shall be paid an allowance of $1.43 for each hour or part thereof whilst so engaged.

(c) Asbestos—

(i) Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority

(ii) Employees engaged in a work process involving asbestos who are required to wear protective equipment, ie. respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, shall be paid an allowance of $0.45 per hour for each hour or part thereof whilst so engaged.

(d) Furnace Work

Employees engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles, steam generators, heat exchangers and similar refractory work or on underpinning shall be paid $1.00 per hour or part thereof whilst so engaged.

(e) Construction Allowance

(i) In addition to the appropriate rate of pay prescribed in Appendix A.—Salaries of this Award, an employee shall be paid—

(aa) $31.60 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(bb) $28.40 per week if engaged on a multi-storey building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storey building" is a building which, when completed, shall consist of at least five stories.

(cc) $16.80 per week if engaged otherwise on Construction Work.

(ii) The rates specified in paragraph (1)(e)(i) shall be discounted by $14.30 per week, the amount of the commuted allowance granted under paragraph (1)(a) of this subclause.

(f) Asbestos Eradication

(i) This sub-clause shall apply to employees engaged in the process of asbestos eradication on the performance of work within the scope of this Award.

(ii) For the purposes of this clause "asbestos eradication" means work on or about buildings, involving the removal or any other method of neutralisation of any materials which consist of, or contain asbestos.

(iii) All aspects of asbestos work shall meet as a minimum standard the provisions of the National Health and Medical Research Council codes, as varied from time to time, for the safe demolition/removal of asbestos based materials.

Without limiting the effect of the above provision, any person who carried out asbestos eradication work shall do so in accordance with the legislation/regulations prescribed by the appropriate authorities.

(iv) An employee engaged in asbestos eradication (as defined) shall receive an allowance of $1.16 per hour worked in lieu of rates prescribed in paragraph (1)(c) of Clause 20.- Special Rates and Provisions.

(v) Respiratory protective equipment, conforming to the relevant parts of the appropriate Australian Standard (ie. 1716 "Specification of Respiratory Protective Devices") shall be worn by all personnel during work involving eradication of asbestos.

(g) Where more than one of the disabilities entitling an employee to extra rates exists on the same job the employee shall be paid only the highest rate for the disabilities so prevailing.

(2) Tools—Allowances and Provisions

(a) The salary of all tradespersons employed under this Award incorporates a tool allowance for the purpose of such tradesperson supplying and maintaining tools ordinarily required in the performance of work as a tradesperson.

(b) The salary of all apprentices incorporates the percentage which appears against the relevant year of apprenticeship in subclause (3) of Clause 18.—Apprentices of the appropriate tradespersons tool allowance.

(c) The tool allowance prescribed in paragraph (2)(a) includes an amount for the purpose of enabling employees to insure their tools against loss or damage by theft or fire.

(d) Apprentice Tool Kits

(i) On commencement of an apprenticeship, the Employer shall provide an apprentice with a basic tool kit, the composition of which shall be agreed in writing between the parties on a HCU by HCU basis.

(ii) The tool kit provided in accordance with paragraph (2)(d)(i) of this subclause shall remain the property of the Employer until, on successful completion of the apprentices indenture, it shall become the property of the apprentice, without deduction.

(iii) Any dispute regarding the composition of the tool kit shall be addressed through the procedures contained in Clause 11.—Dispute Resolution.

(e) The Employer shall provide, for the use of tradespersons or apprentices, all necessary power tools, special purpose tools and precision measuring instruments.

(f) A tradesperson or an apprentice shall replace or pay for any tools supplied by the Employer, if lost through the negligence of such employee.

(g) An employee in receipt of a tool allowance shall provide him/herself with all necessary tools kept in suitable condition for the performance of the work.

(h) Storage of Tools

(i) The Employer shall provide a waterproof and reasonably secure place on each job where the employees' tools (when not in use) may be locked up apart from the Employer's plant or material.

(ii) The Employer shall indemnify an employee in respect of any tools of the employee stolen if the Employer's failure to comply with this clause is a material factor in contributing to the stealing of the tools.

(3) Licences—Allowances and Provisions

(a) Plumbing Trade Allowance

The rate of salary specified in Appendix A.—Salaries of this Award, includes an amount in substitution of payment of the Plumbing Trade Allowance, as defined in the Building Trades (Government) Award 1968 No. 31a of 1966, to compensate for the classes of work specified therein as at the date of registration of this Award.

(b) Permit Work

Any licensed plumber called upon by the Employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $11.84 for that week in addition to the rates otherwise prescribed.

(c) Electrical Trade Allowance

The rate of salary specified in Appendix A.—Salaries of this Award, includes an amount in substitution of payment of the allowance for an electronics tradesperson, an electrician—special class, an electrical fitter and/or an armature winder or an electrical mechanic who holds in the course of employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948.

(d) Scaffolding Certificate Allowance—

A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by an accredited training provider and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid $0.37 per hour or part thereof: in addition to the rates otherwise prescribed in this Award.

(e) Nominee Allowance

A licensed electrical fitter or mechanic who acts as nominee for the Employer shall be paid an allowance of $12.37 per week.

(f) Setter Out—

A setter out (other than a leading hand) in a joiner's shop shall be paid $3.69 per day in addition to the rates otherwise prescribed.

(4) Industry Allowance

The rate of salary specified in Appendix A.—Salaries of this Award, includes an amount in substitution of payment of the industry allowances as defined in the Building Trades (Government) Award 1968 No. 31a of 1966 and the Engineering Trades (Government) Award 1967 No. 29, 30 & 31 of 1961 & 3 of 1962 as at the date of registration of this Award.

(5) Hospital Environment Allowance

The rate of salary specified in Appendix A.—Salaries of this Award, includes an amount in substitution of payment of the Hospital Environment Allowance as defined in the Building Trades (Government) Award 1968 No. 31a of 1966 and the Engineering Trades (Government) Award 1967 No. 29, 30 & 31 of 1961 & 3 of 1962 as at the date of registration of this Award.

(6) General

The work of an electrical fitter/mechanic shall not be tested by an employee holding a lower grade licence.

(7) Variation of Substituted Allowances and Special Rates

No claim shall be made to vary the amount of allowances incorporated into the annual salary.

PART 5—HOURS OF WORK, BREAKS, OVERTIME AND SHIFTWORK

21.— HOURS OF WORK AND ROSTERING

(1) Ordinary hours of work shall be an average of 38 hours per week.

(2) Ordinary hours of work shall be worked as rostered, between 0600 hours and 1800 hours Monday to Friday, in 5 consecutive shifts of 7hours and 36 minutes (exclusive of meal breaks).

(3) The roster shall be established and maintained by the Employer in accordance with the operational requirements of the Employer after consultation with the employees to whom the rosters apply.

(4) The roster shall be posted on each occasion at least 48 hours before it comes into operation, in a convenient place where it can be readily seen by the employees concerned.

(5) Rostered work outside of the ordinary hours of work shall attract the relevant shift penalties. Unrostered work shall attract the relevant overtime provisions.

(6) Any dispute concerning rosters may be addressed through the procedures contained in Clause 11.—Dispute Resolution.

(7) Meal Breaks and Tea Breaks

(a) An employee shall take one unpaid meal break as near as reasonably practicable to the middle of each rostered shift. Meal breaks shall be not less than 30 minutes and not more than 90 minutes in duration. Travelling time taken to reach the staff facility at which the meal break is taken shall not exceed 10 minutes including "wash-up" time between the time of downing tools and commencing the meal break. Travelling time taken to return to the job and commence work after the completion of the meal break shall not exceed 5 minutes.

(b) An employee may take one paid refreshment break prior to the unpaid meal break and one paid refreshment after the unpaid meal break. Refreshment breaks shall be taken on the job or at the staff facility closest to the location the employee is working and, in any event, shall not exceed 10 minutes including "wash-up" time between the time of downing tools and resuming work.

(c) An employee may determine the commencement time of refreshment breaks and the time and duration of the meal break provided that the timing and/or duration of the breaks do not interrupt the near completion of work, interfere with the completion of urgent work, interfere with the rectification of a breakdown of plant, or interfere with routine maintenance of plant which can only be done while such plant is idle.

(d) Notwithstanding paragraph 7(c) the Employer may from time to time roster meal and refreshment breaks if it is necessary for work to continue uninterrupted. Where the Employer so rosters the meal and refreshment breaks and an employee works in excess of six hours without a meal break the employee shall be paid at overtime rates for the time worked in excess of six hours, until released from duty to commence the meal break.

(8) Nothing in this Award shall prevent the Parties from agreeing to alternative arrangements to regulate ordinary hours of work and rostering.

(9) Notwithstanding the provisions of this clause ordinary hours of work may, by agreement between the Employer and employees, be worked as rostered in accordance with one of the following cycles—

(a) Nine day fortnight

Actual hours of 76 hours as rostered over nine days per fortnight with the tenth day to be taken as an unpaid rostered day off. The following provisions shall apply to an employee working under this arrangement—

(i) Rostered Day Off

Each employee shall be allowed 1 rostered day off each fortnight in accordance with a roster prepared by the Employer showing days and hours of duty and rostered days off for each employee.

A rostered day off shall be the first or last day of the week unless otherwise agreed between the Employer and employee.

(ii) Annual Leave and Public Holidays

A four week annual leave entitlement is equivalent to 152 hours, the equivalent of eighteen rostered working days of 8 hours 27 minutes, and 2 rostered days off.

For the purposes of annual leave, a day shall be credited as 8 hours 27 minutes.

(iii) 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, as rostered.

(iv) Study Leave

Credits for Study Leave shall be given for educational commitments falling due between an employee's nominated starting and finishing times.

(b) Nineteen day month

Actual hours of 152 hours as rostered over four weeks with the twentieth day to be taken as an unpaid rostered day off. The following provisions shall apply to an employee working under this arrangement—

(i) Rostered Day Off

Each employee shall be allowed one rostered day off each 4 week cycle in accordance with a roster prepared by the Employer showing days and hours of duty and rostered days off for each employee.

A rostered day off shall be the first or last day of the week unless otherwise agreed between the Employer and employee.

(ii) Leave and Public Holidays.

A 4 week annual leave entitlement is equivalent to 152 hours, the equivalent to 19 rostered working days of 8 hours, and one rostered day off.

For the purposes of annual leave, a day shall be credited as 8 hours.

(iii) 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, as rostered.

(iv) Study Leave

Credits for Study Leave shall be given for educational commitments falling due between and employee's nominated starting and finishing times.

(c) The Employer shall not withdraw from an agreement for ordinary hours to be worked in accordance with this subclause without prior consultation pursuant to Part 2 Communication, Consultation and Dispute Resolution of this Award.

(10) Flexitime

Notwithstanding the provisions of this clause, flexitime may be worked by agreement between the Employer and Employee/s. All provisions of the Award continue to apply except where inconsistent with these provisions.

(a) The working of flexitime arrangements shall be subject to the following—

(i) The Employer shall be responsible for authorising a flexitime roster. The roster shall indicate minimum staffing requirements, any parameters relating to starting and finishing times, lunch break coverage and flexileave, the minimum operation parameters (MOP's).

(ii) The MOP's shall be prepared after consultation with the employee's to whom the roster applies.

(iii) Subject to paragraph (ii), MOP's may be varied to accommodate operational requirements.

(b) Subject to there being work available to be done and subject to the employee being capable of undertaking the available work, an employee may select their own starting and finishing times within the parameters from time to time specified by the Employer. In the absence of such specification the following parameters shall apply—

Commencement of shift: 0600 to 0930 hours.

Minimum lunch break of 30 minutes to be taken within 6 hours of commencing work on any day.

End of Shift: 1500 to 1930 hours.

(c) Hours of Duty

The ordinary hours of duty may be an average of 8 hours and 30 minutes per day, which may be worked with flexible commencement and finishing times in accordance with this clause, provided that—

(i) An average of 38 hours per week shall be worked.

(ii) The maximum number of hours that can be worked on any day shall be 10 hours.

(iii) The minimum number of hours that can be worked on any day shall be 4 hours.

(iv) At no point shall credit hours exceed 76 hours.

(v) At no point shall debit hours exceed 15hours and 12 minutes.

(vi) The ordinary hours of duty shall be worked on Monday to Friday, unless agreed otherwise from time to time.

(vii) The settlement period shall be 4 weeks, commencing at the beginning of a pay cycle.

(d) Credit Hours

(i) Credit hours worked in excess of the average of 38 hours per week to a maximum of 76 hours, are permitted at the end of each settlement period. Credit hours shall be carried forward to the next settlement period.

(ii) Where an employee has credit hours in excess of 76 hours at the end of a settlement period, the employee shall have one settlement period to reduce the credit hours to 76 hours. If the employee does not reduce the credit hours to at least 76 hours within the settlement period, the Employer may roster the employee off duty during the subsequent settlement period to bring credit hours down to 76 hours.

(iii) Where the credit hours of an employee are regularly in excess of 76 hours, the Employer may require the employee to revert to working rostered shifts.

(iv) Ordinarily, credit hours shall be accessed as half days or single days off.

(v) Employees shall be able to nominate the days upon which they shall access their credit time, provided the nominated days accommodate the MOP's and provided the nominated days may be cancelled by the Employer in response to operational necessity.

(vi) The maximum number of days (or equivalent half days) which may be taken off in any settlement period shall be 4 days (inclusive of days taken off by way of the nine day fortnight), except by agreement.

(e) Debit Hours

(i) Debit hours below the required average of 38 hours per week to a maximum of 15 hours and 12 minutes are permitted at the end of a settlement period. Debit hours shall be carried forward to the next settlement period.

(ii) Where an employee has debit hours in excess of 15 hours and 12 minutes, the employee shall have one settlement period to reduce the debit hours to at least 15hours and 12 minutes. If the employee does not reduce the debit hours to at least 15hours and 12 minutes within the settlement period, the Employer may roster the employee on duty for the regular rostered day off without penalty to the Employer, to bring debit hours up to 15hours and 12 minutes.

(iii) Where the debit hours of an employee are regularly in excess of 15 hours and 12 minutes, the Employer may require the employee to revert to working rostered shifts.

(f) Termination of Employment

(i) Once an employee tenders notice of resignation, the employee shall not work additional credit hours, other than where the employee's hours are in debit, except by agreement. Credit hours accrued after notice of resignation is tendered shall not be paid out to an employee, except where the hours are worked by agreement.

(ii) On termination, credit hours to a maximum of 76 hours shall be paid out. Credit hours in excess of 76 shall only be paid out in the instance where the employee has not been allowed by the Employer to clear it during the notice period.

(iii) On termination, debit hours shall be deducted from the employee's final pay.

(g) Rostered Shifts

(i) Where an employee has been instructed to work a rostered shift, the appropriate overtime provisions shall apply after 8 hours and thirty minutes of ordinary hours of work are worked on any day.

(ii) An employee shall be given not less than 48 hours notice by the Employer of the requirement to work a rostered shift.

(iii) Where less than the required notice is provided, an employee shall be credited with one additional hour of credit.

(iv) Notwithstanding the provisions of this subclause, the HCU shall endeavour to provide staff with as much notice as possible of the requirement to work a rostered shift.

(h) All employees are required to record their daily hours of work on flex sheets. At the end of each settlement period, flex sheets are to be verified by the Supervisor. Flex sheets shall be kept in a central location. Past flex sheets shall be maintained by the Department and available for inspection by any person authorised to inspect them.

(i) Nothing in this Clause shall alter the employers pre-existing rights to determine work arrangements and the manner in which work is undertaken to suit the operational requirements of the HCU, including the making of provisions for attendance of employees for duty on Saturday's, Sunday's or Public Holiday's, the performance of shift work or the cancellation of flexible working hours, as provided for by the Award.

(j) For the purposes of this clause—

"Rostered shift" shall mean any shift of 8 hours and 30 minutes of ordinary hours, the starting and finishing times of which are specified by the Employer, which the Employer instructs the employee to work.

22.—OVERTIME

(1) Overtime Rate.

(a) Work required by the Employer to be performed outside of the ordinary hours of work, shall be paid for at the overtime rates of—

(i) Double time and a half when carried out on a public holiday;

(ii) Double time when carried out after 1200 hours on a Saturday, or any time on a Sunday; or

(iii) Time and a half for the first 2 hours and double time thereafter at any other time.

(b) Overtime on shift work shall be based on the rate payable for shift work.

(c) On the request of an employee, the Employer may grant time off in lieu of payment for overtime. Time of in lieu shall be proportionate to the payment to which the employee is otherwise entitled.

(d) The allocation of overtime shall not be made on the basis of an employee's preference for payment or time off in lieu.

(2) The provisions of this clause do not operate so as to require payment of more than double time rates, or double time and a half on a holiday prescribed under this Award.

(3) Each day stands alone in calculating overtime but if overtime continues beyond midnight on any day, time worked after midnight shall be deemed part of the previous day's work.

(a) An employee on overtime duty is entitled, where practicable, to have a minimum break of 10 hours before recommencing work on successive days.

(b) An employee shall be paid at ordinary time for any rostered ordinary hours which fall while a 10 hour break is being observed.

(c) Where an employee is directed by the Employer to recommence work after less than a ten hour break, the employee shall be paid at the rate of double time thereafter until released from duty. The employee shall be entitled to be absent until 10 hours off duty are observed.

(d) For shift employees the period of ten hours shall be reduced to 8 hours when overtime worked—

(i) is due to a private arrangement between employees, or

(ii) is due to a shift employee not reporting for duty, or

(iii) is for the purpose of changing shift rosters.

(e) This subclause does not apply where overtime is worked as a result of a recall and actual time worked is less than three hours on such recall or on each of such recalls.

(f) This subclause shall not apply to casuals.

(4) An employee who is recalled to work after leaving the workplace at the end of the shift shall be paid a minimum of 3 hours at the relevant overtime rates. Time reasonably spent in getting to and from work shall be counted as time worked. An employee shall be paid in excess of the minimum of 3 hours where the addition of the time worked and the time spent travelling to and from work exceeds a total of 3 hours.

(5) Employees in areas as agreed between the parties may be rostered for stand by duty outside of the ordinary hours of work. In addition to any payment due under this Award for any overtime worked, each employee rostered for stand by duty shall be paid—

(a) 3 hours pay at ordinary rates if rostered on any day Monday to Friday inclusive or if stand by rates are applicable on a rostered day off.

(b) 4 hours pay at ordinary rates if rostered on a Saturday or a Sunday.

(c) 3 hours pay at ordinary rates plus a day in lieu if rostered on a holiday.

Provided that alternative arrangements may be agreed upon in writing, between the parties.

(6) Work on a Rostered Day Off

(a) An employee required to work on a rostered day off shall be re-rostered for another day off at a mutually convenient time, in lieu of overtime rates prescribed in this clause.

(b) Provided that, should the Employer and employee so agree, the time involved may be treated and paid as overtime in accordance with the other provisions of this clause.

(c) Provided further, that the employee shall be paid in accordance with the call out provisions of this subclause where called out on a rostered day off and required to work for less than 1 complete day.

(7) Meal Breaks During Overtime

(a) An employee required to work 2 hours or more overtime continuous with their rostered hours, which necessitates taking a meal break, shall be paid a meal allowance of $7.30 for each meal so required or may be provided with a meal ticket.

Provided that this subclause shall not apply to a employee notified on the previous day of the requirement to work such overtime.

(b) Where an employee so notified provides themselves with a meal and subsequently is not required to work overtime or is required to work less overtime than the period notified, the employee shall be paid for each meal provided and not the required the amount prescribed in paragraph 7(a).

(8) Overtime for Apprentices

(a) Apprentices under 18 years of age shall not be required to work overtime or shift work unless the employee so desires.

(b) Apprentices shall not, except in an emergency, work or be required to work overtime or shift work at times which would prevent attendance at Technical School, as required by any statute, award or regulation applicable to the apprentice.

(9) When an employee, after having worked overtime and/or shift for which the employee has not been regularly rostered, finishes work at a time when reasonable means of transport are not available, the Employer shall provide conveyance to the employees home or the nearest public transport.

(a) The Employer may require any employee to work reasonable overtime at overtime rates.

(b) Unions party to this Award, and/or employees covered by this Award, shall not in any way, directly or indirectly, be a party to or concerned in any ban, limitation, or restriction upon the working of overtime in accordance with the requirements of this paragraph.

23.—SHIFT WORK

(1) Notwithstanding any other provision of this Award, shift work may be worked as rostered, but where the shift work is to be regular rostered shiftwork, the Employer shall notify the relevant Union party to this Award.

(2) Shift Penalties

(a) For the purposes of this subclause—

(i) "Afternoon shift" shall mean a shift which commences at or after 1200 hours and before 1800 hours.

Provided that an afternoon shift shall not mean a shift which commences at or after 1200 hours and is completed at or before 1800 hours on that day.

(ii) "Night shift" shall mean a shift which commences at or after1800 hours and before 0600 hours

(b) Shift Penalty Rates

An employee when working on afternoon or night shift shall be paid a loading of 15% of the hourly rate for the classification in which the employee is employed.

(3) Subject to the provisions of this Award all work performed on a rostered shift, when the major portion of the shift falls on a Saturday, Sunday or a public holiday, shall be paid for as follows —

(a) Saturday—at the rate of time and one half

(b) Sunday—at the rate of time and three quarters

(c) Public Holidays—at the rate of double time

(d) These rates shall be paid in lieu of the shift allowance prescribed in subclause (2) of this clause.

(4) Where work is carried out on any combination of afternoon and/or night shifts and less than 5 consecutive penalty shifts are worked, employees employed on such shifts shall be paid as follows—

(a) Monday to Friday—at the rate of time and one half for the first 2 hours and double time thereafter.

(b) Saturday and Sunday—at the rate of double time.

(c) These penalty rates shall be paid in lieu of the shift allowance prescribed in subclause (2) and subclause (3) of this clause.

The work on afternoon and/or night shift shall be deemed to be consecutive when less than five shifts are worked as the result of any absence from work, whether paid or unpaid, or the fact that work on the afternoon or night shift is not carried out on a Saturday or Sunday or on a day off.

PART 6—LEAVE OF ABSENCE AND PUBLIC HOLIDAYS

24.—CASUAL EMPLOYEES

Casual employees are not entitled to paid leave under this Part 6.

25.—PUBLIC HOLIDAYS.

(1) Prescribed Public Holidays.

(a) New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day shall be paid public holidays.

(b) Any additional public holidays proclaimed under Section 7 of the Public and Bank Holidays Act, 1972 shall be observed as public holidays.

(2) When a paid public holiday falls on a Saturday or Sunday, the holiday shall be observed on the next Monday.

(3) When Boxing Day falls on a Sunday or Monday, the holiday shall be observed on the next Tuesday.

(4) In each case the substituted day shall be a paid holiday and the day for which it is substituted shall not be a holiday.

(5) Payment for Public Holidays.

(a) An employee not required to work on a day solely because the day is a public holiday shall be paid for the ordinary hours that the employee would have worked as if the day had not been a public holiday.

(b) Payment for holidays shall be in accordance with the usual hours of work.

(6) All hours worked on a public holiday shall be paid at the rate of double time and a half of the ordinary rate of pay or if an employee chooses, the employee shall be paid at the rate of time and a half of the ordinary rate of pay and time off in lieu credits shall be increased by the equivalent of the time worked.

(7) Public Holidays Falling on Days Off.

(a) Where a public holiday falls on a rostered day off or a day off duty as prescribed in Clause 21.—Hours of Work and Rostering, a day off shall be observed in lieu of the public holiday at a mutually convenient time.

(b) If a public holiday falls on an employee's rostered day off or falls on an employee's day off duty, the employee's time off in lieu credits shall be increased by the number of hours that would ordinarily have been worked if that day had been an ordinary working day.

(8) In exceptional circumstances, where an employee so requests and with the agreement of the Employer, employee and the relevant Union, time off in lieu credits accumulated under this clause may be paid out.

(9) When an employee is absent on leave without pay, sick leave without pay or workers' compensation, any day observed as a public holiday falling during the absence shall not be treated as a paid holiday. If the employee is on duty or available on the whole of the working day immediately preceding a public holiday or on the whole of the working day immediately following a day observed as a public holiday, the employee shall be paid for such holiday.

(10) A part-time employee shall not be entitled to payment for any public holiday referred to in this clause if not so rostered to work on that holiday.

(11) Nothing in this award shall prevent the Parties from agreeing alternative arrangements for the taking of public holidays.

26.—ANNUAL LEAVE

(1) Employees shall receive 20 days of paid annual leave, excluding public holidays, for each period of 12 months continuous service.

(2) An additional 5 days of paid annual leave shall be granted to a shift employee regularly rostered to work on Sundays and public holidays. Where an employee is rostered in this manner for only part of the 12 month qualifying period, the annual leave entitlement shall accrue at the rate of 3.65 hours of pay for each completed week of continuous service.

(3) Employees annual leave entitlement shall accrue pro rata on a weekly basis, being 2.92 hours pay per week of continuous service, and be cumulative from year to year.

(4) With the Employer's agreement, an employee may be allowed to take annual leave before it has accrued.

(5) Annual leave shall be taken at times agreed between the employee and the Employer. In reaching such agreement equal consideration shall be given to the needs of the employee and the operational convenience of the Employer.

(6) Employees shall be entitled, after the end of each period of 12 months continuous service and before the completion of the subsequent period of 12 months continuous service, to take annual leave in one continuous period of 4 weeks or in two separate periods of not less than 2 weeks on each occasion.

(7) If the Employer and the employee agree annual leave may be taken in any number of periods of not less than 1 day on each occasion.

(8) Should any public holidays fall within an employee's period of annual leave, the holiday or holidays, as the case may be, shall be added to the period of annual leave.

(9) Employees shall take unused annual leave accrued during a period of 12 months continuous service before the completion of the subsequent period of 12 months continuous service, if required by the Employer on the giving of reasonable notice.

(10) An employee shall be paid when on leave the rate of pay the employee received for the greatest proportion of the calendar month prior to taking the leave.

(11) An employee shall be paid for each period of annual leave at the time of taking the leave, if the employee so elects.

(12) The annual base salaries prescribed in this Award incorporate a commuted allowance which is in substitution for leave loading. Leave entitlements utilised during the life of this Award, including credits accrued prior to the commencement of this Award, shall not otherwise attract leave loading.

(13) Nothing in this Award shall prevent an employee, with the consent of the Employer, from accumulating and carrying forward any portion of the employee's annual leave entitlements from one year to the next.

(14) The Employer shall not unreasonably withhold consent for the accumulation of up to 40 days of paid annual recreation leave for the purpose of taking extended leave in a particular year.

(15) Annual leave shall continue to accrue during periods of annual leave, public holidays, long service leave and authorised sick leave (paid or unpaid) provided that—

(a) In the case of long service leave, only for up to a maximum period of absence of 3 months, but where long service leave on half pay is taken, annual leave shall accrue proportionally over any period of leave which does not exceed the equivalent of 3 months on full pay.

(b) In the case of sick leave, only for up to a maximum period of absence of 3 months.

(16) Approved periods of absence from work through Workers Compensation shall not interrupt continuity of service, but annual leave shall accrue during the first 6 months only of any such absence.

(17) Annual Leave Pay out or Recovery on Termination.

(a) Any accrued and pro-rata leave which has not been taken shall be paid on termination of employment.

(b) Pro-rata leave shall not be paid where employment is terminated for misconduct or other grounds that justify summary dismissal.

(c) If at termination an employee has taken more leave than has been accrued, the employee shall pay back that leave. The Employer may deduct any money owing from the employee's final pay.

(18) An employee who works an average of a 38 hour week and who accumulates a rostered day off, shall be required to take one period of annual leave to include a rostered day off duty. The rostered day off duty shall not attract additional pay or leave in lieu of that rostered day off.

27.—SICK LEAVE

(1) Employees shall receive 10 days of paid sick leave for each period of 12 months continuous service.

(2) The sick leave entitlement shall accrue pro rata on a weekly basis and be cumulative from year to year.

(3) To be granted paid sick leave, the employee must advise the Employer as soon as reasonably practicable of the inability to attend for work, the nature of the illness or injury and the estimated period of absence. This advice shall be provided within 24 hours of commencement of the absence, other than in extraordinary circumstances.

(4) Any absence on sick leave of more than 2 consecutive days, shall be supported by evidence that satisfies the Employer that the absence from work was on account of personal illness or injury.

(5) The total number of absences on sick leave, which are not supported by evidence that satisfies the Employer that the absence from work was on account of personal illness or injury, shall not exceed 5 days in any particular accrual period.

(6) Payment for sick leave may be adjusted at the end of each accruing year, or at the time the employee leaves the service of the Employer, in the event of the employee being entitled by service subsequent to the sickness in that year to a greater allowance than that made at the time the sickness occurred.

(7) In the event of prolonged or repetitive absence on sick leave, the Employer may require an employee to provide a report on their health status from a registered medical practitioner, or be examined by a registered medical practitioner selected by agreement between the Employer and the employee. The fee for any such examination shall be paid by the Employer.

(8) If an employee provides satisfactory medical evidence that the employee was restricted to a hospital or the employee's place of residence for 7 consecutive days or more whilst on paid leave, the Employer shall grant the employee paid sick leave, up to the limit of the employee's accrued entitlement, and leave credits equivalent to the paid sick leave granted shall be reinstated. Replaced annual leave shall be taken at the rate of wage applicable at the time the leave is subsequently taken.

(9) The provisions of this clause, with respect to payment, do not apply for any period in which the employee is entitled to payment under the Workers' Compensation Act or where illness or injury is the result of the employee's own misconduct.

(10) Sick leave shall not be granted in substitution for a rostered day off duty.

(11) An employee who accrues time towards a rostered day off, shall have sick leave debited on the basis of the ordinary hours which would have been worked each day by the employee and shall accrue the usual entitlement towards the day off.

(12) An employee entitled to paid sick leave shall be granted the leave without loss of ordinary pay.

(13) For the purposes of this clause a certificate issued by a registered medical practitioner or a registered dentist shall satisfy the Employer that the certified absence from work was on account of personal illness or injury.

28.—LONG SERVICE LEAVE

(1) Employees shall receive a cumulative entitlement to 13 weeks paid long service leave after 10 years' continuous service; and after each further 7 years' continuous service.

(2) Long service leave shall be taken at times agreed between the employee and the Employer. In reaching such agreement equal consideration shall be given to the needs of the employee and the operational convenience of the Employer.

(3) Employees shall be entitled, after the end of each accrual period and before the completion of the subsequent accrual period, to take long service leave in one continuous period of 13 weeks.

(4) Employees shall take long service leave within 3 years of the date the leave is accrued unless the Employer agrees otherwise.

(5) An employee, by agreement, may choose to take long service leave as an entitlement to 26 weeks of leave at half pay. In calculating the rate of pay to apply in such an instance, the provisions of subclause (14) of the General Order, referred to in subclause (13) hereof, shall apply.

(6) If the Employer and the employee agree long service leave may be taken in any number of periods not less than 1 week on each occasion.

(7) A public holiday occurring during a period of long service leave is part of the long service leave and an extra day in lieu shall not be granted.

(8) In this clause "continuous service" includes any period during which an employee was absent on approved paid leave, and any service with the Employer immediately prior to this Award having effect.

(9) In this clause "continuous service" does not include any periods exceeding 4 weeks, on each occasion, during which an employee was absent on leave without pay or parental leave or any other absence during which the employee was not paid, however such leave shall not be deemed to break service.

(10) In this clause "continuous service" does not include any periods during which an employee was absent on long service leave which had accrued prior to 1 April 1974.

(11) If an employee is retired by the Employer on the grounds of ill health or for any other cause and the employee has completed at least 12 months continuous service the employee shall be paid out pro-rata long service leave.

(12) Pro-rata long service leave shall be paid out to an employee's estate or any other person nominated by the employee in writing, in the event of the employee's death, if the employee has completed at least 12 months continuous service.

(13) Subject to the provisions of this clause the long service leave provisions set out in Volume 66 of the Western Australian Industrial Gazette, at pages 319 to 321 inclusive, shall apply to employees covered by this Award.

29.—TRAINING LEAVE.

(1) The Employer shall provide an employee with study assistance in the form of leave with pay to undertake part-time study that is relevant to the duties being or likely to be performed by an employee, is relevant to the current and emerging needs of the Employer, enhances their career development, and does not unduly affect or inconvenience the operations of the Employer.

(2) Study leave with pay shall be for formal study periods only and an employee shall undertake at least 50% of formal study in their own time. An employee shall provide evidence that satisfies the Employer as to their attendance and satisfactory progress with studies. The maximum amount of paid study leave shall be 160 hours within a 12 month period for a full-time employee and pro rata for a part-time employee.

(3) Nothing in this Award shall prevent the Employer from agreeing to alternative arrangements for utilising this entitlement to leave with pay for study purposes or for structured trade training.

30.—UNION REPRESENTATIVES

(1) Subject to the recognition of properly constituted authority, Union delegates appointed by the Union shall be recognised by the Employer. The Employer shall be notified in writing by the Union of the delegates appointed.

(2) The Employer shall grant paid leave during ordinary working hours to an employee—

(a) who is required to give evidence before any Industrial Tribunal;

(b) who as a Union nominated representative of the employees is required to attend negotiations and/or conferences between the Union and Employer;

(c) when prior agreement between the Union and Employer has been reached for the employee to attend official Union meetings preliminary to negotiations or industrial hearings;

(d) who as a Union nominated representative of the employees is required to attend joint Union/management consultative committees or working parties.

(3) Trade Union Training.

(a) An employee nominated or nominating to attend trade union training shall be granted up to five (5) days paid leave per annum, by agreement. Up to ten days may be granted in any one calendar year provided that the total leave being granted in that year and in the subsequent year does not exceed ten days.

(b) A qualifying period of 12 months in Government employment shall be served before an employee is eligible to attend courses or seminars of more than a half day duration, unless otherwise agreed.

(4) The granting of leave pursuant to subclause (2) of this clause shall only be approved—

(a) where an application for leave has been submitted by an employee a reasonable time in advance;

(b) for the minimum period necessary to enable the union business to be conducted or evidence to be given;

(c) for those employees whose attendance is essential;

(d) when the operation of the organisation is not being unduly affected and the convenience of the Employer impaired.

(5) Approval of leave requested pursuant to subclause (3) shall be subject to—

(a) notice of at least four weeks or a lesser period by agreement, being given to the Employer;

(b) the request being made in writing detailing the subject, date, duration, venue and authority conducting the course of the leave and being accompanied by Union authorisation.

(c) the operation of the organisation not being unduly affected nor the convenience of the Employer impaired.

(6) Leave shall be granted at the ordinary rate of pay and, in the case of leave granted pursuant to subclause (3)—

(a) shall not include shift allowances, penalty rates or overtime but shift workers shall be deemed to have worked the shifts they would have worked had they not attended the course for all other purposes of the Award.

(b) where a public holiday or rostered day off (including a rostered day off as a result of working a 38 hour week) falls during the duration of a course, a day off in lieu of that day shall not be granted.

(7) Leave granted shall include any necessary travelling time during working hours.

(8) The Employer is not liable for any expense incurred by the employee when attending trade union training or union business.

(9) The provisions of this clause shall not apply when an employee is absent from work without the approval of the Employer.

(10) Reasonable unpaid leave is available to an employee nominated by the Union to attend to union business in work time, subject to operational requirements.

(11) Nothing in this clause shall diminish the existing arrangements relating to the granting of paid leave for union business.

31.—DEFENCE FORCE TRAINING LEAVE

(1) Where an employee is a volunteer member of the Defence Forces or the Cadet Force, leave may be granted for the employee to attend an annual camp of continuous training, additional approved camp or course of instruction, subject to operational requirements and the conditions of this clause.

(2) Leave Entitlement

(a) Two weeks of special leave on full pay may be granted in each period of 12 months commencing on 1 July each year.

(b) If the Officer in Charge of a unit certifies that it is essential for an employee to be at the camp in an advance or rear party, a maximum of four extra days on full pay may be granted in the 12 month period.

(3) Additional Leave

(a) Further leave to attend an additional approved camp or course of instruction may be granted as leave without pay and the difference between civil and Defence Forces pay made up.

(b) In calculating Defence Forces pay for additional camps or courses, weekends and holidays should be excluded so that employees shall have the benefit of any pay with respect of these days. Evidence of the necessity to attend extra camps or courses of instruction shall be provided to the Employer.

(4) Employees who are members of the Defence Forces and the Cadet Force may only be granted leave for attendance at one annual camp of continuous training and one additional approved camp or course of instruction.

32.—WITNESS AND JURY SERVICE

(1) Notification

(a) An employee required to serve on a jury shall, as soon as possible after being summonsed to serve, notify the Employer.

(b) The summons to serve must be produced when making application to obtain leave for jury service.

(2) Leave Entitlement

(a) An employee required to serve on a jury shall be granted leave of absence by the Employer, without loss of pay, but only for the period required to enable the employee to carry out his/her duties as a juror.

(b) An employee shall not claim fees for jury service and any fees paid to an employee for jury service shall be paid to the Employer.

(c) Where jury service is required while an employee is on any form of paid leave, such leave shall not be reinstated.

(3) An employee must return to duty immediately upon being discharged from jury service, if such release occurs during normal working hours.

(4) An employee shall provide evidence of attendance at jury service, the duration of such attendance, and the amount received in respect of such service, to the Employer.

(5) The conditions specified in subclauses (1) to (4) hereof shall also apply where an employee is required as a crown witness during normal working hours.

(6) An employee subpoenaed or called as a witness under any other circumstances other than specified in subclauses (1)(a) and (5), shall be granted leave of absence without pay except when the employee makes an application to use accrued leave in accordance with Award provisions.

33.—BEREAVEMENT LEAVE

(1) Employees shall receive a non—cumulative entitlement to paid bereavement leave of up to 2 days on the death of a family member. Provided that 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.

(2) The 2 days need not be consecutive.

(3) The Employer may require evidence that satisfies the Employer as to the death that is the subject of the leave sought and the employees relationship to the deceased person.

(4) Payment in respect of bereavement leave is to be made only where the employee otherwise would have been on duty and shall not be granted where the employee concerned would have been off duty in accordance with his roster, or on long service leave, annual leave, sick leave, workers' compensation, leave without pay, public holiday, or a special day off.

(5) Bereavement leave shall not be granted in substitution for a rostered day off duty, however an employee on bereavement leave shall continue to accrue an entitlement towards a rostered day off.

(6) For the purposes of this clause "family member" has the same meaning as defined in Clause 35.

34.—PARENTAL LEAVE

(1) Definitions

(a) "Adoption", in relation to a child, is a reference to a child who—

(i) is not the natural child or the step child of the employee or the employee's spouse;

(ii) is less than five years of age; and

(iii) has not lived continuously with the employee for a period of six months or more.

(b) "Continuous service" means service under an unbroken contract of employment and includes—

(i) any period of leave taken in accordance with this clause;

(ii) any period of part-time employment worked in accordance with this clause; or

(iii) any period of leave or absence authorised by the Employer by this Award.

(c) "Expected date of birth" means the day certified by a medical practitioner to be the day of which the medical practitioner expects the employee or the employee's spouse, as the case may be, to give birth to a child.

(d) "Parental leave" means leave provided for by paragraph (2)(a) of this clause.

(e) "Spouse" includes a defacto or a former spouse, provided that it does not include a former spouse in the case of Adoption Leave.

(2) Entitlement to Parental Leave

(a) An employee is entitled to take up to 52 consecutive weeks of unpaid leave in respect of—

(i) the birth of a child to the employee or the employee's spouse; or

(ii) the placement of a child with the employee with a view to the adoption of the child by the employee.

(iii) an employee is not entitled to take parental leave at the same time as the employee's spouse but this paragraph does not apply to—

(aa) one week's parental leave taken by the male parent immediately after birth of the child; or

(bb) three weeks parental leave taken by the employee and the employee's spouse immediately after a child has been placed with them with a view to their adoption of the child.

(iv) The entitlement of parental leave is reduced by any period of parental leave taken by the employee's spouse in relation to the same child, except the period of one week's leave referred to in placitum (a)(iii)(aa) of this subclause.

(3) Entitlement to Part-Time Employment

(a) Where an employee is eligible for Parental Leave and where the Employer agrees—

(i) A male employee may work part-time in one or more periods at any time from the date of birth of the child until its second birthday.

(ii) A female employee may work part-time in one or more periods while she is pregnant where, because of the pregnancy, part-time employment is necessary pursuant to subclause (8) or desirable.

(iii) Subject to subclause (8), a female employee may work part-time in one or more periods at any time after the date of birth of the child until its second birthday.

(iv) In relation to adoption, an employee may work part-time in one or more periods at any time from the date of the placement of the child until the second anniversary of that date.

(v) Subject to the provisions of this clause part-time work under this clause shall be in accordance with Clause 13.2—Part-Time Employees, provided that any restrictions and notification requirements on the employment of part-time employees shall not apply provided that any notice periods and requirements for the variation of part-time hours shall apply.

(vi) Written Agreement

(aa) Before commencing a period of part-time employment under this subclause, the Employer and the employee shall agree in writing to the terms of the part-time employment.

(bb) The terms of this agreement may be varied in writing by consent.

(cc) The Employer and the employee shall each have a copy of any written variation.

(vii) The work to be performed part-time need not be the work performed by the employee in his or her former position but shall be work otherwise performed under this Award.

(4) Special Adoption Leave

(a) The Employer shall grant to any employee who is seeking to adopt a child, such unpaid leave not exceeding two days, as is required by the employee to attend any compulsory interviews or examinations as are necessary as part of the adoption procedure. Where paid leave is available to the employee the Employer may require the employee to take such leave in lieu of special leave.

(5) Notice Period

(a) The employee shall give the Employer at least 10 weeks' notice of his or her intention to take parental leave.

(b) The employee shall notify the Employer of the dates on which he or she wishes to start and finish the leave.

(c) An employee shall not be in breach of this clause as a consequence of failure to give the required notice if such failure is occasioned by—

(i) the confinement occurring earlier than the expected date; or

(ii) the requirement of an adoption agency to accept earlier or later placement of a child, the death of the spouse or other compelling circumstances.

(d) Notwithstanding the provisions of Clause 12A—Contract of Service, a pregnant employee who has not applied for leave in accordance with the provisions of this clause shall be deemed to have resigned six weeks before the expected date of birth.

(e) As soon as practicable an employee shall notify the Employer of any change in the information provided pursuant to this clause.

(6) Certification

(a) An employee who has given notice of his or her intention to take parental leave, other than for adoption, is to provide to the Employer a certificate from a medical practitioner stating that the employee or the employee's spouse, as the case may be, is pregnant and the expected date of birth.

(b) An employee who has given notice of his or her intention to take parental leave for adoption, is to provide to the Employer—

(i) a statement from an adoption agency or other appropriate body of the presumed date of placement of the child with the employee for adoption purposes; or

(ii) a statement from the appropriate government authority confirming that the employee is to have custody of the child pending an application for an adoption order.

(7) Notice of Spouse's Parental Leave

(a) An employee who has given notice of his or her intention to take parental leave and who is actually taking parental leave is to notify the Employer of particulars of any period of parental leave taken or to be taken by the employee's spouse in relation to the same child.

(b) Any notice given under paragraph (7)(a) may either be in a form acceptable to the Employer or shall be supported by a statutory declaration by the employee as to the truth of the particulars notified, including—

(i) That the period of paternity leave is being taken by the employee for the purpose of becoming the primary care giver of the child;

(ii) Particulars of any period of parental leave sought, or taken by the employee's spouse; and

(iii) For the period of parental leave the employee shall not engage in any conduct inconsistent with the employee's contract of employment.

(8) Transfer to a Safe Job

(a) Where in the opinion of a registered medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue at her present work, the employee shall, if the Employer deems it practicable, be transferred to a safe job at the rate and on the conditions attaching to the job until the commencement of parental leave.

(b) If the transfer to a safe job is not practicable, the employee may, or the Employer may require the employee to, take leave for such period as is certified necessary by a registered medical practitioner. Such leave shall be treated as parental leave for the purposes of subclauses (12), (13), (14) and (15) hereof.

(9) Parental Leave Before and After the Birth

A female employee who has given notice of her intention to take parental leave, other than for an adoption, shall ordinarily commence the leave six weeks before the expected date of birth and end the leave six weeks after the day on which the birth has taken place. Provided that an employee may apply to the Employer to continue or resume duty in respect of any period closer to the expected date of birth and the Employer may approve the application, provided the application is supported by the certificate of a registered medical practitioner indicating that the employee is fit for duty.

(10) Variation of Period of Parental Leave

An employee may at any time whilst absent from duty on parental leave, make application to extend or reduce the period referred to in the original application, but so that the amended period complies with the requirements of subclauses (2) and (9) of this clause and the Employer may grant permission in accordance with the amended application.

(11) Cancellation of Parental Leave

(a) Parental leave, applied for but not commenced, shall be cancelled when the pregnancy of a employee terminates other than by the birth of a living child.

(b) Where the pregnancy of a employee then on parental leave terminates other than by the birth of a living child, it shall be the right of the employee to resume work at a time nominated by the Employer which shall not exceed four weeks from the date of notice in writing by the employee to the Employer that she desires to resume work.

(12) Special Parental Leave and Sick Leave

(a) Where the pregnancy of an employee not then on parental leave terminates after twenty-eight weeks other than by the birth of a living child then—

(i) she shall be entitled to such period of unpaid leave (to be known as special parental leave) as a registered medical practitioner certifies as necessary before her return to work, or

(ii) for illness other than the normal consequences of confinement she shall be entitled, either in lieu of or in addition to special parental leave, to such paid sick leave as to which she is then entitled and which a registered medical practitioner certifies as necessary before her return to work.

(b) Where an employee not then on parental leave suffers illness related to her pregnancy, she may take such paid sick leave as to which she is then entitled and such further unpaid leave (to be known as special parental leave) as a registered medical practitioner certifies as necessary before her return to work, provided that the aggregate of paid sick leave, special parental leave and parental leave shall not exceed twelve months.

(c) For the purposes of subclauses (2), (7), (9), (13), (15) and (16) hereof, parental leave shall include special parental leave.

(d) A employee returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which she held immediately before proceeding on such leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (8), to the position she held immediately before such transfer.

(e) Where such position no longer exists but there are other positions available, for which the employee is qualified and the duties of which she is capable of performing, she shall be entitled to a position as nearly comparable in status and salary to that of her former position.

(13) Parental Leave and Other Leave Entitlements

(a) Nothing contained in this clause prevents the grant of accrued annual leave or long service leave to a employee in respect of the whole or any part of the period referred to in subclause (2) of this clause.

(b) Except by reason of the grant of accrued annual leave or long service leave an employee is not entitled to salary in respect of the period of absence from duty permitted in accordance with this clause.

(c) Subject to the provisions of subclause (12), absence of an employee which has been permitted in accordance with the provisions of this clause shall not be deemed absence on sick leave.

(d) An employee working part-time in accordance with this clause shall be paid for and take any leave accrued in respect of a period of full-time employment, in such periods and manner as specified in the annual leave provisions of this Award, as if the employee were working full time in the class of work the employee was performing as a full-time employee immediately before commencing part-time work under this clause.

(e) A full time employee shall be paid for and take any annual leave accrued in respect of a period of part-time employment under this subclause, in such periods and manner as specified in this Award, as if the employee were working part-time in the class of work the employee was performing as a part-time employee immediately before resuming full-time work. Provided that, by agreement between the Employer and the employee, the period over which the leave is taken may be shortened to the extent necessary for the employee to receive pay at the employee's current full-time rate.

(f) An employee working part-time under this clause shall have sick leave entitlements which have accrued under this Award (including any entitlement accrued in respect of previous full-time employment) converted into hours. When this entitlement is used, whether as a part-time or full-time employee, it shall be debited for the ordinary hours that the employee would have worked during the period of absence.

(14) Return to Work After Parental Leave

(a) An employee shall confirm his or her intention of returning to work by notice in writing to the Employer given not less than four weeks prior to the expiration of the period of parental leave.

(b) Return to Former Position

(i) An employee, upon the expiration of the notice required by paragraph (14)(a) hereof, shall be entitled to the position which he or she held immediately before proceeding on parental leave or, in the case of a employee who was transferred to a safe job pursuant to subclause (8), to the position which she held immediately before such transfer. Where such position no longer exists but there are other positions available for which the employee is qualified and the duties of which he or she is capable of performing, the employee shall be entitled to a position as nearly comparable in status and salary or wage to that of the former position.

(ii) An employee who has had at least 12 months continuous service with the Employer immediately prior to commencing part-time employment after the birth or placement of a child has, at the expiration of the period of such part-time employment or the first period, if there is more than one, the right to return to his or her former position.

(iii) Nothing in sub paragraph (b)(ii) of this subclause shall prevent the Employer from permitting the employee to return to his or her former position after a second or subsequent period of part-time work.

(15) Effect of Parental Leave on Employment

(a) Notwithstanding any agreement or other provision to the contrary—

(i) absence on parental leave shall not break the continuity of service of a employee but shall not be taken into account in calculating the period of service for any purpose of the Award.

(ii) commencement of part-time employment in accordance with this clause, and return from part -time to full-time work under this clause, shall not break the continuity of service or employment.

(16) Termination of Employment

(a) An employee on parental leave may terminate his or her employment at any time during the period of leave by notice given in accordance with this Award.

(b) The Employer shall not terminate the employment of a employee on the ground of pregnancy or absence on parental leave, or because the employee exercises of proposes to exercise any rights arising under this clause, or has enjoyed or proposes to enjoy any benefits arising under this clause, but otherwise the rights of the Employer in relation to termination of employment are not hereby affected.

(c) Any termination entitlements payable to an employee whose employment is terminated while working part-time under this clause, or while working full-time after transferring from part-time work under this clause, shall be calculated by reference to the full-time rate of pay at the time of termination with the calculation of entitlements to be apportioned and paid at the full time rate of accrual for periods of full-time employment and at the relevant pro rata rate of accrual for periods of part time employment.

(17) Replacement Employees

(a) A replacement employee is an employee specifically engaged as a result of an employee proceeding on parental leave or working part-time under this clause.

(b) Before the Employer engages a replacement employee under this subclause, the Employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.

(c) Before the Employer engages a person to replace a employee temporarily promoted or transferred in order to replace an employee exercising his or her rights under this clause, the Employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.

(d) Provided that nothing in this subclause shall be construed as requiring the Employer to engage a replacement employee.

(e) A replacement employee shall not be entitled to any of the rights conferred by this clause except where the employment continues beyond the twelve months qualifying period, in which case, unbroken service as a replacement employee shall be treated as continuous service for the purpose of subclause (1)(b) hereof.

(f) The provisions of this subclause shall apply to a replacement employee notwithstanding the provisions of Clause 12A.—Contract of Service.

(g) A replacement employee may be employed part-time. Subject to this subclause, paragraphs (3)(a)(v), (3)(a)(vi), (13)(d), (13)(e), (13)(f) and (16)(c) of this clause apply to the part-time employment of replacement employees

(18) Eligibility

(a) Employees must have completed at least 12 months continuous service before the expected date of birth or placement.

(b) A pregnant employee with less than 12 months of continuous service shall have no right to parental leave and shall be required to resign six weeks before the expected date of birth, unless the Employer determines otherwise.

35.—FAMILY LEAVE

(1) An employee may use in each calendar year up to 5 days of the sick leave with pay entitlements the employee accrued in previous years of service, to care for a family member or a member of the employee's household who is ill and who requires the employee's immediate care and attention during the period of illness. Provided that the Employer may exercise a discretion to grant family leave to an employee in respect of some other person with whom the employee has a special relationship.

(2) Subject to subclause (3) "family member" means—

(a) a spouse or former spouse;

(b) a child, sibling or parent; and

(c) a child, sibling or parent of a spouse or former spouse

(3) Where the context reasonably permits, the term "step" or "defacto" or "grand" may be applied as a prefix to the words "spouse", "child", "sibling", and "parent" to extend the scope of the definition of "family member".

(4) "Member of the employee's household" means a person who resides with the employee.

(5) An employee who does not have accrued sick leave with pay entitlements sufficient to take 5 days family leave during a calender year shall be entitled to use up to 5 days of annual recreational leave for family leave purposes

(6) Absence from work on Family Leave shall be supported by evidence that satisfies the Employer that the person is ill, the employee's relationship to the ill person and the need for the employee to provide the ill person with immediate care and attention.

(7) Family leave is not cumulative from year to year.

36.—PAID LEAVE FOR ENGLISH LANGUAGE TRAINING.

(1) Leave to attend English Language Training (training which is designed to impart an acceptable level of vocational English proficiency) shall be granted, without loss of pay during normal working hours, to employees from a non-English speaking background, who—

(a) are unable to meet standards of communication to advance career prospects;

(b) constitute a safety hazard or risk to themselves and/or fellow employees; or

(c) are not able to meet the accepted production requirements of the Employer.

(2) Subject to appropriate needs assessment participation in training shall be on the basis of a minimum of 100 hours per employee per year.

(3) The content and provider of the training shall be agreed between the Employer, Unions and the Adult Migrant Education Service or other approved authority conducting the training, and shall take account of the vocational needs of an employee in respect of—

(a) communication, safety and welfare;

(b) productivity within his/her current position as well as those positions to which he/she may be considered for promotion or redeployment;

(c) issues in relation to training, retraining and multiskilling, award restructuring, industrial relations and safety provisions, and equal opportunity employment legislation.

(4) The selection of employees for training shall be determined by consultation between the Employer and the appropriate Unions.

37.—SPECIAL LEAVE WITHOUT PAY

Employees may be granted leave without pay provided that the leave does not conflict with operational requirements.

38.—SPECIAL LEAVE WITH PAY

Employees may be granted leave with pay provided that the leave does not conflict with operational requirements.

38A.—SABBATICAL LEAVE

(1) By agreement with the Employer, employees may elect to be paid 80% of their ordinary rate of pay (the reduced ordinary rate of pay) for their ordinary hours of work and for periods of leave during which they would otherwise be entitled to payment at their ordinary rate of pay.

(2) Employees paid the reduced ordinary rate of pay for their ordinary hours of work and for periods of leave shall accrue on a fortnightly basis sabbatical leave credits calculated at the rate of 20% of their ordinary hours of work and/or periods of leave taken during that fortnight.

(3) Sabbatical leave credits may, by agreement between the Employer and the employee, be utilised after—

(a) 52 weeks of service in one continuous period of 13 weeks leave.

(b) 104 weeks of service in one continuous period of 26 weeks leave.

(c) 156 weeks of service in one continuous period of 39 weeks leave.

(d) 208 weeks of service in one continuous period of 52 weeks leave.

(4) Absence on sabbatical leave does not break continuity of service but shall not be taken into account when calculating the period of service for any purpose of this Award.

(5) An employee may elect to have the corresponding leave credits paid in full at the commencement of a period of sabbatical leave or alternatively may elect to be paid on a pro rata basis fortnightly.

(6) Payment for a period of sabbatical leave shall be calculated on the basis of 80% of the employees ordinary rate of pay as at the date the payment, or payments in the case of an election to be paid fortnightly, is made.

(7) Notwithstanding any other provision of this Award the period of leave taken and the rate of payment during that period of leave which was initially agreement may be varied by subsequent agreement.

(8) Notwithstanding any other provision of this Award an employee may elect to use any pro rata entitlement to sabbatical leave in substitution for a corresponding period of parental leave.

(9) Notwithstanding any other provision of this Award an employee shall be paid out accrued sabbatical leave entitlements if this Award ceases to apply to the employee unless the industrial instrument which then applies provides for an equivalent entitlement.

(10) Notwithstanding any other provision of this Award and employees ordinary rate of pay for the purposes of Salary Packaging under this Award shall be determined on the basis of the employees reduced ordinary rate of pay.

(11) Notwithstanding any other provision of this award an employees salary for the purposes of workers compensation

payments shall be determined on the basis of the employees ordinary rate of pay and there shall be no accrual towards sabbatical leave during a period in which the employee is entitled to receive workers compensation payments.

PART 7—TRANSFERS, TRAVELLING AND WORKING AWAY FROM USUAL PLACE OF WORK

39.—CAR ALLOWANCE.

(1) Where an employee is required and authorised to use his/her own motor vehicle in the course of his/her duties an employee shall be paid an allowance not less than that provided for in the table set out hereunder. Notwithstanding anything contained in this subclause the Employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

	Engine Displacement (in Cubic Centimetres)		
Area and Details	Over	Over	1600cc
Distance Traveled Each Year	2600cc	1600cc	& under
on Employer's Business within		-2600cc	
the Metropolitan Area	Rate (cents) per kilometre		
Metropolitan Area	63.3	54.9	48.7
Motor Cycle	21.9 cents per kilometre		

(2) The allowances prescribed in this clause shall be varied in accordance with any movement in the corresponding allowances in the Public Service Award 1992.

40.—FARES & TRAVELLING ALLOWANCES

(1) Fares and Travelling Allowances.

(a) An employee shall be paid for the excess period of travelling time at ordinary rates where—

(i) The employee is required to work at a location other than the employees usual place of work; and

(ii) The time taken in travelling from the employees place of residence to work and return exceeds the time normally taken in travelling from the employees place of residence to the usual place of work and return.

(b) If the fares actually and reasonably incurred in travelling undertaken in accordance with subparagraph (1)(a)(i) exceed the fares normally paid by the employee in travelling from the place of residence and return, the Employer shall pay the employee the difference in the amount of the fares.

PART 8—APPENDICES

APPENDIX A.—SALARIES

(1) Rates of Pay

Subject to this Appendix, employees shall be paid the rates of pay specified in the following table in accordance with the level to which they are from time to time classified.

Classification	Level	Percentage Relativity to C10 Trades-person	Award Base Weekly Metal, Engineering and Associated Industries Award 1998 Part I	Supplementary Payment	1st, , 2nd, 3rd, 4th, 5th and 6th Safety Net Adjustments	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowances (Salary Increase for value for money trade-offs in award safety net of conditions)	Above Award Payment Subject to Absorption	Salary
Carpenter	Building Tradesperson Level 04	100	365.20	52.00	60	477.20	12.40	62.32	12	17.31	30,321
	Building Tradesperson Level 05	105	383.50	54.60	60	498.06	13.04	62.61	12	19.56	31,575
	Building Tradesperson Level 06	110	401.70	57.20	60	518.92	13.68	62.9	12	21.81	32,829
	Building Tradesperson Level 07	115	420.00	59.80	58	537.78	14.22	63.19	12	26.04	34,077
	Building Tradesperson Level 08	120	438.20	62.40	58	558.64	14.86	53.04	12	27.23	34,731
	Building Tradesperson Level 09	125	456.50	65.00	56	577.50	15.50	53.32	12	31.49	35,985
Painter	Building Tradesperson Level 04	100	365.20	52.00	60	477.20	12.40	48.54	12	15.89	29,528
	Building Tradesperson Level 05	105	383.50	54.60	60	498.06	13.04	48.83	12	18.14	30,782
	Building Tradesperson Level 06	110	401.70	57.20	60	518.92	13.68	49.12	12	20.39	32,036
	Building Tradesperson Level 07	115	420.00	59.80	58	537.78	14.22	49.4	12	24.63	33,284
	Building Tradesperson Level 08	120	438.20	62.40	56	556.64	14.86	39.25	12	27.80	33,937
	Building Tradesperson Level 09	125	456.50	65.00	56	577.50	15.50	39.54	12	30.07	35,192
Plasterer	Building Tradesperson Level 04	100	365.20	52.00	60	477.20	12.40	59.93	12	16.14	30,135
	Building Tradesperson Level 05	105	383.50	54.60	60	498.06	13.04	60.22	12	18.39	31,389
	Building Tradesperson Level 06	110	401.70	57.20	60	518.92	13.68	60.51	12	20.64	32,643
	Building Tradesperson Level 07	115	420.00	59.80	58	537.78	14.22	60.79	12	24.87	33,891
	Building Tradesperson Level 08	120	438.20	62.40	58	558.64	14.86	50.51	12	26.18	34,544
	Building Tradesperson Level 09	125	456.50	65.00	56	577.50	15.50	50.79	12	30.43	35,798
Plumber	Building Tradesperson Level 04	100	365.20	52.00	60	477.20	12.40	75.26	12	18.66	31,066
	Building Tradesperson Level 05	105	383.50	54.60	60	498.06	13.04	75.55	12	20.90	32,320
	Building Tradesperson Level 06	110	401.70	57.20	60	518.92	13.68	75.84	12	23.15	33,574
	Building Tradesperson Level 07	115	420.00	59.80	58	537.78	14.22	76.13	12	27.39	34,822
	Building Tradesperson Level 08	120	438.20	62.40	58	558.64	14.86	65.98	12	28.57	35,476
	Building Tradesperson Level 09	125	456.50	65.00	56	577.50	15.50	66.27	12	32.82	36,730
Other Building	Building Employee Entrant Level	78	284.86	40.56	60	385.42	9.68	42.78	14	5.45	23,857
Employees	Building Employee Level 1	82	299.46	42.64	60	402.10	10.20	43.01	14	7.25	24,861
Not Elsewhere	Building Employee Level 2	87	319.18	45.45	60	424.63	10.87	43.33	14	9.68	26,214
Classified	Building Employee Level 3	92	337.44	48.05	60	445.49	11.51	43.62	14	11.92	27,468
	Building Employee Level 4	100	365.20	52.00	60	477.20	12.40	44.18	14	15.22	29,370
Mechanical	Engineering Employee Level 14	78	284.86	40.56	60	385.42	14.68	42.78	14	6.05	24,149
Fitter, Motor	Engineering Employee Level 13	82	299.46	42.64	60	402.10	15.40	43.01	14	7.87	25,164
Mechanic,	Engineering Employee Level 12	87.4	319.18	45.45	60	424.63	16.47	43.33	14	10.34	26,541
Refrigeration	Engineering Employee Level 11	92.4	337.44	48.05	60	445.49	17.41	43.62	14	12.62	27,812
Fitter and	Engineering Tradesperson Level 10	100	365.20	52.00	60	477.20	18.80	53.39	12	17.05	30,175
other	Engineering Tradesperson Level 09	105	383.50	54.60	60	498.10	19.70	53.68	12	19.34	31,447
engineering	Engineering Tradesperson Level 08	110	401.70	57.20	60	518.90	20.70	53.97	12	21.61	32,718
trades	Engineering Tradesperson Level 07	115	420.00	59.80	58	537.80	21.60	54.27	12	25.90	33,990
employees	Engineering Tradesperson Level 06	125	456.50	65.00	56	577.50	23.50	44.41	12	31.38	35,932
notelsewhere	Engineering Tradesperson Level 05	130	474.80	67.60	56	598.40	24.40	44.7	10	33.68	37,100
classified.											
Electrical	Engineering Tradesperson Level 10	100	365.20	52.00	60	477.20	18.80	66.76	12	18.44	30,945
Fitter/	Engineering Tradesperson Level 09	105	383.50	54.60	60	498.10	19.70	67.06	12	20.72	32,217
Mechanic	Engineering Tradesperson Level 08	110	401.70	57.20	60	518.90	20.70	67.35	12	22.99	33,488
	Engineering Tradesperson Level 07	115	420.00	59.80	58	537.80	21.60	67.64	12	27.29	34,760
	Engineering Tradesperson Level 06	125	456.50	65.00	56	577.50	23.50	57.79	12	32.76	36,702
	Engineering Tradesperson Level 05	130	474.80	67.60	56	598.40	24.40	58.08	10	35.06	37,870

(2) (a) The rates of pay in this Appendix include the arbitrated safety net adjustment payable under the June 1999 State Wage Case Decision.

This arbitrated safety net adjustment 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 the 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 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.

(b) The rates of pay in this Award include the minimum weekly wage for adult employees payable under the June 1999 State Wage Case Decision. Any increase arising from the insertion of the adult minimum wage shall 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 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.

(3) This Award shall not operate to reduce the salary of any employee who is at present receiving above the minimum rate prescribed for their class of work.

(4) A junior employee, other than an apprentice or trainee, employed to carry out work regulated by this Award, including work normally done by an apprentice or trainee, shall be paid not less than the wage of an adult performing similar work. No new designation shall be introduced during the currency of this Award so as to reduce the status of any employee covered thereby.

(5) Infirmity

(a) Any employee who by reason of infirmity is unable to earn the minimum wage may be paid a lesser wage as may from time to time be agreed upon in writing between the Union's and the Employer.

(b) Where no agreement is reached the matter may be determined in accordance with Clause 11.- Dispute Resolution for determination.

(6) Minimum Adult Wage—

(a) No employee (including an apprentice), twenty one years of age or over shall be paid less than the minimum weekly rate of pay for employees 21 or more years of age as prescribed by an order made under Section 15 of the Minimum Conditions of Employment Act 1993 as the ordinary rate of pay in respect of the ordinary hours of work prescribed by this Award.

(b) Where the minimum rate of pay is applicable that rate shall be payable for public holidays, during annual leave, sick leave, long service leave and any other paid leave prescribed by this Award.

(c) Where in this Award an additional rate is prescribed for any work as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this Award for the classification in which the employee is employed, and not the minimum wage specified in subclause (6)(a).

(d) Notwithstanding the terms of this 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 $385.40 per week payable from the beginning of the first pay period on or after 1st August 1999.

(ii) The Minimum Adult Wage of $385.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions to July 1999, including the $10.00 per week arbitrated safety net adjustment from Matter No. 609 of 1999.

(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 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 in the Minimum Adult Award Wage of $385.40 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 subclause shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force on the 13th November 1997.

(7) Building Trades Employees

Except to the extent of any inconsistency with this Award, those parts of Appendix D—Award Restructuring of the Building Trades (Government) Award 1968 No. 31a of 1966 (as at the date of registration of this Award), which pertain to transfer from old classification structures, reclassification of employees and classification definitions, shall apply to this Award.

(8) Metal Trades Employees

Except to the extent of any inconsistency with this Award, those parts of Clause 5.—Classification Structure and Definitions of the Engineering Trades (Government) Award 1967 No. 29, 30 & 31 of 1961 & 3 of 1962, (as at the date of registration of this Award), which pertain to transfer from old classification structures, reclassification of employees and classification definitions, shall apply to this Award.

APPENDIX B.—WORKPLACE REFORM

1. COMPETENCY BASED STANDARDS

(1) It is a term of this Award that the parties agree to progress the implementation of the metal/electrical trades national competency standards in accordance with the Competency Standards Implementation Guide (Published June 1996), Metal and Engineering Training Package (National Code Identifier MEM98, published July 1998)and the National Metal and Engineering Competency Standards (published 1996), as issued and endorsed by the MERS ITAB, or subsequent amendments thereto where agreed between the parties. To the extent of any inconsistency between these documents and this Award, this Award shall take precedence.

(2) The Competency Standards shall be implemented on the following basis—

(a) Assessors

(i) An assessment may be undertaken by any accredited assessor recognised , from time to time, by the Employer and Union. Such

recognition may be withdrawn at any time by either party.

(ii) The Employer shall endeavour to ensure that sufficient employees (to include trade and managerial staff employed by the Employer) are trained at any time, to meet the assessment requirements of the HCU.

(iii) In the event of the parties being in dispute regarding the Employer unreasonably withholding or withdrawing recognition of an accredited assessor employed by the Employer, the dispute may be determined through the Dispute Resolution Procedures.

(b) Assessment Appeals

(i) In the event of an employee or the Employer disputing the outcome of an assessment, the aggrieved party may refer the matter to a Board of Reference, established in accordance with s 48 of the Industrial relations Act 1979, for determination.

(ii) The parties agree that the Board of Reference nominees shall consist of an accredited assessor to be nominated by the Employer, and an accredited assessor to be nominated by the employee.

(c) An employee shall be obliged to participate in competency based assessment, where requested by the Employer.

(3) It is a term of this Award that the parties agree to investigate the potential for developing competency based assessment for staff not covered by the metal/electrical trades national competency standards. In the event of the parties agreeing to pursue this item following such investigation, the terms of any implementation shall be the subject of a further agreement between the parties.

2.—MULTISKILLING

(1) The parties shall establish a Working Party consisting of equal numbers of Employer and employee representatives, to examine the potential for multiskilling of engineering and building services staff. The Working Party shall be established between 4-6 months after the registration of this Award, in order that the skills analysis/skills audit material produced during the implementation of the Competency Standards as defined in subclause (1), shall be available for use by the Working Party . The Working Party shall report back to the parties by no later than 2 months prior to the expiry date of this Award. The Terms of Reference of the working party shall be to—

(a) Identify maintenance functions requiring the use of more than one category of Tradesperson and which offer the potential for multiskilling.

(b) Identify what additional skills would be required of a tradesperson in particular trades (and what additional skills could legitimately be undertaken without breaching any licensing requirements etc) to be deemed competent to undertake this work.

(c) Assess the potential for and the implications of introducing a single classification of Hospital Maintenance Technician and develop a proposal for a classification structure and other changes which would be necessary to accommodate the development of such a classification of employee.

(d) Identify and detail career path options and training and development options for an employee in the proposed structure.

(2) Any such structure is to be built around and have regard to the metal/electrical trades national competency standards.

(3) The parties shall not be bound in any way by the Working Party's report.

APPENDIX C—SAVING OF CERTAIN PROVISIONS OF INDUSTRIAL AGREEMENTS REPLACED BY THIS AWARD

(1) Notwithstanding any other provision of this Award such parts of the industrial agreements specified in Clause (2) of Appendix C which pertain to the achievement of HCU specific workplace reform and productivity improvement matters which are not inconsistent with an express provision of this Award shall continue to apply at the applicable HCU until the parties agree otherwise.

(2) Industrial agreements.

(a) Fremantle Hospital (Engineering Workshops) Enterprise Agreement No. AG5 of 1996.

(b) Graylands, Selby Lemnos and Special Care Health Service (Building and Engineering Trades) Enterprise Agreement 1998.

(c) Lower North Metropolitan Health Service (Building and Engineering Trades) Enterprise Agreement 1997.

(d) Metropolitan Health Service Board—King Edward Memorial and Princess Margaret Hospitals (Physical Resources Department) Enterprise Bargaining Agreement 1997.

(e) Royal Perth Engineering Department (Enterprise Bargaining) Agreement 1996.

(f) Sir Charles Gairdner Hospital Engineering and Building Services Workshops Enterprise Agreement 1997, AG 85 of 1997.

PERTH COLLEGE (ENTERPRISE BARGAINING) AGREEMENT 1999.

No. AG 173 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers

and

Perth College Inc.

No. AG 173 of 1999.

Perth College (Enterprise Bargaining) Agreement 1999.

COMMISSIONER P E SCOTT.

11 November 1999.

Order.

HAVING heard Ms T Howe on behalf of the Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers and Ms L Papaelias on behalf of Perth College Inc, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Perth College (Enterprise Bargaining) Agreement 1999 in the terms of the following schedule be registered on the 8th day of November 1999 and shall replace Perth College (Enterprise Bargaining) Agreement 1998.

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

Schedule.

1.—TITLE

This Agreement shall be known as the "Perth College (Enterprise Bargaining) Agreement 1999" and shall replace the "Perth College (Enterprise Bargaining) Agreement 1998".

2.—ARRANGEMENT

3.—PARTIES TO THE AGREEMENT

This Agreement is made between Perth College Inc (the College) and the Independent Schools Salaried Officers' Association, Industrial Union of Workers (the ISSOA), a registered organisation of employees.

4.—SCOPE OF AGREEMENT

(1) This Agreement shall apply to teachers who are employed within the scope of the Independent Schools' Teachers' Award, 1976 (the award) by the College.

(2) The number of employees covered by this Agreement is 82.

5.—DATE AND DURATION OF AGREEMENT

(1) This Agreement shall come into effect on the 1st January 1999 and shall apply until 31st December 2000.

(2) The parties agree to meet no later than six months prior to the expiration of this Agreement to review the Agreement.

6.—EXPIRATION OF AGREEMENT

On expiration of this Agreement and in the absence of the registration of a subsequent agreement the provisions of this Agreement shall apply until such time as a new agreement is registered and takes affect.

7.—RELATIONSHIP TO PARENT AWARD

This Agreement shall be read and interpreted in conjunction with the award.

Where there is any inconsistency between this Agreement and the award, this Agreement will prevail to the extent of the inconsistency.

8.—SINGLE BARGAINING UNIT

(1) The parties to this Agreement have formed a single bargaining unit.

(2) The single bargaining unit has conducted negotiations with the College and reached full agreement with the College represented by this Agreement.

9.—OBJECTIVES

The nature and purposes of this Agreement are to—

(1) Consolidate and develop further, initiatives arising out of the award restructuring process.

(2) Accept a mutual responsibility to maintain a working environment, which will ensure that the College and its teachers become genuine participants and contributors to the College's aims, objectives and philosophy.

(3) Safeguard and improve the quality of teaching and learning by emphasising the upgrading of professional skills and knowledge. The College and the teaching staff acknowledge that this upgrading of skills and experience can best occur when both the College and teachers share responsibility for professional development by undertaking both in-service and external courses and training partly during College time and partly during the teachers' time.

10.—SALARY RATES

(1) The salary rates prescribed in Clause 11.—Salaries of the award, as amended by Clause 10.—Salary Rates of the "Perth College (Enterprise Bargaining) Agreement 1994", by Clause 10.—Salary Rates of the of the "Perth College (Enterprise Bargaining) Agreement 1996", by Clause 10.—Salary Rates of the "Perth College (Enterprise Bargaining) Agreement 1997" and by Clause 10.—Salary Rates of the "Perth College (Enterprise Bargaining) Agreement 1998 are to be increased by a minimum of 4% with effect from 1 January 1999 and by a further 3% from 1 January 2000. In addition, the minimum allowance payable for a promotion position prescribed in Clause 11.—Salaries, subclause (7) (e) of the Award at Promotion Levels 1, 2, and 3 Category A School, will be increased as per the following schedule.

As a consequence, the annual salary rates payable to teachers will be—

Step	1998	1 Jan 99	1 Jan 2000 3%
Step 1	27,906	29,022	29,893
Step 2	29,602	30,786	31,710
Step 3	31,295	32,547	33,523
Step 4	33,252	34,582	35,620
Step 5	35,078	36,481	37,576
Step 6	36,642	38,108	39,251
Step 7	38,208	39,736	40,928
Step 8	40,163	41,770	43,023
Step 9	42,315	44,008	45,328
Step 10	44,076	45,839	47,214
Step 11	45,639	47,465	48,888
Step 12	47,597	49,501	50,986
Step 13	49,552	51,534	53,080
Responsibilities Allowance			
Level 1	10,500	10,920	11,248
Level 2	6,200	6,448	6,641
Level 3	3,500	3,640	3,749
Senior Teacher Allowance			
Level 1	1,527	1,588	1,636
Level 2	3,435	3,572	3,680

(b) In the event of any safety net adjustment being applied to the award, such adjustment shall be absorbed into the salary rates prescribed in this Agreement.

(c) Perth College is committed to providing a Deferred Salary Programme to provide academic staff with an opportunity to rejuvenate and enrich their professional lives. Applications to participate in the programme may be made to the Principal and will be approved on an individual basis.

11.—AGREED EFFICIENCY IMPROVEMENTS

(1) Senior Teacher 2 and 3 Positions

(a) Notwithstanding prior agreement reached by the parties to the Award, the application by the Independent Schools' Salaried Officers Association, relating to the establishment of the Senior Teacher 3 position, not be proceeded with.

(b) The duties and responsibilities of the Senior Teacher 2 position as determined through negotiation by the Independent Schools Industrial Affairs Consultative Committee.

(2) Payment of Relief Teachers

Notwithstanding the provisions of subclause (5) of Clause 11.—Salaries of the award, relief teachers, employed for five (5) days or less, may be engaged by the day or half day and paid a daily rate or a pro-rata rate on the basis of the periods worked in relation to the number of periods in the particular school day.

(3) First Teaching Appointment

A teacher, who, at the end of the initial twelve months service with the College is deemed by the College not to have developed adequate teaching skills, may be appointed as a temporary teacher and subject to Clause 2. – Induction of Appendix 1 of the award.

(4) Long Service Leave

From 1 January 1995, a teacher who has completed eight (8) years continuous service with the College, shall be entitled to take pro-rata long service leave on full pay, corresponding with a completed term.

(5) Promotion Positions

(a) While maintaining the promotion structure described in the award, the College shall have the discretion to adapt this structure to meet its educational needs. The normal process of appointment to promotion positions will be followed.

(b) Teaching staff appointed to Promotion Positions undertake to make whole school management a priority in addition to their own Departmental responsibilities.

(6) Professional Development

The College is committed to an extensive programme of development in respect to Information Technology. Teaching staff are expected to support this commitment by undertaking continuing professional development both within and outside of normal school hours with the aim of increasing individual computer literacy.

(7) Accommodation for sick children

The College is committed to the provision of occasional care of the children of staff in the event that they become ill and the staff member is unable to arrange short-term alternative care. This incentive is agreed to in the interests of assisting staff to remain at work while still providing care for their families.

(8) Employer Sponsored Child Care

The College undertakes to negotiate with a provider of childcare services in the area local to the College to secure an employer-sponsored place for children of staff members. The allocation of this place is subject to the approval of the Principal of the College.

(9) Employee Assistance Program

The College undertakes to provide a counselling service for staff members, the cost of which shall be borne by the College. This will allow staff members to seek advice and counselling confidentially and independently from the College. This service will be provided on a sessional basis and each employee will be entitled to a maximum of 6 sessions each per annum, which they may use for themselves or a member of their immediate family.

12.—OTHER MATTERS

The parties agree to discuss matters that are of relevance to either the College or the staff.

13.—DISPUTE RESOLUTION PROCEDURE

(1) A dispute is defined as any question, dispute or difficulty arising out of this Agreement.

(2) The following procedure shall apply to the resolution of a dispute—

(a) The parties to the dispute shall make reasonable attempts to resolve the matter by mutual discussion and determination.

(b) If the parties are unable to resolve the dispute, the matter, at the request of either party, shall be referred to a meeting between the parties to the Agreement together with any additional representative as may be agreed by the parties.

(c) If the matter is not then resolved it shall be referred to the Western Australian Industrial Relations Commission.

14.—NO FURTHER CLAIMS

It is a condition of this Agreement that the parties will not seek any further claims, with respect to salaries or conditions, unless they are consistent with the State Wage Case Principles.

15.—NO REDUCTION

Nothing contained herein shall entitle the College to reduce the salary or conditions of an employee which prevailed prior to entering into this Agreement, except where provided by this Agreement.

16.—NO PRECEDENT

It is a condition of this Agreement that the parties will not seek to use the terms, contained herein as a precedent for other enterprise agreements, whether they involve the College or not.

17.—REMUNERATION PACKAGE

(1) For the purposes of this clause—

(a) "Benefits" means the benefits nominated by the teacher from the benefits provided by the College and listed in paragraph (d) of subclause (3) of this clause.

(b) "Benefit Value" means the amount specified by the College as the cost to the College of the benefit provided including Fringe Benefit Tax, if any.

(c) "Fringe Benefit Tax" means tax imposed by the Fringe Benefits Tax Act 1986.

(2) Conditions of Employment

(a) Except as provided by this clause, teachers must be employed at a salary based on a rate of pay, and on terms and conditions, not less than those prescribed by the agreement.

(b) For all purposes of the Agreement, salary shall be deemed to include the value of any benefits provided under this clause.

(3) Salary Packaging

The College may offer to provide and the teacher may agree in writing to accept—

(a) Salary packaging of up to 40% of gross salary in the form of expense benefit payments;

(b) The Benefits nominated by the teacher and approved by the employer;

(c) A salary equal to the difference between the Benefit Value and the salary which would have applied to the teacher or under subclause (2) of this clause, in the absence of an agreement under this subclause;

(d) The available Benefits are those made available by the College from the following list—

(i) Superannuation;

(ii) Motor Vehicle; and

(iii) other benefits as agreed between the teacher and the College;

(e) The College must advise the teacher in writing of the Benefit Value before the agreement is entered into.

(4) During the currency of an agreement under subclause (3) of this clause—

(a) Any teacher who takes paid leave on full pay shall receive the Benefits and salary referred to in paragraphs (b) and (c) of subclause (3) of this clause.

(b) If a teacher takes leave without pay the teacher will not be entitled to any Benefits during the period of leave.

(c) If a teacher takes leave on less than full pay he or she shall receive—

(i) the Benefits; and

(ii) the amount of salary calculated as agreed between the College and the teacher.

(5) Renewal will be on an annual basis by agreement between the parties.

(6) Any costs, including Fringe Benefits Tax, incurred in the provision of benefits by the College on behalf of the teacher, under this agreement, must be indemnified by the teacher.

18.—SIGNATORIES

signed	signed	*Common Seal*
(Signature)	(Signature)	
JUDITH COTTIER		T I HOWE
(Name of signatory in block letters)		(Name of signatory in block letters)
Perth College		Independent Schools Salaried Officers' Association of Western Australian, Industrial Union of Workers

PILKINGTON (AUSTRALIA) OPERATIONS LIMITED, WESTERN AUSTRALIAN GLAZING ENTERPRISE AGREEMENT STAGE II.

AG 155 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers

and

Pilkington (Australia) Ltd

AG 155 of 1999.

Pilkington (Australia) Operations Limited, Western Australian Glazing Enterprise Agreement Stage II.

COMMISSIONER S J KENNER.

26 November 1999.

Order.

HAVING heard Mr P Joyce on behalf of the applicant and Mr J Morgan 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 Pilkington (Australia) Operations Limited, Western Australian Glazing Enterprise Agreement Stage II as filed in the Commission on 14 September 1999 in the terms of the following schedule be and is hereby registered as an industrial agreement.

(2) THAT the Pilkington (Australia) Operations Limited, Western Australian Glazing Enterprise Agreement Stage I, No AG 283 of 1996 be and is hereby cancelled.

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

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(1) TITLE

This Agreement shall be known as the *Pilkington (Australia) Operations Limited, Western Australian Glazing Enterprise Agreement Stage II.*

(2) ARRANGEMENT

(3) APPLICATION OF AGREEMENT

This Enterprise Consent Agreement shall apply to those employees who are employed in the Glazing Department located at the Pilkington (Australia) Operations Limited—Western Australian State Operations, Myaree in respect to all it's employees who are covered by the (State) Building Trades (Construction) Award 1987. There are approximately 4 employees covered by this Agreement.

(4) PARTIES BOUND

This Agreement shall be binding upon The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers (hereinafter referred to as the "Union") and officers and members thereof and upon the Company as to all its employees who are members of or eligible to be members of the Union covered by this Consent Agreement.

(5) LIFE OF AGREEMENT

This Agreement shall operate from the beginning of the first full pay period to commence on or after ratification and shall remain in force up to 18th November 2000.

(6) RELATIONSHIP TO PARENT AWARD

This Agreement shall be read and interpreted wholly in conjunction with the State Building Trades (Construction) Award 1987, provided that where there is any inconsistency this Agreement shall take precedence to the extent of any such inconsistency.

(7) SINGLE BARGAINING UNIT

The Union named in this agreement will act along with Company as a single bargaining unit for the purpose of implementing and negotiating items of this agreement.

(8) AIM OF AGREEMENT

The parties to this Agreement recognise that if the Glazing Business of the Company is to survive in Western Australia in the face of increasing competition and a fluctuating economic environment it must create a sustainable competitive edge. The Company also recognises that employees need to be competitively rewarded for the business to retain a stable and committed work force.

This Agreement seeks to recognise the flexibility and productivity gains provided by this Agreement with an increase to wage rates to provide appropriate level of payments to its employees.

The Agreement also involves the implementation of productivity measures and Company initiatives to make the business more competitive as per Clause 9—Measures To Achieve Gains In Productivity, Efficiency & Flexibility.

(9) MEASURES TO ACHIEVE GAINS IN PRODUCTIVITY, EFFICIENCY & FLEXIBILITY

Measures introduced during the period of operation of the Stage I Enterprise Agreement will continue to be developed and advanced.

This agreement includes—

1. Consultative Committee **(Appendix A)**
2. Building One Pilkington **(Appendix B)**
3. Sick Leave Agreement **(Appendix D)**
4. Qualifying Period **(Appendix E)**
5. Training and Development **(Appendix F)**

(10) NATIONAL STANDARDS

This agreement shall not operate so as to cause any employee to suffer a reduction in ordinary time earnings or in National Standards; such as National Standard hours of work, annual leave or long service leave.

(11) STATEMENT OF IMPLEMENTATION

1. Appendix A to F inclusive. Will be introduced upon the signing of this Agreement.

(12) AVOIDANCE OF INDUSTRIAL DISPUTES

It is the intention of this Agreement to deal with disputes, questions or difficulties between the parties, which are liable to cause stoppages in the following manner—

When a matter coming within the ambit of this Agreement or the Award is in dispute between the Union and the Company or a matter coming within the ambit of the Agreement or Award arises that is likely to cause a dispute, the following procedure shall be followed—

1. Work shall continue without interruption whilst the employee/s or their representative discusses the dispute with the employer

concerned, and both parties shall attempt to reach agreement. In these discussions, the employee representative may seek the advice and assistance of an official of the Unions and the employer may seek the advice and assistance of the employer organisation or senior company I.R. representatives.

2. In the event that the discussions provided for in subclause (1) hereof fail to settle the dispute, it shall be referred to the relevant employer organisation or I.R. representative and the Secretary of the relevant Unions.
3. A "cooling off" period of seven days shall apply as from the date the dispute notification is received by the employer organisation and the relevant Unions. The responsibility for notifying the dispute shall be equally on both the employer and the Unions. During the "cooling off" period, work shall continue without interruptions from industrial stoppages, bans and/or limitations.
4. During this "cooling off" period, discussions to take place between the officers of the Company or employer organisation and the Unions, with the view to settling the dispute.
5. Failing a satisfactory settlement being achieved following such discussions, the dispute may then be referred to the Western Australian Industrial Relations Commission.

(13) RATES OF PAY

This Agreement will provide for the wage rate increases in recognition of the productivity commitments made in this Agreement.

Wage increase will be implemented at the following time.

4% upon ratification of this Agreement through the State Commission.

Refer Appendix C—Weekly Rates. This increase is to be the only wage increase available under this Agreement, except where a State Wage Case Decision would have an effect on this Agreement or where a Western Australian Industrial Relations Commission decision on minimum rates applies to the Award.

(14) RENEWAL OF AGREEMENT

This Agreement shall be effective for a period up to 18th November 2000 from date of ratification. It is agreed between the parties that prior to any initiatives being taken to renew or replace this Agreement, discussions between the parties will commence at least two months prior to expiration to determine the appropriate course of action.

(15) NO FURTHER CLAIMS

No variation or amendment to the Agreement shall be sought or entertained by any of the parties during the defined term of the Agreement.

No further claim will be made for the Company to increase contributions to or benefit from Superannuation other than those made by changes to the Trust Deed to which the Company is a signatory.

(16) NOT TO BE USED AS A PRECEDENT

This arrangement shall not be used in any manner whatsoever to obtain similar arrangements or benefits in any other plant or enterprise.

APPENDIX "A"

Consultative Committee

The Consultative Committee shall be a representative group covering the Glazing Operation. The group's primary function is to monitor the overall direction and implementation of this Agreement and facilitate communications regarding change activities between the Company and the workforce in relation to ECA II. In this, their goal shall be to foster broad participation in the joint management of change.

The Consultative Committee should meet at least quarterly to review the implementation process and performance against the Objectives and Targets. This group also has responsibility to deal with other issues relating to ECA II as and when they arise.

The Consultative Committee shall include Union members from each section of the Factory as agreed between the parties.

APPENDIX "B"

Building One Pilkington – Balanced Scorecard

The Pilkington Group has globally adopted the implementation of the Building One Pilkington (BOP) concept to grow the business profitably through;

- Becoming easier to do business with for customers, suppliers and employees.
- Attaining manufacturing excellence as efficient as the best of our competitors.
- Reducing overheads without losing customer focus.

It will measure its businesses and plants on a global basis using the Balanced Scorecard (BS) as a vehicle to measure and communicate performance. To this end the Glazing Operations will adopt the BS as its primary method of performance measurement. The targets defined in the BS can be measured against other sales and marketing locations around the world to ensure continuous improvement, given that local factors such as product mix and market constraints can effect performance.

These targets are used in conjunction with the BOP – BS objectives to measure the overall performance of all business units within Pilkington Australasia Limited. The BS objectives for 1999/2000 are listed below. The guiding behaviours that represent how all Pilkington (Australia) Ltd employees need to work to achieve these BOP – BS targets are as follows—

- Emphasise quality and safety in everything we do.
- Continuously improve and be willing to adapt.
- Anticipate needs, particularly those of our customers.
- Take personal ownership – deliver targets with teamwork and integrity.
- Communicate with openness and involvement.
- Develop, support, train and grow our people.

All employees covered by this agreement are committed to achieving the BOP – BS targets where all or part of their employment has an impact on those targets and is within their control.

GLAZING 1999/2000	Budget 1999/2000	Long Term Target
FINANCIAL (Shareholder Value)		
Sales (% of budget)	100%	100%
Return on Sales (%)	15%	20%
Overhead to Sales (%)	10%	10%
OPERATING EFFICIENCY		
Productivity (m^2/man hour)	1.50 m^2	1.70 m^2
Overtime to ordinary hours	5%	4%
CUSTOMER SATISFACTION		
Credits/Warranties (nos.) (% invoices)	2%	1.5%
EMPLOYEE SATISFACTION		
Safety Performance (LTIR)	3.0	0.2
Absenteeism (%)	3%	2%

APPENDIX "C"

Weekly Rates

Classification	Weekly Rate currently paid under Stage I agreement	Weekly Rate (4%) upon certification
B.T.C. (Glazier)	$524.69	$545.68

APPENDIX "D"

Sick leave Agreement

In line with the Company's philosophy of equality, the parties have agreed that the provision below should apply to all employees covered by this agreement.

It is further agreed that on or after the first day of January each year, that any part of the first five days of accrued sick leave (for the previous year) that is not used in any one year of service by the employee, an equivalent payment shall be made to the employee concerned at the time of taking their annual leave. The employee must, where available, accumulate five sick leave days annually.

APPENDIX "E"

Qualifying Period

New employees will work under a review for a period of three months during which time the employee's suitability, performance and skills acquisition will be subject to review. These reviews will be carried out at weeks**, 2, 6 and 10.** Normal rates of pay will be paid for the relevant classification on commencement of employment.

TERMINATION DURING QUALIFYING PERIOD

Employment in the first two weeks will be with one hour's notice on either side and thereafter with one week's notice on either side, or by payment or forfeiture of a week's wages as the case may be.

APPENDIX "F"

Training and Development

All required Company training will be conducted at the Company's expense and in paid time, whether during or after normal hours. Where practical, such training will be conducted during an employee's normal hours. Where training is conducted after or before normal hours, overtime rates will not be payable – employees will be paid at normal rates and by agreement with the employee concerned.

Such work will be part of a structured training program outside normal rostered hours, be limited to twelve (12) hours in any week and be payable at their normal hourly rate of pay while such training be conducted by accredited educational institutions and providers.

Decisions as to course participants shall be decided by consensus.

APPENDIX "G"

Signatures Of The Parties

Signed for and on behalf of Pilkington (Australia) Operations Ltd (ACN: 004 158 909).

8-9-99

....

Signature John Morgan Date

State Manager W.A.

THE COMMON SEAL of—

Western Australian Builders Labourers Painters and Plasterers Union Of Workers was hereunto affixed in the presence of—

8-9-99

....

Signature Kevin Reynolds Date

Secretary

PRESBYTERIAN LADIES' COLLEGE (ENTERPRISE BARGAINING) AGREEMENT 1999.

No. AG 168 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers

and

Presbyterian Ladies' College.

No. AG 168 of 1999.

Presbyterian Ladies' College (Enterprise Bargaining) Agreement 1999.

COMMISSIONER P E SCOTT.

15 November 1999.

Order.

HAVING heard Ms T Howe on behalf of The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers and there being no appearance on behalf of Presbyterian Ladies' College, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Presbyterian Ladies' College (Enterprise Bargaining) Agreement 1999 in the terms of the following schedule be registered on the 25th day of October 1999 and shall replace the Presbyterian Ladies' College (Enterprise Bargaining) Agreement 1998.

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

Schedule.

1.—TITLE

This Agreement shall be known as the Presbyterian Ladies' College (Enterprise Bargaining) Agreement 1999 and shall replace the Presbyterian Ladies' College (Enterprise Bargaining) Agreement 1998.

2.—ARRANGEMENT

3.—PARTIES TO THE AGREEMENT

This agreement is made between Presbyterian Ladies' College (the College) and the Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers (the ISSOA), a registered organisation of employees.

4.—SCOPE OF AGREEMENT

(1) This agreement shall apply to teachers who are employed within the scope of the Independent Schools' Teachers' Award 1976 (the award) by the College.

(2) The number of teachers covered by this agreement is 83.

5.—DATE AND DURATION OF AGREEMENT

(1) This agreement shall come into effect on 1st January 1999 and shall expire on 31st December, 2000.

(2) The parties have agreed to meet no later than six months prior to the expiration of this agreement to review this agreement.

(3) In addition, there shall be a review meeting in October 1999 to discuss any changes to the State Wage Principles, Conditions of Award or the discontinuation of Enterprise Bargaining Agreements.

6.—RELATIONSHIP TO AWARD

This agreement shall be read and interpreted in conjunction with the award.

Where there is any inconsistency between this agreement and the award, this agreement will prevail to the extent of the inconsistency.

7.—SINGLE BARGAINING UNIT

The bodies party to this agreement have formed a single bargaining unit. The single bargaining unit has conducted negotiations with the College and reached full agreement with the College represented by this agreement.

8.—OBJECTIVES

The nature and purposes of this agreement are to—

(1) Consolidate and develop further, initiatives arising out of the award restructuring process.

(2) Accept a mutual responsibility to maintain a working environment which will ensure that the College and its teachers become genuine participants and contributors to the College's aims, objectives and philosophy.

(3) Safeguard and improve the quality of teaching and learning by emphasising the upgrading of professional skills and knowledge. The College and the teaching staff acknowledge that this upgrading of skills and experience can best occur when both College and teachers share responsibility for professional development by undertaking both in-service and external courses and training partly during school time and partly during teachers' time.

9.—SALARY RATES

(1) The minimum annual rate of salary payable to teachers engaged in the classifications prescribed in Clause 11.—Salaries of the award shall be—

Step	From 1st January 1999 3% $ per annum	From 1 January 2000 2% $ per annum
3	32,732	33,387
4	34,779	35,475
5	36,689	37,422
6	38,325	39,092
7	39,961	40,760
8	42,006	42,847
9	44,255	45,140
10	46,099	47,021
11	47,734	48,689
12	49,783	50,779
13	51,825	52,862

(2) Indexation of Promotional Positions—

Level 1	20%	of Step 13
Level 2	13%	of Step 13
Level 3	7%	of Step 13
Level 4	3%	of Step 13

Explanatory Notes—

(a) Promotion Level 1

The Head of a Major Department, for example, secondary English, Head of School, or an equivalent level of responsibility.

(b) The levels assigned will recognise the graduation of responsibility which apply within a school among various promotion positions.

For example: Promotional Level 2 – The Head or Director of a Department or an equivalent level of responsibility.

For example: Promotional Level 3 – Year Level Co-ordinator, House Leader, or an equivalent level of responsibility.

For example: Promotional Level 4 – Staff with levels of responsibility such as Co-ordinating a subject, or equivalent level of responsibility.

(3) In the event of any safety net adjustment or increase being applied to the award, such adjustment or increase shall be absorbed into the increase specified in sub-clause (1) of this clause.

10.—EFFICIENCY IMPROVEMENTS

(1) Professional Development

(a) Professional Development activities shall be undertaken partly in College time and partly in teachers' own time; where feasible in equal proportions.

(b) There will continue to be consultation with teachers in the planning of appropriate professional development.

(c) (i) The use of information technology is a distinctive and important feature of the teaching and learning approach at the College. Teachers will be required to undertake professional development in order to keep apace with new technology and facilities within the College.

(ii) The College will continue to give priority to requests from teachers who are keen to build their resources and expertise in the use of laptop computers.

(iii) The College will give appropriate in-service in laptop computers to teachers new to the College.

(d) It is an expectation that teachers who have had ten years of continuous service at the College will spend a minimum of 2 weeks in another educational or work situation. This will be conditional on a suitable placement being found at a mutually convenient time of the school year.

(e) The Professional Review Committee is to be established to determine a regular and mutually beneficial appraisal process for teaching staff. The Committee will be comprised of the Principal, Deputy Principal (Staffing), Deputy Principal (Curriculum) and staff representatives from Junior, Middle and Senior School. The review process should be determined for implementation in the year 2000. A process for both summative and formative appraisal needs to be established with benchmarks for computer literacy to be included.

(2) Part-Time Teaching Continuity of Service

(a) The part-time teacher will have the expectation of continuity of service. The teaching load each year shall be reviewed according to the needs of the College. Notice of any variation shall be in writing at least six weeks prior to the end of the teaching term. The consent of the teacher to such variation shall be in writing.

(b) The periods taught will be considered as a fraction of the normal teaching load of a full time teacher for the purposes of calculating salary. A nominal period allocation of 27 periods per cycle will be used.

(c) As members of the teaching team, part time teachers will contribute pro-rata to the extra curricular and pastoral work of the teaching team.

(3) First Teaching Appointment

The College will give a statement of requirements, including methods of appraisal, for teachers during their first year of service. A teacher who, at the end of the initial twelve months is deemed by the College not to have developed adequate teaching skills, may be appointed as a temporary teacher and subject to paragraph (2) of Item 2.—Induction of Appendix 1 of the award.

(4) Promotional Positions

The parties acknowledge that the structure of the promotional position framework contained in the award may not fully

meet the College's needs. It is agreed that to the extent that the award is inadequate, the College may implement a promotional position not consistent with the award and this will be advertised within the College.

(5) Payment of Relief Teachers

Notwithstanding the provisions of subclause (5) of Clause 11.—Salaries of the award, relief teachers employed for five (5) days or less, may be engaged by the day or half day and paid a daily rate or a pro-rata rate on the basis of the periods worked in relation to the number of periods in the particular school day.

(6) Pastoral Care

The parties are committed to enhance pastoral care of both students and teachers.

(a) Pro-active pastoral care of students is seen as the responsibility of every teacher. To meet this responsibility, teachers will be assisted by an appropriate programme of professional development and appraisal.

(b) The College will support teachers in balancing professional and personal responsibilities, recognising that the circumstances of individual teachers will change from time to time and throughout their career.

(7) Deferred Salary Option

Teachers may elect to defer 20% of their annual salary for four years, and receive leave for the whole of the fifth year on 80% of their annual salary on commencement of the agreement. A qualifying period of three years would apply.

(8) Superannuation Scheme

Early retirement is available to all teachers at the age of 55 in line with the availability of the superannuation package.

11.—REDUNDANCY

(1) It is acknowledged that redundancy is a termination of service because the position the teacher occupied is no longer available.

(2) In considering which employee is to be made redundant the College will—

(a) assess its needs;

(b) look at the job being performed and not the individual;

(c) look at any flexibility offered by the teachers being considered;

(d) check with teachers as to future plans (for example, long service leave, early retirement options or leave without pay) which may impact on the need for a redundancy;

(e) terminate positions at the end of the school year whenever possible;

(f) when there are a number of teachers competing for a limited number of positions, decision about which employees are to be retained will be made after a thorough review of the College's requirements in specific work areas and the qualifications of the employees.

(3) (a) The College will hold discussions with the teachers and if appropriate the teachers' industrial union regarding the proposed redundancies, measures being implemented to avoid or minimise the redundancies, and measures to mitigate any adverse effects of the redundancies on the teachers concerned.

(b) All teachers of the College will be informed of the procedures which will be undertaken in order to reach a fair and equitable outcome for all concerned.

(4) To assist the redundant employee the College will—

(a) offer part-time or relief employment if this is possible;

(b) check with other Colleges to see whether there is a suitable vacancy;

(c) provide secretarial assistance with job applications;

(d) permit paid leave to attend job interviews

(e) provide the teacher with a reference and a statement to the effect that he/she is redundant if alternate employment is found either for or by the employee;

(f) provide the employee with a redundancy payment;

(g) The following severance pay scale will apply—

Less than 1 year	4 weeks pay
After 1 year	6 weeks pay
After 2 years	8 weeks pay
After 3 years	10 weeks pay
After 4 years	An additional week for each year of service above 3 years up to a maximum of 20 years

12.—REMUNERATION PACKAGE

(1) For the purposes of this clause—

(a) "Benefits" means the benefits nominated by the teacher from the benefits provided by the College and listed in paragraph (d) of subclause (3) of this clause.

(b) "Benefit Value" means the amount specified by the College as the cost to the College of the benefit provided including Fringe Benefit Tax, if any.

(c) "Fringe Benefit Tax" means tax imposed by the Fringe Benefits Tax Act 1986.

(2) Conditions of Employment

(a) Except as provided by this clause, teachers must be employed at a salary based on a rate of pay, and on terms and conditions, not less than those prescribed by the agreement.

(b) For all purposes of the agreement, salary shall be deemed to include the value of any benefits provided under this clause.

(3) Salary Packaging

The School may offer to provide and the teacher may agree in writing to accept—

(a) Salary packaging of up to 40% of gross salary in the form of expense benefit payments;

(b) The Benefits nominated by the teacher and the employer;

(c) A salary equal to the difference between the Benefit Value and the salary which would have applied to the teacher or under subclause (2) of this clause, in the absence of an agreement under this subclause;

(d) The available Benefits as defined in the Employee Information Booklet as at July 1998.

(e) The College must advise the teacher in writing of the Benefit Value before the agreement is entered into.

(4) The salary of the teacher determined in accordance with the qualifications and recognised experience of the teacher contains the Fringe Benefit Tax if any, to be paid by the teacher and the Benefit Value of the available benefits selected by the teacher.

(5) During the currency of an agreement under subclause (3) of this clause—

(a) Any teacher who takes paid leave on full pay shall receive the Benefits and salary referred to in paragraphs (b) and (c) of subclause (3) of this clause.

(b) If a teacher takes leave without pay the teacher will not be entitled to any Benefits during the period of leave.

(c) If a teacher takes leave on less than full pay he or she shall receive—

(i) the Benefits; and

(ii) the amount of salary calculated as agreed between the College and the teacher.

(6) Renewal of the salary package will be on an annual basis by agreement between the parties.

13.—LONG SERVICE LEAVE

Notwithstanding the provisions of subclause (1) of Clause 10.—Long Service Leave of the award, a teacher who has completed seven (7) years' continuous service with the College shall be entitled to take the entitlement, accrued at the rate of 1.3 weeks per year, when the amount of leave accrued corresponds to the length of a school term.

14.—DISPUTE RESOLUTION PROCEDURES

(1) A dispute is defined as any question, dispute or difficulty arising out of this agreement

(a) The parties to the dispute shall make reasonable attempts to resolve the matter by mutual discussion and determination.

(b) If the parties are unable to resolve the dispute, the matter, at the request of either party shall be referred to a meeting between the parties to the agreement together with any additional representative as may be agreed by the parties.

(c) If the matter is not then resolved it shall be referred to the Western Australian Industrial Relations Commission.

15.—OTHER MATTERS

When reviewing this agreement, or at an earlier mutually agreeable time, the parties agree to discuss such matters that are of relevance to either the College or the teachers.

16.—NO REDUCTION

Nothing contained herein shall entitle the College to reduce the salary or conditions of a teacher which prevailed prior to entering into this agreement, except where provided by this agreement.

17.—NO FURTHER CLAIMS

It is a condition of this agreement that the parties will not seek any further claims, with respect to salaries or conditions, unless they are consistent with the State Wage Case Principles.

18.—NO PRECEDENT

It is a condition of this agreement that the parties will not seek to use the terms, contained herein as a precedent for other enterprise agreements, whether they involve the College or not.

19.—SIGNATORIES

(signed)	(signed)
.....	.....
(Signature)	*(Signature)*
Bethlyn Jan Blackwood	Ivan Joseph Sands
(name of signatory in block letters)	*(name of signatory in block letters)*
Presbyterian Ladies' College	Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers

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REGENT COLLEGE INC (ENTERPRISE BARGAINING AGREEMENT) 1999.
No. AG 162 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers

and

The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division, Western Australian Branch

and

Regent College Inc.

No. AG 162 of 1999.

Regent College Inc (Enterprise Bargaining Agreement) 1999.

COMMISSIONER P E SCOTT.

16 November 1999.

Order.

HAVING heard Ms T Howe on behalf of The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Regent College Inc (Enterprise Bargaining Agreement) 1999 in the terms of the following schedule be registered on the 25th day of October 1999.

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

Schedule.

1.—TITLE

This Agreement shall be known as the Regent College Inc (Enterprise Bargaining Agreement) 1999.

2.—ARRANGEMENT

3.—PARTIES TO THE AGREEMENT

This agreement is made between the Regent College (Inc) (the College) and the Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers (the ISSOA) and the Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division, Western Australian Branch (LHMU), registered organisations of employees.

4.—SINGLE BARGAINING UNIT

The union parties to this agreement have formed a single bargaining unit.

The single bargaining unit has conducted negotiations with the College and reached full agreement.

5.—SCOPE OF AGREEMENT

(1) This agreement shall apply to all staff (excluding the Principal) employed by Regent College, who are covered by the provisions of the relevant awards.

(2) The number of staff covered by this agreement is 22.

6.—DATE AND DURATION OF AGREEMENT

This agreement shall come into effect on 1 January 1999 and shall apply until 31 December 1999.

The parties agree to meet no later than 3 months prior to the expiration of the agreement to review the agreement.

7.—EXPIRATION OF AGREEMENT

On expiration of this agreement and in the absence of the registration of a subsequent Enterprise Bargaining Agreement the provisions of this agreement shall apply until such time as a new agreement is registered and takes effect.

8.—RELATIONSHIP TO PARENT AWARD

This agreement shall be read and interpreted in conjunction with—

Independent Schools' Teachers' Award (1976); and

Independent Schools Administrative and Technical Officers Award (1993); and

Teachers' Aides' (Independent Schools) Award (1988) (the awards).

Where there is any inconsistency between the agreement and the award this agreement will prevail to the extent of the inconsistency.

9.—OBJECTIVES

In reaching this agreement the parties have recognised the need to—

(1) Consolidate and develop further, initiatives arising out of the award restructuring process.

(2) Accept a mutual responsibility to maintain a working environment which will ensure that Regent College and its staff become genuine participants and contributors to the College's aims, objectives and philosophy.

(3) Safeguard and improve the quality of teaching and learning by emphasising the upgrading of professional skills and knowledge. The teaching staff acknowledge that this upgrading of skills and experience can best occur when both the College and staff share responsibility for professional development by undertaking both in-service and external course and training partly during school time and partly during the teachers' time.

(4) Recognise that the College has been established and is maintained to give access to affordable Christian Education to as wide a cross-section of the community as enrolment policy allows.

(5) Acknowledge that the College facilitates the constructive involvement of parents in the life of the College and exists to provide learning and teaching opportunities that will support the Christian ethos of the College and its family members.

(6) Acknowledge that the College is managed within Regent College's policy framework.

(7) All teaching staff agree to abide by the policies, rules and regulations of the College as determined by the Regent College Board of Management.

10.—SALARY RATES

(1) Teachers

(a) The award rates referred to in the table below are the award Independent Schools' Teachers' Award 1976 as at 1 July 1997 plus—

(i) If the ACS is 21.5 or less, the salary rates shall be 10% above the award

(ii) If the ACS is greater than 21.5 but less than or equal to 22.5 the salary rates shall be 11.5% above the award

(iii) If the ACS is greater than 22.5 but less than or equal to 23.5 the salary rates shall be 13.0% above the award

(iv) If the ACS is greater than 23.5 but less than or equal to 24.5 the salary rates shall be 14.5% above the award

(v) If the ACS is greater than 24.5 but less than or equal to 25.5 the salary rates shall be 16% above the award

(This represents an increase of 4% on the preceding schedules)

Step	Award as at 1 July 97	Plus 14.5%	Plus 16%
	$	$	$
1	23,186	26,548	26,896
2	24,519	28,074	28,442
3	25,851	29,599	29,987
4	27,389	31,360	31,771
5	28,824	33,003	33,436
6	30,054	34,412	34,863
7	31,284	35,820	36,289
8	32,821	37,580	38,072
9	34,512	39,516	40,034
10	35,896	41,101	41,639
11	37,126	42,509	43,066
12	38,664	44,270	44,850
13	40,201	46,030	46,633

(b) The ACS will be determined by dividing the student numbers as recorded in the February Government Census by 7.

(c) Any pay increases applicable will be backdated to the first pay period after January 1 1999.

(d) A 3-year trained teacher who has completed ten (10) years service shall be deemed as 4-year trained and may, by annual increments, move through steps 10-13 of the Regent College salary table.

(2) Teachers Aides

Step	Award as at 1 July 97	Plus 14.5%	Plus 16%
	$	$	$
1	10.04	11.50	11.65
2	10.23	11.71	11.87
3	10.43	11.94	12.10
4	10.67	12.22	12.38
5	10.96	12.55	12.71
6	11.33	12.97	13.14
7	11.64	13.33	13.50
8	11.40	13.05	13.22
9	11.71	13.41	13.58
10	12.02	13.76	13.94
11	12.32	14.11	14.29
12	12.51	14.32	14.51
13	12.65	14.48	14.67

(3) Administrative and Technical Officers

Step	Award as at 1 July 97	Plus 14.5%	Plus 16%
	$	$	$
Level 1			
1	19,751	22,615	22,911
2	20,001	22,901	23,201
3	20,251	23,187	23,491
4	20,501	23,474	23,781
5	20,751	23,760	24,071
6	21,001	24,046	24,361
Level 2			
1	21,751	24,905	25,231
2	22,251	25,477	25,811
3	22,751	26,050	26,391
4	23,251	26,622	26,971
5	23,751	27,195	27,551
6	24,251	27,767	28,131
Level 3			
1	25,251	28,912	29,291
2	25,851	29,599	29,987
3	26,451	30,286	30,683
4	27,051	30,973	31,379
5	27,651	31,660	32,075
6	28,251	32,347	32,771
Level 4			
1	26,751	30,630	31,031
2	27,751	31,775	32,191
3	28,751	32,920	33,351
4	29,751	34,065	34,511
5	30,751	35,210	35,671
6	31,751	36,355	36,831

11.—AGREED EFFICIENCY IMPROVEMENTS

(1) Payment of Relief Teachers

Relief teachers employed for five (5) days or less may be engaged by the day or half day. A half day is determined as the hours usually worked in the College prior to or immediately following the lunch break.

(2) First Teaching Appointment

A teacher appointed to his/her first teaching position who at the end of the initial twelve (12) months is deemed by the College not to have developed adequate teaching skills, may be appointed as a temporary teacher.

(3) Part-Time Teachers

The hours of employment of a part-time teacher or the subjects to be taught may be varied on an annual basis with notice given as per the award.

(4) Professional Development

The parties accept a mutual responsibility to share in the teachers' professional development and recognise that courses outside of school hours should be made available to teachers.

(5) Long Service Leave

Under this agreement an employee who has completed eight (8) years' continuous service with the College, shall be entitled to take ten (10) weeks' long service leave on full pay, corresponding with a complete term.

12.—AGREED ENTITLEMENT

(1) Family Leave

(a) An employee who is unable to attend or remain at his/her place of employment during the normal hours of duty by reason of the ill-health or injury of a family member shall be entitled to take paid leave of up to three days per year.

(b) Such leave shall not accrue from year to year.

(c) Such leave shall be debited to the employee's accrued sick leave.

(d) Such leave shall not prejudice an employee's rights to special leave in accordance with the provisions of the award.

13.—OTHER MATTERS

The parties agree to discuss such matters that are of relevance to either the College or the staff including a Professional Development Policy and Planning and Preparation Time.

14.—DISPUTE RESOLUTION PROCEDURE

A dispute is defined as any question, dispute or difficulty arising out of this agreement.

(1) The objectives of this dispute resolution procedure are—

(a) To promote the resolution of grievances and complaints by measures based on consultation, co-operation and discussion;

(b) To avoid industrial confrontation within the College;

(c) To avoid interruption to the performance of work and the consequential loss of services and wages; and

(d) To avoid disharmony within the College as a result of unresolved grievances and disputes.

(2) The following procedure shall apply to the resolution of any dispute—

(a) The parties to the dispute shall make reasonable attempts to resolve the matter by mutual discussion and determination.

(b) If any employee or group of employees is dissatisfied with any matter which relates to their employment by the College, then the employee or group of employees (as the case may be) accompanied by a representative if desired, shall meet and discuss the grievance with the Principal. If the grievance is with the Principal, the party is encouraged to discuss the matter with the Principal, but if this is not possible, proceed to paragraph (c) of this subclause.

(c) If the matter remains unresolved then the employee or group of employees along with a representative if desired, shall meet and discuss the grievance with the Chairman of the Regent College Board of Management with a view to reaching agreement.

(d) If there has not been satisfactory resolution of the grievance, any party to the dispute may refer the dispute to the full Board.

(e) If there has not been a satisfactory resolution of the grievance and the dispute arises out of this agreement, any party to the dispute may refer the dispute to the Western Australian Industrial Relations Commission

(f) While this procedure is being followed work shall continue as normal without prejudice to either party.

15.—NO FURTHER CLAIMS

It is a condition of this agreement that the parties will not seek any further claims, with respect to salaries or conditions during the period of this agreement, unless they are consistent with the State Wage Case Principles.

16.—NO PRECEDENT

It is a condition of this agreement that the parties will not seek to use the terms contained herein as a precedent for other Enterprise Bargaining Agreements, whether they involve the College or not.

17.—NO REDUCTION

Nothing contained herein shall entitle the College to reduce the salary or conditions of any employee which prevailed prior to entering into this agreement, except where provided by this agreement.

18.—SIGNATORIES

(signed)	(signed) ***Common Seal***
(Signature)	*(Signature)*
Graham Irvine	T I Howe
(name of signatory in block letters)	*(name of signatory in block letters)*
Regent College Inc.	Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers

(signed) ***Common Seal***

(Signature)

HARDIE Stanley James

(name of signatory in block letters)

Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division, Western Australian Branch

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ST JOHN OF GOD HOSPITAL, MURDOCH MEDICAL PRACTITIONERS INDUSTRIAL AGREEMENT 1999.

No. AG 112 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Western Australian Branch of the Australian Medical Association Incorporated

and

St John of God Health System Inc. T/A St John of God Hospital Murdoch.

No. AG 112 of 1999.

29 November 1999.

Order.

REGISTRATION OF AN INDUSTRIAL AGREEMENT
No. AG 112 of 1999.

HAVING heard Mr P. Jennings on behalf of the first named party and Ms J.E. Quartermaine 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 St John of God Hospital, Murdoch Medical Practitioners Industrial Agreement 1999 filed in the Commission on 16 June 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.] Commissioner.

Schedule.

1.—TITLE

This Agreement shall be known as the St John of God Hospital, Murdoch Medical Practitioners Industrial Agreement 1999.

2.—ARRANGEMENT

3.—APPLICATION AND PARTIES BOUND

(1) This Agreement shall bind St John of God Health System Inc. and the Western Australian branch of the Australian Medical Association Incorporated ("the parties") and shall apply to medical practitioners employed in the Emergency Department at St John of God Hospital Murdoch in the classifications contained in Schedules A and B.

(2) It is estimated that the number of employees who will be bound by this Agreement is 25.

(3) This agreement shall replace the provisions of the St John of God Hospital, Murdoch Medical Practitioners Industrial Agreement 1996 No. AG 329 of 1996.

4.—TERM OF AGREEMENT

This Agreement shall operate from the first pay period beginning on or after the date of registration and shall remain in force until 30 June 2001.

5.—DEFINITIONS

"Association" means the WA Branch of the Australian Medical Association Incorporated.

"Credentials Committee" means the committee established by the hospital to advise on the clinical privileges and scope of appointment appropriate to individual medical practitioners.

"Employer" means St John of God Health System Inc. or, where the context so admits, St John of God Hospital Murdoch.

"General Practitioner" means a registered medical practitioner, other than a medical officer or specialist, engaged in the provision of primary, continuing whole patient care to individuals, families and their community.

"Hospital" means St John of God Hospital Murdoch.

"Medical Advisory Committee" means the committee established to advise the hospital on patient care and clinical practice.

"Medical Practitioner" means a person, not being a body corporate, who is registered under the *Medical Act* 1894 as amended from time to time.

"On Call" means being directed by the employer to remain readily contactable and available to return to work.

"Senior Medical Officer" means a medical practitioner, other than a general practitioner, who does not have a specialist qualification but who practices without clinical supervision in a specialist area; and/or has significant administrative duties; and/or clinically supervises medical practitioners.

"Specialist" means a medical practitioner who holds the appropriate higher qualification of a University or College recognized under the Health Insurance Act (Cth) and who practices in that specialty.

"Vocationally Registered General Practitioner/Medical Practitioner" means a medical practitioner who has been granted Vocationally Registered status under the Health Insurance Act (Cth) or accepted by the employer as equivalent and undertaking an appropriate maintenance of professional standards programme.

6.—APPOINTMENT OF MEDICAL PRACTITIONER/ CONTRACT OF SERVICE

A medical practitioner may be contracted on a full time, modified full time or sessional basis. Full time hours are determined by reference to Clause 11(1). Modified full time means employment at 80% of full time employment with the rate of pay, hours of work and entitlements pro rata. Sessional employment is defined in Clause 10.

(1) The contract of service shall be between the medical practitioner and the employer and may be terminated by not less than 3 month's notice on either side given in writing on any day or by the payment or forfeiture as the case may be of 3 month's salary. A lesser period of notice may be given by agreement between the medical practitioner and the employer.

Provided that the employer must not terminate the employment unless there is a valid reason, or valid reasons, connected with the medical practitioner's capacity or conduct or based on the operational requirements of the hospital.

(2) Notwithstanding the provisions of subclause (1) a medical practitioner shall be appointed subject to a probationary period of six months. In the case of a full time medical practitioner the employer may extend the period of probation for a further period of up to six months. During the period of probation either party may terminate the employment contract by giving 4 weeks notice or such lesser period as is agreed between the medical practitioner and the employer.

(3) All appointments of medical practitioners shall be subject to credentialling by the Credentials Committee.

(4) A medical practitioner shall be appointed to work in accordance with his/her duty statement and the Hospital's policies/procedures.

(5) Notwithstanding the provisions of subclauses (1) and (2), the employer may at any time, without prior notice, dismiss the medical practitioner for refusal or neglect to obey lawful orders or for serious misconduct.

7.—SALARIES AND SALARY RANGES

(1) Full time medical practitioners shall be paid in accordance with Schedule A1 and in the case of modified full time medical practitioners at 80% of the appropriate rate prescribed in Schedule A1.

(2) Sessional medical practitioners shall be paid in accordance with Schedule B.

(3) Provided that the salary/payment levels apply as follows—

		Levels
(a)	General Practitioner (not vocationally registered)	13-15 inclusive
(b)	Vocationally Registered General Practitioner/Medical Practitioner.	13-17 inclusive
(c)	Senior Medical Officer	15-17 inclusive
(d)	Specialist	15-23 inclusive

And provided that all medical practitioners are placed within the relevant range according to years of relevant experience.

(4) Subject to good conduct, satisfactory annual performance appraisal, diligence and efficiency a medical practitioner shall proceed from the point of entry in the salary range to the maximum of the salary range by annual increments according to the increments of such salary range.

Provided that a medical practitioner shall not be appointed at or proceed to salary level 23 unless the conditions set out have been met.

(5) Salaries shall be reviewed annually with effect from 1 July each year. Any increases shall take effect from the first pay period in each financial year.

8.—AUTHORITY TO RENDER ACCOUNTS

A medical practitioner shall give to the hospital written authority to render accounts in the medical practitioner name after the medical practitioner has assessed the fee for service. Income for all services provided in the emergency department shall be retained by the hospital.

9.—CASUAL

(1) Casual medical practitioners may be employed by the Hospital to provide cover where necessary for up to 6 months in any period of engagement.

(2) Medical practitioners so employed shall be engaged for minimum periods of 3.5 hours.

(3) The ordinary rate payable shall be the appropriate salary rate prescribed in Schedule A with the addition of a 20% loading in lieu of leave entitlements.

(4) The contract of service of a casual may be terminated by either party giving one hour's notice or payment or forfeiture, as the case may be, of one hour's salary in lieu thereof.

10.—SESSIONAL MEDICAL PRACTITIONERS

(1) Medical practitioners employed on a sessional basis shall be paid fortnightly at the sessional rate set out in Schedule B.

(2) Where a sessional medical practitioner has demonstrated the incurrence of private practice costs outside the hospital, a further loading shall be paid at the rate of 14% of the sessional payment, exclusive of superannuation contributions specified by the *Superannuation Guarantee (Administration) Act* 1992, on each session allocated up to and including 5 sessions. The medical practitioner must demonstrate the incurrence of private practice costs annually.

Where a sessional medical practitioner by agreement with the hospital works sessions in excess of 5 per week, the private practice loading on the 6th session shall be reduced to 10% and for the 7th session shall be 5%.

No private practice loading is payable for sessions which attract any penalty payment specified in Clause 13 or for sessions worked in excess of 7 per week.

(3) (a) A session is a notional half day of approximately three and a half hours spent by the medical practitioner in attending patients. A session can be a continuous working period or be made up of any combinations of part sessions. Where a sessional medical practitioner works sessions outside of 8 am to 6 pm Monday to Friday, or on public holidays, the rate detailed in Clause 13 shall apply.

(b) Where a sessional medical practitioner is rostered on call for a specified period outside the agreed hours, payment shall be made in accordance with Clause 12.

(4) Sessions shall count as qualifying service for annual leave and sick leave on the following basis—

(a) Annual Leave

Normal entitlement as prescribed by Clause 16. A medical practitioner's salary during the period of such leave shall be calculated in accordance with the number of sessions worked.

(b) Sick Leave

Normal credits prescribed by Clause 18 shall accrue to a medical practitioner. Payment made for sick leave granted in respect of sessional service shall be at the salary rate prescribed in subclause (1) of this clause.

(5) A medical practitioner employed on a sessional basis shall be given the benefit of public holidays provided by Clause 17 without variation to the medical practitioner's sessional rate of payment provided the public holidays occur on a day on which a session is normally worked.

Provided that where a medical practitioner is required to work on a public holiday the provisions of Clause 17(5) shall apply.

(6) Sessional medical practitioners shall accrue long service leave according to the number of sessions worked. The rate of accrual shall be as prescribed by Clause 19. Payment made for long service leave granted to a medical practitioner in respect of sessional service shall be adjusted according to the sessions worked by the medical practitioner subject to the following—

(a) If a medical practitioner consistently worked on a sessional basis for a regular number of sessions during the whole of qualifying service, the medical practitioner shall continue to be paid the salary determined on that basis during the long se If a medical practitioner has worked a varying number of weekly sessions during qualifyingervice, the payment for long service leave granted in respect of sessional service shall be calculated at the salary rate applicable to the medical practitioner at the time of taking the long service leave with the number of sessions for which payment is to be made being calculated by averaging the number of sessions for which the medical practitioner is employed over the qualifying period.

Example—

Payment for long service leave granted for 15 years' service consisting of nine years working four sessions a week and six years working two sessions a week shall be calculated a s follows—

(a) 9/15 of leave paid at the rate applicable for four sessions; and

(b) 6/15 of leave paid at the rate applicable for two sessions.

This provision also applies in respect of that portion of service of a full time medical practitioner who has been employed on a sessional basis for part of the period of qualifying service.

(7) Sessional medical practitioners shall be entitled to conference and study leave provided for under Clause 23 on a pro rata basis according to the number of sessions for which they are employed bears to ten.

11.—HOURS, ON CALL AND CALL BACK

(1) Hours of work for full time medical practitioners are to be consistent with professional practice. These hours are determined by consultation between the medical practitioner and the employer.

Solely for administrative purposes, when calculating entitlements to leave and other benefits which are expressed in days and weeks in this Agreement, a full time medical practitioner's hours of work will nominally be 37.5 per week.

(2) (a) A full time medical practitioner may be rostered for 128 hours in any four week cycle and be placed on call for a continuous period of up to 24 hours a week without additional remuneration. In such a case the maximum number of shifts in any four week cycle shall be 14.

(b) Where such medical practitioner is recalled to work, during the on call period specified in paragraph (a), the first 5 hours of recall, or the first two recalls totalling not more than 5 hours, in each such on call period shall not attract any additional remuneration.

Where under this arrangement there are more than two recalls, or where more than 5 hours of recall are worked, in a 24 hour on call period, any additional hours worked shall be paid for at the rate of time and one half.

(3) A medical practitioner placed on call, other than in accordance with subclause (2), shall be paid an allowance of $8.47 for each hour on call. Provided that the allowance shall not be paid with respect to any period for which payment is made in accordance with subclause (4) when the medical practitioner is recalled to work.

This allowance shall be adjusted in accordance with general movements in the salary rates prescribed in this agreement on and from the same date.

(4) The following provisions shall apply to a medical practitioner recalled to work, other than in accordance with subclause (2)—

(a) The medical practitioner shall be paid a minimum of two hours at the rate of time and a half. For this purpose, payment to a sessional medical practitioner shall be calculated on the basis of the salary prescribed for a full time medical practitioner at the same salary point.

Provided that any call back work performed between midnight and 6.00 am shall be remunerated at the rate double time.

(b) The medical practitioner shall not be obliged to work for two hours if the work for which the medical practitioner was recalled is completed in less time, provided that if the medical practitioner is called out within two hours of starting work on a previous recall the medical practitioner shall not be entitled to any further payment for the time worked within that period of two hours.

(c) Time worked in excess of the two hour call back period shall be remunerated at the rate of time and one half for the third hour and thereafter at the rate of double time.

(d) Payment for the call back shall commence from—

(i) In the case of a medical practitioner who is on call, the time the medical practitioner starts work;

(ii) In the case of a medical practitioner who is not on call, the time the medical practitioner embarks on the journey to attend the call. Provided that where a medical practitioner is recalled within 2 hours prior to commencing normal duty, any time spent in travelling shall not be included in actual duty performed for the purpose of determining payment under this paragraph.

(5) The provisions of this clause may be varied by agreement between the medical practitioner and the Hospital.

12.—NO REDUCTION

No medical practitioner shall suffer a reduction in (pre-tax) income as a result of the implementation of this Agreement.

13.—SHIFTS AND WEEKEND WORK

(1) **Full Time Medical Practitioners**

(a) A full time medical practitioner shall, in addition to the salaries prescribed in Clause 7 and Schedule A hereof, be paid an annual loading of 23%, payable fortnightly as part of salary, to compensate for the requirement to work evening, night, weekend and public holiday shifts.

(b) Full time medical practitioners may on average be required to work, as a condition of their employment, four weekend day shifts and seven evening and night shifts in each cycle of 14 shifts. Provided that full time medical practitioners shall be expected to work the same proportion of evening, night, weekend and public holiday shifts as sessional medical practitioners.

(2) **Sessional and Casual Medical Practitioners**

(a) Where a sessional or casual medical practitioner begins ordinary hours of work at or after 12.00 noon and before 4.00 am, he/she shall be paid, with respect to those ordinary hours, a loading of 12.5 % in addition to his/her ordinary rate.

(b) The provisions of paragraph (a) do not apply to a sessional or casual medical practitioner who on any day commences work at or after 12.00 noon and completes those hours at or before 6.00 pm.

(c) Where a sessional or casual medical practitioner agrees to work a broken shift, at the hospital's request , each portion of that shift shall be considered a separate shift for the purposes of this subclause.

(d) Where a sessional or casual medical practitioner works ordinary hours on a Saturday or Sunday, the medical practitioner shall be paid, with respect to those ordinary hours, a loading of 50% in addition to his/her ordinary rate.

(e) Where a sessional or casual medical practitioner works ordinary hours on a public holiday, the medical practitioner shall be paid, with respect to those ordinary hours, a loading of 150% in addition to his/her ordinary rate. Provided that, if the hospital agrees, the medical practitioner may be paid with respect to those ordinary hours, a loading of 50% in addition to his/her ordinary rate and, in addition, be allowed to observe the holiday on a day mutually acceptable to the hospital and the medical practitioner.

(f) Where a sessional or casual medical practitioner works hours that would entitle him/her to more than one of the loadings payable in accordance with this subclause, only the highest loading shall apply.

(g) Provided that a sessional medical practitioner shall not be entitled to claim the 14% private practice loading for sessions which attract any shift or weekend penalty payment specified in this subclause.

(h) Provided that in the case of casuals the loadings prescribed in this subclause shall be calculated on the appropriate salary rate prescribed in Schedule A.

14.—SUPERANNUATION

Medical practitioners appointed under this agreement shall as a minimum receive an employer level of superannuation contribution as specified by the *Superannuation Guarantee (Administration) Act* 1992. The medical practitioner can designate a superannuation fund which complies with the *Superannuation Guarantee (Administration) Act* 1992 into which the employer contribution(s) shall be paid.

For the purpose of calculating superannuation entitlements the medical practitioner's earnings base shall include the base rate prescribed in Schedule A or B, as the case may be, and any applicable shift, weekend or public holiday penalty.

15.—SALARY SACRIFICE/PACKAGING

Full time medical practitioners, and sessional medical practitioners who work a regular number of hours, may sacrifice up to 30% of the medical practitioner's base salary (in the case of full time medical practitioners this shall include the loading prescribed in Clause 13(1)) for an agreed benefit of package of benefits to be provided by the employer. The amount sacrificed and remaining benefits must together equate to the gross value of the benefits payable to the medical practitioner before tax such that the gross benefits payable to the medical practitioner as a consequence of the sacrifice is not in any way reduced.

The list of benefits, from which the medical practitioner may choose, in exchange for a salary sacrifice is—

1. Payment of private health insurance;
2. Education expenses for self/family;
3. Novation of a motor vehicle lease;
4 Contributions to a superannuation fund nominated by the medical practitioner;
5. Mortgage expenses;
6. Other matters subject to agreement with the employer.

The following conditions will apply—

(a) The medical practitioner will, commencing from the date of receipt of written notification by the employer, pay any subsequent fringe benefits tax liability incurred by the employer arising out of the provision of any non-cash benefit to the medical practitioner under this clause.

(b) The medical practitioner has the ability to vary the packaging arrangement every 6 months subject to giving 4 weeks notice. The medical practitioner may elect to cancel any salary packaging arrangements subject to the giving of a period of notice of four weeks. Provided that where the employer and the medical practitioner agree a lesser period of notice may be agreed.

(c) The provision of packaged remuneration to medical practitioners is dependent on St John of God Health Care System Inc. retaining its exemption from the various forms of taxation which impact on such arrangements.

(d) The cancellation of salary packaging does not cancel or otherwise affect the operation of this agreement.

Provided that the amount packaged shall be applied within the relevant financial year.

16.—ANNUAL LEAVE

1. (a) Except as provided in paragraph (b), medical practitioners employed on a full-time basis shall be entitled to four weeks' annual leave on full pay at the completion of 52 weeks' continuous service.

(b) Medical practitioners who are rostered to work their ordinary hours on Sundays and/or public holidays during a qualifying period of employment for annual leave shall be entitled to receive additional annual leave as follows—

(i) If 35 ordinary shifts on such days have been worked—one week.

(ii) If less than 35 ordinary shifts on such days have been worked the medical practitioner shall be entitled to have one additional day's leave for each seven ordinary shifts so worked, provided that the maximum additional leave shall not exceed five working days.

(c) A medical practitioner who during a qualifying period towards an entitlement of leave was employed continuously on both a full-time and sessional basis or a sessional basis only may elect to take a lesser period of annual leave calculated by converting the sessional service to equivalent full-time service.

(2) A medical practitioner may take annual leave during the period in which it accrues, but the time during which the leave may be taken is subject to the approval of the employer. All annual leave taken shall be at the rate of salary applicable at the time of taking such leave.

(3) When the convenience of the hospital is served the employer may approve the deferment of the commencing date for taking annual leave, but such approval shall only remain in force for one year.

The employer may renew the approval referred to immediately above for a further period of a year or further periods of a year but so that a medical practitioner does not at any time accumulate more than three years' entitlement.

Where the convenience of the employer is served the employer may approve the deferment of the commencement date for taking annual leave so that a medical practitioner accumulates more than three years' entitlement, subject to any condition which the employer may determine.

When a medical practitioner who has received approval to defer the commencement date for taking annual leave under this subclause next proceeds on annual leave, the annual leave first accrued shall be the first leave taken.

(4) Notwithstanding the provisions of this clause, the employer may direct a medical practitioner to take accrued annual leave and may determine the date on which such leave shall commence.

(5) Medical practitioners upon request shall receive their ordinary pay and any allowances due to them for the period of their annual leave prior to going on such annual leave.

(6) (a) If after four weeks' continuous service in any qualifying 52 week period, a medical practitioner lawfully terminates service, or employment is terminated by the employer through no fault of the medical practitioner, the medical practitioner shall be paid one-fifty second of the entitlement to annual leave in respect of each completed week of continuous service in that qualifying period.

(b) If the services of a medical practitioner terminate and the medical practitioner has taken a period of annual leave in accordance with subclause (2) of this clause, and if the period of leave so taken exceeds that which would become due pursuant to paragraph (a) of this subclause, the medical practitioner shall be liable to pay the amount representing the difference between the amount received for the period of annual leave taken and the amount which would have accrued in accordance with subclause (1) of this clause. The employer may deduct this amount from money due to the medical practitioner by reason of the other provisions of this Agreement at the time of termination. Provided that no refund is required in the event of the death of the medical practitioner.

(c) In addition to any payment to which a medical practitioner may be entitled under this clause, where a medical practitioner's employment is terminated after the completion of 52 weeks' continuous service and the medical practitioner has not been allowed the annual leave prescribed under this Agreement, the medical practitioner shall be given payment in lieu of that leave.

(7) Annual leave loading has been annualized into the base salary.

(8) A medical practitioner who has been permitted to proceed on annual leave and who ceases duty before completing the required continuous service to accrue such leave must refund the value for the unearned pro rata portion, but no refund is required in the event of the death of a medical practitioner.

(9) Payment in lieu of annual leave shall be made on the death, resignation or retirement of a medical practitioner.

(10) A medical practitioner employed on a sessional basis shall receive payment for annual leave in accordance with Clause 10 of this Agreement.

17.—PUBLIC HOLIDAYS

(1) A medical practitioner employed on a full time basis is entitled to the following public holidays in accordance with the Public *and Bank Holidays Act, 1972*—

New Years Day, Australia Day, Labour Day, Good Friday, Easter Monday, Anzac Day, Foundation Day, Sovereign's Birthday, Christmas Day, Boxing Day.

(2) When any of the days mentioned in subclause (1) hereof falls on a Saturday or Sunday the holiday shall be observed on the next succeeding Monday, provided that when Boxing Day falls on a Saturday, Sunday or Monday the holiday shall be observed on the next succeeding Tuesday.

(3) When any of the days observed as a holiday in this clause fall during a period of annual leave the holiday or holidays shall be observed on the next succeeding work day or days as the case may be after completion of that annual leave.

(4) When any of the days observed as a holiday as prescribed in this clause fall on a day when a medical practitioner is rostered off duty and the medical practitioner has not been required to work on that day the medical practitioner shall be paid as if the day was an ordinary working day or if the employer agrees be allowed to take a day's holiday in lieu of the holiday at a time mutually acceptable to the employer and the medical practitioner.

(5) A medical practitioner who is required to be on call on a day observed as a public holiday during what would normally have been the medical practitioner's ordinary hours shall be allowed to observe that holiday on a day mutually acceptable to the hospital and the medical practitioner.

(6) A medical practitioner employed on a sessional basis shall be entitled to public holidays in accordance with Clause 10 of this Agreement.

18.—SICK LEAVE

(1) A medical practitioner who is incapacitated for duty in consequence of illness or injury shall, as soon as possible, notify the employer of the fact and shall also advise the likely date of resuming duty.

(2) No sick leave with pay exceeding two consecutive working days shall be granted without an adequate medical certificate or other evidence satisfactory to the employer. Provided that the number of days sick leave which may be granted without the production of a medical certificate shall not exceed, in the aggregate, five working days in any one calendar year.

(3) A medical practitioner who is unable to resume duty on the expiration of the period shown in the first certificate, shall produce a further certificate and shall continue to do so upon the expiration of the period respectively covered by such certificates.

(4) Where a medical practitioner is ill during a period of annual leave and produces at the time, or as soon as practicable thereafter, medical evidence to the satisfaction of the employer that the medical practitioner is or was as a result of the illness confined to the medical practitioner's place of residence or a hospital for a period of at least seven consecutive calendar days, the employer may grant the medical practitioner sick leave for the period during which the medical practitioner was so confined and reinstate the medical practitioner annual leave equivalent to the period of confinement.

(5) Where a medical practitioner is ill during the period of long service leave and produces at the time or as soon as practicable thereafter medical evidence to the satisfaction of the employer that the medical practitioner is or was confined to the medical practitioner's place of residence or a hospital for a period of at least fourteen consecutive calendar days, the employer may grant sick leave for the period during which the medical practitioner was so confined and reinstate the medical practitioner long service leave equivalent to the period of confinement.

(6) The basis for determining the leave of absence on the grounds of illness that may be granted shall be ascertained by crediting the medical practitioner concerned with the following periods, but the leave shall be cumulative—

	Working Day's Leave on Full Pay
(a) On day of employment of the medical practitioner	5
(b) On completion by the medical practitioner six months service	5
(c) On completion by the medical practitioner of twelve months service and on completion of each additional twelve months	10

(7) No leave on account of illness or injury shall be granted with pay if the illness or injury has been caused by misconduct of the medical practitioner or in any case of absence from duty without sufficient cause.

(8) Where a medical practitioner suffers a disability within the meaning of Section 5 of the *Workers Compensation and Rehabilitation Act 1981*, which necessitates that medical practitioner being absent from duty, sick leave with pay shall be granted to the extent of sick leave credits. In accordance with Section 80(2) of the *Workers' Compensation and Rehabilitation Act 1981* where the claim for workers' compensation is decided in favour of the medical practitioner, sick leave credit is to be reinstated and the period of absence shall be granted as sick leave without pay.

(9) A pregnant medical practitioner shall not be refused sick leave by reason only that the "illness or injury" encountered by the medical practitioner is associated with the pregnancy.

19.—LONG SERVICE LEAVE

(1) The long service leave provisions published in Volume 73 of the Western Australian Industrial Gazette at pages 1 to 4 as updated from time to time, are incorporated in and deemed to be part of this Agreement.

(2) Provided that the leave to which a medical practitioner shall be entitled or deemed to be entitled shall be as provided in this clause—

Where a medical practitioner has completed at least 10 years' service the amount of leave shall be—

(a) in respect of 10 years service so completed—eight and two thirds weeks leave;

(b) in respect of the next 5 years service completed after such 10 years—four and one thirds weeks leave

(c) in respect of each 10 years service completed after such 15 years—eight and two thirds weeks leave;

(d) on the termination of the medical practitioner's employment—

(i) by his/her death;

(ii) in any circumstances otherwise than by the employer for serious misconduct;

in respect of the number of years' service with the employer completed since he/she last became entitled to an amount of long service leave, a proportionate amount on the basis of eight and two thirds weeks for 10 years service.

A medical practitioner whose employment ceases through no fault of the employee and has at least 5 years of continuous service shall be provided with pro rata long service leave.

(3) Leave shall be granted and taken as soon as reasonably practicable after the right thereto accrues due or at such time or times as may be agreed between the medical practitioner and the hospital.

(4) A medical practitioner who during a qualifying period towards an entitlement of long service leave was employed continuously on both a full-time and sessional basis or a sessional basis only may elect to take a lesser period of annual leave calculated by converting the sessional service to equivalent full-time service.

20.—FAMILY LEAVE

(1) A medical practitioner is entitled to paid family leave of up to [2] days in a calendar year to care for an ill family member provided the days used are sick leave entitlements accrued from the previous years of service and are not the medical practitioner's entitlements for the current year.

(2) In this subclause "family member" means the medical practitioner's spouse, de facto spouse, child, stepchild, parent, step parent or another person who lives with the medical practitioner as a member of the medical practitioner's family.

(3) Family leave is not cumulative from year to year.

(4) An absence on family leave must, if required by the Hospital, be supported by a certificate, dated at the time of the absence, from a registered medical practitioner, stating that the family member was ill.

21.—BEREAVEMENT LEAVE

(1) A medical practitioner is entitled to paid bereavement leave for up to [2] days on the death of a spouse, de facto spouse, child, stepchild, parent, step parent or another person who, immediately before that person's death, lived with the medical practitioner as a member of the medical practitioner's family.

(2) Bereavement leave must be supported by evidence that would satisfy a reasonable person as to—

(a) the death that is the subject of the leave sought; and

(b) the relationship of the medical practitioner to the deceased person if the employer requires this.

22.—PARENTAL LEAVE

A medical practitioner shall be entitled to Parental Leave in accordance with Division 6—Parental Leave of the *Minimum Conditions of Employment Act 1993.*

23.—CONFERENCE AND STUDY LEAVE

(1) **Conference Leave**: Leave of up to two weeks, on full pay, shall be allowed to each medical practitioner during each year of continuous service, provided that where in any year of continuous service, the whole or any part of such leave is not taken by the medical practitioner nor granted by the employer, any leave not so taken shall be granted during the following year; provided further that the maximum amount of such leave that may be allowed to any medical practitioner shall not exceed four (4) weeks in any year of continuous service.

Reasonable conference, travel and accommodation expenses shall be paid on production of the appropriate receipts where it is agreed that a conference or course of study is relevant or beneficial to the hospital.

(2) **Study Leave:** Additional paid study leave of up to one week and/or unpaid leave (and/or payment of additional expenses) may be agreed to by the employer where a course of study, maintenance of professional standards or development program is relevant or beneficial to the hospital.

24.—REDUNDANCY

In addition to the notice requirements contained in Clause 6 a medical practitioner whose employment is terminated on the grounds of redundancy shall be entitled to the following amount

of severance pay in respect of a continuous period of service—

Period of Continuous Service	Severance 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
Thereafter	1 weeks additional pay for Each additional year of service

A week's pay means the ordinary weekly rate of wage for the medical practitioner concerned.

25.—PROFESSIONAL INDEMNITY

The Hospital shall indemnify and keep indemnified the medical practitioner from and in respect of all claims, demands, actions, proceedings, judgements, damages, losses, costs and expenses which may be brought against the medical practitioner or which the medical practitioner may suffer or incur or to which the medical practitioner may be put as the consequence of any act done or omitted to be done by the medical practitioner in the course of the engagement of the medical practitioner by the hospital pursuant to and in accordance with the provisions of this Agreement PROVIDED THAT neither the hospital nor the medical practitioner shall make any statement in respect of any act done or omitted to be done by the medical practitioner which is or could be construed to be an admission of liability or negligence in the care or treatment of any patient without the consent in writing of both the other of them and that other's insurer.

26.—ETHICS

The AMA Code of Ethics shall govern the professional conduct of the employer and medical practitioners covered by this Agreement.

27.—HEALTH AND SAFETY

The Hospital shall provide medical practitioners with such protection from injury and equivalent compensation or other cover with such amenities as are required to be provided by any statute or regulation thereunder or industrial award for the protection and comfort of workers employed or engaged in the same or any similar class or work in Western Australia.

28.—GRIEVANCE/DISPUTE SETTING PROCEDURES

(a) When a medical practitioner has a grievance arising from his/her/their contract to raise with the Hospital, the Director of Emergency Medicine shall be advised in the first instance. Provided that where a medical practitioner claims to have been aggrieved by the Director of Emergency Medicine or if the matter is unresolved, the Chairman of the Medical Advisory Committee shall also be informed.

(b) If the grievance is not resolved, the Director and/or Chairman of the Medical Advisory Committee shall advise the Chief Executive Officer of.

(i) the nature of grievance; and

(ii) the action taken

(c) If the grievance is not resolved by the Chief Executive Officer within fourteen (14) days, the Chief Executive Officer shall inform the medical practitioner of his/her right to be represented at a meeting of the parties by a representative of the Association.

(d) If not settled at that meeting, the grievance may be formally submitted in writing to the Hospital by the Association and the grievance discussed by representatives of the Association and the Hospital. Where agreement still cannot be reached the grievance shall be referred for resolution to an arbitrator and with such terms of reference as mutually agreed to between the Hospital and Association.

(e) The Association shall endeavour to ensure that the visiting medical practitioner concerned continues providing services in a normal manner until the grievance has been resolved in accordance with the procedures set out above, or as otherwise agreed by the Hospital, except where the safety of a visiting medical practitioner or patients is concerned.

(f) The provisions contained in this Clause shall also apply to the resolution of questions, disputes or difficulties arising under this Agreement.

29.—AGREEMENT FLEXIBILITY

In recognition of the need for maximum flexibility within this Agreement: a medical practitioner may by agreement in writing with the employer receive an all in salary in full satisfaction of the monetary entitlements prescribed by this Agreement. Provided that the rate shall not when viewed objectively, and having regard to the whole of the medical practitioner's terms and conditions of employment, be less favourable to the medical practitioner than the entitlements otherwise available under this Agreement.

30.—RENEGOTIATION OF AGREEMENT

Negotiations for a new agreement will commence at least six months prior to the date of expiration of this Agreement.

If at the date of expiration no new agreement has been reached then this Agreement shall continue until such time as a new agreement is entered into.

31.—SIGNING OF AGREEMENT/COMMON SEAL

Dated this day 1999

Signature (signed by G.L. Palmer)

Signed by G.L. Palmer

Chief Executive Officer (Position) St John of God Hospital Murdoch

as agent for and on behalf of the employer

Witness Name Janet Healey

Signature (Signed J. Healey)

The Common Seal of the Western Australian Branch of the Australian Medical Association was hereunto affixed in the presence of.

Rosanna Capolingua-Host Name

(Signed R. Capolingua-Host) Signature

(Common Seal affixed)

in the presence of

Vincent Caruso Name

(Signed V. Caruso) Signature

SCHEDULE A1—FULL TIME

Medical practitioners engaged on a full time basis shall be paid in accordance with the following scale—

Classification	Level	Base Annual Salary at 1 July 1998	Base Annual Salary at 1 July 1999	Base Annual Salary at 1 July 2000
GP (YR 1) VRGP/VRMP (YR 1)	13	101187	103210	105274
GP (YR 2) VRGP/VRMP (YR 2)	14	105775	107890	110047
GP (YR 3) VRGP/VRMP (YR 3) SNR MED OFFICER (NON SPECIALIST/ SPECIALIST)(YRI) SPECIALIST (YR 1)	15	110336	112542	114792
VRGP/VRMP (YR 4) SNR MED OFFICER (NON SPECIALIST / SPECIALIST)(YR 2) SPECIALIST (YR 2)	16	114921	117219	119563
VRGP/VRMP (YR 5) SNR MED OFFICER (NON SPECIALIST/ SPECIALIST) (YR 3) SPECIALIST (YR 3)	17	120721	123136	125598
SNR MED OFFICER (SPECIALIST QUALS) (YR 4) SPECIALIST (YR 4)	18	123850	126327	128854
SNR MED OFFICER (SPECIALIST QUALS) (YR 5) SPECIALIST (YR 5)	19	125132	127634	130187
SNR MED OFFICER (SPECIALIST QUALS) (YR 6) SPECIALIST (YR 6)	20	126997	129537	132127
SNR MED OFFICER (SPECIALIST QUALS) (YR 7) SPECIALIST (YR 7)	21	131166	133790	136465
SNR MED OFFICER (SPECIALIST QUALS) (YR 8) SPECIALIST (YR 8)	22	133774	136450	139179
SNR MED OFFICER (SPECIALIST QUALS) SPECIALIST	23	139408	142197	145041

Note: Medical practitioner engaged on a 0.8 modified full time basis shall be paid at .8 of the rate

SCHEDULE B—SESSIONAL

Medical practitioners employed on a sessional basis shall be paid fortnightly at the sessional rate in accordance with the following scale—

Classification	Level	Base	Base	Base
Session at 1 July 1998	Session at 1 July 1999	Session at 1 July 2000		
GP (YR 1) VRGP/VRMP (YR 1)	13	193.97	197.85	201.81
GP (YR 2) VRGP/VRMP (YR 2)	14	202.77	206.82	210.96
GP (YR 3) VRGP/VRMP (YR 3)	15	211.51	215.74	220.06
SNR MED OFFICER (NON SPECIALIST/ SPECIALIST)(YR 1) SPECIALIST (YR 1) VRGP/VRMP (YR 4)	16	220.29	224.69	229.19
SNR MED OFFICER (NON SPECIALIST SPECIALIST)(YR 2) SPECIALIST (YR 2) VRGP/VRMP (YR 5)	17	231.41	236.04	240.76
SNR MED OFFICER (NON SPECIALIST SPECIALIST) (YR 3) SPECIALIST (YR 3) SNR MED OFFICER (SPECIALIST QUALS) (YR 4)	18	237.42	242.16	247.00
SPECIALIST (YR 4) SNR MED OFFICER (SPECIALIST QUALS) (YR 5)	19	239.88	244.67	249.57
SPECIALIST (YR 5) SNR MED OFFICER (SPECIALIST QUALS) (YR 6)	20	243.45	248.32	253.29
SPECIALIST (YR 6) SNR MED OFFICER (SPECIALIST QUALS) (YR 7)	21	251.44	256.47	261.60
SPECIALIST (YR 7) SNR MED OFFICER (SPECIALIST QUALS) (YR 8)	22	256.44	261.57	266.80
SPECIALIST (YR 8) SNR MED OFFICER (SPECIALIST QUALS) SPECIALIST	23	267.24	272.59	278.04

VALUER GENERAL'S OFFICE ENTERPRISE BARGAINING AGREEMENT 1999.

No. PSG AG 3 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated and the Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, WA Branch

and

Valuer General, Valuer General's Office

No. PSG AG 3 of 1999.

Valuer General's Office Enterprise Bargaining Agreement 1999.

PUBLIC SERVICE ARBITRATOR.

COMMISSIONER P E SCOTT.

3 December 1999.

Order.

HAVING heard Ms K Franz and with her Ms R Harley on behalf of the Applicants and Mr P Whyte and with him Ms C Holmes 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 Valuer General's Office Enterprise Bargaining Agreement 1999 in the terms of the following schedule be registered on the 1st day of December 1999 and shall replace the Valuer General's Office Enterprise Bargaining Agreement 1997.

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

Schedule.

PART I: — AGREEMENT FRAMEWORK

1.—TITLE

This Enterprise Bargaining Agreement shall be known as the "Valuer General's Office Enterprise Bargaining Agreement 1999" and shall replace the "Valuer General's Office Enterprise Bargaining Agreement 1997".

2.—ARRANGEMENT

PART I—AGREEMENT FRAMEWORK

PART II—WORKPLACE REFORMS AND PRODUCTIVITY INITIATIVES

PART III—TERMS AND CONDITIONS OF EMPLOYMENT

3.—SCOPE

This Enterprise Bargaining Agreement shall apply to all Valuer General's Office employees including Senior Executive Service employees working in the Valuer General's Office who are members of or are eligible to be members of the Unions party to this Enterprise Bargaining Agreement.

4.—PARTIES BOUND

(1) The parties to this Agreement are—

(a) the Valuer General, of the Valuer General's Office, 18 Mount Street, Perth, Western Australia ("the Employer"); and

(b) the Civil Service Association of Western Australia (Inc); and

(c) the Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, WA Branch.

5.—NUMBER OF EMPLOYEES COVERED

As at the date of registration, the approximate number of employees covered by this Enterprise Bargaining Agreement is 35.

6.—DEFINITIONS

In this Agreement, unless stated otherwise, the following terms will be defined as—

"Agreement" means the Valuer General's Office Enterprise Bargaining Agreement 1999.

"Country Areas" means all areas other than "metropolitan area" as defined below.

"CSA" means the Civil Service Association of Western Australia (Inc).

"Employee" means any person who is employed by the Valuer General.

"Employer" means the Valuer General, as Chief Employee of the VGO.

"Fixed Term Employee" means a full or part time employee, as prescribed under the Public Sector Management Act, for a fixed period of up to five (5) years.

"Government" means the State Government of Western Australia.

"Metropolitan Area" means that area within a radius of fifty (50) kilometres from the Perth City Railway Station.

"MFP" means Multi Factor Productivity measurement model.

"Office" means the premises and work areas of the Valuer General's Office.

"Parties" means the Valuer General; the Civil Service Association of WA (Inc); and the Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, WA Branch, when referred to jointly in the Agreement.

"Place of Duty" means a job location, other than their usual place of work, where the employee carries out their work. See usual place of work.

"PSA" means Public Service Award 1992.

"Settlement Period" for the purposes of Flexitime and Annualised Hours means a period of four weeks.

"Tea Caterer's Award" means Catering Employees and Tea Attendants Government Award 1992.

"Unions" means the Civil Service Association of WA (Inc); and the Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, WA Branch.

"Usual place of work" means the Office, other regional headquarters or approved home based site.

"Valuer General" means Valuer General or Delegated Officer of Authority.

"VGO" means Valuer General's Office, the whole of Agency.

"WAIRC" means the Western Australian Industrial Relations Commission.

7.—DURATION

(1) This Agreement shall come into effect on 1st December 1999 as the operative date, and shall remain in force for a period of two years (24 months).

(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) This Agreement will continue in force after the expiry of the term until such time as any of the parties withdraw from the Agreement by notification in writing to the parties and to the WAIRC, or replace this Agreement with a subsequent agreement.

8.—NO FURTHER CLAIMS

The parties to this Agreement undertake that for the duration of this Agreement there shall be no further salary or wage increases sought or granted except where expressly provided for in a State Wage Case decision. All arbitrated safety net adjustments are to be absorbed into the pay rates provided for in this Agreement.

9.—SINGLE BARGAINING UNIT

This Agreement has been negotiated through a Single Bargaining Unit (SBU), which comprised of representatives of the Unions who are party to this Agreement and the Employer.

10.—RELATIONSHIP TO PARENT AWARDS

(1) This Agreement shall be read in conjunction with the existing awards and agreements that apply to the parties to this Agreement. In the event of any inconsistency, this Agreement shall have precedence to the extent of any inconsistency. Where this Agreement is silent, award provisions apply. The relevant awards are—

(a) PSA

(b) Tea Caterer's Award

11.—RE-OPEN NEGOTIATIONS

The parties agree to commence negotiations for a replacement agreement at least six (6) months prior to the expiration of the period of this Agreement.

12.—AVAILABILITY OF AGREEMENT

Every employee will be entitled to a copy of this Agreement. This Agreement is available on the VGO's network information database VGOINFO. In addition, a copy or copies of this Agreement will be kept in an easily accessible place or places within the Office, and the location of copies will be communicated to all employees.

13.—DISPUTE RESOLUTION PROCEDURE

(1) Any questions, disputes or difficulties arising under this Agreement shall be dealt with in the following manner—

(a) Any grievance in relation to an employee's concern about, or perceptions of, unnecessary or unjustified personal hardship, detriment or annoyance resulting from management's actions or decisions in applying any personnel management system which directly effects the employee shall be dealt with in accordance with Schedule A—Grievance Resolution Policy.

(b) Any questions, dispute or difficulties that arise under this Agreement, and which cannot be satisfied under paragraph (a) of this subclause, shall be dealt with as follows—

(i) The employee(s) concerned and or the Union representative shall, if requested, discuss the matters with the immediate supervisor in the first instance. An employee may be accompanied by a Union representative.

(ii) If the matter is not resolved within 5 working days following the discussion in accordance with subparagraph (i) hereof, the matter shall be referred by the employee(s) and or the Union representative to the Valuer General or the Delegated Officer for resolution.

(iii) If the matter is not resolved within 5 working days of the employee's and or the Union representative's notification of the dispute to the Valuer General, it may be referred by either party to the WAIRC.

(iv) Until the matter is determined, work should continue as normal, as instructed by the Valuer General. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this clause.

(v) In the event of a safety dispute the Occupational Safety and Welfare Act 1984 as amended shall apply.

PART II: WORKPLACE REFORMS AND PRODUCTIVITY INITIATIVES

14—MISSION STATEMENTS AND PROGRAMS.

(1) The Valuer General is responsible for the administration of the Valuation of Land Act 1978 and the operation of the Office. The Valuation of Land Act specifically identifies the Office's core business responsibilities.

(2) The VGO mission is—

"To provide Government and our clients with an effective and impartial valuation and property information service".

(3) The VGO vision is to be—

(a) "The benchmark in the provision of quality rating and taxing valuations"

(b) "The preferred provider of valuation services and property information to our clients".

(4) The Office's corporate objective is to provide an independent and impartial valuation service that is cost effective for Government and clients, and maintain an accurate land and property database. The corporate objective is achieved through the valuation program by—

(a) Making general and interim valuations of rateable land at a frequency that meets legislative responsibilities and satisfies client needs in terms of time frame, accuracy and currency.

(b) Making valuations of land other than rating and taxing valuations for Government, statutory clients and any person, body and authority authorised by the Valuation of Land Act, within agreed time frames and standards.

(c) Maintaining a fully integrated central land and property database to facilitate the provision of valuation, property information and consultancy services to Government and the wider community.

(5) The valuation program ensures that valuation rolls for rating and taxing purposes are provided—

(a) Within a determined timeframe,

(b) In a format acceptable to clients and in accordance with the Valuation of Land Act, and

(c) That valuations for all other purposes are made in accordance with professional standards and within agreed timeframes.

(6) The VGO operates in a manner that is consistent with promoting the collective interest of its clients. The VGO will contribute to Government's policy outcomes by providing a reliable, equitable and independent valuation base for State and local government to use—

(a) As a base for determining State Government taxes;

(b) As a base for determining local government and Water Corporation rates;

(c) As an impartial valuation service to protect the public interest in regard to land purchase, sale, lease and compensation by Government;

(d) To aid planning and allocation of funds at a regional and local level;

(e) As a reliable and impartial source of information to enable informed decision making by Government;

(f) To identify and value the State's property assets for effective management of these assets; and

(g) To provide the business sector and the public with reliable property related information.

15.—STRATEGIC TRENDS AND INITIATIVES.

(1) The VGO intends to continue to provide its valuation products and services to Government and clients over the period of this Agreement. It has strategies to improve its range of products and services and to identify and meet the demands of the market place. This includes the ongoing development of expertise and strengthening of capabilities to ensure the Office continues to fulfil its mission.

(2) Significant issues and trends faced by the Office in the coming years have been identified through the Office's corporate planning process and are—

(a) Rating and taxing values are strategic to the raising of revenue by State and local government, thus the Valuer General has an ongoing responsibility to ensure impartiality, protect privacy and confidentiality, and coordinate the standards for the vital data that supports the State's revenue base.

(b) Valuation of public sector agencies' and local governments' assets is a basic requirement of accrual accounting. Demand for the valuation of assets continues to increase and is now a major component of the overall valuation program, and the maintenance of appropriate expertise and policies is essential.

(c) Plant, equipment and insurance valuations comprise a relatively new service and because of their complexity the Office conducts some of this work in partnership with private sector valuers. The further development of expertise and policy is now a priority.

(d) The demand for property related data and information is increasing and the Office continues to develop initiatives to enable Government, the real estate and financial industries and the wider community to be better informed.

(3) The major initiatives identified as being crucial to the success of the Office in addressing strategic trends over the next two financial years are—

(a) Increase client access to the new valuation system to improve services and efficiencies.

(b) The early supply of 95% of provisional unimproved values to the Commissioner of State Revenue for land tax purposes by January instead of March 2000.

(c) Continue the redevelopment of an integrated Geographic Information System to meet an increasing demand for valuation information and to ensure Year 2000 compliance.

(d) Further develop and refine the valuation system to enable the Office to expand its client base through improving the quality of products and services.

(e) Establish Australia wide benchmarks for the cost of providing rating and taxing values.

(f) Establish and review service level agreements with major clients.

(g) Enhance the Office's ability to provide a more comprehensive plant and equipment valuation service by further developing the necessary professional skills in-house and in response to increasing demand from clients.

(h) Increase client awareness of the services that can be provided in respect to valuations for compensation, insurance and reporting purposes.

(i) Assist Treasury to review discrepancies between agency property registers and the Government Property Register.

(j) Investigate new formats and mediums for the provision of property information in accordance with the needs of users and the growth in technology.

(k) Increase the use of Internet technology for marketing and the delivery of services.

(l) Establish new private sector partnering arrangements for the sale of data.

16.—PURPOSE AND OBJECTIVES OF THE AGREEMENT.

(1) The VGO workplace reform philosophy is—

(a) to create a more efficient work environment so as to achieve corporate objectives and to maximise productivity;

(b) to retain and reward staff by—

(i) Recognising achievements;

(ii) Providing flexibility in work conditions;

(iii) Maximising motivation and morale; and

(iv) Eliminating ineffective or dysfunctional inputs and activities.

(2) The shared objectives of this Agreement are to—

(a) Continue to increase productivity and efficiency as part of the Government's workplace reform initiatives,

(b) Promote and gain ongoing employee commitment and contribution to specific strategies that will continue to improve the overall efficiency and effectiveness of the VGO,

(c) Enhance the quality and security of employment for the employee, and

(d) Recognise and reward the employees for their contribution to improved customer services, productivity and performance levels of the VGO.

(e) Develop and pursue changes on a co-operative basis by using participative practices.

17.—PRODUCTIVITY INITIATIVES

(1) The parties agree that significant changes in work practices will continue to be made to achieve real and ongoing productivity improvements. The range of work flexibility initiatives included in this Agreement will enable management and employees to achieve further increases in productivity and cost savings.

(2) In terms of working conditions employees will continue to—

(a) Work a 38 hour week; and

(b) Forgo the first five days of higher duties allowance in each financial year;

(c) Sacrifice their entitlement to the payment of overtime and instead take time in lieu at normal rates of pay, that is extratime.

(3) In terms of increased flexibility of working conditions, employees will continue to have access to—

(a) Annualised Hours and greater flexibility in the application of Flexitime.

(b) Home Based Work.

(c) Voluntary Reduced Time.

(d) Greater flexibility in the taking of long service leave as well as the ability to convert accumulated long service and annual leave into equivalent cash amounts.

(e) Salary Packaging.

(4) Incentive based initiatives and re-modelled working conditions introduced by this Agreement are as follows—

(a) The introduction of a Travel Allowance Incentive Scheme that seeks to provide an incentive and to reward staff for their flexibility and extra effort in being more competitive and responsive to customer requirements especially when working away from their usual place of work.

(b) The introduction of a more consistent approach to extratime claims in relation to travelling time.

(c) The requirement for employees to certify that each meal claimed was actually purchased and further clarification of when employees are entitled to meal allowances.

(5) This Agreement also seeks to increase productivity through various mechanisms including lower rates of absenteeism and providing greater support to staff in balancing their work and family responsibilities. Apart from the variety of "family friendly" initiatives already available, this Agreement establishes—

(a) A "Family Room" which enables an employee to continue to work as productively as possible whilst minding a child or another dependent family member when carer arrangements break down. This will assist employees with childcare emergencies, pupil free days or eldercare responsibilities.

(b) An employee "Wellness Program" sponsored by the Office. This program forms part of an overall strategy to address the underlying causes and reduce the incidence of sick leave absenteeism, in conjunction with the Office's existing sick leave bonus scheme. The aim of the program is to provide information and activities relating to and promoting the health and wellbeing of staff.

(6) Productivity improvement is also achieved through—

(a) Increased demand for Office products and services through improvements to the quality, variety and delivery of services to clients;

(b) New projects to meet changing Government requirements such as the proposed Treasurer's Instruction relating to revaluation of non-current physical assets to comply with the new accrual accounting standards;

(c) A natural increase in workload annually, that is a greater number of properties to be valued;

(d) Staff accepting additional duties and responsibilities;

(e) Willingness of employees to accept change;

(f) Unique in-house development of computer systems;

(g) Acquisition of new skills by employees;

(h) Development of new methodologies, that is working smarter;

(i) Devolved responsibility for the delivery of products and services to the most appropriate service provider.

18.—PRODU CTIVITY MEASUREMENT

(1) The Multi Factor Productivity (MFP) model is the tool used to evaluate the Office's organisational efficiency. The MFP, a recognised and widely used methodology endorsed by Treasury, measures whether key services are being provided with relatively fewer inputs or whether more services are provided for the same amount of inputs.

(2) Comparisons between the VGO's past and current levels of efficiency have been made by using various performance indicators. Each of the key performance indicators shows a "partial" aspect of the Office's efficiency and effectiveness. The MFP combines the data of these indicators to establish a single efficiency measure.

(3) Data used in the MFP calculations is taken primarily from the Office's Operational Plan targets and associated end of year outcomes. The Operational Plan is an established document produced annually by the Office and as such provides a direct and meaningful link between MFP calculations and productivity target levels of performance for staff to aim for.

(4) The Operational Plan contains target levels of Full Time Equivalent (FTE) resources, number of values, expenditure and revenue. Achievement of Operational Plan targets have a direct impact on the Office's ability to fund salary increases achieved through increased productivity.

(5) The MFP demonstrates an efficiency growth rate of at least 6.0% over the next two financial years, that is 1999/2000 and 2000/2001.

(6) The Office will continue to develop productivity measurements—

(a) To ensure compliance with Government policy on Output Based Management and Customer Focus policies;

(b) Based on financial management initiatives; and

(c) To continue commitment to a continuous improvement philosophy.

19.—SALARY INCREASE

(1) It is important to recognise and reward employees for their contribution to improved levels of performance. This recognition will be in the form of salary increases.

(2) The salary increase will be based on demonstrated increases in efficiency as determined by the MFP model.

(3) Employees will be entitled to an annual salary increase depending on the level of efficiency achieved by the whole of Office during the 1999/2000 and 2000/2001 financial years.

(4) Notwithstanding paragraphs (1), (2) and (3) of this clause, any salary increases will also be dependant on the Office's ability to fund from—

(a) The amount of cost savings achieved by the Office through the implementation of the productivity initiatives,

(b) Any budgetary provision by Government to supplement the additional cost of salary and wage agreements flowing from this Agreement in 1999-2000 and outyears, and

(c) Sharing of gains from productivity improvements between employees and Government.

(5) An initial increase of 3.0% is effective from the date of registration of the Agreement with the WAIRC.

(6) A second increase of 2.0% will be payable one year from the date of registration of this Agreement with the WAIRC, subject to the achievement of productivity gains in the first year of the Agreement and the Office's ability to fund the salary increase.

(7) A further 1.0% salary increase will be paid as a lump sum on or before the last day of the second year of this Agreement (two years from the date of registration of the Agreement with the WAIRC), subject to

(a) The achievement of productivity gains in the first year of the Agreement,

(b) The achievement of Operational Plan targets in 2000-2001,

(c) Achievement of revenue forecasts and the Office's ability to fund the salary increase during the term of the Agreement.

(8) Total salary per annum after the increases referred to in paragraphs (1), (2) and (3) forms the basis of negotiations in the next round of agreements.

(9) Subject to the parties to the Agreement having complied with all the requirements placed on them by the Agreement, employees will not be disadvantaged in relation to the Agreement by Government decisions which directly impact on the Agreement.

20.—IMPLEMENTATION OF 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 consultative forum to—

(a) monitor;

(b) review;

(c) have input into the progress of the implementation of the Agreement;

(d) actively share information and consult on corporate strategic issues affecting the VGO business operation.

(3) The parties to the consultative 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

PART III: TERMS AND CONDITIONS OF EMPLOYMENT

21.—CONDITIONS OF SERVICE

(1) Continuity of employment

(a) Employees' continuity of employment is not affected by the Agreement. A permanent employee will retain their permanency of tenure during and on cessation of the Agreement.

(b) Existing accrued and pro rata leave and other entitlements will be retained under the Agreement. Future leave and other entitlements will be calculated as provided for in this Agreement and added to existing leave and entitlements.

(2) Probation

(a) A new employee employed by the Valuer General under the terms and conditions of this Agreement will serve a three month probationary period.

(b) An employee appointed from the Public Sector of Western Australia, and who has had at least three months of continuous and satisfactory service immediately prior to permanent appointment will not be required to serve a period of probation.

(c) At any time during the period of probation the Valuer General may annul the appointment and terminate the services of the employee by the giving of one week's notice or payment in lieu thereof.

(d) An employee, who is on probation and has completed three months probation at the time of registration of this Agreement, will be eligible to become a permanent employee subject to subclause (3) of this clause.

(3) Permanent employee

Prior to the expiry of the period of probation, the relevant Branch Manager shall—

(a) Have a report completed in respect to the employee's level of performance, efficiency and conduct; and

(b) Confirm the permanent appointment; or

(c) Extend the probation period for up to 3 months if the relevant Branch Manager considers further assessment of the employee's performance is required; or

(d) Forward the employee's personal file to the Valuer General with the performance report with a recommendation to either extend the period of probation beyond 12 months, or terminate the services of the employee.

(4) Fixed Term Employee

(a) A fixed term employee is employed for a period of up to five years with a stated commencement and completion date. Subject to subclauses (3), (4) and (5) of this clause, the fixed term employee will be required to serve a three month probationary period under the same conditions as for a permanent employee. All other conditions for a fixed term employee will be the same as for a permanent employee.

(5) Termination of Employment

a) A permanent or fixed term employee engaged on a full or part time basis shall give the employer written notice of their intention to resign of not less than four weeks unless a shorter period is otherwise agreed between the employer and the employee.

b) An employee who fails to give the required written notice forfeits a sum of $500.00 unless agreement is reached between the employee and the Valuer General for a shorter period of notice than that specified. Where a fixed term employee's services are to be terminated for any reason other than misconduct, that employee shall be given written notice of four weeks or such other period as specified in a contract of service, or payment of salary for the appropriate period in lieu of notice.

c) With regard to termination, procedure should comply with the Public Sector Management Act, the Public Sector Standards, the PSA and the Tea Caterer's Award as amended from time to time. An employee who is covered by this Agreement shall not be dismissed unfairly, harshly or oppressively from employment.

22.—SALARIES

Payment of Salary

(1) Employees will be paid an annual salary according to the salary scale listed in Appendix A—Salary Scale and the classification of the position to which they are appointed by the Valuer General.

(2) The classification of any particular position, except Senior Executive Service positions, may be changed by the Valuer General in accordance with the Public Sector Management Act and other relevant procedures.

(3) Salary shall be paid fortnightly but where the usual payday falls on a public holiday, payment shall be made on the previous working day. A fortnight's salary shall be computed by dividing the annual salary by 313 and multiplying the result by 12. The hourly rate shall be computed as one seventy-sixth of the fortnight's salary.

(4) Salary shall be paid by direct funds transfer to the credit of an account nominated by the officer at a bank, building society or credit union approved by the Under Treasurer or Valuer General, as the Accountable Officer. Provided that where such payment by direct funds transfer is impracticable or where some exceptional circumstances exist, and by agreement between the Valuer General and the employee, payment by cheque may be made.

23.—HIGHER DUTIES ALLOWANCE

(1) Except where varied by this clause, all other provisions as contained in Clause 14—Higher Duties Allowance of the PSA continue to apply.

(2) Where an employee is required to act in a position at a higher level than the employee's substantive position for less than five consecutive working days, the acting period is not considered as higher duty and will not be recognised as such.

(3) An employee who is directed by the Valuer General to act in a position which is classified higher than the employee's own substantive position and who performs the full duties and accepts the full responsibility of the higher position for a continuous period of five or more consecutive working days, shall be paid, subject to subclause (6) of this clause, an allowance equal to the difference between the employee's own salary and the salary the employee would receive if the employee was permanently appointed to the position in which the employee is so directed to act. This period shall not include any time worked as extratime in accordance with Clause 30—Extratime Arrangements of this Agreement.

(4) Where an employee who is in receipt of an allowance granted under this clause and has been so for a continuous period of twelve months or more, proceeds on—

(a) A period of normal annual leave; or

(b) A period of any other approved leave of absence of not more than four weeks

the employee shall continue to receive the allowance for the period of leave.

Provided that this subclause shall also apply to an employee who has been in receipt of an allowance for less than twelve months if, during the employees absence, no other employee acts in the position in which the employee was acting immediately prior to proceeding on leave; and the employee resumes in the position, or an equivalent level, immediately after the leave.

(5) Where an employee, who is in receipt of an allowance granted under this clause, proceeds on—

(a) A period of annual leave in excess of the normal; or

(b) A period of any other approved leave of absence of more than four weeks,

the employee shall not be entitled to receive payment of such allowance for leave which is in excess of that provided in subclause (4) paragraphs (a) and (b) *(four weeks)*.

(6) During their first period of acting in each financial year, employees have agreed to forgo the payment for the first five days of a higher duty allowance.

(7) An employee who acts in a higher position on more than one separate occasion shall be entitled to payment of higher duties allowance for the full period of acting on the second and subsequent periods of acting per financial year.

(8) All periods of acting in five or more consecutive working days will count as qualifying service for promotion and will be recorded on the employee's personal file.

24.—PRIVATE MOTOR VEHICLE USAGE

(1) Except where varied by this clause, all other provisions as contained in Clause 35—Motor Vehicle Allowance of the PSA continue to apply.

(2) The Valuer General may invite an employee to provide a private motor vehicle to be used for business purposes. When an employee volunteers to provide a vehicle, the employee shall be reimbursed for such use in accordance with the rate set by the Australian Taxation Office, as amended from time to time.

(3) Both parties will agree to a set period of use and the number of times the vehicle will be made available during that period.

(4) Where a vehicle is provided voluntarily the employee is required to ensure that all necessary licenses and insurances are in place to warrant the Office against any claims for damages arising from the use of the vehicle.

25.—MEAL ALLOWANCES

(1) An employee is entitled to make a claim for meal allowance in accordance with the provisions of this Agreement and relevant provisions of the PSA, as varied by this Agreement.

(2) All meal allowances will be paid in accordance with the scheduled amount as set out in the PSA, subject to the employee's certification that each meal claimed was actually purchased.

(3) When an employee—

(a) Travels to a place of duty outside a radius of 50 kilometres from their usual place of work, or beyond the boundaries of the Metropolitan region, whichever is the greater; and

(b) The trip does not involve an overnight stay away from their usual place of work

reimbursement for all meals claimed will be in accordance with the scheduled amount as set out in the PSA.

(4)Breakfast allowance will not be paid unless an employee departs their usual place of work prior to 7.00am.

26.—TRAVEL ALLOWANCE INCENTIVE SCHEME

(1) Where an employee is required to travel on official business and spend several days away from the usual place of work, the employee is eligible for reimbursement of reasonable expenses, in accordance with Schedule I – Travelling, Transfer and Relieving Allowance of the PSA.

(2) If the employee is able to complete the work sooner than the agreed period between the manager and the employee and therefore reduce the length of stay away from the usual place of work, the employee will receive 25 % of the travelling allowance saved as a bonus payment.

27.—HOURS OF DUTY

(1) Except where varied by this clause, all other provisions as contained in Clause 16—Hours, of the PSA continue to apply.

(2) Prescribed Hours of Duty

(a) The prescribed hours of duty to be observed by employees shall be seven hours and thirty-six minutes per day. The hours to be worked are between 7.00am and 6.00pm Monday to Friday as determined by the Valuer General with a minimum lunch interval of thirty minutes to be taken between 12.00 pm and 2.00 pm. An employee shall be allowed a meal break between 12 noon and 2.00 pm of not less than thirty minutes but not exceeding sixty minutes. The employee may be allowed to extend the meal break up to a maximum of two hours, subject to prior approval of the employee's supervisor.

(b) The prescribed hours of duty may be worked with flexible commencement and finishing times in accordance with the provisions of this clause and Clause 28—Flexitime Arrangements, provided that the required hours of duty for each four week settlement period shall be 152 hours.

(c) Employees at classification level 6 and above may be required to work additional hours on an outcomes basis to ensure that the needs of clients are met as they arise and the objectives of the employer are satisfied.

(3) Other Working Arrangements

(a) The Valuer General wishing to vary the prescribed hours of duty to be observed shall be required to give one month's notice in writing to the relevant branch, section or employees affected by the change.

(b) The Valuer General may authorise the operation of alternative working arrangements in the Office, or any branch or section thereof, subject to subclause (2) of Clause 16—Hours, of the PSA**.**

(4) Annualising Hours

(a) Annualised hours may be used to allow longer hours to be worked in peak periods and shorter hours in quiet periods. These hours are available in conjunction with flexitime, nine day fortnight and extratime arrangements. Where the employee is required by a manager or supervisor to work additional hours outside core periods and subject to the employee's agreement, the additional hours will be accumulated as credit hours.

(b) Subject to the supervisor's approval, this accumulated time can be stored past the settlement period provided for under flexitime provisions, and used during the quiet periods. In the event the employee has a negative flexitime balance, the accumulation towards annualised hours shall not commence until the negative flexitime balance is cleared.

(c) In compliance with the Occupational Safety and Health Act, an employee shall not be compelled to work more than five consecutive hours without a meal break and at the conclusion of a meal break the calculation of the five hour limit recommences. On this basis, a maximum of ten hours may be worked in any one day.

(d) Annualised hours may be accrued during ordinary hours between 7.00am and 6.00pm. Therefore—

(i) Under flexitime provisions, the maximum hours that will be allowed in any one day for annualising is two hours and twenty four minutes on the basis of a normal working period of seven hours and thirty six minutes per day.

(ii) Under nine day fortnight provisions, the maximum hours that will be allowed in any one day for annualising is one hour thirty three minutes on the basis of a normal working period of eight hours twenty seven minutes per day.

(e) Where the hours worked exceed the maximum hours referred to in paragraph (c) of this subclause then those excess hours will be considered as extratime subject to Clause 30—Extratime Arrangements of this Agreement.

(5) Nine Day Fortnight

(a) The Valuer General may authorise the operation of a nine day fortnight. The prescribed hours of duty of seventy six hours per fortnight are worked over nine days per fortnight, exclusive of work performed on Saturday, Sunday and the special rostered day off, with each day consisting of eight hours and twenty seven minutes

(b) The Valuer General shall determine the employee's starting and finishing times between the hours of 7.00am and 6.00pm in order to ensure that the VGO's requirements are met on each day. An employee shall be allowed a meal break between 12 noon and 2.00 pm of not less than thirty minutes but not exceeding sixty minutes. The employee may be allowed to extend the meal break up to a maximum of two hours, subject to prior approval of the employee's supervisor.

(c) Subject to paragraph (a) of this subclause, 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) For the purposes of leave and public holidays, a day shall be credited as eight hours and twenty-seven minutes, notwithstanding the following—

(i) When a public holiday or public service holiday falls on an employee's rostered day off the employee shall be granted a day in lieu of the holiday prior to the conclusion of the current fortnight cycle.

(ii) For a public holiday or public service 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 18 rostered working days of 8 hours and 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.

(6) The provisions of Clause 30—Extratime Arrangements of this Agreement, shall apply for work performed prior to an employee's nominated starting times and after an employee's nominated ceasing time in accordance with subclause (5) paragraph (b) and on an employee's special rostered day off.

28.—FLEXITIME ARRANGEMENTS

(1) In accordance with the flexitime provisions, the employee may be allowed a maximum of two full days off in any one settlement period. Subject to the approval of the manager or supervisor and the employee having accrued sufficient credit hours to cover the absence prior to taking the leave, flexileave can be taken in minimum increments of one hour or any combination of half days and full days that does not in total exceed two days per settlement period.

(2) Subject to approval of the supervisor, employees may select their own start and finish times within the following periods—

7.00 am to 9.30 am

12.00 noon to 2.00 pm (minimum half an hour break)

3.30 pm to 6.00 pm

(3) Employees must work in the following core periods unless unavoidably absent due to illness or approved leave—

9.30 am to 12.00 noon

2.00 pm to 3.30 pm

(4) An employee shall be allowed a meal break between 12 noon and 2.00 pm of not less than thirty minutes but not exceeding sixty minutes. The employee may be allowed to extend the meal break up to a maximum of two hours, subject to prior approval of the employee's supervisor. Employees shall not be compelled to work more than five hours without a meal break and therefore a maximum of ten hours may be worked in any one day.

(5) For recording time worked, there shall be a settlement period which shall consist of four weeks. The settlement period shall commence from the Monday following the designated pay period**.** The required hours of duty for a settlement period shall be 152 hours.

(6) Credit hours in excess of the required 152 hours up to a maximum of seven hours and thirty-six minutes are permitted at the end of each settlement period.

(7) Such credit hours shall be carried forward to the next settlement period. Credit hours in excess of seven hours and thirty six minutes at the end of each settlement period shall be lost unless prior approval has been given by the Valuer General in which case the additional hours worked may be treated as annualised hours in accordance with Clause 27—Hours of Duty or extratime in accordance with Clause 30—Extratime of this Agreement. Credit hours under flexitime arrangements shall not exceed twenty hours at any point within the settlement period.

(8) Debit hours below the required 152 hours up to a maximum of four hours are permitted at the end of each settlement period. Such debit hours shall be carried forward to the next settlement period. For debit hours in excess of four hours, the employee may be requested to take approved leave for the period necessary to reduce debit hours to those specified in this subclause. Employees having excessive debit hours may be placed on standard working hours in addition to being required to take approved leave or leave without pay.

29.—HOME BASED WORK

(1) The employee can seek a work from home arrangement, for all or part of their working hours, during the operation of this Agreement and in accordance with Schedule B—Home Based Work Policy. This may be for a fixed period or for an indefinite period. A work from home arrangement may be granted providing—

(a) The arrangement suits customer service and work requirements,

(b) The Valuer General is satisfied that the employee's work outputs can be adequately monitored,

(c) Adequate safety provisions (as determined by the Valuer General) are available in the home,

(d) Arrangements can be agreed between the parties for the provision of equipment, and

(e) Appropriate insurance requirements, such as Worksafe, Workcover and Risk Management, can be met.

(f) Compliance with the Occupational Safety and Health Act, the Worker's Compensation Act and other relevant legislation.

30.—EXTRATIME ARRANGEMENTS

(1) This clause replaces Clause 18—Overtime Allowance of the PSA.

(2) All work performed by direction of the Valuer General before or after the prescribed hours of duty on a weekday, on a Saturday, Sunday, Public holiday or Public Service Holiday, shall be deemed as extratime and, subject to Schedule C—Extratime Policy of this Agreement, the employee shall be compensated for by being given paid time off in lieu of such extratime worked on an hour for hour basis. All work leading to a claim for extratime requires the prior approval of the Branch Manager

(3) A minimum break of thirty minutes shall be made for meals between, 12.00 noon and 2.00pm and between 4.30pm and 6.30pm when extratime duty is being performed. Except in the case of emergency, an employee shall not be compelled to work more than five hours extratime without a meal break. The calculation of the five-hour limit recommences at the conclusion of a meal break. An employee required to work extratime who purchases a meal shall be reimbursed upon certification that each meal claimed was actually purchased.

(4) An employee who is required to return to duty before or after the prescribed hours of duty shall be entitled to a minimum amount of time off in lieu in accordance with Schedule C—Extratime Policy. The minimum time off in lieu provisions do not apply to an employee rostered for "out of hours contact" duty.

(5) The employee shall be required to clear the extratime within three months of the extratime being performed. If the VGO is unable to release the employee to clear such leave, or on request from the employee and agreed to by the Branch Managers or Delegated Officer, then the employee shall be paid for the extratime worked at the applicable hourly rate.

(6) Provided that by agreement between the Branch Manager and the employee, time off in lieu of extratime may be able to be accumulated beyond three months from the time the extratime is performed so as to be taken in conjunction with periods of leave.

Travelling Time

(7) When an employee, having received prior notice, is required to return to duty to their usual place of work, the employee will receive an amount of half an hour of travelling time each way to be included as extratime. This half an hour of travelling time will not apply to an employee rostered for "out of hours" contact or on emergency duty.

(8) Subject to subclause (9), the time off in lieu for travelling time will be granted only if work was performed on the same day and is outside of the prescribed hours of duty.

(9) The time off in lieu for travelling time will not be granted as extratime if the extratime work performed is continuous (subject to meal breaks) with the completion or commencement of prescribed hours of duty and the work was performed at the usual place of work.

(10) Travelling time may be claimed as extratime in a number of different circumstances apart from that described in subclauses (7), (8) and (9). These circumstances are set out in the Schedule C—Extratime Policy.

(11) All claims for travelling time to be included as extratime are to be made in accordance with the provisions of the Schedule C – Extratime Policy.

31.—VOLUNTARY REDUCED TIME ARRANGEMENTS.

(1) This initiative is to allow an employee to voluntarily trade income for time off for an agreed period within the term of this Agreement with the right to return to full time at the end of that period. The time off can be taken by reducing the working day or week or by taking a block of time off during the term of this Agreement.

(2) Reductions of work time (and salary) can generally range up to 50% for example—

(a) A work week of 5 days at 6 hours each,

(b) A four day work week with no change in the length of the working day,

(c) A three day work week at 10 hours per day.

(3) This initiative provides greater flexibility for an employee to work part time on an interim basis but is subject to meeting the operational requirements of the VGO and the approval of the Valuer General.

(4) Upon expiry of the agreed period, the employee shall return to the original position occupied prior to entering the voluntary reduced time arrangements

(5) Each voluntary reduced time arrangement shall be confirmed in writing and shall include the agreed period of the arrangement and the agreed hours of duty.

32.—PART TIME EMPLOYMENT.

(1) Except where varied by this clause, all other provisions of Clause 9—Part Time Employment of the PSA continue to apply.

(2) Permanent part time employment is defined as regular and continuing employment for a minimum of fifteen hours and 12 minutes per week and a maximum of 30 hours and 24 minutes per week.

(3) Each permanent part time arrangement shall be confirmed in writing and shall include the agreed period of the arrangement and the agreed hours of duty.

(4) The employer shall give a part time employee one months notice, in writing, of any proposed variation to that employee's starting and finishing times and/or particular days worked provided the employer shall not vary the employee's total weekly hours or the agreed hours of duty without the employee's prior written consent.

(5) An employee who is employed on a part time basis shall be paid a proportion of the appropriate full time salary dependent upon the number of hours worked. The salary shall be calculated in the following manner—

Hours worked per fortnight	Full time fortnightly salary
76	1

(6) The employee shall be entitled to the same leave and conditions as prescribed for full time employees on a pro rata basis wherever it applies. Payment to an employee proceeding on accrued annual leave and long service leave shall be calculated on a pro rata basis having regard for any variations to the employee's ordinary working hours during the accrual period.

(7) The conversion of a full time employee to part time employment can only be implemented with the written consent or by written request of the employee, subject to the convenience of the Office. No employee may be converted to part time employment without his or her prior agreement.

33.—ANNUAL LEAVE

(1) Except where varied by this clause, all other provisions as contained in Clause 19—Annual Leave of the PSA continue to apply.

(2) For the purpose of this clause—

(a) Accrued or accumulated leave—is the leave an employee is entitled to from previous calendar year(s).

(b) Pro-rata leave—is the proportion of leave that an employee is entitled to in the current year, either from the date of commencement or to date of cessation.

(3) Each employee is entitled to four weeks paid leave for each year of service, which shall be calculated on a daily accrual basis. An employee who commences with the VGO after January 1 in any year is entitled to a proportion of the annual leave entitlement.

(4) Unused accrued and pro rata leave entitlements will be retained under this Agreement.

(5) A fixed term employee appointed for a period greater than twelve months, shall be credited with the same entitlement as a permanent employee. A fixed term employee appointed for a period less than twelve months, shall be credited with the same entitlement on a pro rata basis for the period of the contract. A part-time employee shall be entitled to the same annual leave entitlements, on a pro rata basis according to the number of hours worked each fortnight.

(6) An employee may take annual leave during the calendar year in which it accrues, at the convenience of the VGO or as otherwise approved by the Valuer General.

(7) The salary rate paid to the employee for any period of annual leave accrued before the commencement of this Agreement and taken during the term of the Agreement, shall be at the rate applicable to the employee under the terms and entitlements of this Agreement.

(8) The salary rate paid to the employee for any period of annual leave to which the employee becomes entitled during the term of this Agreement shall be at the rate applicable to the employee at the time when the leave is taken.

(9) In exceptional circumstances, an employee who has accumulated annual leave entitlements prior to the term of the Agreement may apply to convert the accumulated leave and leave loading entitlements into an equivalent cash amount, subject to the Valuer General's approval and availability of funds. A written application for payment in lieu of accumulated annual leave must be made to the Valuer General. Cash payment for leave entitlements for the current year will not be allowed.

(10) Annual Leave Loading

(a) Since 1 January 1998, all leave loading on the current year's entitlement has been annualised, in accordance with Appendix A. All past leave loading entitlements prior to 1 January 1998, will continue to be paid as lump sums as accrued leave entitlements are progressively cleared.

(b) Where payment in lieu of accrued or pro rata annual leave is made on the death or retirement of an employee, a loading calculated in accordance with the terms of this clause is to be paid on accrued and pro rata leave.

(c) Where an employee resigns, or ceases employment, or is dismissed under the Public Sector Management Act, annual leave loading shall be paid out.

34.—LONG SERVICE LEAVE

(1) Except where varied by this clause, all other provisions as contained in Clause 21—Long Service Leave of the PSA continue to apply.

(2) For the purpose of determining an employee's long service leave entitlement, the expression "continuous service" includes any period during which the employee is absent on full pay or part pay from duties in the Public Service but does not include—

(a) any period exceeding two weeks during which the employee is absent on leave without pay or parental leave, except where leave without pay is approved for the purpose of fulfilling an obligation by the Government of Western Australia to provide staff for a particular assignment external to the Public Sector of Western Australia;

(b) any period during which an employee is taking long service leave entitlement or any portion thereof except in the case of subclause (11), when the period excised will equate to a full entitlement of thirteen weeks;

(c) any service by an employee who resigns, is dismissed or whose services are otherwise terminated other than service prior to such resignation, dismissal or termination when that prior service has actually entitled the employee to the long service leave under this clause; and

(d) any period of service that was taken into account in ascertaining the amount of a lump sum payment in lieu of long service leave.

(3) An employee who has completed a period of seven years of continuous service in a permanent capacity or ten years of continuous service in a temporary capacity shall be entitled to thirteen weeks of long service leave on full pay. An employee is entitled to an additional thirteen weeks of long service leave on full pay for each subsequent period of seven years of continuous service completed by the employee.

(4) A part-time employee shall have the same entitlement to long service leave as a full time employee, however payment made during such periods of long service leave shall be adjusted according to the hours worked by the officer during the accrual period.

(5) Should an employee have an accrued long service leave entitlement prior to and during the term of the Agreement, the employee may apply to take the complete entitlement of long service leave on full or half pay, or take the long service leave in a minimum of one week increments at full or half pay subject to the following classification—

(a) A long service leave entitlement which fell due prior to March 16 1988 amounted to three months; and

(b) A long service leave entitlement which fell due on or after that date shall amount to thirteen weeks.

(6) In exceptional circumstances an employee who has accumulated long service leave entitlements prior to and during the term of the Agreement may apply to convert all, or increments of one week, of accumulated leave into an equivalent cash amount, subject to the Valuer General's approval and availability of funds. Written application to the Valuer General will be required for payment in lieu of accumulated long service leave.

(7) The Valuer General may direct an employee to take accrued long service leave and may determine the date on which the such leave shall commence. Should the employee not comply with the direction, disciplinary action may be taken against the employee.

(8) A public holiday occurring during an employees absence on long service leave shall be deemed to be a portion of the long service leave and extra days in lieu thereof shall not be granted.

(9) An employee who has elected to retire at or over the age of fifty five years and who will complete more than twelve months continuous service before the date of retirement may apply to the Valuer General to be paid pro rata long service.

(10) An employee who, during an accrual period was subject to variations in ordinary working hours or whose ordinary working hours during the accrual period are less than the employee's ordinary working hours at the time of commencement of long service leave may elect to take a lesser period of long service leave calculated by converting the average ordinary working hours during the accrual period to the equivalent ordinary hours at the time of commencement of long service leave.

35.—SICK LEAVE

(1) Except where varied by this clause, all other provisions as contained in Clause 22—Sick Leave of the PSA continue to apply.

(2) The Valuer General shall credit each permanent employee with the following sick leave credits, which shall be cumulative—

	Full pay	Half pay
On the day of initial appointment	38 hours	15 hours 12 minutes
On completion of 6 months continuous service	38 hours	22 hours 48 minutes
On the completion of 12 months continuous service	76 hours	38 hours
On the completion of each further period of 12 months continuous service	76 hours	38 hours

(3) A fixed term employee appointed for a period greater than twelve months, shall be credited with the same entitlement as a permanent employee. A fixed term employee appointed for a period less than twelve months, shall be credited with the same entitlement on a pro rata basis for the period of the contract.

(4) A part-time employee shall be entitled to the same sick leave credits, on a pro rata basis according to the number of hours worked each fortnight. Payment for sick leave shall only be made for those hours that would normally have been worked had the employee not been on sick leave. The provisions of this clause do not apply to casual employees.

(5) In any one calendar year for each unused seven hours and thirty six minutes sick leave entitlements on full pay, employees will be granted one hour bonus leave up to a maximum of ten hours bonus leave per year, which will be taken as time in lieu within six months of the completion of each calendar year. If the VGO is unable to release the employee to clear such leave, or on request from the employee and agreed to by the Valuer General, then the employee shall be paid for the time in lieu at the then current hourly rate.

(6) Subject to subclause (5), all existing pro rata bonus leave shall be retained under this Agreement. Future bonus leave will be calculated as provided for in this Agreement and added to the existing bonus leave entitlements. The bonus leave provision will not have effect on any other cumulative sick leave entitlement accumulated before the commencement of this Agreement.

(7) An application for sick leave exceeding two consecutive working days shall be supported by the certificate of a registered medical practitioner or, when the nature of the illness consists of a dental condition, by the certificate of a registered dentist.

(8) The amount of sick leave granted without the production of the certificate shall not exceed, in the aggregate, five working days in any one credit year.

(9) Where an employee is ill during the period of annual leave or long service leave and produces as soon as practicable, medical evidence that as a result of the illness the employee was confined to the employee's place of residence or a hospital for a period of at least seven consecutive calendar days of annual leave or fourteen consecutive calendar days of long service leave respectively, then the Valuer General may grant sick leave for the period during which the employee was so confined and reinstate annual leave or long service leave equivalent to the period of confinement.

(10) An employee who is absent on leave without pay is not eligible for sick leave during the currency of that leave without pay.

(11) No sick leave shall be granted with pay, if the illness has been caused by the misconduct of the employee or in any case of absence from duty without sufficient cause.

(12) Where an employee who has been retired from the VGO on medical grounds resumes duty therein, sick leave credits at the date of retirement shall be reinstated. This provision does not apply to an employee who has resigned from the VGO and is subsequently re-appointed.

(13) Where an employee suffers a disability, as prescribed by the Worker's Compensation and Assistance Act, 1981 and as amended, which necessitates that an employee being absent from duty, sick leave with pay shall be granted to the extent of sick leave credits. Where the claim for worker's compensation is decided in favour of the employee, sick leave credit is to be reinstated and the period of absence shall be granted as workers compensation.

(14) An employee who produces a certificate from the Department of Veteran's Affairs stating that the employee suffers from war caused illness, may be granted special sick leave credits of fifteen normal working days per annum on full pay in respect of that war caused illness. These credits shall accumulate up to a maximum credit of forty five normal working days, and shall be recorded separately to the employee's normal sick leave credit. Every application for sick leave for war caused illness shall be supported by a certificate from a registered medical practitioner as to the nature of the illness.

36.—COMPASSIONATE LEAVE

(1) In accordance with Schedule D—Compassionate Leave Policy of this Agreement, an employee is entitled to paid compassionate leave of up to three days on the death of—

(a) The spouse or de facto spouse of an employee (including a spouse from whom the employee is separated); or

(b) The child, stepchild, or grandchild of an employee; or

(c) The father, mother (including a guardian of dependant children), stepfather, stepmother, father in law or mother in law of an employee; or

(d) Brother, sister, grandfather or grandmother of an employee; or

(e) Any other person who, immediately before that person's death, lived with the employee as a member of the employee's family

provided that the funeral of such a relation is held on one of the days of leave granted.

(2) In accordance with Schedule D—Compassionate Leave Policy of this Agreement, an employee is also entitled to paid compassionate leave of up to three days in any one calendar year, in respect of the incapacitating illness of the spouse or dependant child of the employee provided that the employee establishes to the satisfaction of the Valuer General that the spouse or child is in need of the assistance of the employee and that no other person is available for this purpose.

(3) The right to paid compassionate leave shall be dependant on compliance with the following conditions—

(a) The employee shall give the Valuer General or Delegated Officer notice of intention to take such leave as soon as reasonably practicable,

(b) The employee shall provide satisfactory evidence of such death or incapacitating illness, if so requested by the Valuer General,

(c) An application for compassionate leave for incapacitating illness exceeding two consecutive days shall be supported by the certificate of a registered medical practitioner,

(d) The employee shall not be entitled to leave under this clause in respect of any period which coincides with any other period of leave entitlement.

(4) The provisions of this clause also apply to—

a) Part-time employees—leave granted as per subclause (2) of this clause is calculated on a pro rata basis in accordance with Schedule D—Compassionate Leave Policy of this Agreement.

b) An employee employed on a fixed term contract of more than twelve months.

c) An employee employed on a fixed term contract of less than twelve months—leave granted as per subclause (2) of this clause is calculated on a pro rata basis in accordance with Schedule D—Compassionate Leave Policy of this Agreement.

37.—PARENTAL LEAVE

(1) An employee is entitled to take up to fifty two consecutive weeks of unpaid leave in respect of—

a) the birth of a child to the employee or the employee's spouse; or

b) the placement of a child with the employee with a view to the adoption of the child by the employee.

subject to the employee giving the employer at least ten weeks written notice of intention to take the leave.

(2) Where both employees are employed by the Valuer General only one employee will be entitled to take parental leave at the same time but this subclause does not apply to one week's parental leave—

a) Taken by the male parent after the birth of the child; or

b) Taken by the employee and the employee's spouse after a child has been placed with them with a view to their adoption of the child.

(3) An employee who has given notice of intention to take parental leave or who is actually taking parental leave is to notify the Valuer General of any period of parental leave taken or to be taken by the employee's spouse in relation to the same child. The entitlement to parental leave is reduced by any period of parental leave taken by the employee's spouse in relation to the same child except for the period of one week's leave referred to in subclause (2).

(4) An employee who has given notice to take parental leave must notify the Valuer General of the starting and finishing dates of the period of parental leave and will be subject to the Valuer General's approval. An employee proceeding on parental leave may elect to extend or reduce the period of the original application within the limitations of Schedule E—Parental Leave Policy of this Agreement.

(5) An employee who has given notice to take parental leave, other than for adoption, is to provide to the Valuer General a certificate from a medical practitioner confirming the pregnancy and the expected date of birth. The pregnant employee is to start the leave six weeks before the expected date of birth unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work.

(6) Where an employee has not applied for leave in accordance with this clause, and does not have express approval of the Valuer General for continued employment, the Valuer General may direct the employee to take parental leave, and may determine the date on which such leave shall commence.

(7) On finishing parental leave and subject to the VGO's requirements, an employee is entitled to the position the employee held immediately before starting parental leave.

(8) Absence on parental leave does not break the continuity of service of an employee and is not to be taken into account when calculating the period of service for a purpose of salary increments, sick leave credits, long service leave and annual leave.

(9) A part-time employee shall have the same entitlement to parental leave as full time employees. An employee employed on 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.

38.—LEAVE WITHOUT PAY

(1) Except where varied by this clause, all other provisions as contained in Clause 24—Leave Without Pay of the PSA still continue to apply.

(2) Subject to the provisions of subclause (3) of this clause, the Valuer General may grant an employee leave without pay for any period.

(3) Every application for leave without pay will be considered on its merits and may be granted provided that—

a) The leave does not conflict with the VGO's operational requirements,

b) All time in lieu, annual recreational leave and long service leave credits are exhausted.

39.—REDUNDANCY

(1) The conditions and entitlements as provided for in Part 6 (Redeployment and Redundancy of Employees) of the Public Sector Management Act and in the Public Sector Management (Redeployment and Redundancy) Regulations 1994, will apply to all employees.

APPENDIX A—SALARY SCALE

(1) The annual salaries/wages applicable to employees covered by this Agreement shall be—

	Salary p.a. EBA 1997	Salary p.a. Date of Registration (3.0%)	Salary p.a. One Year from Registration (2.0%)	Salary p.a. Two Years from Registration (1.0%)
Level 1				
Under 17 years	$12,603	$12,981	$13,240	$13,373
17 years	$14,729	$15,171	$15,474	$15,629
18 years	$17,181	$17,696	$18,050	$18,231
19 years	$19,887	$20,484	$20,894	$21,102
20 years	$22,333	$23,003	$23,463	$23,697
1.1	$24,532	$25,268	$25,774	$26,031
1.2	$25,288	$26,047	$26,568	$26,833
1.3	$26,043	$26,824	$27,361	$27,634
1.4	$26,793	$27,597	$28,149	$28,431
1.5	$27,547	$28,374	$28,941	$29,230
1.6	$28,302	$29,151	$29,734	$30,031
1.7	$29,170	$30,045	$30,646	$30,952
1.8	$29,770	$30,664	$31,277	$31,590
1.9	$30,659	$31,579	$32,210	$32,532
Level 2				
2.1	$31,722	$32,674	$33,327	$33,661
2.2	$32,536	$33,512	$34,183	$34,524
2.3	$33,393	$34,395	$35,083	$35,434
2.4	$34,298	$35,327	$36,034	$36,394
2.5	$35,246	$36,303	$37,029	$37,400
Level 3				
3.1	$36,547	$37,644	$38,397	$38,781
3.2	$37,561	$38,688	$39,461	$39,856
3.3	$38,607	$39,765	$40,560	$40,966
3.4	$39,680	$40,870	$41,687	$42,104
Level 2/3/4				
Step 1	$31,722	$32,674	$33,327	$33,661
Step 2	$32,536	$33,512	$34,183	$34,524
Step 3	$34,298	$35,327	$36,034	$36,394
Step 4	$36,547	$37,644	$38,397	$38,781
Step 5	$38,607	$39,765	$40,560	$40,966
Step 6	$41,152	$42,387	$43,235	$43,667
Step 7	$43,492	$44,797	$45,693	$46,150
Level 4				
4.1	$41,152	$42,387	$43,235	$43,667
4.2	$42,305	$43,574	$44,446	$44,890
4.3	$43,492	$44,797	$45,693	$46,150
Level 5				
5.1	$45,778	$47,152	$48,095	$48,575
5.2	$47,323	$48,743	$49,718	$50,215
5.3	$48,929	$50,397	$51,405	$51,919
5.4	$50,595	$52,113	$53,155	$53,686
Level 6				
6.1	$53,273	$54,871	$55,969	$56,528
6.2	$55,094	$56,743	$57,878	$58,457
6.3	$56,956	$58,659	$59,832	$60,430
6.4	$58,941	$60,704	$61,918	$62,537
Level 7				
7.1	$61,986	$63,840	$65,117	$65,768
7.2	$64,093	$66,010	$67,330	$68,004
7.3	$66,385	$68,371	$69,738	$70,436
Level 8				
8.1	$70,110	$72,208	$73,652	$74,388
8.2	$72,778	$74,956	$76,455	$77,220
8.3	$76,087	$78,364	$79,932	$80,731
Level 9				
9.1	$80,220	$82,621	$84,273	$85,116
9.2	$83,012	$85,497	$87,206	$88,079
9.3	$86,196	$88,777	$90,552	$91,458
Class 1	$91,012	$93,737	$95,611	$96,568
Class 2	$95,828	$98,697	$100,671	$101,677
Class 3	$100,640	$103,654	$105,727	$106,784
Class 4	$105,456	$108,614	$110,786	$111,894

	Salary p.a. EBA 1997	Salary p.a. Date of Registration (3.0%)	Salary p.a. One Year from Registration (2.0%)	Salary p.a. Two Years from Registration (1.0%)
Tea Attendants				
On commencement	$23,818	$24,533	$25,024	$25,274
After 12 months	$24,134	$24,858	$25,355	$25,609
After 24 months & thereafter	$24,409	$25,141	$25,644	$25,900

APPENDIX B—SIGNATORIES TO AGREEMENT

This Agreement shall be lodged with the Western Australian Industrial Relations Commission for registration under Section 41 of the Western Australian Industrial Relations Act 1979.

Signed for and behalf of the Valuer General's Office by;

signed
Roger Williams
Valuer General
Dated 17/11/99

Signed for and on behalf of the Civil Service Association of Western Australian Incorporated by—

signed ***Common Seal***
Dave Robinson
General Secretary
Dated 18/11/99

Signed for and on behalf of the Australian Liquor, Hospitality and Miscellaneous Worker's Union, Miscellaneous Workers Division, WA Branch.

signed ***Common Seal***
Helen Creed
Secretary
Dated 19/11/99

SCHEDULE A—GRIEVANCE RESOLUTION POLICY

BACKGROUND

The Valuer General's Office is committed to providing a grievance resolution procedure within the workplace. Administrative Instruction 1001 sets out the general principles and standards for grievance resolution procedures.

This policy covers the resolution of grievances other than those relating to—

- employees wages and conditions;
- equal opportunity issues such as discrimination, sexual harassment, etc., and
- occupational health, safety and welfare.

POLICY

Definition

1. Grievance resolution is the process by which solutions are sought for an employee's concerns about, or perceptions of, unnecessary or unjustified personal hardship, detriment or annoyance resulting from management's actions or decisions in applying any Personnel Management System (eg: PDP) which directly affects the employee.

Grievance Contact Officers

2. The Valuer General will appoint officers to act as grievance contact officers. Their role will be to advise staff members as to their rights with respect to this policy and to assist in resolving the grievance informally.

3. An officer who wishes to report a grievance is encouraged to first discuss the problem with a grievance contact officer.

4. An officer who then wishes to proceed should approach his/her supervisor or manager to discuss the issue, except where the officer believes that it would be inappropriate to do so. In the latter case the officer should take the grievance direct to the Branch Manager or, if he/she considers that inappropriate, to the Executive Officer.

5. In taking a grievance to a Supervisor, Manager, or the Executive Officer the officer may choose to be accompanied by a grievance contact officer.

6. If the grievance can be resolved after this initial contact then that should be done as quickly as possible. If further information is required or the supervisor or manager does not have the authority to make the decision, then the matter must be referred by the supervisor or manager to the appropriate level of management and the officer informed accordingly.

7. If the grievance is not resolved within what the aggrieved officer considers to be a reasonable time, the formal grievance resolution process should be initiated.

Guidelines for Grievance Resolution (Formal)

8. An officer with a grievance, which he/she wishes to formally report, should submit in writing details of the grievance to the Branch Manager or, where he/she considers this to be inappropriate, to the Executive Officer.

9. An officer who receives a written grievance shall immediately send a copy to the Valuer General together with advice as to who is to undertake an investigation.

10. The matter is to be thoroughly investigated by the Branch Manager or Executive Officer or an officer delegated by either of those officers and a report prepared containing the following information.

a) details of the grievance;

b) a summary of any investigations carried out;

c) record of any interviews;

d) facts established and, in particular, whether the grievance is considered to be justified;

e) whether any action has been taken to resolve the grievance; and

f) whether any action is recommended to resolve the grievance.

This report must be submitted to the Valuer General, who will decide the appropriate course of action.

Records

11. All papers relating to a grievance are to be placed on a separate grievance resolution file which is to be retained by the Human Resources Officer on a confidential basis.

Other Remedies

12. If an officer is dissatisfied with the outcome of the grievance resolution process, the availability of any further recourse may be discussed with the Executive Officer (Corporate Manager).

13. This policy does not prevent the employee and/or employees the right to seek assistance or representation from a third party of their choice.

R. F. WILLIAMS
VALUER GENERAL

SCHEDULE B—HOME BASED WORK POLICY

BACKGROUND

The Valuer General is committed to contemporary management practice in recognition of the changing nature of work and its impact on personal life and the diverse needs of employees.

Home Based Work is the practice of working at home or other location, using telecommunications technology, remote from an organisation's usual place of business.

Primary Office is the Valuer General's Office, 18 Mount Street Perth or any of the VGO's country office locations.

Home Office is the room or area set aside by the employee for the performance of work for the VGO by the employee

Intent

The Valuer General seeks to maximise the potential advantages of home based work through its introduction in the Office.

The potential advantages of home based work for employees are—

- Reduced travelling time and costs.
- Opportunities for those unable to leave the house such as people with particular disabilities.
- Greater flexibility in scheduling and more effective time management
- More casual working environment.
- Higher morale.
- Greater job satisfaction.
- Lifestyle improvements.
- A less disruptive working environment.

The potential advantages of home based work for employer's are—

- Increased productivity.
- Reduced sick leave.
- Reduced overhead costs.
- Reduced staff turnover and retention of valued employees.
- Improved personal performances.
- Greater "out of hours" use of computer resources.

Potential advantages of home based work for the community at large are—

- Reduced traffic congestion, accident levels and pollution.
- Rejuvenation of local communities.

Broad Principles

Implementation of this policy requires managers to consider the primary operating principles—

- Risk to the Office must be minimised.
- Long term efficiency of Office operations must be safeguarded and enhanced.
- Employees working from home must not be disadvantaged in comparison to other employees.

POLICY

1. *General*

a) Working from home is not an entitlement, right or obligation and may only be entered into on a voluntary basis with a written agreement, covering all aspects of the arrangement, between management and employees.

b) Working from home is to be performed on the basis that employees will spend some of their working hours at their normal work location during ordinary hours of work. The ratio is to be agreed between management and employees.

c) Working from home is not the same as unscheduled, intermittent periods where an employee may work from home.

d) Working from home is not a substitute for dependent care.

e) An employee working from home is prohibited from contracting out his or her work.

f) Employees are prohibited from doing any other work or non-work related activity during the times agreed in the Home Based Work Agreement.

g) Employees working from home should have the same opportunities, rights and responsibilities as those employees in traditional arrangements.

h) Employees working from home will be entitled to all relevant provisions contained in applicable awards and agreements as well as being subject to the same policies, procedures and standards as those located at the primary office.

i) All employees working from home will be covered by workers' compensation as they would be when working at the primary office. That is, within predefined times and areas.

j) The primary office shall remain as the employee's headquarters. No allowances will be paid for travel between an employee's home and their headquarters.

k) A home based work arrangement may be altered or discontinued by agreement and at the request of either the manager or employee. Neither party can unreasonably withhold agreement.

2. *Approval*

a) Before approval can be granted in respect of a home based work agreement, the manager and employee must agree to, and record, all matters specified in the Home Based Work Agreement template.

b) Approval to work from home will take into account the suitability of the position (eg client contact), technological requirements and impact upon the Office's services.

c) Each application for a home based work arrangement is to be considered on an individual case by case basis.

d) Approval of a home based work arrangement must have regard to the competency of an employee in undertaking work from home

e) Attendance requirements need to be determined by agreement between the employee and manager and any variation should be sought in writing prior to any alteration of attendance requirement.

3. *Responsibilities*

a) The Office is responsible for the provision and maintenance of work related equipment and supplies, provided that the manager and employee may agree on an alternative arrangement if appropriate. Such alternative arrangements must be recorded.

b) The Office is responsible for conducting regular home inspections to ensure occupational safety and health standards are being met and maintained.

c) Employees who work from home have the same responsibility as other employees to meet deadlines, work standards and maintain communication in the workplace.

4. *Delegation*

a) The initial decision to allow employees to take up the option of working from home is delegated to the relevant Branch Manager who will seek advice from the employee's section manager or supervisor who should have consulted with their workplace team before recommending any work to be performed from home.

b) A Branch Manager has the right to refuse to consent to a home based work arrangement and an employee may withhold his/her consent to a proposed home based work arrangement.

c) The Valuer General has final approval of any Home Based Work Agreement.

5. *Coverage*

This policy applies to all employees of the Valuer General's Office who are covered by either the Valuer General's Office Enterprise Bargaining Agreement or Workplace Agreements.

6. *Disputes*

All disputes relating to the operation of this policy will proceed firstly through the VGO Grievance Resolution Policy and then in accordance with the relevant Dispute Resolution Clause as contained in either the Enterprise Bargaining Agreement or Workplace Agreements.

GUIDELINES

1. These guidelines aim to provide guidance to managers and staff on the implementation of home based work within their sections. They set the minimum standards for allowing work at home and provide guidance on the legal and procedural issues surrounding working at home.

Issues relating to Workers' Compensation, Equal Employment Opportunity etc are significantly complicated when working from home. Many of the issues relating to the applicability of such external regulation is unclear or not yet decided on by courts. This policy does not purport, nor is it intended, to constitute legal advice and does not contain a complete statement of the relevant legislation. This policy does, however, set out procedures that must be followed by officers of the Valuer General's Office in dealing with applications for working from home.

2. *Process for Approval of a Home Based Work Arrangement*

STEP 1	**STEP 2**	**STEP 3**	**STEP 4**
If I want to work at home for part of the week I should obtain and fill in an Expression of Interest Form	If it is feasible, my section manager or supervisor must then discuss with me if any special equipment or training is required, and how the work is to be managed.	The details of the agreement, costs, etc are forwarded to my relevant Branch Manager in the form of a draft Home Based Work Agreement (as per template).	If the business unit can meet the cost of the total package, then the application is forwarded to the Valuer General for approval.
↓	↓	↓	↓
My section manager or supervisor discusses the application with myself, and the work team* goes through the policy's checklist, to see if it is feasible	My section manager or supervisor and myself come to an agreement about what is required.	If my Branch Manager approves of the proposal and costs, then a workplace safety assessment needs to be done.	If the application is approved, my section manager or supervisor and I work out a plan for implementing the application and set a review date.
↓	↓	↓	↓
If feasible **GO TO STEP 2**	If feasible **GO TO STEP 3**	If feasible **GO TO STEP 4**	**Process Complete**

*Note: work team means those staff members who work closely with the proposed home based worker and who will be directly effected by such a proposal.

3. *Terms And Conditions*

a) Home workers will be entitled to all relevant provisions contained in the applicable awards and agreements as well as being subject to the same policies and procedures as those at the primary office. However, there are certain additional conditions specific to a home based work arrangement—

i) home based work will be on the basis that the employee spends a designated period of time agreed between the employer and the employee of his/her usual weekly hours of duty at the office based site;

ii) as there may be considerable expense related to setting up a home it is intended that working from home will constitute a significant amount of the employee's working time;

iii) home based work is not a substitute for dependant care;

iv) the Office is responsible for the provision and maintenance of work related equipment and supplies, unless varied by mutual agreement;

v) employees are prohibited from doing any other work or non work related activity during the times agreed in the Home Based Work Agreement;

vi) Travel and motor vehicle allowances shall not be paid for travel between the employee's home and the primary office.

b) Employees who work at home have the same responsibility as other employees to meet deadlines, work standards and maintain communication in the workplace. They need to be aware of their attendance requirements and get approval for any variation in attendance agreements.

c) Employees who are working from home should have the same opportunities as those employees in traditional arrangements, for example; opportunities to act in higher positions, and to participate in project teams and internal committees.

4. *Occupational Safety and Health*

a) Even though the employee is working at home, the home becomes the place of work for all safety and health considerations. "Home" includes not only any office but also the rest of the house and its environs, that is, any area within the boundaries of the property. It is therefore incumbent on the Office to ensure that the same safety and health precautions normally carried out in the workplace and applicable to the type of work being performed are also carried out in the employee's home. Specifically this entails—

- provision of ergonomically correct equipment for any work related tasks.
- assessment of any risk factors.
- assessment of the work environment in regard to lighting, air quality, safe access and egress.
- appropriate training
- ongoing monitoring

b) While it is the responsibility of the Office to provide any equipment necessary to do the job and ensure that this meets the Office's Occupational Safety and Health policies, it is the responsibility of the individual, as a result of an Occupational Safety and Health inspection, to make safe and keep safe their home. If the individual does not do this, it potentially opens the Office to prosecution, and therefore permission to work at home cannot be granted or continued.

c) The Office will regularly inspect the home based workplace to ensure that it meets Occupational Safety and Health regulations and a date and period of review is to be set on initial assessment. Details of who will conduct the inspection and when it will be conducted should be specified in the Home Based Work Agreement.

d) Should the home based workplace fail a safety inspection it is the responsibility of the employee to make it safe as soon as possible, otherwise continued permission to work at home will be revoked.

e) Determining when work related accidents occur is a difficult issue in regard to home based work. For this reason it is essential that diaries and timesheets are maintained and monitored on a regular basis.

f) The individual is covered for Workers' Compensation only when doing a task related to work, and within ordinary working hours as specified in the Home Based Work Agreement for that task.

5. *Access To The Employee's Place Of Work*

a) It is necessary for a variety of statutory reasons, and good management practices, to have reasonable access to the employee's place of work/home. Reasons include—

- contact by management or staff;
- union or employee representation;
- occupational safety and health assessment;
- maintenance of any equipment;
- disciplinary or grievance investigations;
- security reasons.

b) While it is recognised that the place of work is the employee's home, and therefore the employee has slightly different rights than if in an office environment, the fact that the employee has elected to work at home, means that access rights need to be negotiated before any approval to work at home is granted.

c) Any access negotiated does not remove any statutory right the Office may have for access to the person's "place of work", eg safety and health. For occupational safety and health inspections, security checks on confidential data and maintenance of equipment it would be considered courteous to give at least one working days notice.

d) When working at home it is reasonable to expect that access during normal working hours should be available to other Office employees with direct business with that employee. This does not however give open access to the employee's home and courtesy should prevail in organising any meetings or required access.

e) Outside ordinary working hours, Office employees have no more rights to access than if the employee were working in an office environment. Exceptions may be in extremely unusual cases, for example, where urgent access is required to information which is only stored at that individual's home.

6. *Cost Considerations*

a) Managers need to balance the cost of setting up home based sites with the potential productivity gains made and from staff retention and reduced absenteeism. Responsibility for expenses should be clearly articulated in the Home Based Work Agreement.

b) The section manager or supervisor and the individual employee need to negotiate the responsibility for the costs associated with one of their employees working from home. Mandatory costs for the Office will include the occupational safety and health assessment. Any cost to the Office must be found within the individual business unit's budget allocation.

c) The individual will be responsible for some costs in working from home. These would be non-work related running costs of the workplace, for example, electricity, wear and tear of non-work related equipment, fixtures etc; and any transport costs which would not normally be undertaken if the person was working at the primary office.

d) Other issues to be considered may be taxation issues regarding deductibility and FBT; and IT help for employees using their own equipment. It is the employee's responsibility to investigate and understand the personal taxation implications of entering into a Home Based Work Agreement.

7. *Reappraisal*

a) Should the individual change positions, act in a substantially different position, change homes, or have substantial alterations made to the home, consideration needs to be given to conducting a new appraisal.

b) For new positions, or acting positions, the authorisation of the employee's immediate section manager or supervisor is all that would be required. However, if the employee changes homes then the new "worksite" must be appraised for occupational safety and health implications and approved by the relevant Branch Manager as soon as possible.

8. *Equipment*

a) The Valuer General's Office may provide employees with any equipment necessary to do their work as efficiently and effectively as at the primary office. This does not necessarily mean that exactly the same equipment is required, as might be found at the primary office. Any equipment provided remains the property of the Valuer General's Office.

b) The section manager or supervisor and the employee may agree on alternative arrangements if appropriate.

c) Personal use of Office equipment made available for home based work is permitted as long as the personal use of the equipment contributes to the employee's proficiency with it, does not harm it, and does not conflict with other Office rules and regulations. Office equipment may not be used for unlawful purposes or for work for other employees, nor may other persons use it.

9. *Job Redesign*

In considering any application for working at home, all parties should consider the possibility of redesigning the job so that different tasks may be undertaken at the home site and the office site. For example, the home work site may be more suited to certain tasks than others, hence, those tasks suited to the home site could be completed at home and those more suited to the office site completed at the office.

10. *Assessing if a Position is Appropriate for Home Based Work*

a) Certain jobs are more suitable for home based work and include intellectual work, project work, research, report writing, policy analysis, case work, work which does not require input from other staff. However, jobs requiring a high degree of public contact, interaction, specialist equipment, training responsibilities or team based work are usually not suitable for home based work.

b) If a job has a significant component of one or small component of more than one of the following characteristics then it is unlikely to be considered as suitable for home based work—

- the position requires a high degree of supervision or close scrutiny;
- the position requires direct client face to face contact at the work site;
- the position does not lend itself to objective performance monitoring;
- the position deals with highly confidential or secure documents that cannot be taken out of a particular work environment.
- the position requires the occupant to be a member of a team and that regular face to face contact on a daily basis with other team members at the office based site is an integral part of the job's responsibilities.

11. *Competency and Training*

a) Any application for a home based work arrangement must have consideration to the competency of an individual in undertaking work from home. A competent home based worker may need skills and training to successfully carry out those activities additional to the normal work functions performed. That is, an employee performing the duties of a position at home may need greater skills and training than an employee performing the duties of a similar position at the primary office.

b) Skills may be required in regard to time management, organisational ability, communication, information management, human resource management, occupational health and safety, administration and the ability to work unsupervised.

c) Vocational training may be provided to assist in meeting these requirements.

12. *Security*

a) The Office deals with confidential information and in assessing any application for working at home it is the responsibility of the approving officer to ensure that any confidential information and documents have the same level of security at the employee's home, that would operate ordinarily at the primary office. It is still the responsibility of the individual, however, to maintain secure working practices wherever they work.

b) Security arrangements contained in the Home Based Work Agreement should give due consideration to—

- security clearance of the home based worker
- general physical security of the employee's home
- access by family and friends to work
- protection of home computers and their links
- appropriate use of other communication links
- disposal of classified waste
- the employees obligation to report security incidents

13. *Insurance, Zoning, Mortgages etc*

a) Individuals applying for permission to work at home, should investigate any changes in their insurance liability. It is the responsibility of the individual to meet the cost of any extra insurance charges associated with working from home.

b) It is also the responsibility of the individual to ensure that they are in compliance with any planning regulations regarding using their home as their place of work and that any application to work at home does not compromise any other agreement associated with their home, for example, a mortgage or lease agreement.

14. *Termination*

a) If any item in the home based work agreement changes, or any significant event occurs which would alter the intent of the agreement, then all parties agree to re-evaluate the agreement as soon as possible.

b) A home based working arrangement may be terminated at any time at the request of the Office or the individual. If possible, either party must give reasonable notice of termination (minimum 10 working days) so that alternative working arrangements can be made. Neither party can unreasonably withhold agreement.

15. *Working From Home Checklist*

- Is the employee aware of his/her responsibilities in relation to working from home?
- Does the employee have the necessary level of competency to perform the duties of the position from a home base? What training may be required?
- Is the type of work to be performed suitable for home based employment?
- Has a representative from the Office's Occupational Safety and Health Committee examined the house and reported on its suitability for home based employment? (The report will need to include a statement on the suitability of the lighting, equipment, and furniture to be used).
- Have arrangements been made for routine Occupational Safety and Health assessments?

- Has workers' compensation cover been arranged (the insurer will require a diagram showing the layout of the home, the rooms primarily to be used, as well as a copy of the Home Based Work Agreement).
- Has the effect on insurance cover for public liability and equipment insurance been investigated? (A clause in the contract should be included which releases the Office from liability).
- For home based work on the basis of disability, has a medical certificate been obtained which states that the employee is able to work safely from home?
- Does the written agreement specify the days and hours to be worked at home, the days and hours to be worked at the office and the duration of the agreement to work at home?
- Is the workload commensurate with the number of hours worked?
- Is the employee aware of the specific tasks, goals and other work requirements associated with a working from home arrangement?
- Are there any specific furniture requirements and how much do they cost? (The hiring of equipment may be an option).
- Are the workplace attendance times of employees working from home scheduled so that they may attend important regular events such as staff meetings?
- Are strategies in place to ensure that employees working from home are kept informed of organisational changes and developments, developmental opportunities, vacancies, higher duties opportunities, activities and social functions during the time they are not in the workplace.
- Are employees working from home managed in an appropriate way, including regular feedback and support, work allocation and opportunities to participate within the organisation?
- Where applicable, have suitable dependant care arrangements been made?
- Have arrangements been made for IT support at the home office?
- In the case of IT equipment supplied by the employee, does it meet the Office's specifications?
- Has the allocation of costs been fully discussed and agreed upon? For example, telephone line rental, phone calls to the Office, hiring of equipment, cost of putting in a second telephone line etc.
- Have the taxation implications been investigated and understood by the employee?

R. F. WILLIAMS,
VALUER GENERAL.

20 November 1997.

SCHEDULE C—EXTRATIME POLICY

This policy should be read in conjunction with *1.113 Extratime Guidelines* and *1.132 Annualising Hours* policies.

(1) For the purposes of this policy, the following terms shall have the following meanings—

(a) "Extratime" means all work performed only at the direction of the Valuer General or a duly authorised employee outside the prescribed hours of duty.

(b) "Emergency Duty" means duty by an employee required to return to duty, without prior notice, to meet an emergency at a time that the employee would not ordinarily have been on duty.

(c) "Prescribed hours of duty" means an employee's normal working hours as prescribed by the Valuer General in accordance with the Hours of Duty Clauses of the relevant Agreements. All time worked in excess of the prescribed hours of duty (over and above the maximum carry over in a settlement period under flexitime) may be considered as time in lieu of extratime, subject to the requirements of this policy.

(d) "Duly authorised employee" means an employee or employees appointed in writing by the Valuer General for the purpose of authorising extratime.

(e) "A day" shall mean from midnight to midnight.

(f) "Public Service Holiday" means the days prescribed as Public Holidays or Public Service Holidays in Clause 20—Public Holidays of the Public Service Award; and *21.119 Public Holidays* policy relevant to the Workplace Agreements, whichever is applicable.

(g) "Ordinary travelling time" means time that an employee would have ordinarily spent in travelling once daily from the employee's home to the employee's usual headquarters and home again, by either public transport, or where continuing approval has been given to use a vehicle for official business, by that vehicle.

(h) "Excess travelling time" means all time travelled on official business outside prescribed hours of duty and away from the employee's usual headquarters in accordance with subclause (7) of this policy.

(i) "Fortnightly salary" means an employee's substantive salary exclusive of any allowances such as the district allowance, personal allowance, qualifications allowance, efficiency allowance, service allowance, special allowance, or higher duties allowance unless otherwise approved by the Valuer General. Provided that a special allowance or higher duties allowance shall be included in "fortnightly salary" when extratime is worked on duties for which these allowances are specifically paid.

(j) "Out of hours contact" shall include the following—

STANDBY—shall mean a written instruction to an employee to remain at the employee's place of employment during any period outside the employee's normal hours of duty, and to perform certain designated tasks periodically or on an ad hoc basis.

Such employee shall be provided with appropriate facilities for sleeping if attendance is overnight, and other personal needs, where practicable.

Other than in extraordinary circumstances, employees shall not be required to perform more than two periods of standby in any rostered week. This provision shall not replace normal extratime requirements.

ON CALL—shall mean a written instruction to an employee rostered to remain at the employee's residence or to otherwise be immediately contactable by telephone or paging system outside the employee's normal hours of duty in case of a call out requiring an immediate return to duty.

AVAILABILITY—shall mean a written instruction to an employee to remain contactable, but not necessarily in immediate proximity to a telephone or paging system, outside the employee's normal hours of duty and be available and in a fit state at all such times for recall to duty.

"Availability" will not include situations in which employees carry paging devices or make their telephone numbers available only in the event that they may be needed for casual contact or recall to work.

Subject to subclause (3) of this policy recall to work under such circumstances would constitute emergency duty in accordance with subclause (6) of this policy.

(2) Extratime

(a) All work performed by direction of the Valuer General before or after the prescribed hours of duty on a weekday, on a Saturday, Sunday or Public Service holiday, subject to the relevant Agreement, shall be deemed as Extratime and, the employee shall, subject to paragraph (b), be compensated for by being given paid time off in lieu of such Extratime worked on an hour for hour basis in accordance with paragraph (c).

(b) An employee who works extratime for a greater period than 30 minutes, shall be entitled to time off in lieu in accordance with paragraph (c).

(c) Time off in lieu

(i) Time off in lieu for extratime worked may be taken in accordance with the time ratios in subparagraph (iv).

(ii) The employee shall be required to clear accumulated time off in lieu within three months of the extratime being performed, provided that by written agreement between the employee and the Valuer General, or duly authorised employee, time off in lieu for extratime may be accumulated beyond three months from the time the extratime is performed so as to be taken in conjunction with periods of approved leave.

(iii) If the Office is unable to release the employee to clear such leave within three months of the extratime being performed, and no further agreement prescribed in subparagraph (ii) of this paragraph is reached, then the employee shall be paid for the extratime worked at the ordinary hourly rate in accordance with subparagraph (iv).

(iv) Payment for extratime

Time off in lieu for extratime worked and payment for extratime, in accordance with subparagraph (iii), shall be calculated on an hourly basis in accordance with the following formula—

(aa) Weekdays

For hours worked outside the prescribed hours of duty on any one weekday, at the rate of normal time.

(bb) Saturdays

For hours worked on any Saturday, at the rate of normal time.

(cc) Sundays

For all hours on any Sunday, at the rate of normal time.

(dd) Public Service Holidays (if applicable)

For hours worked during prescribed hours of duty on any Public Holiday or Public Service Holiday at the normal rate of time.

(d) Annual Leave/Long Service Leave

An employee directed to return to duty during periods of annual or long service leave shall be deemed to be no longer on leave for the duration of that period of duty.

(i) If the employee is directed to return to duty during a period of leave during prescribed hours of duty, then that employee shall be recredited with that leave for the same number of hours of duty performed.

(ii) If the employee is directed to return to duty during a period of leave outside of prescribed hours of duty, then that employee shall be entitled to time off in lieu for extratime worked in accordance with subclause (2) of this policy.

(e) Time Worked Past Midnight

Where an employee is required to work a continuous period of extratime which extends past midnight into the succeeding day, the time worked after midnight shall be included with that worked before midnight for the purpose of calculation of time off in lieu for extratime worked provided for in this subclause.

(f) Minimum Periods for Return to Duty

(i) An employee, having received prior notice, who is required to return to duty—

(aa) on a Saturday, Sunday or Public Service Holiday (if applicable), otherwise than during prescribed hours of duty, shall be entitled to time off in lieu at the rate in accordance with paragraph (c) of this subclause for a minimum of three hours;

(bb) before or after the prescribed hours of duty on a weekday shall be entitled to time off in lieu at the rate in accordance with paragraph (c) of this subclause for a minimum period of one and one half hours;

(ii) For the purpose of this subclause, where an employee is required to return to duty more than once, each duty period shall stand alone in respect to the application of minimum period for time off in lieu except where the second or subsequent return to duty is within any such minimum period.

(iii) The provisions of this subparagraph shall not apply in cases where it is customary for an employee to return to the place of employment to perform a specific job outside the prescribed hours of duty, or where the extratime is continuous (subject to a meal break) with the completion or commencement of prescribed hours of duty.

(g) Extratime at a Place Other than Usual Headquarters

(i) When an employee is directed to work extratime at a place other than usual headquarters, and provided that the place where the extratime is to be worked is situated in the area within a radius of fifty (50) kilometers from usual headquarters, and the time spent in travelling to and from that place is in excess of the time which an employee would ordinarily spend in travelling to and from usual headquarters, and provided such travel is undertaken on the same day as the extratime is worked, then such excess time shall be deemed to form part of the extratime worked.

(ii) Except as provided in paragraph (e) of subclause (5) and paragraph (b) of subclause (6) of this clause, when an employee is directed to work extratime at a place other than usual headquarters, and provided that the place where the extratime is to be worked is situated outside the area within a radius of fifty(50) kilometers from usual headquarters and the time spent in travelling to and from that place is in excess of the time which the employee would ordinarily spend in travelling to and from usual headquarters, then the employee shall be granted time off in lieu of such excess time spent in actual travel in accordance with subclause (7) Excess Travelling Time of this clause.

(h) Ten Hour Break

(i) When extratime is worked, a break of not less than ten (10) hours shall be taken between the completion of work on one day and the commencement of work on the next, without loss of salary for ordinary working time occurring during such absence.

(ii) Provided that where an employee is directed to return to or continue work without the break provided in subparagraph (i) of this paragraph then the employee shall be granted time off in lieu at double the ordinary rate until released from duty, or until the employee has had ten consecutive hours off duty without loss of salary for ordinary working time occurring during such absence.

(iii) The provisions of subparagraphs (i) and (ii) of this paragraph, shall not apply to employees included in subclause (5) of this policy.

(3) Cases where extratime provisions do not apply

(a) Except as provided in paragraph (b) of this subclause, time off in lieu for extratime or travelling time, shall not be approved in the following cases—

(i) Employees whose maximum salary or maximum salary and allowance in the nature of salary exceeds that as determined for Level 5.

(ii) Employees whose work is not subject to close supervision.

(b) (i) Where it appears just and reasonable, the Valuer General may grant time off in lieu to any employee referred to in paragraph (a) of this subclause.

(aa) Employees at Level 6 and above can be credited extratime if directed in writing by the Valuer General to carry out specific additional duties.

(ii) When an employee who is not subject to close supervision is directed by the Valuer General to carry out specific duties involving the working of extratime, and provided such extratime can be reasonably determined by the employee's supervisor, then such employee shall be entitled to time off in lieu for extratime worked in accordance with paragraph (2)(c) of this policy.

(4) Meal Allowances

(a) A minimum break of 30 minutes shall be made for meals between 5.30am and 7.30am, between 12.00 noon and 2.00pm and between 4.30pm and 6.30pm when extratime duty is being performed.

(b) Except in the case of emergency, an employee shall not be compelled to work more than five hours extratime duty without a meal break. At the conclusion of a meal break, the calculation of the five hour limit recommences.

(c) An employee required to work extratime of not less than two hours, and who actually purchases a meal shall be reimbursed upon certification that each meal claimed was actually purchased. The amount reimbursed will be in accordance with the attached Schedule 1—Extratime Allowances, and is in addition to any time off in lieu for extratime to which that employee is entitled.

(d) An employee working a continuous period of extratime who has already purchased one meal during a meal break in accordance with subclause 4(c), shall not be entitled to reimbursement for the purchase of any subsequent meal in accordance with the attached Schedule—Extratime Allowances, until that employee has worked a further five hours extratime from the time of the last meal break.

(e) If an employee, having received prior notification of a requirement to work extratime, is no longer required to work extratime, then the employee shall be entitled, in addition to any other penalty, to reimbursement for a meal previously purchased in accordance with the attached Schedule—Extratime Allowances. The reimbursement is subject upon certification that each meal claimed was actually purchased.

(5) Out of Hours Contact

(a) Except as otherwise agreed, an employee who is required by the Valuer General or a duly authorised employee to be on "out of hours contact" during periods off duty shall be paid an allowance in accordance with the following formulae for each hour or part thereof the employee is on "out of hours contact".

Standby

$$\text{Level 2 (minimum) weekly rate} \times \frac{1}{38} \times \frac{38}{100}$$

On Call

$$\text{Level 2 (minimum) weekly rate} \times \frac{1}{38} \times \frac{19}{100}$$

Availability

$$\text{Level 2 (minimum) weekly rate} \times \frac{1}{38} \times \frac{19}{100} \times \frac{50}{100}$$

Such allowances are contained in the attached Schedule—Extratime Allowances.

Provided that payment in accordance with this paragraph shall not be made with respect to any period for which time off in lieu is granted in accordance with the provisions of subclause (2) of this policy when the employee is recalled to work.

A claim for payment must be accompanied by the Office's Return of On Call/Standby form. A copy is attached as Schedule 2.

(b) When an employee is required to be "on call" or "availability" and the means of contact is to be by telephone the Office shall either provide a mobile phone or pager; or:

(i) Where the telephone is not already installed, pay the cost of such installation.

(ii) Where an employee pays or contributes towards the payment of the rental of such telephone, pay the employee 1/52nd of the annual rental paid by the employee for each seven days or part thereof on which an employee is rostered to be "on call" or "availability".

(iii) Provided that where as a usual feature of the duties an employee is regularly rostered to be on "on call" or "availability", pay the full amount of the telephone rental.

(c) An employee shall be reimbursed the cost of all telephone calls made on behalf of the employer as a result of being on out of hours contact.

(d) Where an employee rostered for "on call" or "availability" is recalled to duty during the period for which the employee is on "out of hours contact" then the employee shall receive time off in lieu for hours worked in accordance with subclause (2) of this policy.

(e) Where an employee rostered for "on call" or "availability" is recalled to duty, the time spent travelling to and from the place at which duty is to be performed, shall be included with actual duty for the purposes of extratime.

(f) Minimum time off in lieu provisions do not apply to an employee rostered for "out of hours contact" duty.

(g) An employee in receipt of an "out of hours contact" allowance and who is recalled to duty shall not be regarded as having performed emergency duty in accordance with subclause (6) of this policy.

(h) Employees subject to this policy shall, where practicable, be periodically relieved from any requirement to hold themselves on "standby", "on call" or "availability".

(i) No employee shall be on out of hours contact after the last working day preceding a period of annual leave or long service leave.

(6) Emergency Duty

(a) Where an employee is required to return to duty to meet an emergency at a time when he or she would not ordinarily have been on duty, and no notice of such call was given prior to completion of usual duty on the last day of work prior to the day on which called on duty, then if called to duty—

(i) on a Saturday, Sunday or Public Service Holiday (if applicable), otherwise than during prescribed hours of duty he/she shall be entitled to time off in lieu at the rate in accordance with subclause (2) of this policy for a minimum period of three hours;

(ii) before or after the prescribed hours of duty on a weekday he/she shall be entitled to time off in lieu at the rate in accordance with subclause (2) of this policy for a minimum period of two and a half hours.

(b) Time spent in travelling to and from the place of duty where the employee is actually recalled to perform emergency duty shall be included with actual duty performed for the purpose of extratime.

(c) An employee recalled for emergency duty shall not be obliged to work for the minimum period if the work is completed in less time, provided that an

employee called out more than once within any such minimum period shall not be entitled to any further time off in lieu for the time worked within that minimum period.

(d) Where an employee is required to work beyond the minimum period on the first or subsequent recall for emergency duty, the additional time worked at the conclusion of that minimum period shall be deemed extratime in accordance with the appropriate rate in subclause (2) of this policy.

(e) Where an employee is recalled for a second or subsequent period of emergency duty outside of the initial minimum period, the employee shall be entitled to time off in lieu for a new minimum period, and the provisions of this subclause shall be re-applied.

(f) For the purpose of this subclause, no claim for time off in lieu shall be allowed in respect of any emergency duty, including travelling time, which amounts to less than 30 minutes.

(7) Excess Travelling Time

An employee eligible for time off in lieu for extratime, who is required to travel on official business outside normal working hours and away from usual headquarters shall be granted time off in lieu of such actual time spent in travelling at equivalent or ordinary rates, otherwise than during prescribed hours of duty, provided that—

(a) such travel is undertaken at the direction of the Valuer General;

(b) such travel shall not include—

(i) time spent in travelling by an employee on duty at a temporary headquarters to the employee's home for weekends for the employee's own convenience;

(ii) time spent in travelling by plane between the hours of 11.00 pm and 6.00 am;

(iii) time spent in travelling by train between the hours of 11.00 pm and 6.00 am;

(iv) time spent in travelling by ship when meals and accommodation are provided;

(v) time spent in travel resulting from the permanent transfer or promotion of an employee to a new location;

(vi) time of travelling in which an employee is required by the Office to drive, outside ordinary hours of duty, an Office vehicle or to drive the employee's own motor vehicle involving the payment of mileage allowance, but such time shall be deemed to be extratime in accordance with subclause (2) of this policy. Passengers, however, are entitled to the provisions of this subclause;

(vii) time spent in travelling to and from the place at which extratime or emergency duty is performed, when that travelling time is already included with actual duty time for the calculation of extratime worked.

(c) Time off in lieu will not be granted for periods of less than 30 minutes.

(d) Where such travel is undertaken on a normal working day, time off in lieu is granted only for such time spent in travelling before and/or after the usual hours of duty which is in excess of the employee's ordinary travelling time.

(e) Where the urgent need to travel compels an employee to travel during the employee's usual lunch interval such additional travelling time is not to be taken into account in computing the number of hours of travelling time due.

(f) In the case of an employee absent from usual headquarters, not involving an overnight stay, the time spent by the employee, outside the prescribed hours of duty, in waiting between the time of arrival at place of duty and the time of commencing duty, and between the time of ceasing duty and the time of departure by the first available transport shall be deemed to be excess travelling time.

(g) In the case of an employee absent from usual headquarters that does involve an overnight stay, the time spent by the employee, outside the prescribed hours of duty, in waiting between the time of ceasing duty on the last day and the time of departure by the first available transport shall be deemed to be excess travelling time.

(h) When an employee, having received prior notice, is required to return to duty to their usual place of work, the employee will receive an amount of half an hour of travelling time each way to be included as extratime. This half an hour of travelling time will not apply to an employee rostered for "out of hours" contact or on emergency duty.

(i) Subject to subclause (j), the time off in lieu for travelling time will be granted only if work was performed on the same day and is outside of the prescribed hours of duty.

(j) The time off in lieu for travelling time will not be granted as extratime if the extratime work performed is continuous (subject to meal breaks) with the completion or commencement of prescribed hours of duty and the work was performed at the usual place of work.

(8) Special Conditions

Any group of employees whose duties necessarily entail special conditions of employment shall not be subject to the prescribed hours of duty as defined in the Hours of Duty Clauses of the relevant Agreements, if the Valuer General so determines.

RF WILLIAMS
VALUER GENERAL
15 October 1999

SCHEDULE D—COMPASSIONATE LEAVE POLICY

POLICY

(1) Compassionate Leave on Bereavement

An employee is entitled to paid compassionate leave of up to 3 days on the death of—

(a) the spouse or de facto spouse of an employee (including a spouse from whom the employee is separated)

(b) the child or stepchild, or grandchild of an employee

(c) the father, mother (including a guardian of dependant children), stepfather, stepmother, father in law or mother in law of an employee; or

(d) brother, sister, grandfather or grandmother of an employee

(e) any other person who, immediately before that person's death, lived with the employee as a member of the employee's family.

provided that the funeral of such a relation is held on one of the days of leave granted.

(2) Compassionate Leave on Incapacitating Illness

(a) An employee is entitled to paid compassionate leave of up to three days in any one calendar year, in respect of the incapacitating illness of the spouse or dependant child of the employee.

(i) An employee employed on a fixed term contract of more than twelve months is eligible for leave in accordance with this paragraph.

(ii) Part-time employees are eligible for leave in accordance with this paragraph, on a pro rata basis calculated in accordance with the following formula—

$$\frac{\text{hours worked per fortnight}}{76} \times \frac{\text{22 hours 48 minutes}}{1}$$

(iii) An employee employed on a fixed term contract of less than 12 months is eligible for leave in accordance with this paragraph, on a pro rata basis calculated in accordance with the following formula—

$$\frac{\text{Period of Contract}}{12} \times \frac{\text{22 hours 48 minutes}}{1}$$

(b) Compassionate Leave on Incapacitating Illness will be granted provided that—

(i) the employee establishes to the satisfaction of the Valuer General or delegated officer that the spouse or child is in need of the assistance of the employee and that no other person is available for this purpose.

(ii) a Doctor's certificate in respect of the incapacitating illness is provided to the Valuer General or delegated officer where Compassionate Leave on Incapacitating Illness exceeds 2 consecutive working days.

(3) Proof in Support of Claim

The right to paid compassionate leave shall be dependant on compliance with the following conditions—

(a) the employee shall give the Valuer General or delegated officer notice of intention to take such leave as soon as reasonably practicable,

(b) the employee shall provide satisfactory evidence of such death or incapacitating illness, if so requested by the Valuer General

(c) the employee shall not be entitled to leave under this policy in respect of any period which coincides with any other period of leave entitlement under these Agreements or otherwise

(4) The provisions of this policy also apply to—

(a) part-time employees.

(b) an employee employed on a fixed term contract.

R F WILLIAMS
VALUER GENERAL
30 October 1998

SCHEDULE E—PARENTAL LEAVE POLICY

POLICY

(1) An employee is entitled to take up to 52 consecutive weeks of unpaid leave in respect of—

(a) the birth of a child to the employee or the employee's spouse; or

(b) the placement of a child with the employee with a view to the adoption of the child by the employee.

(2) An employee is not entitled to take parental leave unless he or she has—

(a) before the expected date of birth or placement, completed at least twelve months continuous service with the Public Sector; and

(b) given the employer at least 10 weeks written notice of intention to take the leave.

(3) Where both employees are employed by the Valuer General only one employee will be entitled to take parental leave at the same time but this paragraph does not apply to one week's parental leave—

(a) taken by the male parent after the birth of the child; or

(b) taken by the employee and the employee's spouse after a child has been placed with them with a view to their adoption of the child.

(4) An employee who has given notice of intention to take parental leave, or who is actually taking parental leave is to notify the Valuer General of any period of parental leave taken or to be taken by the employee's spouse in relation to the same child. The entitlement to parental leave is reduced by any period of parental leave taken by the employee's spouse in relation to the same child except for the period of one week's leave referred to in paragraph (3).

(5) An employee who has given notice to take parental leave must notify the Valuer General of the starting and finishing dates of the period of parental leave and will be subject to the Valuer General's approval.

(6) An employee who has given notice to take parental leave, other than for adoption, is to provide to the Valuer General a certificate from a medical practitioner confirming the pregnancy and the expected date of birth.

(7) The female employee who has given notice of her intention to take parental leave, other than for adoption, is to start the leave six (6) weeks before the expected date, however an employee may apply to the Valuer General to vary this period provided her application is supported by a certificate from a registered medical practitioner indicating that the employee is fit to continue duty within this minimum period.

(8) An employee proceeding on parental leave may elect to take a shorter period of parental leave in accordance with paragraph (7) of this policy, and may at any time during that period of leave elect to extend or reduce the period of the original application within the limitations of the provisions of paragraph (1) and (4) of this policy.

(9) Where an employee who is expecting a child has not applied for leave in accordance with the provisions of this policy, and does not have express approval of the Valuer General for continued employment, the Valuer General may direct the employee to take parental leave, and may determine the date on which such leave shall commence. Should the employee not comply with the direction, disciplinary action may be taken against her.

(10) An employee proceeding on parental leave may elect to utilise—

(a) accrued annual leave

(b) accrued long service leave

for the whole or part of the period referred to in paragraph (1) of this clause. The periods of leave referred to in paragraphs (a) and (b) of this paragraph which are utilised, shall be paid leave.

(11) On finishing parental leave and subject to the VGO's requirements, an employee is entitled to the position the employee held immediately before starting parental leave.

(12) Absence on parental leave does not break the continuity of service of an employee, however, parental leave should be treated like leave without pay and is not to be taken into account when calculating the period of service for a purpose of salary increments, sick leave credits, long service leave and annual leave.

(13) Absence of an employee which has been permitted in accordance with the provisions of this policy shall not be deemed absent on sick leave.

(14) A part-time employee shall have the same entitlement to parental leave as full time employees.

(15)An employee employed on 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.

R F WILLIAMS
VALUER GENERAL
23 October 1998

AWARDS/AGREEMENTS— Variation of—

BUILDING TRADES (GOVERNMENT) AWARD 1968. No. 31 A of 1966.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers

and

Contract and Management Services & Others.

No. 820 of 1999.

Building Trades (Government) Award 1968.

No. 31 A of 1966.

COMMISSIONER S J KENNER.

2 December 1999.

Order.

Having heard Mr P Joyce on behalf of the applicant and Ms N Embleton as agent 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 Building Trades (Government) Award 1968 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 2 December 1999.

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

———

Schedule.

1. Clause 9—Wages: Delete subclauses (3), (4) and (7) of this clause and insert the following in lieu thereof—

(3) Allowance for Lost Time: Thirteen days' sick leave and follow the job (per week)—

An employee whose employment is terminated through no fault of his/her own and who has not completed nine months' continuous service with his/her employer shall, for each week of continuous employment with that employer, immediately prior to his/her termination of employment be paid the lost time allowance prescribed hereunder less any payments made to him/her in respect of sick leave during that employment—

	$
(a) Bricklayers, stoneworkers, carpenters, joiners, painters, glaziers, signwriters, plasterers, plumbers and stonemasons	40.85
(b) Special Class Tradesperson (as defined)	42.90
(c) Registered Plumbers	42.44
(d) Builders Labourers	
(i) Classifications (i) to (iii) inclusive	40.05
(ii) Classifications (iv) to (ix)	37.66
(iii) Classification (x)	36.41
(iv) Classification (xi)	33.91

NOTE: In the event of any increase or decrease in the wages and other allowances prescribed in this clause, except the tool allowances, the amounts prescribed in this subclause shall be increased or decreased by an amount equal to 9.7% of that increase or decrease.

(4) Disabilities Allowance (Per Week): $17.85

(a) Subject to the provisions of paragraph (b), of this subclause an allowance of $17.85 shall be paid to all employees excepting employees who are employed for the major portion of any week in or about a permanent maintenance depot or who are usually employed in or about the employer's business when an employee coming within the exception is engaged on the erection or demolition of a building exceeding 250 square feet in floor area.

(b) Employees who are directed to work temporarily in or about a permanent maintenance depot and who immediately prior to being so directed were in receipt of the allowance for a period of not less than three months shall be paid two-thirds of the allowance prescribed herein.

(7) Plumbing Trade Allowance

Plumbers shall be paid an allowance at the rate of $13.78 per week to compensate for the following classes of work and in lieu of the relevant amounts in Clause 13.—Special Rates and Provisions of this award whether or not such work is performed in any one week. When working outside the categories listed hereunder, a plumber shall receive the appropriate rates provided for in the said Clause 13.—Special Rates and Provisions.

(a) General Plumber—

(i) clearing stoppages in soil or waste pipes, or sewer drain pipes, also repairing and putting same in proper order;

(ii) work in wet places;

(iii) work requiring a swing scaffold, swing seat or rope;

(iv) dirty or offensive work;

(v) work in any confined space;

(vi) work on a ladder exceeding eight metres in height;

(vii) work in and around abattoirs.

(b) Mechanical Services Plumber—

(i) handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, or other recognised insulation material of a like nature or working in the immediate vicinity so as to be affected by the use thereof;

(ii) work in a place where the temperature has been raised by artificial means to between 46° and 54° Celsius or exceeding 54° Celsius;

(iii) work in a place where fumes of sulphur or other acid or other offensive fumes are present;

(iv) dirty or offensive work;

(v) work in any confined space;

(vi) work on a ladder exceeding eight metres in height;

(vii) work in and around abattoirs.

(c) Roof Plumber—

(i) work in the fixing of aluminium foil insulation on roofs or walls prior to the sheeting thereof;

(ii) use of explosive powered tools;

(iii) work requiring use of materials containing asbestos or to work in close proximity to employees using such materials shall be provided with, and shall use, all necessary safeguards as required by the appropriate occupational health authority including the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus);

(iv) dirty or offensive work;
(v) work requiring a swing scaffold, swing seat or rope;
(vi) work on a ladder exceeding eight metres in height;
(vii) work in and around abattoirs.

2. Clause 11—Leading Hands: Delete subclause (1) of this clause and insert the following in lieu thereof—

(1) Any employee referred to in Clause 9.—Wages of this award or a leading hand defined in paragraph (h) of subclause (3) of Clause 6.—Definitions of this award, who is placed in charge for not less than one day of—
(a) not less than three and not more than ten other employees referred to in Clause 9.—Wages shall be paid at the rate of $29.01 per week extra;
(b) more than ten and not more than twenty other employees referred to in Clause 9.—Wages shall be paid at the rate of $38.81 per week extra;
(c) more than twenty other employees referred to in Clause 9.—Wages shall be paid at the rate of $48.59 per week extra.

3. Clause 13—Special Rates and Provisions: Delete clause and insert the following in lieu thereof—

13.—SPECIAL RATES AND PROVISIONS

(1) Conditions respecting Special Rates—
(a) The special rates prescribed in this award shall be paid irrespective of the times at which work is performed and shall not be subject to any premium or penalty conditions.
(b) Where more than one of the above rates provides payments for disabilities of substantially the same nature then only the highest of such rates shall be payable.

(2) Swing Scaffold—
(a) An employee employed—
(i) on any type of swing scaffold or any scaffold suspended by rope or cable or bosun's chair or cantilever scaffold, or
(ii) on a suspended scaffold requiring the use of steel or iron hooks or angle irons at a height 6.1 metres or more above the nearest horizontal plane,
shall be paid $2.83 for the first four hours or part thereof: and 57 cents for each hour thereafter on any day in addition to the rates otherwise prescribed.
(b) A solid plasterer when working on a swing scaffold shall be paid an additional 13 cents per hour.
(c) No apprentice with less than two years' experience shall use a swing scaffold or bosun's chair.
(d) Provided that no allowance shall be payable for working on such scaffolds when used under bridges or jetties unless the height of the scaffold above the water exceeds 0.9 metres.

(3) Insulation—
An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool or other recognised insulation material of a like nature or working in the immediate vicinity so as to be affected by the use thereof: shall be paid 47 cents per hour part thereof: in addition to the rates otherwise prescribed.

(4) Work in Dust Laden Atmosphere
Working in a dust laden atmosphere in a joiner's shop where dust extractors are not provided in or such atmosphere caused by the use of materials for insulating, deafening or plugging work (as, for instance, pumice, charcoal, silicate of cotton, or any other substitute) or from earthworks, 47 cents per hour extra.

(5) Confined Space—
An employee required to work in a confined space, being a place the dimension or nature of which necessitates working in a cramped position or without sufficient ventilation, shall be paid 47 cents per hour or part thereof: in addition to the rate otherwise prescribed.

(6) Sewer Work—
An employee engaged in repairs to sewers shall be paid 37 cents per hour or part thereof: in addition to the rates otherwise prescribed.

(7) Sanitary Plumbing Work—
A plumber doing sanitary plumbing work on repairs to sewer drainage or waste pipe services in any of the following places—
(a) Infectious and contagious disease hospitals or any block or portion of a hospital used for the care or treatment of patients suffering from any infectious or contagious disease.
(b) Morgues—
shall be paid 40 cents per hour or part thereof: in addition to the rates otherwise prescribed.

(8) Ship Plumbing—
A plumber doing work on a ship of any class—
(a) Whilst under way; or
(b) In a wet place being one in which the clothing of an employee necessarily becomes wet to an uncomfortable degree or one in which water accumulates underfoot; or
(c) In a confined space; or
(d) In a ship which has done one trip or more in a fume or dust laden atmosphere, in bilges, or when cleaning blockages in soil pipe or waste pipes or repairing brine pipes, shall be paid 56 cents per hour or part thereof: in addition to the rate otherwise prescribed.
(e) A plumber carrying out pipe work in a ship of any class under the plates in the engine and boiler rooms and oil fuel tanks shall be paid $1.15 per hour or part thereof: in addition to the rates otherwise prescribed.

(9) Well Work—
A plumber or labourer required to enter a well nine metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith, shall be paid $2.02 for such examination and 70 cents per hour extra thereafter for fixing, renewing or repairing such work.

(10) Permit Work—
Any licensed plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $12.14 for that week in addition to the rates otherwise prescribed.

(11) Plumbers on Sewerage Work—
Plumbers or apprentices in their third, fourth or fifth year, on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose, or work involving the cleaning out of septic tanks or dry wells, shall be paid a minimum of $2.01 per day or part thereof: in addition to the prescribed rate.

(12) Height Money—
An employee required to work on a chimney stack, spire, tower, air shaft, cooling tower, water tower exceeding fifteen metres in height shall be paid for all work above fifteen metres, 40 cents per hour thereof: with an additional 40 cents per hour or part thereof: for work above each further fifteen metres in addition to the rates otherwise prescribed.

(13) Barge Work
A Main Roads Employee required to work on scaffolding which is mounted on a barge is to be paid an

allowance of $3.61 per day, or majority thereof, or $1.80 per half day, or part thereof, for such work.

(14) Furnace Work—

An employee engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work or on underpinning shall be paid $1.03 per hour or part thereof: in addition to the rates otherwise prescribed.

(15) Hot Work—

(a) An employee required to work in a place where the temperature has been raised by artificial means to between 46° Celsius and 54° Celsius shall be paid 40 cents per hour or part thereof: in addition to the rates otherwise prescribed, or in excess of 54° Celsius shall be paid 47 cents per hour or part thereof: in addition to the said rates.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of twenty minutes after every two hours' work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(16) Cold Work—

(a) An employee required to work in a place where the temperature is lowered by artificial means to less than 0° Celsius shall be paid 40 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of twenty minutes after every two hours' work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(17) Swanbourne and Graylands: Employees required to work at the Swanbourne and Graylands Hospitals controlled by the Mental Health Service shall be paid at the rate of 40 cents per hour in addition to the prescribed rate.

(18) Flintcote: Plasterers using flintcote shall be paid 40 cents per hour or part thereof: except when flintcote is applied by hawk and trowel to walls and ceilings when the rate shall be 68 cents per hour extra in addition to the prescribed rate.

(19) Dirty Work—

(a) An employee employed on excessively dirty work which is more likely to render the employee or his/her clothes dirtier than the normal run of work, shall be paid 40 cents per hour extra in addition to the prescribed rate (with a minimum payment of four hours when employed on such work).

(b) This shall not apply to an employee in receipt of the allowance prescribed in subclause (4) of Clause 9.—Wages of this award nor to a worker in receipt of the allowance prescribed in subclause (27) hereof.

(20) Stonemason on Wall—

A stonemason working on the wall (cottage work and foundation work in coastal stone excepted) shall be paid 40 cents per hour thereof: in addition to the rates otherwise prescribed.

(21) Setter Out—

A setter out (other than a leading hand) in a joiner's shop shall be paid $3.78 per day in addition to the rates otherwise prescribed.

(22) Detail Employee—

A detail employee (other than a leading hand) shall be paid $3.78 in addition to the rates otherwise prescribed.

(23) Spray Painting—Painter—

(a) Lead paint shall not be applied by a spray to the interior of any building.

(b) All employees (including apprentices) applying paint by spraying, shall be provided with full overalls and head covering and respirators by the employer.

(c) Where from the nature of the paint or substance used in spraying, a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substance used by an employee in spray painting, the employee shall be paid a special allowance of $1.03 per day.

(24) Lead Paint Surfaces—

(a) No surface painted with lead paint shall be rubbed down or scraped by a dry process.

(b) Width of Brushes: All brushes shall not exceed 127 millimetres in width and no kalsomine brush shall be more than 177.8 millimetres in width.

(c) Meals not to be taken in paint shop. No employee shall be permitted to have a meal in any paint shop or place where paint is stored or used.

(25) Spray Application—Painters—

A painter engaged on all applications carried out in other than a properly constructed booth approved by the Department of Labour and Industry shall be paid 40 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(26) An employee who is a qualified first aid person and is appointed by his/her employer to carry out first aid duties in addition to his/her usual duties shall be paid an additional rate of $1.33 per day.

(27) Toxic Substances—

(a) An employee required to use toxic substances or materials of a like nature shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(b) An employee using such materials will be provided with and shall use all safeguards as are required by the appropriate Government Authority in the absence of such requirement such safeguards as are determined by a competent authority or person chosen by the union and the employer.

(c) An employee using toxic substances or materials of a like nature shall be paid 47 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 37 cents per hour extra.

(d) For the purposes of this subclause all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(28) Abattoirs—

An employee, other than a plumber in receipt of the plumbing trade allowance, employed in an abattoir shall be paid such rate as is agreed upon between the parties, or, in default of agreement, the rate determined by the Board of Reference.

(29) Fumes—

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer.

(30) Asbestos—

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (ie. combination overalls and breathing equipment or similar apparatus) such employees shall be paid 47 cents per hour whilst so engaged.

(31) Explosive Powered Tools—

An operator of explosive powered tools, being an employee qualified in accord with the laws and regulations of the State of Western Australia to operate explosive powered tools, who is required to use an explosive powered tool shall be paid 91 cents for each day on which he/she used a tool in addition to the rates otherwise prescribed.

(32) Wet Work—

An employee required to work in a place where water is continually dripping on him/her so that his/her clothing and boots become wet or where there is water underfoot shall be paid 40 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(33) Cleaning Down Brickwork—

An employee required to clean down bricks using acids or other corrosive substances shall be supplied with gloves and be paid 37 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(34) Bagging—

An employee engaged upon bagging brick or concrete structures shall be paid 37 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(35) Bitumen Work—

An employee handling hot bitumen or asphalt or dripping materials in creosote shall be paid 47 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(36) Scaffolding Certificate Allowance—

A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Labour and Industry and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid 40 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award but this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(37) Dry Polishing or Cutting of Tiles—

An employee required to dry polish tiles with a machine or to cut tiles with an electric saw shall be paid 47 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(38) Secondhand Timber—

Where, whilst working with second-hand timber, an employees tools are damaged by nails, dumps or other foreign matter on the timber, he/she shall be entitled to an allowance of $1.33 per day on each day upon which his/her tools are so damaged, provided that no allowance shall be payable under this clause unless it is reported immediately to the employer's representative on the job in order that the claim may be proved.

(39) Roof Repairs—

An employee engaged on repairs to roofs shall be paid 43 cents per hour or part thereof: in addition to the rates otherwise provided in this award.

(40) Computing Quantities—

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of the work performed by others shall be paid $2.84 per day or part thereof: in addition to the rates otherwise prescribed in this award.

(41) Loads—

Where bricks are being used the employee shall not be required to carry—

(a) More than 40 bricks each load in a wheelbarrow (or a scaffold) to a height of 4.6 metres from the ground.

(b) More than 36 bricks each load in a wheelbarrow over a height of 4.6 metres on a scaffold.

The type of wheelbarrow shall be agreed upon with the union.

(42) Grinding Facilities—

The employer shall provide adequate facilities for the employees to grind tools either at the job or at the employer's premises and the employees shall be allowed time to use the same whenever reasonably necessary.

(43) First Aid Outfit—

On each job the employer shall provide sufficient supply of bandages and antiseptic dressings for use in case of accidents.

(44) Water and Soap—

Water and soap shall be provided in each shop or on each job by the employer.

(45) (a) The employer shall supply a safety helmet for each of his/her employees requesting one on any job where, pursuant to the regulations made under the Construction Safety Act, 1972, an employee is required to wear such helmet.

(b) Any helmet so supplied shall remain the property of the employer and during that time it is on issue the employee shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(46) Provision of Boiling Water—

The employer shall, where practicable provide boiling water for the use of his/her employees on each job at lunch time.

(47) Sanitary Arrangements—

The employer shall comply with the provisions of section 102 of the Health Act, 1911.

(48) Attendants on Ladders—

No employees shall work on a ladder at a height of over 6.1 metres from the ground when such ladder is standing in any street, way or lane where traffic is passing to and fro, without an assistant on the ground.

(49) Electrical Sanding Machines—

The use of electrical sanding machines for sanding down paint work shall be governed by the following provisions—

(a) The weight of each such machine shall not exceed 5.9 kilograms.

(b) Every employer operating any such machine shall endeavour to ensure that each such machine, together with all electrical leads and associated equipment, is kept in a safe condition and shall if requested so to do by any employee but not more often than once in any four weeks cause the same to be inspected under the provisions of the Electricity Act and the regulations made thereunder.

(c) Employers shall provide and supply respirators of a suitable type, to each employee and shall maintain same in an effective and clean state at all times.

Where respirators are used by more than one employee, each such respirator shall be sterilised or a new pad inserted after use by each such employee.

(d) Employers shall also provide and supply goggles of suitable type provided that the goggles with celluloid lenses shall not be regarded as suitable.

(e) All employees shall use the protective equipment supplied when using electrical sanding machines of any type.

(50) Dam Walls—

Adequate precautions shall be taken by all employers for the safety of workers employed on the retaining walls of dams. Any dispute as to the adequacy of precautions taken shall be referred to the Board of Reference.

(51) The Secretary or any authorised officer of the union shall have the right to visit any job for the purpose of ascertaining whether work is being performed in accordance with the provisions of the Construction Safety Act, 1972, and any regulations made thereunder. Should he/she be of the opinion that the work being carried out is not in accordance with those provisions the Secretary or any authorised officer of the union shall inform the employer and the employees concerned accordingly and may report any alleged breach of Act or the regulations to the Chief Inspector of Construction Safety.

(52) Where the employer provides transport to and from the job the conveyance used for such transport shall be provided with suitable seating and weatherproof covering.

(53) An employee engaged on work at Fremantle Prison shall be paid 40 cents per hour extra.

(54) Any dispute which may arise between the parties in relation to the application of any of the foregoing special rates and provisions may be determined by the Board of Reference.

(55) Building tradespersons engaged solely on outside work at Homeswest shall be given one winter jacket per year to be replaced on a fair wear and tear basis.

4. Schedule C—Hospital Environment Allowance: Delete subclauses (1), (2) and (3) of this Schedule and insert the following in lieu thereof—

1. (a) For work performed in a hospital environment—$10.48 per week.

   (b) For disabilities associated with work performed in—

   Difficult access areas;
   Tunnel complexes;
   Areas with great temperature variation:—
   $3.65 per week.

   Princess Margaret Hospital
   King Edward Memorial Hospital
   Sir Charles Gairdner Hospital
   Royal Perth Hospital
   Fremantle Hospital

2. For work performed in a hospital environment—$7.05 per week.

   Kalgoorlie Hospital
   Osborne Park Hospital
   Albany Hospital
   Bunbury Hospital
   Geraldton Hospital
   Mt Henry Hospital
   Northam Hospital
   Swan Districts Hospital
   Perth Dental Hospital

3. For work performed in a hospital environment—$5.00 per week.

   Bentley Hospital
   Derby Hospital
   Narrogin Hospital
   Port Hedland Hospital
   Rockingham Hospital
   Sunset Hospital
   Armadale Hospital
   Broome Hospital
   Busselton Hospital
   Carnarvon Hospital
   Collie Hospital
   Esperance Hospital
   Katanning Hospital
   Merredin Hospital
   Murray Hospital
   Warren Hospital
   Wyndham Hospital

5. Appendix D—Award Restructuring: Delete clause (8) of this Appendix and insert the following in lieu thereof—

(8) Rates of Pay

Employees shall be paid the following rates of pay in accordance with the level to which they are classified.

(a) Wage Rates

Level	Percentage Relativity to Level 4	Rates $	Safety Net Adjustment $	Total Weekly Rate $
New Entrant	78	335.10	60.00	395.10
1	82	352.30	60.00	412.30
2	87	375.50	60.00	435.50
3	92	397.00	60.00	457.00
4	100	429.60	60.00	489.60
5	105	451.10	60.00	511.10
6	110	472.60	58.00	530.60
7	115	494.00	58.00	552.00
8	120	515.50	58.00	573.50
9	125	537.00	58.00	593.00

(b) (i) In addition to the rates contained in paragraph (a) of this subclause, employees designated in classification levels to 7 inclusive shall receive an all purpose industry allowance of $11.11.

(ii) This allowance shall be paid in two instalments as follows—

(aa) $5.61 of the allowance shall be paid after the first twelve months of government service; and

(bb) the remaining $5.50 shall be paid on 24 months of government service.

(c) The rates of pay in this appendix include three arbitrated safety net adjustments totalling $24.00 per week available under the Arbitrated Safety Net Adjustment Principle pursuant to either the December 1993 State Wage Decision, the December 1994 State Wage Decision and the March 1996 State Wage Decision. This first, second and third $8.00 per week arbitrated safety net adjustments may be offset to the extent of any wage increase payable since 1 November, 1991 pursuant to enterprise agreements or consent awards or award variations to give effect to enterprise agreements insofar as that wage increase or part of it 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.

Furthermore the rates of pay in this award include the $10.00 per week arbitrated safety net adjustment payable from the beginning of the first pay period on or after 14th day of November 1997

This arbitrated safety net adjustment 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 November 1997, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $10.00 per week.

Further the rates of pay in this award include the $12 per week or $10 per week arbitrated safety net adjustments payable from the beginning of the first pay period on or after 1st August, 1999.

This arbitrated safety net adjustment 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 July 1999, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $12 per week or $10 per week.

BUILDING TRADES (GOVERNMENT) AWARD 1968.

31 A of 1966.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers

and

Contract and Management Services & Others.

No. 1446 of 1999.

Building Trades (Government) Award 1968.

31 A of 1966.

COMMISSIONER S J KENNER.

2 December 1999.

Order.

HAVING heard Mr P Joyce on behalf of the applicant and Ms N Embleton as agent 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 Building Trades (Government) Award 1968 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 2 December 1999.

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

Schedule.

1. Clause 9—Wages: Delete subclause (2) of this clause and insert the following in lieu thereof—

(2) Tool Allowance		(Per Week) $
(a)	Bricklayers and Stoneworkers	13.60
(b)	Plasterers	15.70
(c)	Carpenters and Joiners	19.10
(d)	Plumbers	19.10
(e)	Painters and Sign-writers	4.70
(f)	Glaziers	4.70

(g) Stonemasons: The employer shall supply all necessary tools for the use of stonemasons, except when engaged on building construction, when the worker, if required to supply his/her own tools, shall receive a tool allowance at the rate of $1.50 per week.

NOTE 1: The tool allowance prescribed in paragraphs (a), (b), (c) and (d) of this subclause each include an amount of six cents for the purpose of enabling the employees to insure their tools against loss or damage by theft or fire.

NOTE 2: The abovenamed allowances shall not be paid where the employer supplies an employee with all necessary tools.

2. Clause 19—Overtime: Delete subclause (6) of this clause and insert the following in lieu thereof—

(6) Any employee who is required to continue working for more than two hours after his usual knock-off time on any day shall be supplied by the employer with a reasonable meal, or in lieu of such meal, shall be paid an allowance of $8.00 for a meal.

Provided that this subclause shall not apply to a worker who has been notified on the previous day that he would be required to work such overtime.

BUILDING TRADES (GOVERNMENT) AWARD 1968.

No. 1686 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Metropolitan Health Service Board (MHSB)

and

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

No. 1686 of 1999.

Building Trades (Government) Award 1968.

2 December 1999.

Order.

HAVING heard Ms S A Seenikatty on behalf of The Metropolitan Health Service Board, and Mr J Murie on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electrical Division, WA Branch and The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch, and Ms J L Harrison on behalf of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch and The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers, Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, being satisfied that its terms are not contrary to any General Order or any principle formulated as a result of General Order proceedings under section 51 of the Industrial Relations Act, 1979, and by consent, hereby orders—

THAT the Building Trades (Government) Award 1968 be amended in accordance with the following Schedule, with effect on and from the commencement of the first pay period on or after the 12th day of October 1999.

(Sgd.) G. L. FIELDING,
[L.S.] Senior Commissioner.

Schedule.

Schedule A—List of Respondents: Delete the following parties from this Schedule—

Royal Perth Hospital
Princess Margaret Hospital
Queen Elizabeth II Medical Centre
Fremantle Hospital
King Edward Memorial Hospital

ENGINE DRIVERS' (GOVERNMENT) AWARD 1983.

No. A 5 of 1983.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Construction, Mining, Energy Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch

and

Board of Management, Fremantle Hospital & Others.

No. 1450 of 1999.

Engine Drivers' (Government) Award 1983.

No. A 5 of 1983.

COMMISSIONER S J KENNER.

2 December 1999.

Order.

HAVING heard Mr P Joyce on behalf of the applicant and Ms N Embleton as agent 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 Engine Drivers' (Government) Award 1983 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 2 December 1999.

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

Schedule.

1. Clause 10—Overtime: Delete subparagraph (i) of paragraph (b) of subclause (3) of this clause and insert the following in lieu thereof—

(i) Where an employee without being notified on the previous day or earlier, has to continue working after his usual knockoff time for more than two hours, he shall be provided with a meal or shall be paid $6.40 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required he shall be supplied with each such meal by the employer or be paid $4.50 for each meal so required. Provided that this paragraph shall not apply to an employee residing in the same locality as his place of employment who can reasonably return home for a meal.

Provided further that an employee who commences to work overtime before the usual starting time shall, if the overtime exceeds two hours and is continuous with his day's work, be supplied with a meal by his employer or be paid $6.40 for a meal.

2. Clause 10—Overtime: Delete subparagraph (ii) of paragraph (b) of subclause (3) of this clause and insert the following in lieu thereof—

(ii) An employee required to work continuous from 12 midnight to 6.30 a.m. and ordered back to work at 8.00 a.m. the same day, shall be paid $3.20 for breakfast.

ENGINE DRIVERS (GOVERNMENT) AWARD 1983.

No. A 5 of 1983.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Construction, Mining, Energy Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch

and

Fremantle Hospital, Board of Management & Others.

No. 825 of 1999.

Engine Drivers (Government) Award 1983.

No. A 5 of 1983.

COMMISSIONER S J KENNER.

2 December 1999.

Order.

Having heard Mr Paul Joyce on behalf of the applicant and Ms N Embleton as agent 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 Engine Drivers (Government) Award 1983 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 2 December 1999.

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

Schedule.

1. Clause 24—Wages: Delete subclause (2) and (3) of this clause and insert the following in lieu thereof—

(2) Hospital Plant Operator

(a) The weekly rates of wages payable to employees defined as such shall be—

	Base Rate $	ASNA $	Total Rate $	%
Hospital Plant Operator—Level 1 (C12a)	380.80	60.00	440.80	91.55
Hospital Plant Operator—Level 2 (C11a)	399.20	60.00	459.20	95.77
Hospital Plant Operator—Level 3 (C10)	417.20	60.00	477.20	100.00
Hospital Plant Operator—Level 4 (C9a)	449.40	60.00	509.40	107.33

(b) Employees employed on boiler cleaning inside the boiler or flues or combustion chamber shall be paid 89 cents per hour while so engaged. Provided that this allowance shall not be payable to employees who are in receipt of the industry allowance or construction work allowance prescribed in subclause (1) of Clause 19.—Special Provisions of this Award.

(3) Additions to Wage Rates — Per Week $

(a) A classified employee engaged as hereinafter specified shall have his/her wage rate increased as follows—

(i) Attending to refrigerator and/or air compressor or compressors — 19.77

(ii) Attending to an electric generator or dynamo exceeding 10 watt capacity — 19.77

(iii) Attending to a switchboard where the generating capacity is 350kw or more — 6.33

(iv) In charge of plant as defined — 19.77

(v) Leading Fireperson, where two or more Firepersons are employed on one shift (per shift) — 0.43

(b) Employees employed on boiler cleaning inside the boiler or flues or combustion chambers shall be paid 96 cents per hour while so engaged. Provided that this allowance shall not be payable to employees who are in receipt of the industry allowance or construction allowance prescribed in subclause (1) of Clause 19.—Special Provisions of this Award.

ENGINE DRIVERS (GOVERNMENT) AWARD 1983.
No. A5 of 1983.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Metropolitan Health Service Board (MHSB)

and

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

No. 1687 of 1999.

Engine Drivers (Government) Award 1983.

2 December 1999.

Order.

HAVING heard Ms S A Seenikatty on behalf of The Metropolitan Health Service Board, and Mr J Murie on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electrical Division, WA Branch and The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch, and Ms J L Harrison on behalf of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch and The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers, Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, and by consent, hereby orders—

THAT the application be and is hereby withdrawn by leave.

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissioner.

ENGINEERING TRADES (GOVERNMENT) AWARD, 1967.
No. 1685 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Metropolitan Health Service Board (MHSB)

and

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

No. 1685 of 1999.

Engineering Trades (Government) Award, 1967.

2 December 1999.

Order.

HAVING heard Ms S A Seenikatty on behalf of The Metropolitan Health Service Board, and Mr J Murie on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electrical Division, WA Branch and The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch, and Ms J L Harrison on behalf of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch and The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers, Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, being satisfied that its terms are not contrary to any General Order or any principle formulated as a result of General Order proceedings under section 51 of the Industrial Relations Act, 1979, and by consent, hereby orders—

THAT the Engineering Trades (Government) Award, 1967 as amended be further varied in accordance with the following Schedule, with effect on and from the commencement of the first pay period on or after the 12th day of October 1999 (i.e. 12th October 1999).

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissioner.

Schedule.

Clause 3.—Area and Scope: Immediately following subclause (2) of this clause, insert a new subclause as follows—

(3) This award shall not apply to employees of the Metropolitan Health Service Board who are covered by the Metropolitan Health Service Engineering and Building Services Enterprise Award 1999 (No. A 1 of 1999).

FOREMEN (BUILDING TRADES) AWARD 1991.
No. A 5 of 1987.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers & Other

and

Master Builders' Association of Western Australia (Union of Employers) & Others.

No. 371 of 1999.

Foremen (Building Trades) Award 1991.

No. A 5 of 1987.

COMMISSIONER S J KENNER.

15 November 1999.

Order.

HAVING heard Mr G Giffard on behalf of the applicants and Mr K Richardson as agent 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 Foremen (Building Trades) Award 1991 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 15 November 1999.

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

Schedule.

1. Clause 6—Minimum Rates: Insert the following new point (viii) as follows—

(viii) The rates of pay in this award include the minimum weekly wage for adult employees payable under the

July 1999 State Wage 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 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.

2. Clause 7 – Wages: Delete clause 2 and insert the following in lieu thereof—

(2) (a) Subject to the provisions of subclause (3) of this clause, a foreman may be reclassified at any time. In the event of any dispute between an employer and the appropriate union as to the classification of any foreman employed by that employer, the matter may be referred to the Board of Reference for determination.

Classification Range * $	A.S.N.A. $	Total Wage $
514.90	56.00	570.90
535.00	56.00	591.00
555.20	56.00	611.20
575.30	56.00	631.30
595.50	56.00	651.50
615.70	56.00	671.70
635.90	56.00	691.90

* Note—inclusive of an Industry Allowance of $15.90.

(b) The rates of pay in this award include three arbitrated safety net adjustments totalling $24.00 per week available under the Arbitrated Safety Net Adjustment Principle pursuant to either the December, 1993 State Wage Decision, the December 1994 State Wage Decision and he March 1996 State Wage Decision. The first, second and third $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, insofar as that wage increase or part of it 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.

Furthermore the rates of pay in this award include the $10.00 per week arbitrated safety net adjustment payable from the beginning of the first pay period on or after the 14th of November 1997.

This arbitrated safety net adjustment 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 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 November 1997, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $10.00 per week.

The rates of pay in this award include the arbitrated safety net adjustment payable under the June 1998 State Wage Decision. This arbitrated safety net adjustment may 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 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 made under previous State Wage 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.

Further the rates of pay in this award include the $12 per week or $10 per week arbitrated safety net adjustments payable from the beginning of the first pay period on or after 1st August, 1999.

This arbitrated safety net adjustment 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 July 1999, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $12 per week or $10 per week.

3. Clause 14—Distant Work: Delete subclause 4(b) and insert the following in lieu thereof—

(b) Return Journey—

A foreman shall, for the return journey receive the same time, fare and meal payments as provided in paragraph (a) of this subclause together with an amount of $14.30 to cover the cost of transporting himself/herself and his/her tools from the main public transport terminal to his/her usual place of residence.

Provided that the above return journey payments shall not be paid if the foreman terminates or discontinues his/her employment within two months of commencing on the job, or if he is dismissed for incompetence within one working week of commencing on the job, or is dismissed for misconduct.

4. Clause 14—Distant Work: Delete subclause 6(a) and insert the following in lieu thereof—

(6) (a) Weekend Return Home—

A foreman who works as required during the ordinary hours of work on the working day before and the working day after a weekend and who notifies the employer or his/her representative, no later than Tuesday of each week, of his/her intention to return to his/her usual place of residence at the weekend and who returns to his/her usual place of residence for the weekend, shall be paid an allowance of $24.10 for each occasion.

5. Clause 14 – Distant Work: Delete subclause 7(b) and insert the following in lieu thereof—

(b) Camping Allowance—

A foreman living in a construction camp where free messing is not provided shall receive a camping allowance of $115.90 for every complete week he/she is available for work. If required to be in camp for less than a complete week he/she shall be paid $16.70 per day including any Saturday or Sunday if he/she is in camp and available for work on the working days immediately preceding and succeeding each Saturday and Sunday. If a foreman is absent without the employer's approval on any day, the allowance shall not be payable for that day and if such unauthorised absence occurs on the working day immediately preceding or succeeding a Saturday or Sunday, the allowance shall not be payable for the Saturday or Sunday.

6. Clause 18—Fares and Travelling Time: Delete subclause 1(a-d) and insert the following in lieu thereof—

(1) A foreman required to report directly to the job shall be paid the following allowances to compensate for travel patterns and costs peculiar to the construction industry—

(a) On places of work within a 50 kilometres radius from the General Post Office, Perth, $11.80 per day.

(b) Where an employer's business or branch is situated outside the 50 kilometres radius referred to in (a) and a foreman is engaged for work from that establishment, and is required to report to a job within a 50 kilometres radius from the post office nearest the establishment, $11.80 per day.

(c) Where a foreman travels daily from inside any radius referred to in (a) or (b) to a job outside that area that foreman shall be paid—

(i) $11.80 per day.

(ii) In respect of travel from the designated radius to the job and return to that radius 35 cents per kilometre and wages for the time spent in such travel.

(d) Where a foreman is transferred from one site to another during working hours, 65 cents per kilometre and wages for the time spent travelling.

7. Clause 19—Superannuation: Delete subclause 1 and insert the following in lieu thereof—

(1) Each employer to whom this Award applies shall make monthly contributions to a superannuation fund at the rate of 7% of ordinary time earnings in respect of each foreman employed by that employer pursuant to this Award.

8. Clause 19 – Superannuation: Insert the following new subclause 3 as follows—

(3) "Ordinary Time Earnings" (which for the purposes of the Superannuation Guarantee (Administration) Act 1992 will operate a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work. The term includes any regular over-award pay as well as casual rates received and any additional rates and allowances paid for on a regular basis for work undertaken during ordinary hours of work, excluding fares and travel and other reimbursement allowances.

LICENSED ESTABLISHMENTS (RETAIL AND WHOLESALE) AWARD 1979.
No. R23 of 1977.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Shop, Distributive and Allied employees' Association of Western Australia

and

Burns Philp and Co Ltd & Others.

No. 1466 of 1999.

18 November 1999.

Order.

HAVING heard Mr T. Pope on behalf of the Applicant and Mr R. Bath on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, and by consent, hereby orders—

THAT the Licensed Establishments (Retail and Wholesale) Award 1979 as varied, be further 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 26 November 1999.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

Schedule.

1. Clause 10—Meal Times and Meal Allowance

In Part I subclause (2) and Part II subclause (3) delete the amount "$6.50" and insert in lieu thereof the amount "$7.40".

2. Clause 21—Wages

A. Delete Part I—Retail Establishments and Part II—Wholesale and Other Establishments and insert in lieu thereof the following—

PART I—RETAIL ESTABLISHMENTS

(1) ADULTS (Classification and Wage per Week)—

Operative from the beginning of the first pay period commencing on or after 26 November 1999 for both parts I and II of this clause

	$	ASNA	Total
(a) Shop Assistant, Sales Person, Demonstrator, Canvasser and/or Collector, Storeperson Packer, Despatch Hand, Reserve Stock Hand	409.00	36.00	445.00
(b) Window Dresser	415.90	36.00	451.90
(c) Shop Assistant, Sales Person, Demonstrator, Canvasser and/or Collector, Storeperson Packer, Despatch Hand, who is required by the employer to be in charge of a shop or other employees —			
(i) If placed in charge of a shop with no other employees or, if placed in charge of less than three other employees	419.40	36.00	455.40
(ii) If placed in charge of three or more other employees, but less than ten other employees	429.00	36.00	465.00
(iii) If placed in charge of ten or more other employees	445.50	36.00	481.50
(d) Window Dresser who is required by the employer to be in charge of a shop or other employees—			
(i) If placed in charge of a shop with no other employees or, if placed in charge of less than three other employees	426.00	36.00	462.00
(ii) If placed in charge of three or more other employees, but less than ten other employees	434.90	36.00	470.90
(iii) If placed in charge of ten or more other employees	452.20	36.00	488.20
(e) Storeperson Operator Grade I	420.20	36.00	456.20
(f) Storeperson Operator Grade 1 who is required by the employer to be in charge of a shop, store or warehouse or other employees—			
(i) If placed in charge of a shop, store or warehouse with no other employees or if placed in charge of less than three other employees	430.00	36.00	466.00
(ii) If placed in charge of three or more other employees but less than ten other employees	439.40	36.00	475.40
(iii) If placed in charge of ten or more other employees	455.90	36.00	491.90
(g) Storeperson Operator Grade II	425.00	36.00	461.00

	$	ASNA	Total
(h) Storeperson Operator Grade II who is required by the employer to be in charge of a shop, store or warehouse or other employees -			
(i) If placed in charge of a shop, store or warehouse with no other employees or if placed in charge of less than three other employees	435.50	36.00	471.50
(ii) If placed in charge of three or more other employees but less than ten other employees	444.20	36.00	480.20
(iii) If placed in charge of ten or more other employees	461.70	36.00	497.70

PART II—WHOLESALE AND OTHER ESTABLISHMENTS

(1) ADULTS (Classification and Wage per week)—

	$	ASNA	Total
(a) Head Cellarperson	446.90	36.00	482.90
(b) Storeperson, Packer, Despatch Hand, Reserve Stock Hand	409.00	36.00	445.00
(c) Storeperson, Packer, Despatch Hand, Reserve Stock Hand, who is required by the employer to be in charge of a store or other employees—			
(i) If placed in charge of a store with no other employees, or if placed in charge of less than three other employees	419.40	36.00	455.40
(ii) If placed in charge of three or more other employees, but less than ten other employees	428.00	36.00	464.00
(iii) If placed in charge of ten or more other employees	446.50	36.00	482.50
(d) Filling Process Employee (as defined)	392.70	36.00	428.70
(e) Storeperson Operator Grade I	420.20	36.00	456.20
(f) Storeperson Operator Grade I who is required by the employer to be in charge of a shop, store or warehouse or other employees—			
(i) If placed in charge of a shop, store or warehouse with no other employees or if placed in charge of less than three other employees	430.60	36.00	466.60
(ii) If placed in charge of three or more other employees but less than ten other employees	439.40	36.00	475.40
(iii) If placed in charge of ten or more other employees	456.90	36.00	492.90
(g) Storeperson Operator Grade II	425.00	36.00	461.00
(h) Storeperson Operator Grade II who is required by the employer to be in charge of a shop, store or warehouse or other employees—			
(i) If placed in charge of a shop, store or warehouse with no other employees or if placed in charge of less than three other employees	435.50	36.00	471.50
(ii) If placed in charge of three or more other employees but less than ten other employees	443.20	36.00	479.20
(iii) If placed in charge of ten or more other employees	461.70	36.00	497.70

The rates of pay in this award include three arbitrated safety net adjustments totalling $24.00 per week available under the Arbitrated Safety Net Adjustment Principle pursuant to either the December 1993 State Wage Decision, the December 1994 State Wage Decision and the March 1996 State Wage Decision. The first, second and third $8.00 per week arbitrated safety net adjustments may be offset to the extent of any wage increase payable since 1 November 1991 pursuant to enterprise agreements or consent awards or award variations to give effect to enterprise agreements, insofar as that wage increase or part of it 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 agreement, are not to be used to offset arbitrated safety net adjustments.

Furthermore the rates of pay in this award include the $10.00 per week arbitrated safety net adjustment payable from the beginning of the first pay period on or after 14th day of November 1997

This arbitrated safety net adjustment 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 November 1997, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $10.00 per week.

Further the rates of pay in this award include the $12 per week or $10 per week arbitrated safety net adjustments payable from the beginning of the first pay period on or after 1st August, 1999.

This arbitrated safety net adjustment 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 July 1999, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $12 per week or $10 per week.

Further the rates of pay in this award include the $14 per week arbitrated safety net adjustments payable from the beginning of the first pay period on or after 26 November 1999

The arbitrated safety net adjustment 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 per week.

B. PART IV, subclause (1)

In paragraph (a) delete the words “thirty four cents” and insert in lieu thereof “thirty nine cents”.

In paragraph (b) delete the words “Forty seven cents” and insert in lieu thereof “fifty four cents”.

C. PART IV, subclause (2)

In paragraph (a) subparagraphs (i), (ii) and (iii) delete the figures 50, 58 and 67 and insert in lieu thereof respectively 58, 67 and 77.

5. Clause 22.—Motor Vehicle Allowance

Delete the schedule in Clause 22 and insert in lieu the following schedule—

	Engine Displacement (in Cubic Centimetres)		
Area and Details	Over 2600cc	Over 1600cc - 2600cc	1600cc & under
	Rate (cents) per kilometre		
Metropolitan Area	51.6	46.2	40.2
South West Land Division	52.8	47.4	41.2
North of 23.5° South Latitude	58.0	52.2	45.4
Rest of the State	54.6	48.9	42.5

MANUFACTURING CHEMISTS AWARD, 1976

No. R3 of 1976.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Food Preservers' Union of Western Australia, Union of Workers

and

FH Faulding & Co Ltd & other.

No. 1564 of 1999.

24 November 1999.

Order.

HAVING heard Mr T. Pope on behalf of the Applicant and there being no appearance on behalf of the Respondents, the Commission being satisfied that the respondents have been duly served with the Notice of Application and have been notified of the proceeding before the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Manufacturing Chemists Award, 1976 as varied, be further 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 17 November 1999.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

SCHEDULE

1. Clause 7—Wages—

Delete this clause and insert in lieu thereof—

7.—WAGES

The following shall be the minimum weekly rate of wage payable to employees covered by this award, with effect from the beginning of the first pay period commencing on or after 17 November 1999.

(1) Adult Employees

	Base Rates Per Week $	Arbitrated Safety Net Adjustments $	Total Award Rate Per Week $
(a) Extracts, Essences and Distillation			
First Class Plant Operative	363.15	60.00	423.15
Second Class Plant Operative			
1st three months	336.60	60.00	396.60
Thereafter	343.25	60.00	403.25
(b) Galenicals, Patents, Medicines, Cordials etc			
First Class Factory Hands	330.05	60.00	390.05
Factory Hands (Handling Corrosive Acids)	321.65	60.00	381.65
(c) General Factory Hands	304.30	60.00	364.30

The rates of pay in this award include three arbitrated safety net adjustments totalling $24.00 per week available under the Arbitrated Safety Net Adjustment Principle pursuant to either the December 1993 State Wage Decision, the December 1994 State Wage Decision and the March 1996 State Wage Decision. The first, second and third $8.00 per week arbitrated safety net adjustments may be offset to the extent of any wage increase payable since 1 November 1991 pursuant to enterprise agreements or consent awards or award variations to give effect to enterprise agreements, insofar as that wage increase or part of it 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 agreement, are not to be used to offset arbitrated safety net adjustments.

Furthermore the rates of pay in this award include the $10.00 per week arbitrated safety net adjustment payable from the beginning of the first pay period on or after 14th day of November 1997

This arbitrated safety net adjustment 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 November 1997, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $10.00 per week.

Further the rates of pay in this award include the $12 per week or $10 per week arbitrated safety net adjustments payable from the beginning of the first pay period on or after 1st August, 1999.

This arbitrated safety net adjustment 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 July 1999, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $12 per week or $10 per week.

Further the rates of pay in this award include the $14 per week arbitrated safety net adjustment payable from the beginning of the first pay period on or after 17 November 1999.

This arbitrated safety net adjustment 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 per week.

(2) Junior Employees (Percent of rate for classification in which employed)—

	%
Under 16 years of age	50
16 to 17 years of age	60
17 to 18 years of age	70
18 to 19 years of age	80
19 to 20 years of age	90
20 years and over	Adult Rate

(3) Leading Hands (per week extra)—

In charge of—

	$
(a) Less than three other employees	10.30
(b) Not less than three and not more than ten other employees	20.70
(c) More than ten other employees	30.20
(d) More than twenty other employees	40.85

(4) Additional Rates—

Where an employee is required to drive a fork lift in the performance of their duties they shall be paid an additional 35 cents per hour whilst so engaged.

(5) Casual Employees—

Casual employees shall receive 20 percent in addition to the ordinary rates prescribed in this clause for the work performed.

2. Clause 10—Shift Work—

In subclause (3) delete the amount in figures "$8.60" and insert in lieu thereof the amount in figures "$10.00".

3. Clause 11—Overtime—

In subclause (3), paragraphs (a) and (b), delete the amounts in figures "$3.60" and "$2.80" and insert in lieu thereof the amounts in figures "$4.70" and "$3.60" respectively.

4. Clause 28—General Conditions—

In subclause (2), delete the amount in words "forty cents" and insert in lieu thereof the amount in words "ninety five cents".

PLASTER, PLASTERGLASS AND CEMENT WORKERS' AWARD.
No. A 29 of 1989.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers

and

Anderson Industries and Others.

No. 1246 of 1999.

5 November 1999.

Reasons for Decision.
(extempore)

SENIOR COMMISSIONER: This is an application to amend the Plaster, Plasterglass and Cement Workers' Award being award number A29 of 1989 by deleting clause 11 of the Award.

Clause 11 provides—

> An employee employed by an employer shall not without the express consent of such employer and the union, accept temporary or other employment with any other employer whilst in such employ, nor shall such employee undertake a contract or sub-contract to perform any other work whilst his/her employment by the first mentioned employer continues.

The clause appears to have had its origin, for the purposes of this Award, in clause 12 of the Fibrous Plaster and Cement Workers' Award made in 1965 [(*1965-66) 45 WAIG 170*]. In the claim for that award the provisions of clause 12 were included as part of the hours clause, but were ultimately included in a separate clause and by consent without recorded explanation.

The Union, for its part, now seeks the deletion of the clause on the grounds that it is "oppressive and contrary to an individual's rights with respect to employment outside of the workplace." It is very hard to find a rational argument against that proposition. Clearly, by any standards of modern industrial relations it is oppressive that such a stricture should continue to exist. Indeed, the clause may well operate in a way which is contrary to Part VIA, if not to other provisions of the *Industrial Relations Act 1979*. As the agent for the Applicant has so rightly said, the stricture not only operates to prevent employees from working in competition with their employer but would prevent an employee from performing any paid work whatsoever outside of the normal working hours, whether as an employee or an independent contractor. Furthermore, not only is the consent of the employer required but the consent is also required of the Union. It is difficult to see what justification there can be for such a requirement. Not surprisingly, the Union does not wish to be concerned with what are essentially the private affairs of its members. Much the same should apply to the employer. Again, as the agent for the Applicant has so rightly said, the common law provides adequate protection to stop employees working in a vocation to the detriment of their employer. Thus, in that regard, the Award provision is unnecessary.

I take the same view as the agent for the Applicant that to delete this clause adds something to the concept of award modernisation. If some form of restraint needs to be imposed on outside employment, then it is best dealt with at enterprise level through an enterprise bargaining agreement or the like.

In the circumstances, I accept that the clause should be deleted. In so concluding, I note that none of the parties to the Award have filed an answer opposing the amendment and none have appeared to oppose it on this occasion.

Appearances: Mr G.T. Giffard appeared on behalf of the Applicant.

No appearance on behalf of the Respondents.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers

and

Anderson Industries and Others.

No. 1246 of 1999.

Plaster, Plasterglass and Cement Workers' Award
No. A 29 of 1989.

19 November 1999.

Order.

THERE being no appearance on behalf of either party, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

> THAT the Plaster, Plasterglass and Cement Workers' Award No. A 29 of 1989 as amended be varied by deleting Clause 11—Other Employment and that such variation shall have effect on and from the 19th day of November 1999.

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissioner.

ROCK LOBSTER AND PRAWN PROCESSING AWARD 1978.
No. R24 of 1977.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Food Preservers' Union of Western Australia, Union of Workers

and

MG Kailis Pty Ltd & Others.

No. 1559 of 1999.

25 November 1999.

Order.

HAVING heard Mr T. Pope on behalf of the Applicant and Mr M. Beros on behalf of a Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, and by consent, hereby orders—

> THAT the Rock Lobster and Prawn Processing Award 1978 as varied, be further 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 17 November 1999.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

SCHEDULE

1. Clause 7—Wages—

Delete this clause and insert in lieu thereof—

7.—WAGES

The following shall be the minimum weekly rate of wage payable to employees covered by this award, with effect from the beginning of the first pay period commencing on or after 17 November 1999.

(1) Adult Employees

	Base Rates Per Week	Arbitrated Safety Net Adjustments	Total Award Rate Per Week
	$	$	$
(a) Grader	325.95	60.00	385.95
(b) Process Employee	312.30	60.00	372.30

The rates of pay in this award include three arbitrated safety net adjustments totalling $24.00 per week available under the Arbitrated Safety Net Adjustment Principle pursuant to either the December 1993 State Wage Decision, the December 1994 State Wage Decision and the March 1996 State Wage Decision. The first, second and third $8.00 per week arbitrated safety net adjustments may be offset to the extent of any wage increase payable since 1 November 1991 pursuant to enterprise agreements or consent awards or award variations to give effect to enterprise agreements, insofar as that wage increase or part of it 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 agreement, are not to be used to offset arbitrated safety net adjustments.

Furthermore the rates of pay in this award include the $10.00 per week arbitrated safety net adjustment payable from the beginning of the first pay period on or after 14th day of November 1997

This arbitrated safety net adjustment 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 November 1997, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $10.00 per week.

Further the rates of pay in this award include the $12 per week or $10 per week arbitrated safety net adjustments payable from the beginning of the first pay period on or after 1st August, 1999.

This arbitrated safety net adjustment 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 July 1999, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $12 per week or $10 per week.

Further the rates of pay in this award include the $14 per week arbitrated safety net adjustment payable from the beginning of the first pay period on or after 17 November 1999.

This arbitrated safety net adjustment 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 per week.

(2) Junior Employees (Graders)

(Per cent of Grader rate per week):	%
Under 16 years of age	50
16 to 17 years of age	60
17 to 18 years of age	70
18 to 19 years of age	80
19 to 20 years of age	90
20 years and over	Adult Rate

(3) Junior Employees (Process Employees)

(Per cent of Process Employee rate per week):	%
Under 16 years of age	50
16 to 17 years of age	60
17 to 18 years of age	70
18 to 19 years of age	80
19 to 20 years of age	90
20 years and over	Adult Rate

(4) Leading Hands (per week extra)—

In charge of—

	$
(a) Less than three other employees	10.50
(b) Not less than three and not more than ten other employees	21.00
(c) More than ten but not more than twenty other employees	30.65
(d) More than twenty other employees	40.85

(5) Casual Employees—

Casual employees shall receive 20 per cent in addition to the ordinary rates prescribed in this clause for the work performed.

2. Clause 9—Overtime—

In subclause (3), paragraph (a), delete the amounts in figures "$5.40" and "$3.70" and insert in lieu thereof the amounts in figures "$7.00" and "$4.80" respectively.

3. Clause 21—General Conditions—

In subclause (3) delete the amount in words "forty cents" and insert in lieu thereof the amount in words "eighty three cents".

4. Clause 22—Cold Chambers—

In subclause (3) delete the amount in words "thirty cents" and insert in lieu thereof the amount in words "thirty six cents".

AWARDS/AGREEMENTS—Interpretation of—

EDUCATION DEPARTMENT OF WESTERN AUSTRALIA (CSA) ENTERPRISE BARGAINING AGREEMENT 1998.
No. PSAAG 32 of 1998.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia (Incorporated)

and

Minister for Education.

No P 9 of 1999.

COMMISSIONER P E SCOTT.

29 November 1999.

Order.

WHEREAS this is an application for interpretation pursuant to section 46 of the Industrial Relations Act 1979; and

WHEREAS on the 14th day of October and the 10th day of November 1999 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference on the 10th day of November 1999 the Commission made a recommendation to the parties as a means of resolving the dispute; and

WHEREAS the parties accepted the Recommendation; and

WHEREAS by a letter dated the 25th day of November 1999 the Applicant advised the Commission that it wished to withdraw 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.

AGREEMENTS—Industrial—Retirements from—

WESTERN AUSTRALIAN GOVERNMENT RAILWAYS COMMISSION FREIGHT RAILWAY SYSTEM AGREEMENT 1995.
No Ag 21 of 1996.

IN THE WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION

No. 1728 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 a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch will cease to be a party to the Western Australian Government Railways Commission Freight Railway System Agreement 1995 No Ag 21 of 1996 on and from the 13th day of December 1999.

DATED at Perth this 12th day of November 1999.

J. A. SPURLING, Registrar.

CANCELLATION OF AWARDS/AGREEMENTS/RESPONDENTS—

SIR CHARLES GAIRDNER HOSPITAL ENGINEERING AND BUILDING SERVICES WORKSHOPS AWARD 1998.
No. A 2 of 1997.

SIR CHARLES GAIRDNER HOSPITAL ENGINEERING AND BUILDING SERVICES WORKSHOPS ENTERPRISE AGREEMENT 1997.
No. AG 85 of 1997.

LOWER NORTH METROPOLITAN HEALTH SERVICE (BUILDING AND ENGINEERING TRADES) ENTERPRISE AGREEMENT 1997.
No. AG 135 of 1997.

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES (BUILDING AND ENGINEERING TRADES) ENTERPRISE AGREEMENT 1998.
No. AG 82 of 1998.

FREMANTLE HOSPITAL (ENGINEERING WORKSHOPS) ENTERPRISE AGREEMENT.
No. AG 5 of 1996.

ROYAL PERTH HOSPITAL ENGINEERING DEPARTMENT ENTERPRISE BARGAINING AGREEMENT 1996.
No. AG 41 of 1997.

METROPOLITAN HEALTH SERVICE BOARD KING EDWARD MEMORIAL AND PRINCESS MARGARET HOSPITALS (PHYSICAL RESOURCES DEPARTMENT) ENTERPRISE BARGAINING AGREEMENT, 1997.
No. AG 21 of 1998.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia

and

The Metropolitan Health Service Board and Others.

No. 1688 of 1999.

Sir Charles Gairdner Hospital Engineering and Building Services Workshops Award 1998 and various Agreements.

2 December 1999.

Order.

HAVING heard Ms S A Seenikatty on behalf of The Metropolitan Health Service Board, and Mr J Murie on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electrical Division, WA Branch and The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch, and Ms J L Harrison on behalf of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch and The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers, Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, being satisfied that its terms are not contrary to any General Order or any principle formulated as a result of General Order proceedings under section 51 of the Industrial Relations Act, 1979, and by consent, hereby orders—

THAT the Award and Agreements named in the following Schedule be and are hereby cancelled, with effect on and from the 12th day of October 1999.

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissioner.

Schedule.

Sir Charles Gairdner Hospital Engineering and Building Services Workshops Award 1998

Sir Charles Gairdner Hospital Engineering & Building Services Workshops Enterprise Agreement 1997

Lower North Metropolitan Health Service (Building and Engineering Trades) Enterprise Agreement 1997

Graylands Selby-Lemnos & Special Care Health Services (Building and Engineering Trades) Enterprise Agreement 1998

Fremantle Hospital (Engineering Workshops) Enterprise Agreement

Royal Perth Hospital Engineering Department Enterprise Bargaining Agreement 1996

Metropolitan Health Service Board King Edward Memorial and Princess Margaret Hospitals (Physical Resources Department) Enterprise Bargaining Agreement, 1997.

5.—INCIDENCE OF AND PARTIES BOUND TO AWARD

(1) This award applies in respect of employees engaged by P&O Port Limited in connection with Pilot Cutters.

(2) This award shall be binding upon—

(a) the P&O Ports Limited; and

(b) such employees whether a member of the following organisations or not; and

(c) officers and members of the Australian Maritime Officers Union.

6.—APPLICATION

(1) This award shall—

(a) Regulate the conditions of employment relevant to P&O Ports Limited employees in the performance of Pilot Cutter's operation.

A copy of the proposed Award may be inspected at my office at the Axa Centre, 111 St George's Terrace, Perth.

J. SPURLING, Registrar.

NOTICES— Award/Agreement matters—

Application No. AG 185 of 1999.

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED

"CREATIVE AND THERAPY ACTIVITIES DISABLED GROUP INC ENTERPRISE BARGAINING AGREEMENT 1999".

NOTICE is given that an application has been made to the Commission by Creative and Therapy Activities Disabled Group Inc under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement which relate to area of operation or scope are published hereunder.

PARTIES TO AGREEMENT

The parties to the agreement are the Creative and Therapy Activities Disabled Group Inc of Warwick Community Services Building, Dorchester Avenue, Warwick 6024 and the Australian Liquor, Hospitality and Miscellaneous Workers Union, Micellaneous Workers Division, WA Branch of 61 Thomas Street, Subiaco 6008.

AREA AND SCOPE

The area of operation and scope of the agreement will be confined to the premises and activities of "CATA" and to the employees employed by this organisation, throughout the State of Western Australia

A copy of the Agreement may be inspected at my office at the AXA Centre, 111 St George's Terrace, Perth.

J. A. SPURLING, Registrar.

30 November 1999.

Application No. A 2 of 1999.

APPLICATION FOR AN AWARD

ENTITLED "PILOT CUTTERS—BUNBURY AWARD 1999"

NOTICE is given that an application has been made to the Commission by the Merchant Service Guild of Australia, Western Australian Branch, Union of Workers under the Industrial Relations Act 1979 for the above Award.

As far as relevant, those parts of the Award which relate to area of operation or scope are published hereunder.

PUBLIC SERVICE ARBITRATOR— Matters Dealt With—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia (Incorporated)

and

Minister for Education.

No. P 9 of 1999.

COMMISSIONER P E SCOTT.

16 November 1999.

Recommendation.

WHEREAS this is an application for interpretation pursuant to section 46 of the Industrial Relations Act 1979; and

WHEREAS on the 10th day of November 1999 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the Commissioner made a recommendation to the parties as a means of resolving the dispute;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby recommends that—

1. Employees the subject of this application shall finish work on 17th day of December 1999.
2. If schools elect to work through to 22nd day of December 1999, then those employees required to work to 12.00 noon on 22nd day of December 1999 will be granted 2.5 days time off in lieu in Semester 1, 2000.
3. If time off in lieu referred to in clause 2 above is not taken by 30th day of June 2000 it will be paid out to employees in July 2000 at time for time.
4. All employees shall return to work on the 27th day of January 2000.
5. On a "without prejudice" basis, the Respondent agree, for the purposes of the commencement of the 41 weeks, that the 26th day of January 2000 shall be the first working day.

(Sgd.) P.E. SCOTT, Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Civil Service Association of Western Australia (Inc)

and

Registrar, Western Australian Industrial Relations Commission.

P 35 of 1998.

PUBLIC SERVICE ARBITRATOR
COMMISSIONER J F GREGOR.

23 November 1999.

Order.

WHEREAS on 20 August 1999 The Civil Service Association of Western Australia Incorporated (CSA) applied to the Public Service Arbitrator for a hearing and determination pursuant to section 80 E of the Industrial Relations Act, 1979 in relation to a contention that a restructure of the Department of the Registry had resulted in a number of positions being abolished without justification; and

WHEREAS the Commission convened a conference on 24 September 1998 at which time the Commission recommended that any employees names that had been placed on the redeployment list without their consent be removed; that the involved members should have their positions explained; that they should be made aware of the consequences of not registering for redeployment and that it may be in their best interest to do so because if they were not on the redeployment list there may not be an available position within the Registry when their own jobs came to an end; and

WHEREAS to s. 32 of the Act, the Commission convened a conference between the parties on 4 March 1999 at which time the applicant advised the Commission that despite numerous attempts to obtain written responses from the respondent to questions they had posed no written information had been forthcoming; and

WHEREAS the Commission issued Directions on 12 March 1999 whereby directing the Registrar to supply written answers to all questions posed by the CSA in letters dated 9 and 12 February 1999; to arrange a professional body to conduct an audit of the skills and competencies of Mr. Ranjit Ratnayake, Ms Cheryl D'Souza, Ms Jasmine Rihards, Ms Lena Dundon and Ms Nanette Constant, to advise the abovenamed officers of any vacancy within the Department of the Registry whether at their level or not to which they might be suited prior to the position being filled; subject to the skills audit to offer the abovenamed officers appropriate training which would enhance their skills within and without the Department of the Registry, to serve a copy of the Directions issued on 12 March 1999 on the abovenamed officers and that the parties report to the Commission within 30 days of the Directions being issued; and

WHEREAS pursuant to s. 32 of the Act the Commission convened a conference between the parties on 13 April 1999 at which time the matter did not settle; and

WHEREAS the Commission issued Directions on 16 April 1999 directing that the written formal assessment of the abovenamed officers be completed by 13 May 1999, provided that the Registrar had liberty to apply for an extension; and

WHEREAS on 22 April 1999, the Registrar responded to questions posed by the CSA in a letter dated 18 March 1999 and advised of some meetings that had occurred between the Director of Operations and Registry staff members; and

NOW THEREFORE pursuant to the powers vested in it by s 27 of the Industrial Relations Act, 1979 the Commission hereby orders—

THAT the above matter be, and is hereby, discontinued.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

UNFAIR DISMISSAL/ CONTRACTUAL ENTITLEMENTS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Troy Bogaers

and

Spotless Services Australia Limited.

No. 2078 of 1998.

15 November 1999.

Reasons for Decision.

COMMISSIONER C.B. PARKS: The respondent company is contracted with Robe River Iron Associates (hereinafter referred to as "Robe River") to provide such with various services which, so far as is presently material, involves the operation of a motor vehicle garage located at Pannawonica. Mr Bogaers worked as the Foreman Motor Mechanic, employed by the respondent, at the motor vehicle garage from 15 September 1997 until 2 October 1998 when he was forced to leave the Robe River private township in consequence of, a direction to the respondent from, and the withdrawal of the accommodation provided to him by, Mr R Baker the Senior Manager Operations Pannawonica, for Robe River. Mr Bogaers and his family relocated to Perth on 2 October 1998 and observed a period of annual leave up to and including 26 October 1998 around which date his employment relationship with the respondent ended. The applicant contends that he was dismissed from his employment on 26 October 1998, that his contract was for a fixed term of three years, and that the dismissal is both unlawful and unfair. In remedy, Mr Bogaers claims payment of his salary for the remainder of the contract term on the basis such is a benefit of the contract he has not been allowed, or alternatively, he claims compensation for the financial loss he is alleged to have incurred as a result of the dismissal.

On 1 October 1998 Mr G. A. Braithwaite, the Project Manager for the respondent and the senior management person located at Pannawonica, was called to the office of Mr R. Baker where he met with him and Ms E. K. Linsten, a Human Resources and Training Officer for Robe River. At that meeting Mr Baker directed Mr Braithwaite to remove the applicant from Pannawonica for the reason that his conduct, and that of his wife, directly toward a named immediate neighbour and employee of Robe River, and his family, and because other families in the same street objected to the loud and abusive language they had overheard emanating from the Bogaers residence on occasions.

Mr Braithwaite, being aware that the contract between the respondent and Robe River contains a provision of a kind which requires the respondent to comply with a direction given by Robe River, therefore referred the matter to Mr R. E. McQuillan the General Manager for the respondent located in Perth. Mr Braithwaite was convinced from his meeting with Mr Baker that the decision that the applicant be removed would not be reconsidered and that he conveyed to Mr McQuillan when he queried the possibility of further consideration by Mr Baker. According to Mr Braithwaite he questioned what would occur if the applicant objected and was told by Mr Baker that he would be removed by "the appropriate authorities". Ms Linsten confirmed that Mr Baker left no room for Mr Braithwaite to think Mr Baker might reconsider his decision. Mr McQuillan says he decided that management ought first comply with the direction of Robe River and then attempt to pursue the matter further. It is plain from the testimony of Mr McQuillan, and from that of Mr Braithwaite and his subordinate Mr G. D. Rolfe, that the respondent had no prior knowledge of complaints regarding the alleged anti-social conduct of the applicant, they had been well satisfied with his work related performance, and his removal from the workplace and the requirement that he and his family leave Pannawonica happened solely in response to the direction given by Mr Baker.

When Mr Bogaers was informed that Robe River required he and his family to leave Pannawonica he made it known to Mr Braithwaite that he did not have the funds available to do so whereupon Mr Braithwaite suggested to him that he apply for an immediate period of annual leave which would be authorised and would, in accordance with his contract of employment, afford him the right to payment of the necessary air fares by the respondent. That the applicant did and the necessary air fares were paid by the respondent. Because of the immediacy of the Bogaers' forced departure, there being no public accommodation in the township, he was not afforded the opportunity to arrange the packing of the family's goods and chattels and their removal and transport to Perth. Mr Bogaers subsequently returned to Pannawonica from Perth and organised the packing and transport of the family's goods and chattels back to Perth where he also returned, the cost of which was borne by him.

According to Mr McQuillan, and Mr P. G. O'Mara a former employee and then Manager Support Services for the respondent, within a day or so of the removal of the applicant from Pannawonica, Mr McQuillan sought to address what had occurred and conversed with a Mr C. Jury, an employee of Robe River whose role he understands is to administer contracts with Robe River and whom, when questioned regarding a review of the material decision, stated that Robe River would not review their decision.

In the week following the return of Mr Bogaers to Perth his counsel corresponded with Robe River and with the respondent (exhibit 2A) regarding their treatment of him. The respondent replied (exhibit 2C) stating to the effect that Robe River had withdrawn the accommodation of Mr Bogaers and had been responsible for his removal from Pannawonica and that the respondent had no involvement in that decision. On 9 October 1998 the respondent wrote to the applicant (exhibit 2D), made reference to earlier telephone discussions, and requested that he make contact in order to arrange a meeting to discuss his future with the respondent. A meeting attended by Messrs McQuillan, O'Mara, and Mr Bogaers and his counsel, was held at the Perth office of the respondent on 20 October 1998 and there the future employment of Mr Bogaers was discussed. At that meeting the applicant was informed that, aside from the work done for Robe River, the respondent does not engage in work requiring a motor mechanic and hence the respondent was unable to place him in a similar position elsewhere. The suggestion was made to the applicant that he consider the option of alternative employment in some occupation within the catering operations of the respondent. At the conclusion of Mr Bogaers' annual leave the respondent inquired of him (exhibit 2F) his intention regarding future employment and to that his counsel responded by facsimile on 28 October 1998 (exhibit 2G) and stated that the applicant "— has no interest—in being employed in any other capacity than that for which he was originally employed by your company", and also stated, "—should you further offer our client alternative employment offering a lesser income or of a completely different nature of service, then our client will consider your conduct as a constructive termination of his employment—", which response the respondent says was not received until about 5 November 1998.

Material documents tendered in proceedings were, the employment contract between the respondent and the applicant (exhibit 1), the Robe River tenancy agreement regarding the premises which Mr Bogaers had occupied (exhibit 6), and "Schedule A Special Conditions MINE EQUIPMENT CLEANING PA264" together with "SCHEDULE D— CONDITIONS OF CONTRACT" (exhibit 4). Notwithstanding the argument of Counsel for the applicant that the documents entered into evidence as exhibit 4 are unsigned and therefore ought not be accepted by the Commission as representing the contract between Robe River and the respondent, I am satisfied that the two documents are parts of the contract and they contain the several terms of contract relevant here. Before turning to the arguments for each party it is apposite that the provisions each relies upon in exhibits 1, 4, and 6 be identified and those extracts are therefore set out here under—

Exhibit 1

"SALARY You understand that your remuneration consists of the following components—

(S)—Married (i) Base salary at a rate of $450.00 gross p.w.

(ii) An overtime component of $200.00 gross p.w.

(iii) A site allowance of $100.00 gross p.w.

(iv) Total Paid Weekly Wage $750.00 gross p.w.

(v) Superannuation of $33.00 per working week.

These components totalling $783.00 gross per week—including public Holidays.

—

—

You understand and agree that your contract of employment with SSL Nationwide Field Catering is for three (3) years or the termination date of our contract at your work location whichever occurs first.

—

—"

"TRIAL PERIOD Subject to the provisions contained herein it is understood that you will be on a six (6) month's trial

(S)—Married period, during this period seven (7) days notice of termination may be given by the Company.

TERMINATION Your employment may be terminated by either party giving 28 days notice of intention to terminate your employment.

The exception—misconduct or negligence—without notice or payment in lieu."

Exhibit 4

"SCHEDULE D—CONDITIONS OF CONTRACT

D1 DEFINITIONS AND INTERPRETATION—

1.1 'Engineer' means the person named in Schedule A hereto as the Engineer or other person from time to time appointed in writing nominated by the Manager to act in that capacity and if no such person has been named ought appointed it shall mean the 'Manager';

D14 CONTRACTOR'S PERSONNEL

14.4 Objection by Engineer—The Engineer shall be at liberty to object to any representative of or person employed by the Contractor or a sub-contractor in the performance of the Works/Services who, in the opinion of the Engineer, misconducts himself or is incompetent or negligent and the Contractor shall forthwith remove the person so objected to upon receipt from the Engineer of notice in writing requiring him to do so and shall not again employ such person in upon or about the Works/Services without the prior written approval of the Engineer and shall ensure that no sub-contractor does so.

D19 ARBITRATION

19.1 Resolution—Any dispute or difference whatsoever arising in connection with the Contract which cannot be resolved by agreement between the parties shall be submitted to arbitration in accordance with and subject to The Institute of Arbitrators Australia Rules for the conduct of Commercial Arbitrations without prejudice to the rights of each party to apply to the courts for equitable relief."

"Schedule A Special Conditions MINE EQUIPMENT CLEANING PA264

5 The Engineer for the duration of the Contract shall be the Senior Manager Operations Pannawonica or his nominee."

Exhibit 6

"2. The Owner and the Tenant shall comply with the provisions of the Residential Tenancies Act 1987 as amended from time to time and the Residential Tenancies Regulations 1989 as amended from time to time as they apply to each party. The definition and interpretation of words used in the Agreement are the same as in the Residential Tenancies Act 1987."

It is argued on behalf of Mr Bogaers that he was denied natural justice when Robe River decided that he had engaged in the conduct complained of without him being heard in relation thereto. Robe River is also said to have acted unlawfully when it immediately withdrew the accommodation from its tenant, the applicant, without providing him with the period of notice to vacate prescribed by the legislation and regulations cited in their tenancy agreement (exhibit 6,supra). The respondent, it was said, too readily complied with the oral direction given, it acted without regard for the applicant and wanted to protect itself and its position with Robe River. The applicant contends that the respondent was remiss in that management ought have questioned the legality of the accommodation withdrawal from their employee, and ought have questioned the direction given before acting upon it because the respondent was not bound to comply therewith, such not having been validly given in writing in accordance with clause 14.4 of their contract (supra). Furthermore, it had been open to the respondent to dispute the direction and to seek arbitration upon the matter pursuant to clause 19.1 (supra).

The respondent is said to have further treated Mr Bogaers unfairly when it failed to assume any responsibility to remedy the plight of their employee and his family and expected him to provide for the travel from Pannawonica to Perth, thereby leaving him no alternative but to adopt the proposal of the respondent that he draw upon the annual leave and associated entitlements he had accrued. The adverse consequences for Mr Bogaers being that his leave was used for a different purpose than such is intended and that meant he had to abandon his plan to enjoy a period of annual leave in December 1998. Mr Bogaers was removed from his position of Foreman Motor Mechanic and therefore his employment in that capacity, his counsel asserts, was wrongfully brought to an end within the 3 year term of his employment contract, which term counsel contends over-rides the inconsistent provision allowing termination of the employment upon 28 days prior notice. In the alternative, it is submitted that if the contract not be for the said fixed term, Mr Bogaers was not provided with the prescribed 28 days prior notice.

The respondent concedes that the direction given by Mr Baker did not conform with the requirement of its contract with Robe River but says it was faced with the practical situation that a direction had been given, there was clear indication that Robe River expected immediate compliance, and also, Robe River would act to have the applicant removed from Pannawonica if that became necessary. Given that Robe River plainly intended to withdraw the accommodation they were providing to Mr Bogaers and his family and was prepared to take some other direct and immediate action to achieve their removal, the respondent says, had immediate ramifications for the applicant which could not be ignored and, in addition, the respondent held the reasonable belief that it would also be better to avoid direct conflict with Robe River at the time and to anticipate that the atmosphere after the event would be more conducive to the discussing of a satisfactory solution. No argument was made by the respondent in response to the assertion that the absence of financial assistance to aid the departure of the applicant constituted unfair treatment of him. However it appeared plain from Mr Braithwaite that although there was concern with the decision of Robe River and its implementation, that arose from the alleged conduct of the applicant in his private life and not from the employment. The matter was a personal one and therefore the associated costs ought be borne by the applicant, and hence that was done, however there was co-operation and assistance provided by the respondent which overcame the immediate problem, including the applicant's lack of available funds.

An unsuccessful overture to Robe River after Mr Bogaers commenced leave served to convince the respondent that he could not be returned to work at Pannawonica. The respondent is said to have found itself in the position where it could no longer provide the applicant with the kind of work and the associated terms upon which he had been engaged. An attempt by the respondent to explore whether the applicant was interested in possible alternative employment is said to evidence that the respondent had no wish to end the employment relationship and had acted in a reasonable way to assist Mr Bogaers. The rejection of work different to that for which Mr Bogaers was engaged, and upon different terms, meant the respondent had no work upon which he could be employed and therefore the employment ended, the Commission was told. The respondent contends that the circumstances of this case are akin to those considered in the matter *Graeme H Euvrard v. Black Star Holdings Pty Ltd* (Print Q7456) [*Euvrard*] wherein the Australian Industrial Relations Commission held that the dismissal of Mr Euvrard, by his employer the respondent, had not been harsh, unjust or unreasonable in the circumstance where the owners of the gold mine at which the employer was engaged had directed that he be removed from the works in progress, and the employer had no alternative work for him to perform elsewhere, notwithstanding the owners of the gold mine were held to have acted harshly.

The agent for the respondent argues that notwithstanding the contract of employment speaks of a three year term, that period is not fixed and certain, given there are express terms within the contract which recognise that employment under the contract may be terminated before the expiration of that period, in particular, the right of either party to terminate the employment by giving 28 days notice of that intention. In support of this contention the respondent relies upon the ratio expressed in a decision of the Australian Industrial Relations Commission in the matter *of Andrew Howarth v. Mornington Peninsula Shire Council* (Print R0859) [*Howarth*] wherein it was held that a contract which expresses a defined period of employment is not for a fixed term where there is provision for one or other of the parties to end the employment upon giving a specified period of notice for that purpose. It was observed by the agent that the respondent did not give the applicant 28 days notice that his employment was to end and he has conceded the respondent may have acted in error and not provided the applicant with a benefit which he was due.

Counsel for the applicant submits that *Euvrard* (op cit) is not completely akin to the matter before the Commission. There the owners of the gold mine had issued their direction to the employer in writing, as was required by the contract with the employer, and hence the direction had been validly given which is not what occurred in the present case.

It is plain to the Commission that Robe River acted with complete disregard for the principles of natural justice and the legal rights of Mr Bogaers when it ejected him from the accommodation and directed that the respondent remove him from his employment in Pannawonica. The direction to the respondent was not given in the form required and I accept that there was a refusal to give the direction in writing when such was later requested by the respondent. Notwithstanding the direction to the respondent was oral, and that the respondent probably acted with some self interest, the respondent was also faced with the threat that Robe River would act to achieve its end and it rightly assessed that were that to occur the situation would almost certainly become unrecoverable. In my view the respondent had no reasonable option but to remove the applicant from Pannawonica and shortly after, when it became plain his return would not be allowed, the respondent no longer had the means of providing the position of work that Mr Bogaers had been contracted to perform. The respondent was forced into a repudiation of the contract of employment in consequence of the direction by Robe River, which repudiation the applicant later accepted when his Counsel declared he was not prepared to accept a different occupation and terms of employment. Hence the employment was terminated by the respondent and that was done without the prescribed period of 28 days notice being given, however the action of the respondent was not an unfair exercise of the right to dismiss.

The contract of employment, although stating that the employment is for a period of three years, also provides that the first six months thereof was a trial period during which the respondent was entitled to terminate the employment by giving a period of 7days notice, and further, either party was thereafter entitled to terminate the employment by giving

28 days notice. During the course of proceedings the Commission drew attention to an additional provision titled "Removal Expenses" wherein there is recognition that the applicant could resign, or be dismissed, and if that occurred prior to the completion of 18 months service certain removal costs were to be borne by the applicant. Given these several provisions which prescribe for the termination of the employment by means of notice and the ratio of the decision in *Howarth* (op cit) I am compelled to the conclusion that the contract of the applicant was not for a fixed term. As I have observed earlier the applicant had been entitled to the benefit of 28 days notice and the payment of his salary throughout that period upon the completion of his annual leave. A salary of $783.00 is prescribed per seven day week and therefore the respondent will be ordered to pay the applicant $3132.00.

Appearances: Mr H. Paiker (of Counsel) on behalf of the applicant

Mr D. Jones on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Troy Bogaers

and

Spotless Services Australia Limited.

No. 2078 of 1998.

18 November 1999.

Order.

HAVING heard Mr H. Paiker (of Counsel) on behalf of the applicant and Mr D. Jones on behalf of the respondent the Commission, pursuant to the power conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT Spotless Services Australia Limited pay to Troy Bogaers the sum of $3132.00

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

David Andrew Cross

and

Centecliffe Holdings Pty Ltd t/a The Vineyard People.

No. 686 of 1999.

12 November 1999.

Order.

WHEREAS on 17 May 1999 the application cited herein was filed in the Commission pursuant to section 29 of the Industrial Relations Act, 1979 (the Act) alleging unfair dismissal and denied contractual benefits; and

WHEREAS on 26 July 1999 written notice was given to the parties that a conference pursuant to section 32 of the Industrial Relations Act, 1979 would be conducted on 14 October 1999 in Bunbury; and

WHEREAS on 13 October 1999 the respondent through its counsel, requested and was granted an adjournment of the conference scheduled for the following day; and

WHEREAS a conference was conducted on 9 November 1999 in Bunbury, at which the respondent failed to attend to instruct its counsel as had been arranged with counsel that the respondent would do; and

WHEREAS the respondent has failed to file an answer to the application within the prescribed time or by the date of the last mentioned conference; and

WHEREAS counsel for the respondent was unable to engage in a conciliation process for the lack of instructions for that purpose; and

WHEREAS counsel for the applicant applied for orders that the costs of the applicant in the loss of wages and the travel expenses incurred on each of the aforementioned two dates for conferences, and that the respondent file an answer to the application;

AND WHEREAS the Commission is satisfied that—

(a) the respondent has not acted with reasonable care and attention to the matter before the Commission nor has the respondent shown due regard to the effect such actions may have upon the applicant; and

(b) it was not until 14 October 1999, the day scheduled for conference, and after the applicant had absented himself from his place of work for the day, that he became aware the conference had been adjourned; and

(c) on 14 October 1999 and 9 November 1999 the applicant incurred a loss of wages to the value of $100.00 each such day; and

(d) the applicant has not incurred travel expenses on either of the immediately aforesaid days; and

(e) the aforesaid loss of $200.00 was unnecessary and is a loss for which the respondent is responsible; and

(f) the applicant is entitled to be formally notified of the defence of the respondent to the matters referred to the Commission by him;

NOW THEREFORE the Commission pursuant to the power conferred on it under the Act, hereby orders—

(a) THAT Centecliffe Holdings Pty Ltd t/a The Vineyard People forthwith pay Mr David Andrew Cross costs in the sum of $200;

and

(b) THAT Centecliffe Holdings Pty Ltd t/a The Vineyard People file in the Commission and serve upon the applicant, an answer to the application no. 686 of 1999 prepared in the prescribed form, within 14 days of the date of this order.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
MNDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Ray Hart

and

Culunga Aboriginal Community School

(No. 615 of 1997)

John King

and

Culunga Aboriginal Community School

(No. 616 of 1997)

Lois Alexander

and

Culunga Aboriginal Community School

(No. 617 of 1997)

29 November 1999.

Reasons for Decision.

COMMISSIONER C.B. PARKS: Before the Commission are separate applications by Messrs Hart and King, and Ms Alexander, in which each complains they were unfairly dismissed from their position of teacher by the managing Board of the school at which they had been employed. Each of the three former teachers accepts that the school Board faced a substantial financial deficit in 1997 and hence the Board had

valid reason to restructure and reduce the number of staff employed. Their complaints are that they were wrongly selected for dismissal, that the selection process was tainted with bias against them because of their involvement in matters of conflict which arose with the Board during 1995 and 1996, and each contends that they have attributes which warranted each being retained in employment in preference to those who have been retained, and for these reasons each dismissal was unfair. Monetary compensation is the remedy claimed in each case.

In 1994 the school ceased to be administered by the Catholic Education Commission and became independent and administered by a board, the members of which are elected from the Aboriginal community which the school serves. In late 1995 and in 1996 conflict occurred between the teaching staff and the Board, Ms T D Gosling the school Principal was suspended from duty for a period by the Board, and complaints made to the Registrar of Aboriginal Corporations led to the appointment of an administrator who, for the latter part of 1996, assumed the role which had previously been that of the Board. The Board was seen to be improperly constituted and controlled by one Aboriginal family group. A constitutional change was implemented which included an increase in the number of Board members, and following community elections a new Board was formed in December 1996. Administrative control of the school was thereupon returned to the newly constituted Board. The previous chairperson of the Board, Ms G Corunna, had also been employed in the position of Co-ordinator within the school and she continued in that position. Ms M Bowie became the new chairperson of the Board.

The school teaches Aboriginal children, principally those from the Nyungar people, and educates in the subjects of the standard school curriculum and in the Nyungar culture. The school relies on Government funding to operate, which funding, the Commission is told, is determined greatly by the number of students attending the school, and to some degree, by the number of Aboriginal Education Workers ie a category of Aboriginal persons not trained as teachers who are employed to assist with the teaching process. A decline in the number of students attending school in 1996, and an unforeseen level of decline in student enrolments in 1997, meant funding would be reduced and would lead to a substantial financial deficit from which the school would be unable to recover were it to continue with the same cost structure. It is this situation which caused the decision to be taken by the Board to restructure the duties of staff and to further reduce the number of staff employed at the school, there also having been two teachers notified in 1996 that they had become redundant because of reduced student numbers. The three applicants were among a group of six other employees made redundant and included a bus driver, a gardener, and another teacher who pursued a separate claim before the Commission. Additional employees were made redundant a short time later.

Prior to the decision to restructure and make staff redundant, Ms Gosling operated as an administrative Principal with no teaching role attached, a Ms I Jeyaretnam occupied a secretarial position, Mr Hart taught years 6 and7 primary school, Mr King taught years 4 and 5 primary school, and Ms Alexander worked as librarian and also performed vocational education teaching duties.

Ms Gosling and Ms Bowie, when appraised of the financial difficulty the school faced, sought advice and Mr L D Mack, a co-ordinator with a support unit formed to advise Aboriginal independent community schools, told them that restructure and staffing cost reductions were necessary, and expressed the opinion that the circumstance of their school was such that, it did not warrant a Principal restricted to an administrative role, nor a full time secretarial position, nor the position of librarian, and their focus ought be upon the delivery of appropriate education and that the staff complement be assessed on that basis.

Ms Gosling and Ms Bowie reported the discussions with Mr Mack to the Board which deliberated upon the options open to it and the decision was taken that Ms Gosling and Ms Jeyaretnam were, in addition to their other roles, to also perform teaching duties. The teachers whom the Board decided to retain in preference to those made redundant, and whom the applicants say have been wrongly retained and they, each of the applicants, ought be returned to one of their teaching positions, are Ms Gosling, Ms Jeyaretnam, Ms M Decarvalho, and Mr P Sundra.

Mr Hart is an Aboriginal person from northern New South Wales who served in the Australian airforce where his duties included the training of apprentices. Mr Hart worked as an Aboriginal Education Worker in two Western Australian schools for the period between 1986 and 1990, and again during 1994. In 1995 he completed training to teach secondary school and commenced teaching the secondary class years 8 and 9, upon his engagement by the respondent at the start of the 1996 school year. He contends that Mr Sundra, and Ms Corunna the Co-ordinator, were wrongly retained in employment in preference to him, and that he ought have been considered for bus driving duties.

Mr King graduated in 1994 and commenced teaching upon his engagement by the respondent in 1995. Throughout this first year he taught the primary class years 4 and 5. The following year, 1996, he taught the primary class years 6 and 7, and started the 1997 year teaching the primary class years 4 and 5. Mr King contends that Ms Gosling, Ms Jeyaretnam, Ms Decarvalho, and Mr Sundra, were wrongly retained in employment in preference to him.

Ms Alexander qualified to teach in 1970 and thereafter taught in Government schools. From 1981, until her resignation in 1989, she served as a secondary school teacher with what she described as the forerunner of the respondent school. From 1990, until Ms Alexander was made redundant in 1993, she taught art to primary and secondary classes at the school. Ms Alexander recommenced employment with the respondent school in 1994 when she accepted an invitation to become the Librarian, which role was extended to include secondary vocational education that from 1995 onward was with the year 10 class, and this combined part time role she carried into 1997. Ms Alexander contends that Ms Jeyaretnam, Ms Decarvalho, and Mr Sundra, or alternatively an Aboriginal Education Worker, were wrongly retained in employment in preference to her.

The restructure leading to the redundancy of teachers involved the amalgamation of classes and an arrangement whereby the teaching staff for primary classes teach particular subjects across classes. Ms Gosling continued as Principal and also teaches language to the primary classes which have been amalgamated into two classes, years 2, 3 and 4, and years 5, 6 and 7. Ms Jeyaretnam continues to perform secretarial duties, and in addition, teaches mathematics, social studies, and health, across the same primary classes as Ms Gosling. Ms Decarvalho teaches wholly the combined pre-primary and primary year 1 class, she also teaches science to the other two amalgamated primary classes, and in addition delivers instruction in the Catholic religion generally. Mr Sundra teaches the now amalgamated and single secondary class years 8,9 and 10. Mr McGuire was retained to teach the Nyungar language and culture to all classes, part time, and to return to bus driving duties where the need arises. Ms Corunna continued in the position of Co-ordinator and assists with the subject of music for primary classes.

Both Messrs Hart and King say that during the period between receiving notice of their redundancy and the date their employment ended, Ms Bowie made comments that indicated their selection had been wrongly based. Comments of this nature, having been made by the Chairperson of the Board, are said to support the contention that they were declared redundant because of their participation in the events of 1995/96, such being the implication to be drawn from Ms Bowie saying what she did, in the context that her period of association with them had caused her to doubt the premise upon which the decisions had been made, and hence the comments that, a mistake may have been made in reference to Mr Hart, and Mr King did not appear to be the "baddie" she had understood him to be. What be the reason for the possible "mistake", or what be the reason for the categorisation "baddie", is not apparent from the content of the comments made. There is nothing in the evidence which directly connects the comments of Ms Bowie to the reason the three applicants attribute to the decisions of the Board and it is suspicion alone which attributes to those decisions the reasons they contend. Ms Gosling participated in the deliberations of the Board and was in attendance

when the decisions were made regarding the employees to be retained and those who would be made redundant. It is her evidence that the selection was made on the basis of, meeting the administrative needs, meeting the teaching requirements of the restructured classes, the flexibility afforded by the training and/or experience employees have, the levels of remuneration required to be paid, a consideration of service with the school, the degree of acceptability employees have to the Nyungar community, and what understanding employees have of the Nyungar "way". There is no reason for me to doubt this testimony from Ms Gosling and hence I conclude that the Board decided who would be made redundant on the basis she described and did not act with a common bias against the applicants.

It is apposite that I indicate at this point that the role of the Commission is not to review the dismissals and decide whether in the prevailing circumstances it may have decided differently to the respondent. The respondent had the legal right to terminate the employment of the applicants and the task of the Commission is to determine whether there has been an unfair exercise of that right. The onus to demonstrate that their dismissal is unfair rests with each applicant.

Primarily the applicants argue that they ought have been retained as teachers, and consequently the bulk of each applicant's evidence has been directed at a comparison between them and the present teachers with the intended purpose of showing each was erroneously, and therefore unfairly, dismissed. Before turning to deal with this substantial area in which the applicants have a number of competing claims in relation to the present teaching positions, I will address the other individual and lesser areas of claim and argument.

Mr Hart argues that his training, his past work experience, and his different Aboriginal background, are attributes which make him better suited to be position of Co-ordinator than Ms Corunna. That is so, according to Mr Hart, because the role is one of liaison between the school and the Aboriginal community which he is equipped to do, and given that part of the role is to promote, and gain, student enrolment, Ms Corunna must be seen to have failed. The failure of Ms Corunna Mr Hart says is attributable to the fact that she is from the Nyungar community and there is family based conflict between her and others in that community. He, on the other hand, is not of the Nyungar people and therefore his efforts would not be hampered by a family alignment within the Nyungar community. Ms Gosling concedes that Ms Corunna has had differences with some in the community, but in her opinion they are a minority and she does not concede that Ms Corunna is to blame for the lack of students at the school. Ms Gosling also told the Commission that acceptance by the community is important and Ms Corunna is a Nyungar elder, she is well known in the community, she has held the position of Co-ordinator for many years and has had an involvement with the school for a longer period than that. Ms Gosling also expressed the opinion that notwithstanding Mr Hart is Aboriginal he does not understand the Nyungar "way".

On several occasions Counsel for the applicants pressed Ms Gosling, who is of the Nyungar people, to describe what it is that constitutes the Nyungar "way". Ms Gosling was not able to explain such in any precise way and settled for the explanation of it being something stemming from "the heart". Ms Gosling says an understanding of the Nyungar "way", by persons not of the Nyungar people, does not automatically accompany Aboriginal origins but comes from the individual person, and exampled that her husband does not understand the Nyungar "way". I do not attempt to conclude there is a definitive meaning which may be ascribed to the term or the associated understanding but indicate that I am left with the impression that such is material in dealings with a Nyungar person and the likes of empathy and affinity may be material factors.

Given the origins of Ms Corunna, her elder status, that she has served the school and the community in her different capacities for some years, and there being no evidence but simply opinion that she is responsible for the lack of students, there is no apparent reason why Mr Hart who is from a different cultural background, and who relies on his self serving opinion to support the contention he would be more successful than Ms Corunna, I am not persuaded that Mr Hart ought have been appointed Co-ordinator and Ms Corunna made redundant.

Mr Hart says he ought have been considered in relation to any required bus driving duties, and it is my understanding that he does so in the context such would be an adjunct to teaching. There was express reference to such duties being a factor which favoured the retainment of Mr Sundra, in that he would be a reserve driver, and there was mention of Mr McGuire who it was intended would perform some of the driving done by the displaced bus driver. The Commission is told that Mr Hart does not hold the necessary license however his driving experience in the airforce meant he could have readily obtained the license, and would have done so, had he been afforded the opportunity when the dismissal decision was made.

The Board retained one only part time bus driver who was to perform the usual driving and elected to have Mr McGuire assist with those duties, it being well known to the Board that he is appropriately licensed and had previously performed such driving for the school. Notwithstanding, the overall part time working hours, and in consequence the remuneration, of Mr Mcguire were reduced in any event. Mr McGuire is said to have been retained and allocated to assist with bus driving because the Board wished to have him continue teaching the Nyungar language and culture, he is an elder who is well known and respected within the community, and that he is familiar with the family situations in the community.

When the Board decided the reallocation of bus driving duties to Mr McGuire, Mr Hart did not possess the required license to perform those duties, and plainly the Board was unaware that he might qualify to obtain the necessary license. Justifiably some criticism is to be levelled at the Board for not informing the staff of the need to make a number of them redundant, and to address with them the needs of the school and their circumstances, before the decisions were made. However, were it that the Board had known the driving background of Mr Hart and been satisfied that he would readily gain the necessary license, there is no argument or evidence whatsoever before the Commission which reveals there is good objective reason why the Board ought have retained Mr Hart to perform the driving in preference to Mr McGuire.

Ms Alexander has two non-teaching related claims. The first of these is that the Board made an error in judgement when it decided to dispense with the position of Librarian and to have class teachers, who are not as conversant with the library and its systems, instruct students in the use of the library. The second claim is that an Aboriginal Education Worker ought have been displaced, and that Ms Alexander ought have been retained to fulfil that role.

The decision of the Board to dispense with the position of Librarian was plainly made upon the basis that costs needed to be reduced, the classroom teaching of curriculum subjects was held to be the more important, and the maintenance of the library and the provision of instruction in its use would therefore be allocated to the retained teaching staff. Plainly the decision was an objective one in which the need to have a person occupy the position was the consideration, not whether Ms Alexander be retained as an employee. Ms Alexander complains the decision is wrong and that the education of the students would be better served had the provision of their library instruction been continued by her, a person expressly trained in the field and fully conversant with the library. Brought into issue is the manner and extent of the education that the school intends to provide. That is a matter which is within the prerogative of the Board to decide and with which the Commission may not interfere. The second of the claims requires little comment. An Aboriginal Education Worker must be an Aboriginal person which Ms Alexander is not and therefore this claim is not a valid one.

Mesdames Jeyaretnam and Decarvalho, and Mr Sundra, did not give testimony to the Commission. Their background material, and that of the applicants, upon which the respondent relies to show they were correctly selected in preference to the applicants, has been provided by Ms Gosling together with a written outline of the selection basis (exhibit Q4), a brief explanatory document provided to the applicants following upon an unsuccessful conciliation conference before the Commission.

The relevant extracts from the written outline are set out hereunder—

"Principal—Mrs Tracey Gosling

Ms Gosling was retained for administration duties, which were reduced from full-time to 0.6 FTE. Mrs Gosling's teaching role was to teach Language for Years 2 to 7. Mrs Gosling, with more than 15 years' experience in the school, was the most experienced teacher to teach Language. Mrs Gosling can also impart the Nyungar culture in the teaching of Language.

Mrs Irene Jeyaretnam

Mrs Jeyaretnam is teacher trained and will teach Maths, Social Studies and Health to Years 2 to 7. She will have a 0.5 FTE teaching role. As the school must have secretarial duties, Mrs Jeyaretnam will undertake secretarial duties at 0.5 FTE.

In establishing these two roles, the school considered the skills of Ms Alexander, Mr Hart and Mr King. None of these teachers has experience as a Principal and none has acted in the secretarial role at the school.

Mr Peter Sundra

The school required a teacher for secondary children. Mr Sundra is able to teach all subjects and he has taught vocational education in the past. He has a bus driver's license and can drive the school bus when the other drivers, Mr Penny and Mr McGuire, are not available. Mr Sundra has been at the school for approximately seven years.

The other teacher, who is secondary trained, is Mr Ray Hart. Mr Hart has been at the school for one year only. Given the combination of factors, Mr Peter Sundra was preferred as the teacher to be retained to teach the secondary students rather than Mr Hart.

Ms Mona Decarvalho

Ms Decarvalho will teach Science to children in Years 2 to 7 and will be the full-time teacher for pre-school and year one children to whom she will teach all subject areas. This was a difficult position to fill.

The major reason why Ms Decarvalho was chosen, was that the young children coming to the school have Aboriginal English as their first language and require training in English as a Second Language. The school teaches ESL to these children. The children do speak English, but it is a dialect of English.

Mrs Decarvalho has a considerable advantage in that she has the teaching of English to children who speak a language other than traditional English as their first language as a curriculum major in her bachelor of Education degree. This was seen as a most important asset and, consequently, Ms Decarvalho was retained in preference to Ms Sue Reys. Another factor in deciding to choose Ms Decarvalho was that she has nine years' experience teaching in other schools. The ability to teach upper primary years was considered a further advantage.

Ms Lois Alexander

Ms Alexander was the former Librarian and responsible for Vocational Education. Her duty load was 0.6 FTE. Large secondary schools have a teacher librarian and a large primary school may have a teacher librarian on staff. There is no doubting the need for librarians, but they are not as essential as classroom teachers. Given the amount of time that any school can devote to library studies, a school with 95 children would find difficulty in providing a workload. All classroom teachers are capable of teaching children to use a library and can assist students with questions relating to library use.

Mr Ray Hart

Mr Hart was the former teacher of years six and seven. Mr Hart is secondary trained, but the reasons for the school's preference to retain Mr Peter Sundra rather than Mr Hart for secondary teaching have been given above.

Mr John King

Mr King was the former teacher of years four and five. He has been in the school for two years, but, in the opinion of the principal and the Board, does not possess the necessary blend of skills and abilities as do other staff members—given the approach which is to be taken to the teaching of the education program. Mr King is not closely familiar with the Nyungar culture."

Mr Hart describes Mr Sundra to be a teacher who, is authoritarian and some students from his class refused to attend Mr Sundra's class, does not make learning interesting, has failed to effect learning programs, swears at students, and who has mainly taught secondary class year 10. Whereas he, the applicant, has been commended for his work in the school, he has applied more appropriate teaching principles, he does not swear at students, and at the time of his engagement to teach at the school he was informed that Mr Sundra had been unsatisfactory and he was being engaged with the intention that he replace Mr Sundra. Ms Gosling says the applicant is a respected teacher but in her opinion the strict approach of Mr Sundra is preferred to the practice of Mr Hart allowing students to often engage in games and entertainment to occupy them. It is denied that Mr Hart was engaged with the intention of him replacing Mr Sundra although Mr Sundra was to be, and was, replaced by the applicant in relation to teaching years 8 and 9. Mr Sundra is said to have been teaching at the school in the vicinity of seven years during which he has taught several secondary classes, he is familiar with the Nyungar whereas the applicant has not come to understand the Nyungar "way".

Ms Gosling has ten years primary level teaching experience with the respondent and, for in excess of three years, she has been the Principal of the school. Although Ms Gosling was suspended by the Board on one occasion the reason for that is not presently material there is no other evidence before the Commission which places doubt upon her expertise or judgement in either occupation. The fact that Mr Sundra has completed several years of employment teaching in the Nyungar cultural environment and that the Board, the voice of the community, is prepared to retain him in preference to Mr Hart an Aboriginal person, indicates that he has been judged a satisfactory teacher. Mr Hart has taught in the school environment and according to the related curriculum for one year only, this lesser experience and lesser service with the school also weighs in favour of Mr Sundra and hence the Commission is not persuaded that Mr Hart had a better claim to the secondary teacher position than Mr Sundra.

Mr King claims that he is better qualified than Ms Gosling to undertake the role she now has. The applicant has taught primary classes for two years. He argues that Ms Gosling had not taught classes for the period she has been the Principal and therefore would not be abreast of what is required in classroom teaching role. Ms Gosling, on the other hand, has told the Commission that although she had not engaged in teaching for a period she has the background knowledge and experience, coupled with the knowledge necessary to review the teaching programs teachers are required to submit to her, and she has also observed the conduct of classes from time to time. Mr King concedes he has not performed in, nor has he obtained experience in, the role of a school Principal. Ms Gosling has successfully performed the role of both teacher and Principal separately during her thirteen years of employment at the school. The role is now a joint one of Principal and teaching, and Ms Gosling has successfully served the school in both facets, whereas Mr King has no experience in one facet of the role and limited experience in the other. Ms Gosling was plainly the person best acquitted to undertake the joint role.

Mr King contends he has a better claim to the part time primary level teaching position to which Ms Jeyaretnam has been appointed, essentially because of his background and in particular that Ms Jeyaretnam is trained in secondary level teaching and has not taught classes for approximately six years. Much of the evidence before the Commission is hearsay and from the different recollections of Mesdames Gosling and Alexander, it appears Ms Jeyaretnam has been employed at the school between eight and ten years. Ms Jeyaretnam was first engaged as a teacher and has served in the vicinity of the last five years in the only secretarial position at the school. Ms Gosling recollects her to have been a competent teacher, she has taken an active role in the Aboriginal community, and she is accepted by the school community. The need remained for the school to retain a level of secretarial services and I infer, from what Ms Gosling had to say, that given that Ms

Jeyaretnam was conversant with the secretarial function and administration, and considering the service she has given the school together with the fact that she is able to teach, it was viewed appropriate that she be retained in the secretarial role and in full time employment by undertaking a part time teaching role. In the opinion of the Principal, Ms Jeyaretnam is the appropriate person for the dual role to which she has been appointed.

Essentially the argument of Mr King relies upon the Commission being satisfied that his academic background and his primary level experience ought have outweighed the service, and the outdated and secondary level experience of Ms Jeyaretnam. On more than one occasion it was put to the Commission that an absence from teaching for a period meant that the person involved had become "outdated" with their methodology. Whilst the Commission is prepared to accept that an absence may have that result, the result will depend upon the period of absence, what has changed in the time frame, whether the person has an awareness of the changes, and whether the person has made an effort to stay abreast of changes that have occurred. The Commission is also prepared to accept that a secondary level teacher may experience a degree of difficulty teaching children who are less mature, however the suitability of such a teacher for a particular position will also depend upon a number of factors. The reliance on broad based assumptions is not useful and does not discharge the onus of proof that resides with this applicant.

A claim is also made in relation to the position of Mr Sundra. The sole supporting evidence being the academic background of Mr King and that his training has qualified him to teach to secondary level 10. No argument was put in an attempt to show why, upon a comparison between them, Mr King ought have been the preferred teacher. Again there has been no real attempt to discharge the onus upon the applicant.

The final claim by Mr King relates to the appointment of Ms Decarvalho. In this regard it is said that she has no better claim to engage in early childhood education than him because neither of them are so trained, and to the extent that the respondent relies upon her being trained to deal with English as a second language (E S L), he has that training also. Two areas of difference which are claimed to favour the applicant are that, he has achieved excellent mathematics results during his training and had acted as the co-ordinator for that subject for the school, and that he has served the respondent for two years whereas Ms Decarvalho had been employed in the vicinity of eight months.

Ms Decarvalho is an indigenous person of the Seychelles who, according to Ms Gosling, has ten years of experience teaching classes from pre-primary through to secondary level year 10, is trained in and has taught E S L, understands the Nyungar "way", and is of the Catholic religion and therefore suited to instruct in the same. The comparison given in relation to Mr King is that he has no secondary level teaching experience, or primary level teaching experience below the years 4 and 5. It is the opinion of Ms Gosling that he has not shown any special achievement in the teaching of mathematics, nor has he displayed an understanding of the Nyungar "way".

The service which Mr King has given the school weighs in his favour and it is a matter of whether there are other factors which outweigh that in favour of Ms Decarvalho whom the applicant concedes is a "pretty good" teacher. No issue is taken with the background and experience of Ms Decarvalho as has been described by the Principal and hence I accept it and the reasons given for her selection to be accurate. Given that the number of classes has been reduced in order to reduce the number of teachers, and that to teach the primary level classes and to have Ms Gosling and Ms Jeyaretnam teach years 2 to 7 thereof part of their time, the teaching of particular subjects across those classes has been introduced. That in turn requires that the one full time primary level teacher retained be equipped to teach subjects across those same classes and to teach the remaining lower and pre-primary level. Ms Decarvalho is known to be experienced in the teaching of various primary levels and she provides the added flexibility of being able to teach the secondary levels. Notwithstanding the shorter period that Ms Decarvalho has been employed she better meets the needs of the school in the present circumstances.

In 1994 Ms Alexander recommenced with the school as the part time Librarian and in that capacity she has been responsible for the overhaul of the library, including the implementation of its computerisation. At an undisclosed time her role altered to also include the teaching function of vocational training in which there has been the success of a number of students pursuing subsequent vocational education. According to the applicant, her success in these two roles and her overall experience as a secondary level teacher, together with that of teaching art throughout primary and secondary levels during an earlier period of employment with the school, are factors which ought have favoured her retention to teach. Ms Alexander provided no evidence of the scope of her teaching experience prior to when she was first employed by the school.

According to Ms Alexander she has a better claim to a teaching position than Ms Jeyaretnam, firstly for the reason that when Ms Jeyaretnam commenced at the school as a teacher she was not conversant with the Western Australian curriculum, and hence she has gained limited relevant experience in the few years she taught before moving to the secretarial role, secondly Ms Jeyaretnam has no primary level teaching experience, and finally she has not taught for the several years she has performed the secretarial role.

In the opinion of Ms Gosling, Ms Jeyaretnam is competent to teach in the part time role to which she has been appointed. She has a lengthy period of continuous service during which she has also become experienced in the secretarial role and the associated administration and therefore it is more appropriate that she be retained full time and fulfil both roles.

Ms Alexander has laid claim to the part time teaching role alone. Experience in administration and a secretarial role are plainly not attributes which are directly relevant to the selection of an appropriate person to undertake that teaching role. The applicant has, in the aggregate, served the school for longer than Ms Jeyaretnam and given that she has been re-engaged on two occasions, her service has obviously been satisfactory. Ms Alexander has a strong claim to the material part time teaching position. However the decision of the respondent has been to combine that role with another in order to retain an employee in full time employment and that is logical and not an unreasonable approach. Ensuring that the services of Ms Jeyaretnam were retained did not make the decision to end the services of Ms Alexander unfair.

Ms Alexander was very critical of Mr Sundra. In her assessment his teaching performance and his knowledge of the curriculum are inadequate. The opinion of the Principal has been recorded earlier herein. Again the Commission is faced with weighing the competing interests and deciding the matter on what are differences of opinion upon whether Mr Sundra had been, or had not been, the most suitable secondary teacher to be retained. There has been no probative evidence and accordingly there is nothing before the Commission to cause it to reach a conclusion different to that expressed earlier in relation to Mr Sundra. It is however apposite that I refer to the fact that Mr Sundra was, in addition to his teaching role, also chosen because he was to act as the reserve bus driver and that is not a duty which Ms Alexander has said she is able to perform.

The final claim relates to Ms Decarvalho whom it is said speaks with a French accent. The applicant asserts that the accent of Ms Decarvalho creates an understanding difficulty for the students notwithstanding she is versed in teaching where E S L has application. It is also asserted that the teaching experience of Ms Decarvalho has been at the upper-primary level. These factors, combined with the fact that Ms Decarvalho has given far less service to the school, according to Ms Alexander ought have weighed in her favour.

It is not necessary to repeat what Ms Gosling has had to say in justification of the decision to retain Ms Decarvalho. It is however appropriate that I record she was equivocal regarding the breadth of the primary teaching experience Ms Decarvalho has acquired, but given her testimony and that of the applicant are both hearsay, I have accepted that of the Principal as the most likely to be accurate given that she considered the background of Ms Decarvalho when she was engaged. There is no evidence that the accent of Ms Decarvalho creates a teaching difficulty. Ms Alexander is not trained to teach in relation to E S L and she has not disputed the opinion

expressed that such is an advantage in the teaching of Aboriginal students. Hence, I am satisfied that the termination of Ms Alexander's services and the decision to retain Ms Decarvalho in preference was not unfair.

Each of the applications will be determined by ordering their dismissal.

Appearances: Ms J. Quinlivan (of Counsel) on behalf of the applicants

Mr R. Gifford on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Ray Hart

and

Culunga Aboriginal Community School.

No. 615 of 1997.

29 November 1999.

Order.

HAVING heard Ms J. Quinlivan (of Counsel) on behalf of the Applicant and Mr R. Gifford 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 dismissed.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John King

and

Culunga Aboriginal Community School.

No. 616 of 1997.

29 November 1999.

Order.

HAVING heard Ms J. Quinlivan (of Counsel) on behalf of the Applicant and Mr R. Gifford 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 dismissed.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Lois Alexander

and

Culunga Aboriginal Community School.

No. 617 of 1997.

29 November 1999.

Order.

HAVING heard Ms J. Quinlivan (of Counsel) on behalf of the Applicant and Mr R. Gifford 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 dismissed.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Jodi Ann Hoffman

and

Western Australian Aboriginal Media Association.

No. 180 of 1999.

COMMISSIONER A.R. BEECH.

11 October 1999.

Reasons for Decision.

(Given extemporaneously at the conclusion of the proceedings as edited by the Commission.)

The application before the Commission by Ms Hoffman alleges that she was unfairly dismissed on the 20th of January 1999. The proceedings have followed a somewhat unexpected course, in that, after the conclusion of Ms Hoffman's case, the respondent elected not to call evidence in support of its position, and with the consent of the parties, requests that the matter be adjourned, following the decision of the Commission.

The position before the Commission, therefore, is that it has before it Ms Hoffman's application and the evidence of Ms Hoffman, which has been tested by cross-examination, and the documentary material that has been put into evidence, together with the Notice of Answer and Counter Proposal of the respondent and any other documentary material that has been put in.

The starting point for the Commission's analysis is the letter to Ms Hoffman of 20 January 1999 (Exhibit 13). As both Mr Woodward and Mr Clohessy observed, that letter is capable of two interpretations. The first interpretation is that it is, in fact, a letter of dismissal because the letter gives Ms Hoffman 4 weeks' notice. The second interpretation that is open is that it is merely a notification to Ms Hoffman that her employment came to an end, by virtue of frustration, and the giving of 4 weeks' notice, is something that was not necessary to be done, and should not be taken into account.

Although I have the view that the letter, in fact, is a letter of termination because 4 weeks' notice was given, I think it is appropriate to look at it from both perspectives. If the letter terminated her employment, then it is clear that she has been dismissed. The reasons for dismissal, as set out in the letter of termination, are the extended period of absence from work, the alternative satisfactory arrangements that have taken place, and makes reference to frustration. If, therefore, that letter did terminate her employment, Ms Hoffman's absence from work was the essential reason for termination. In the alternative, that is, that Ms Hoffman's contract of employment came to an end of itself, by frustration, then the same essential issue remains.

I therefore turn to examine whether or not it could be said that Ms Hoffman's absence from work on both sick leave and workers' compensation for the period 14 April 1998 to 21 January 1999 provides either a valid reason to terminate her employment or, of itself, operated to terminate her employment.

To deal first with the issue of frustration: as the authorities referred to by both advocates show, it is a common law concept which comes into operation where—

> …without default of either party, a contractual obligation has become incapable of being performed, because of circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.
>
> Carter, J. and Harland, D., Contract Law in Australia, 3rd ed, Butterworths, para 2001.

I have some reservation whether or not the doctrine of frustration applies to what we in modern parlance would refer to as "the contract of employment", and those reservations are as stated in the decision of Wooton J in *Finch v. Sayers*, as referred to in the text "The Law of Employment" by Macken, McCarry and Sappideen to which Mr Clohessy referred me. If the doctrine of frustration does apply, I also have reservations as to whether it would apply in Ms Hoffman's circumstances, given that she had 9 years' service, she was absent for less

than 1 year and the length of her absence as a proportion of her length of service argues against her absence as being an event which would frustrate her contract of employment.

Even so, if the common law doctrine of frustration did apply, in my view, it is overridden by the provisions of section 84AA of the *Worker's Compensation and Rehabilitation Act, 1981*. I do agree, as Mr Woodward has said, that the Commission is not the body to enforce the *Workers' Compensation and Rehabilitation Act, 1981*. However, I also agree that it is a provision that I can take into account in exercising my discretion. I have, on two earlier occasions, in the case of *Stockwin v. Cable Sands* a matter with which Mr Clohessy was involved (77 WAIG 509), and in *Pacey v. Modular Masonry* (78 WAIG 1421) had occasion to consider section 84AA and I was of the opinion then, and I am of the opinion now, that section 84AA obliges an employer to hold the employee's job open for 12 months whilst the employee is in receipt of worker's compensation.

I am supported in that opinion by the decision of the Industrial Relations Court in *Fernandez v. Comgroup Supplies Pty Ltd*, a decision of Judicial Registrar Ritter of 11 December 1995. I only have the unreported decision. I do not have the citation of where it is reported. The relevance of that decision is that it leads me to the conclusion that section 84AA says that if somebody's absence is less that 12 months, then they are able to return to the job, and that is an indication, at least, that the length of Ms Hoffman's absence, being less than 12 months, does not allow frustration of the contract to operate.

For those reasons, I am of the view that there is no proper foundation for the respondent to say, as it did, either that "The contract has been terminated by operation of frustration", or "It has now been terminated by us because of frustration." As the respondent's Notice of Answer is amended, the issue of frustration is the only remaining ground of any substance that it has in defending itself against the claim of unfair dismissal. There is no evidence to support any other suggestion that might be contained in the Notice of Answer.

Furthermore, as Mr Woodward has properly pointed out, the evidence of Ms Hoffman herself shows that she has not been warned regarding any issue of work performance. In fact, there is some evidence that she has been praised in her work. The reasons, advanced by the respondent, I have found to not have any substance. I find that Ms Hoffman's claim is made out.

I add that I do agree that it was reasonable for the respondent to have made satisfactory alternative arrangements. The fact remains that, in its position, it had a radio station to run, it needed to continue to do so, notwithstanding Ms Hoffman's absence, and with that there can be no quarrel. If, however, the respondent asks me to assume that it was reasonable for it to have made satisfactory alternative arrangements which would not accommodate the possibility that Ms Hoffman would return to her employment, then I think the respondent goes too far. It certainly should have made reasonable alternative arrangements, but it should have taken into account that Ms Hoffman might one day, certainly within that 12 month period, return to the job, because that is what section 84AA requires it to do.

For those reasons, I have no difficulty in reaching the conclusion that Ms Hoffman was dismissed and that the dismissal was unfair, and that is my decision in the matter.

Appearances: Mr P. Woodward on behalf of the applicant.

Mr R. Clohessy on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Jodi Ann Hoffmann

and

Western Australian Aboriginal Media Association.

No. 180 of 1999.

11 October 1999.

Order.

HAVING HEARD Mr P. Woodward on behalf of the applicant and Mr R. Clohessy on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby:

A. DECLARES THAT—

1. The dismissal of Jodi Ann Hoffmann was unfair; and
2. Reinstatement is impracticable.

B. ORDERS THAT the application be adjourned to a date to be fixed to allow the parties time to continue their negotiations.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Simon Michael Lowings

and

Russell W Roberts.

No. 761 of 1998.

COMMISSIONER J F GREGOR.

22 November 1999.

Reasons for Decision.

THE COMMISSIONER: On 5 May 1998, Simon Michael Lowings (the applicant) applied to the Commission for orders pursuant to Section 29 of the Industrial Relations Act, 1979 (the Act) contending that he was unfairly dismissed from his employment with Russell W Roberts (the respondent) on or about 15 April 1998.

The applicant told the Commission that he was employed by the respondent as a private trainer for eleven and a half years. The applicant contended that he had been a loyal and competent employee. The applicant lived on the respondent's property known as "Pure Steel Estate". The respondent provided the applicant with free housing because he was required, as a horse trainer, to be available 24 hours per day.

In evidence the applicant said that the respondent did not raise any specific concerns regarding his work performance with him. There had been what he described as [the…] 'usual issues' that arise between a horse trainer and principal but these were not of such moment that he regarded his position as being under threat**.** In early 1998, the applicant heard rumours that the respondent wished to replace him with Mr Norman Payne, a horse trainer from Geraldton. After making some inquiries, the applicant concluded that the rumours were true. He was not surprised when two weeks after he had been given notice on 18 March 1998, the respondent advised that Mr Payne was moving from Geraldton to Pure Steel Estate on the following Easter weekend. The applicant helped Mr Payne move his furniture into the house.

The applicant said the respondent's son, who eventually left the property, originally employed him as a stable hand. The respondent then managed Pure Steel Estate. The applicant's advocate, Mr Clarke, put a number of issues to him regarding gambling and other matters. The applicant denied that he had a gambling problem and explained the sale of stock to Ms Pissoli, in that mares, which later proved to be in foal, were sold to her. The applicant contended that he did not know of

this and had taken reasonable care of the mares before they were sold to Ms Pissoli. Another issue was a rental reference (*Exhibit C1)* which was supplied to the applicant at his request. The reference describes him as hard working, dedicated, conscientious with horses, honest at all times and in good standing when he left the employ of the respondent. The rental reference confirms his employment reference (*Exhibit C2).* The employment reference certified that the respondent employed the applicant for eleven and a half years as a stable foreman and was hard working, dedicated, conscientious and honest. Further, the respondent recommended the applicant for any position he would apply for. The Commission was presented a copy of the Separation Certificate (*Exhibit C4)* which states that the applicant was dismissed because of work shortages.

The applicant contends that when he left the property, the respondent inspected it and had no complaint. The applicant removed a swimming pool and arranged to have the hole filled in. Mr Clarke examined the applicant about a number of other issues which need not be analysed in detail. They cover the applicant's explanation of the purchase of some low quality hay, missing brindles and horse gear, the treatment of injured horses and the whereabouts of stock. There is no need to summarise that information.

In support of the applicant's contention that the respondent was kindly disposed towards him, the Commission was shown a videotape of the respondent speaking in favour of the applicant at a marriage ceremony. The applicant told the Commission that prior to his dismissal he received a pay increase of $50.00 per week, which he understood to be because of his efforts. He had not received any written or verbal warning about his performance.

When the employment contact was terminated the applicant and his family suffered financially as he found it difficult to obtain work as a horse trainer and they had to find new accommodation. He eventually obtained work as a casual.

A number of witnesses were called to support the applicant. The Commission heard from Gary Raymond Reid who was a horse trainer and had observed the applicant working with horses. He thought his aptitude was good and had never witnessed him being cruel to horses. Mr Raymond Walter Nimmo told the Commission that he had known the applicant for eleven years and had visited the property socially and for mechanical work. He told the Commission that he was informed that the applicant had been sacked. He stated that he had not done any structural work on the property for sometime, but had observed work being done since the applicant had left. Evidence was also taken from Ms Teena Zacharko who had been employed over a number of years when the applicant was the trainer. She said that she had never seen him mistreat a horse. He was very good with gallopers and controlled them well at all times. She did recall an injury to the horse "You'll do" but in her opinion it did not result from the applicant's neglect. Another witness, Mr Adam Troy Kirke had worked with the applicant and he had not seen him being cruel to horses. He remembered the applicant asking Mr Roberts whether the fencing could be fixed and that patchwork has been carried out consistently. Evidence was taken from Ms Sandy Rose Galvin who had helped the applicant's wife clean the house before they vacated the premises.

The respondent's view of the matter is different to that of the applicant. Mr Russell Roberts told the Commission that he owned the Pure Steel Estate, but due to other business commitments he spent little time at the property from 1986 through to 1999. In 1986, the respondent's son, Mark, managed Pure Steel Estate and its 100 horses. Around July 1986 he agreed that his son could employ the applicant as a stable hand. Due to the respondent's business commitments, he was not interested in the running of the property. Mark dealt with every aspect of the farm and stables except paying the bills. Twelve months after the applicant commenced employment, the respondent's son left the property. The respondent offered this job to the applicant which he accepted. The respondent claimed that they did not discuss a job description because the applicant had been working on the property for a year or more and was aware that his duties were to look after the horses, manage the property, buy feed, sell animals and arrange agistment. He was to obtain a trainer's licence and to be paid 10% of winning stakes. During 1987 to 1989, the respondent briefly visited the property once or twice a week. From 1989 to 1994, the respondent's visits were more extensive. Sometimes he would attend 4 to 5 times a week for up to 2 hours at a time.

The respondent confirmed that the applicant had been living in an old house on the property since he commenced employment. The applicant was told that he could live in the house during the course of his employment on the condition that he looked after it. In 1994, the respondent commenced living on the property and was interested in training the horses.

During this period, the respondent observed the applicant at work. The respondent explicitly instructed the applicant to perform his duties in a manner suitable to him. For instance, the respondent instructed the applicant to lead gallopers on a long rein because they may run up the back of jog carts and injure themselves. The respondent was not satisfied with the applicant's manner of riding gallopers and taught him how to ride. The respondent asserted that the applicant never sufficiently achieved the training skill that he required. Additionally, the respondent alleged that the applicant's negligence caused two mares, in foal to a pony, to be sold to Ms Pissoli, of Kalgoorlie. Ms Pissoli made numerous attempts to resolve this problem with the applicant. However, he failed to resolve the problem or bring it to the respondent's attention. Ms Pissoli wrote to the respondent in 1998, enabling him to deal with the problem (*Exhibit B7).* The respondent raised the matter with the applicant, who responded that he did not think that the mares being in foal was important. The respondent warned him that if it ever happened again he would be dismissed.

In 1994, the horses were in poor condition resulting in the applicant being told to feed them regularly and in accordance with specific instructions. When the horse's condition did not improve, the respondent determined that the applicant had purchased 60 to 70 bales of rotten hay. Even though he had been directed not to, he continued to feed the horses rotten hay. He was told to buy quality feed otherwise he was wasting the respondent's time and money.

The respondent observed water running into a horse's ear while a stable hand washed it down under the applicant's supervision. The applicant did not intervene, causing the respondent to instruct the stable hand in the correct techniques. The applicant was warned for failing to supervise and teach the stable hand the correct method. In 1996, the applicant incorrectly injected a horse with vitamins. Mr Roberts noticed an air bubble in the needle and shouted at the applicant to stop but it was too late. The injection was made in the wrong position causing it to never race again. The applicant entered a horse in a race which the respondent determined was injured and scratched. On another occasion the horse "Cable Broome", was led behind a cart on a short rein contrary to the respondent's instructions. Cable Broome ran into the cart and chipped its shine bone. The respondent advised the applicant that he could not afford horses breaking down and warned him that if he could not manage them properly they would have to "call it quits".

The respondent and his wife, Mrs Roberts, discussed the "Cable Broome" incident and determined that the applicant would have to be dismissed. The respondent intended to dismiss the applicant the next day. He gave him another chance, however, after the applicant pleaded that he did so. During the conversation the applicant said that he was finding it very hard to make "ends meet". He had not received a pay rise for some time and his share of the prize money had diminished, as there had not been many winners. As a result of this conversation, the respondent decided to increase his pay merely to help him out, not to reward his work performance.

Another warning was issued in February 1998, when a horse running up and down the fence was injured. There was another incident where a contractor had informed the respondent that he had seen one of the employees beating a horse by holding and kicking it. The respondent says that he advised the applicant words to the effect "...if another horse gets hurt, we are going to have to call it quits. There will be no more excuses".

There were complaints by the respondent about the standard of maintenance on the estate. Despite requesting him to do so the applicant would not hire contractors to fix fences. In general, the state of the property deteriorated. In March 1998, another horse was injured while being led by an unsupervised

inexperienced stable hand. This was the last straw. The respondent decided to terminate the contract and told the applicant that they had to "…call it quits". The applicant asked the respondent how long he had to work for, and was advised that there was no hurry to leave. The applicant could stay until he had arranged accommodation for his family and horse. The respondent told the Commission that he did not discuss specific reasons for the applicant's dismissal, but the context of the conversation was clear. The applicant knew what the reasons were and was present when the horse was injured.

The respondent did not seek a replacement for the applicant until approximately one week after he had given him notice. He made contact with Mr Payne who, in due course, decided to take the job. Prior to the applicant leaving he was instructed to bring back a number of horses which had been on the Bullsbrook property. Some horses were missing and when asked to identify the horses, he had difficulty in doing so. He could not name the horses or named them incorrectly.

The dispute over missing horses is the subject of other proceedings. I do not need to summarise the evidence in that case. The respondent was extremely concerned about the state of disrepair and uncleanliness of the applicant's residence. In fact, he described the house as "uninhabitable", costing him $21,000.00 to repair. It is not necessary to detail this dispute.

The respondent contends that the references were given in good faith to try and help the applicant. The rental reference was given when the parties were on amicable terms. The applicant had not indicated that he was dissatisfied with his dismissal. Ms Benzie, the respondent's secretary, urged the respondent to give the applicant a reference. Ms Benzie told the Commission she faxed it to the respondent while he was working out of Perth. The respondent says he gave it a cursory read, signed it and sent it back. On reflection, the respondent contends that it overstates the applicant's abilities and in light of what has occurred, it certainly overstates his honesty.

The Commission also received evidence from Ms Sally Roberts, Director of Walter Developments and the respondent's wife. She told the Commission that she disagreed with the respondent's decision to give the applicant a pay increase. The respondent intended to dismiss the applicant but ended up giving him a pay rise. She had told her husband that she had seen the applicant mistreating trotters and was concerned about the applicant's lack of commitment to his job.

Evidence was taken from Ms Sandra Lee Cambridge, Company Director of Walter Developments. She was advised in March 1998, that the applicant had been dismissed. She was not surprised, as over the last 12 to 18 months numerous incidents caused her father, the respondent, to be unhappy with the applicant's efforts and attitude. Ms Cambridge recalled a conversation when the applicant's wife asked her to supply a Separation Certificate. There were difficulties calculating the final amount of money because of a loan between the parties. It is not necessary to summarise the information given to the Commission about this matter because the applicant has not bought a contractual benefits claim. Ms Cambridge said that she filled in the Separation Certificate to help the applicant find a job. She recalled that the applicant's wife seemed more concerned about the Separation Certificate than money. Ms Cambridge was unable to discuss the matter with her father.

Evidence was taken from Mr Payne, who was the applicant's successor. He contended that when he moved into the house, previously occupied by the applicant, it was almost uninhabitable. He said that the respondent was shocked by the state of the house. A lot of rubbish was left around the property, which was poorly maintained and some of the horses were in poor condition.

Ms Wendy Joan Benzie, the respondent's and Walter Development's secretary told the Commission that the applicant's wife asked her for his reference. The respondent was not in Perth and provided the reference reluctantly, giving what Ms Benzie described as a "fairly standard reference to help him out". Ms Benzie drafted the reference, sent it to the respondent to sign and gave it to the applicant.

The above is a sufficient summary of the factual matrix for the purpose of these Reasons for Decision. Before discussing the law to be applied in this matter I need to discuss witness credibility. I had the opportunity to observe the applicant in the witness box over an extended period of time. Many of the answers that he gave during cross-examination appeared to be self-serving. His fundamental position was that he had done nothing that would cause the respondent to dismiss him. He claimed he did not know it was a possibility. However, his answers during cross-examination call into question his claim. This equivocation casts doubt on his version of events.

Much of the evidence given by the applicant's witnesses dealt with conduct they observed outside the applicant and respondent's working relationship with exception of Ms Zacharko and Mr Kirke. Their evidence does little to support the applicant's contentions. Ms Zacharko and Mr Kirke particularly recanted in cross-examination. For those reasons, I doubt their evidence.

Evidence given by Mr Russell Roberts, the respondent, was not extensively challenged during cross-examination. Most of the cross-examination related to registration and identification of certain horses. These matters have nothing to do with the issues before the Commission. Much of the respondent's evidence is unchallenged and in the absence of any evidence to the contrary, I am obliged to except that evidence in chief was logical, consistent and thorough. Nothing occurred during the hearing, which led me to doubt the truth of the respondent's evidence, and I so find.

The evidence of Mrs Roberts, Ms Cambridge, Mr Payne and Ms Benzie, seems to be truthful. There was no substantial cross-examination causing me to conclude otherwise.

For the reasons that I have expressed where the applicant's evidence differs from the respondent's and the respondent's witnesses, I accept the respondent's evidence.

The law to be applied to a matter such as this is well established. The question is whether the respondent acted harshly, unfairly or oppressively in its dismissal of the applicant. It is for the applicant to establish that the dismissal was in all these circumstances unfair. The test for ascertaining whether a dismissal is harsh, oppressive or unfair is outlined by the Industrial Appeal Court in *Undercliff Nursing Home v. Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385*. The question to be answered is whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as to amount to an abuse of the right. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. If the employment has been terminated in a manner which is procedurally irregular that will not of itself necessarily mean the dismissal is unfair (*see Shire of Esperance v. Mouritz (1991) 71 WAIG 891* and also *Byrne v. Australian Airlines (1995) 65 IR 32*). In *Shire of Esperance v. Mouritz*, Kennedy J observed that whether an employer in bringing about a dismissal adopted procedures which were unfair to the employee, is but an element in determining whether the dismissal was harsh or unjust.

There is overwhelming evidence that on a number of occasions the respondent advised the applicant that he was dissatisfied with his work. The applicant attempted to establish that his work performance was not an issue because he received a favourable rental and work reference. His Separation Certificate states that he was dismissed because of a shortage of work. When one examines the context in which each of these documents was produced, the respondent's explanation is understandable. When the rental reference was produced, the applicant still resided on the property and the parties, as far as the respondent was concerned, had mutually agreed that the relationship should end. There was no reason why the respondent would not give a reference. The respondent states that if he had at that time known about the condition of the house, he would not have given that reference. I find that he did not know about the condition of the house. I accept that when the applicant resided in the house, the respondent respected his privacy and did not enter the premises. Whether that was prudent of him or not, is not an issue. The fact is that he did not enter nor he did not know of the condition of the house. Although he was concerned about the standard of the whole estate, there was no reason for him to refuse to provide a rental reference.

The respondent stated that he was extremely reluctant to give the work reference. He gave it after his secretary suggested that a 'standard company' reference would be appropriate. The respondent did not doubt the applicant's

honesty until, after his dismissal, he became aware that some horses and equipment were missing. One can understand the reference being reluctantly given. Importantly, it does not endorse the applicant's service. Whether the respondent was prudent or wise to give the reference is not a matter for me to decide.

Thirdly, the applicant relies upon the Separation Certificate as proof that there was nothing wrong with his work. Even if the Separation Certificate is misleading, which prima facie it is, it was not prepared as a reference. Ms Cambridge produced the document at the insistence of the applicant's wife. It was prepared in a way which enabled the applicant access to Social Security assistance. The applicant's contention, that it indicates that he was a good employee, is unsubstantiated.

It is open to find, and I do, that on at least four occasions the applicant was warned about his future as the respondent's employee. The $50.00 pay increase does not support the contention that he was a good employee. The respondent says that he went to see the applicant with intention of dismissing him. The evidence from Mrs Roberts supports this. However, he decided not to and in response to the applicant's plea, gave him a pay increase. The $50.00 increase was given to assist the applicant and I accept the evidence of the respondent to that end.

The evidence of Mr Payne supports the respondent's evidence that the property was in a bad state. Mr Payne indicated the work reasonably required to restore the property. The contactor who gave evidence confirmed this evidence. The applicant was not dismissed because he did not adequately care for the house. However, his assertions say much about his credibility.

As I understand it, allegations concerning missing horses and equipment are being determined elsewhere. I make no finding in that regard. What I need to address is whether the applicant was unfairly dismissed.

On the evidence, no unfairness, in the terms of any applicable authorities, occurred. The employer is required to act within a band of reasonableness (*British Leyland UK Ltd v. Swift [1981] IRLR 91 for Denning MR).* The respondent has done so in this case. The applicant was given a number of opportunities to improve his performance however he did not do so (*Margio v. Fremantle Arts Centre Press (1990) 70 WAIG 3921).* The respondent was concerned about the care his animals were receiving. He has a legal obligation to ensure the animals are properly cared for. The respondent must act to protect any animal if, potentially, they are being poorly treated pursuant to Sections 4 and 5 of *Prevention of Cruelty to Animals Act 1920—1976.* There is enough evidence before the Commission to suggest that the potential was real. I do not find that the applicant was cruel to the animals. However, the animals were injured in training which the respondent has a duty of care to prevent. The respondent detailed his concerns to the applicant, which were not remedied. The respondent was entitled to consider his business interest and review the applicant's position as an employee (*Sangwin v. Imogen Pty Ltd t/a Carleton Customs Upholstery 1996 40 AILR 3—388).* He did so against the background of the other evidence and concluded, in his own words, "it was time to call it quits".

The applicant was given adequate notice. He was not thrown out after another person had been engaged, as he would have the Commission believe. On the contrary, I find that the respondent did not approach the applicant's successor until at least two weeks after the applicant was given notice.

For all of the reasons that I have set out above, the application will be dismissed.

Appearances: Mr D Clarke appeared on behalf of the applicant.

Ms C Brown and later Mr Randles appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Simon Michael Lowings

and

Russell W Roberts.

No. 761 of 1998.

COMMISSIONER J F GREGOR.

22 November 1999.

Order.

HAVING heard Mr D Clarke, on behalf of the applicant and Ms C Brown and later Mr A Randles, of Counsel, on behalf of the respondent, the Commission pursuant to the powers conferred 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.

Thomas William Maher

and

Bunnings Forest Products Pty Ltd.

No. 1509 of 1998.

CHIEF COMMISSIONER W.S. COLEMAN.

29th November 1998.

Reasons for Decision.

The applicant, Mr Maher, was employed as a feller by Bunnings Forest Products Pty Ltd ("Bunnings"). He commenced employment on 5th February 1992 and his services were terminated with effect on 18th July 1998.

Under the "Safety and Health Code" for Native Forrest/Hardwood Logging and Plantation Logger (Interim Version) it is compulsory that spiked boots be worn in karri in wet conditions (See Exhibit 11, p69—Personal Protective Equipment). This Code was set down in 1997 following consultation between industry representatives including employees, supervisors and managers, trade union officials and Worksafe personnel. Bunnings has, since 15th November 1996, applied the following policy to "all fallers of karri trees".

> "After consultation with fallers and company foreman, the following instruction regarding the wearing of spiked boots has been issued.
>
> For the period between 1st November to 31st May the wearing of spiked boots when felling karri trees will be optional. During this time, fallers may wear standard company-issued safety boots when dry weather conditions exist.
>
> Fellers must carry in their vehicles a set of spiked boots. Should rain prevail when felling karri trees during the above period, fallers must change to spiked boots. After 31st May wearing spiked boots for karri felling will be compulsory.
>
> Company foremen will manage these instructions.
>
> Regards
> S. Martyn
> Manager."

(Exhibit 4.)

For some time up until November 1996 it had been Bunnings' policy that fellers working in karri coupes were required to wear spiked boots at all times. A "coupe" is a work site within the forest where timber harvesting is carried out. A coupe is located within a block which in turn forms part of a larger compartment.

The amendment to the policy effected by the memo in November 1996 is within the scope of the "Safety and Health Code" *(Exhibit 11).*

In 1993 Mr Maher was approached by a safety officer who queried why he was not wearing spiked boots. He was subsequently issued with a pair. However, the boots caused him leg and back pain. He was unable to wear them for an extended period. The company maintained its requirement and in an effort to comply with the policy Mr Maher purchased another pair of spiked boots from Tasmania. These were no more comfortable. He consulted a podiatrist and received a report dated 24th July 1996 *(Exhibit 9)*.

Mr Maher claims that he endeavoured to have this report presented to a meeting of fellers, bush bosses and supervisors through his supervisor, Mr Forrest, in mid 1996. It is Mr Maher's evidence that while the meeting was not convened to deal exclusively with spiked boots, that topic was of concern to him and a number of his colleagues at the time. Mr Maher goes on to say that Mr Forrest was prevented from presenting the podiatrist's report to the meeting by Mr Martyn, the manager.

The concerns expressed by Mr Maher went further than the discomfort and pain caused by the spiked boots; he believes that they are unsafe. In July 1996 while wearing the boots, he slipped off a 2.5m karri log and injured his shoulder. While this injury did not cause Mr Maher any "lost time", it served to illustrate for him problems that can arise when a piece of bark becomes implanted on the spikes and causes a flat surface to make contact with the slippery bark on the karri log. He believes that spiked boots may engender a false sense of security. Mr Maher asserts that around this time the policy that spiked boots must be worn at all times was reaffirmed.

In September 1996 Mr Maher was stood down for refusing to wear spiked boots whilst working in a karri coupe. The other feller working there who was not wearing the required footwear agreed to comply with the request and continued to work.

Mr Maher believes that Bunnings became more concerned about the wearing of spiked boots around this time because of litigation involving spiked boots and another feller, Mr Smith. That matter was subsequently determined by the District Court with Bunnings being found liable. However, Mr Maher believes that Bunnings "went over the top" in its insistence on wearing spiked boots in the wet. He acknowledges that the Safety and Health Code has wider application than just Bunnings' policy. Mr Maher states that he attempted to have input into the consultative process during the period in which the Code was being formulated, but his telephone call had not been returned.

It was Mr Maher's evidence that notwithstanding the adoption of the "Safety and Health Code" in 1997, he insisted on not wearing spiked boots. It was put to Mr Maher that this lead to many verbal warnings and confrontations. He agrees but points out that he just could not wear the boots. This culminated in Mr Maher being stood down again and a letter sent to him by Mr Martyn dated 16th June 1998. The letter states—

> "Further to our discussions this morning and again this afternoon when you advised me that you would not wear spiked boots in karri type because you believe they are unsafe and hurt your feet.
>
> Our position is that all fallers working in the karri type during wet conditions must wear spiked boots (as per 7.04.19.01 of the Safety and health Code for Native Hardwood Logging).
>
> Please advise me by no later than midday tomorrow Wednesday 17/06/98 if you are prepared to wear the spiked boots and meet all other requirements of the above Safety Code.
>
> If you advise that you are not prepared to comply with the requirement, we will have no alternative but to terminate your employment.
>
> Until we receive your response we are not able to allow you to work.
>
> After checking, I confirm that we are not able to provide alternative felling duties until conditions are suitable for felling without spiked boots.
>
> Stephen Martyn
>
> FH & T Southern Operations."

(Exhibit 5).

By letter dated 17th June 1998 Mr Martyn was advised by Mr Maher's legal representative that—

> "We advise that this office acts on behalf of Mr Tom Maher of Walpole, employee of Bunnings Forest Products and he has handed us correspondence from your company, together with information from Podiatrist Mr. Mark Herriman, concerning the wearing of spiked boots for the felling of Karri trees.
>
> Information in our possession would indicate that the said boots are unsuitable for extended walking periods and cause general foot fatigue, arch aggravation and muscle strain.
>
> We are informed by our client that there has been a Court decision in regard to the question of negligence for workers who do not wear appropriate footwear.
>
> In order for our client to totally consider his options in this matter, we would be pleased if you would make available a copy of that decision or alternatively, provide us with the information concerning the name and citation of the case previously mentioned by Bunnings to our client.
>
> Until this matter is resolved, our client will continue to present for work but will not be wearing the boots.
>
> Any other relevant information in your possession concerning the alleged suitability of the boots would also be gratefully received.
>
> Yours faithfully
>
> HAYNES ROBINSON."

(Exhibit 6).

It is common ground that Mr Maher was on leave from 6th July until 17th July 1998.

In a letter dated 14th July and received by Mr Maher on 18th July he was advised—

> "This letter is to advise termination of your employment effective immediately. Regrettably this termination is necessary due to your unwillingness to wear spiked boots, an essential safety requirement for falling in Karri.
>
> Advice of this requirement was provided on 16 June 1998 and since then detailed information has been provided to your legal representatives.
>
> We have not received any response from yourself or your legal representatives regarding this matter, following several attempts to contact both of you.
>
> All piecework payments due to you until your last day of employment, plus any other entitlements will be forwarded to your bank account.
>
> Yours faithfully
>
> D R Sawers
>
> Manager, Forest Harvesting & Treatment"

(Exhibit 7).

It was Mr Maher's evidence that from 16th June to 6th July the company did not have any other work for him. Mr Martyn had advised him of that. Mr Maher did not initiate any communication with Mr Martyn during the period of his leave. On the day after he had been stood down he told Mr Martyn that he did not have a choice, he simply could not wear the boots.

Bunnings presented evidence through Mr Martyn (Manager, Southern Operations), Mr Forrest (Supervisor), Mr Love (Supervisor) and Mr Sawers (Executive Manager, Logging Operations). Collectively their evidence went to the development of policies for the wearing of spiked boots by fellers, the particular circumstances of Mr Maher's dismissal arising from his refusal to wear the spiked boots and the management of the CALM contracts as it relates to felling operations.

Although Mr Martyn and Mr Forrest do not have a particular recollection of any meeting at which the podiatrist's report was attempted to be raised by Mr Maher they were able to provide evidence on attempts that were made to accommodate his problem. In particular Mr Forrest recalls that he received a copy of the report *(Exhibit 9)* and in response to the direction from Mr Martyn to see if the issue could be resolved, he made enquiries about the availability, cost and effectiveness of orthoses referred to by the podiatrist. He spoke with Mr Maher about this suggestion but was left with the impression that the applicant was not very interested. Under cross-examination Mr Maher acknowledged that he had spoken with Mr Forrest

and that he had pursued the availability of "over-the-counter" orthoses. Indeed he had a set made for him by the podiatrist. However, they did not provide any relief. Mr Maher admits that he did not tell Mr Forrest about his efforts. Indeed it is clear that Mr Maher did not pursue any further professional advice beyond the podiatrist's report in July 1996. He advises that the podiatrist is a friend and discussed the matter with him from time to time.

I do not accept that Mr Martyn or Mr Forrest acted to present the podiatrist's report being addressed in a way that prejudiced Mr Maher. The only meetings which they could recall where the possibility of spiked boots being an issue were those organised by Worksafe and the union. However, the assertions by Mr Maher did serve to illustrate what I believe to be the misconception upon which he has acted in this matter. As far as Mr Maher is concerned his discomfort, pain and fatigue from wearing spiked boots was Bunnings' problem. On this premise there was the expectation that the respondent should reorganise the management of coupes, the procedures at landings and the reallocation of work between karri and jarrah fellers. In this respect I believe that it was not reasonable to expect Bunnings to have to go to these lengths to accommodate Mr Maher . He had done no more than obtain a podiatrist's report some two years before. The company had worked with others in the industry to establish safe working procedures. The Safety and Health Code set the standard. Mr Maher's grievances went beyond the suffering he experienced from wearing spiked boots. He believed their use to be fundamentally unsafe. His complaint was that Bunnings adhered to a policy which required the wearing of spiked boots in karri coupes failed to recognise that it was the necessity to walk on logs that provided the rationale for wearing their boots. By insisting on the wearing of spiked boots in karri coupes for a specified period of the year (i.e., from the end of May until the beginning of November) and when it is wet, Bunnings and indeed the industry, had somehow missed the point of what the issue was. As I understand it there should therefore be some discretion vested in fellers to decide when to wear spiked boots and this is likely to be dependent on the diameter of the karri log. He claims that felling and cross-cutting without the necessity to walk on the fallen log should not attract the requirement to wear spiked boots. I cannot accept this line of argument. Clearly the timber industry has serious concerns about safety and work practices. By making it compulsory to wear spiked boots when working with karri in wet conditions the risk of injury is minimised. The policy is prudent and reasonable. It does not detract from the efficacy of the policy to cite the situation where bush bosses and trimmers may stand on karri logs in the course of their duties. Just as Mr Forrest points out, bush bosses and supervisors who may need to walk down the log to inspect the crown of the fallen tree should wear spiked boots; this is part of spotting the risk. Trimmers should not engage in practices which jeopardise their safety if indeed they do. As pointed out, the landings are equipped with machinery to manoeuvre the logs. I accept the evidence of Mr Forrest and Mr Martyn.

The truth is that the distress that wearing the boots created was Mr Maher's problem. It was only going to be resolved by the provision of footwear that met the safety standards of the industry and the requirements of Mr Maher's personal comfort. I consider that the latter was to a significant extent Mr Maher's responsibility. Bunnings had endeavoured to assist and the efforts were reasonable in the circumstances. I do not consider that Mr Maher exhausted the avenues available to him. He appears to have preferred to confront the safety standards of the industry. There was no evidence that other fellers disregarded the safety requirements to wear spiked boots or that bush bosses turned a blind eye to an unsafe practice.

I accept the evidence of Mr Sawer and Mr Martyn that even when Mr Maher was stood down in June 1998 they looked at the appointments to redeploy him. However, because of the circumstances of the industry, that could not be done. That does not make the dismissal unfair.

I accept that the replacement boot being distributed since July 1997 is comparable with the John Bull boot provided to the applicant.

There is no doubting Mr Maher's ability as a dedicated and able feller. However, that was not in issue. In all of the circumstances I do not believe that Bunnings acted harshly, oppressively or unfairly in their dealings with the applicant and in particular in terminating his services on the basis of his refusal to comply with safety requirements of the job.

The application is dismissed.

Appearances Ms B. Lewis (of counsel) on behalf of the applicant.

Mr D. Jones on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Thomas William Maher

and

Bunnings Forest Products Pty Ltd.

No. 1509 of 1998.

CHIEF COMMISSIONER W S COLEMAN.

29th November 1999.

Order.

HAVING heard Ms B. Lewis (of counsel) on behalf of the applicant and Mr D. Jones on behalf of the respondent;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the application be dismissed.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Paul Marcoux

and

ECU Resources for Learning Limited.

No. 432 of 1999.

COMMISSIONER J F GREGOR.

15 November 1999.

Reasons for Decision.

THE COMMISSIONER: On 30 March 1999, Paul Marcoux (the applicant) applied to the Commission for an order pursuant to section 29 of the Industrial Relations Act, 1979, (the Act) on the grounds that he had been unfairly dismissed from his employment with ECU Resources for Learning Limited (the respondent) on or about 4 March 1999.

The events surrounding the applicant's dismissal have their genesis in arrangements made between the respondent and the Department of Education of Western Australia (EDWA) whereby the respondent managed the First Steps Consulting Unit (FSCU) of EDWA. FSCU is a teacher education program which provides assessment procedures for primary school children which are matched to teaching strategies. Until FSCU management was awarded to the respondent, EDWA had published the program internationally through two publishers. The last publisher was Heineman. Their relationship began in 1995 and continued until the respondent managed FSCU.

The Commission was told the First Steps program is used in every State of Australia, New Zealand, United States, Canada, United Kingdom and some parts of South East Asia. EDWA originally published the program after their officers had developed it. The Commission was told that Edith Cowan University (ECU) became interested in tendering for the program. One of its senior academics, Dr Judith Rivalland, Chair of the Primary and Early Childhood program, had written some of the material. According to her evidence, she helped conceptualise the development continua upon which the whole

program is based. The continua are a set of progress indicators matched with teaching strategies. Dr Rivalland devised the first conceptual maps that become absorbed into the program. Naturally, when EDWA tendered FSCU management ECU, with Dr Rivalland's expertise, were interested. The tender was open to the four universities of Western Australia. The respondent submitted a tender.

It was decided that ECU would operate through a corporate body duly incorporated under Western Australian law. The respondent was created for that purpose. It was to have a nominated Board of Directors comprising of 4 to 6 members. The entity, held in its entirety by ECU, was to enable the respondent to achieve the goals and objectives stated in its strategic plan and approved by its Board of Directors. Relevantly for these proceedings, the Board would appoint an Executive Director who had the authority and responsibility to execute the strategic plan. The Executive Director's authority came from a 3 year business plan approved by the Directors, enabling him or her to function freely on his or her own initiative within the perimeters of the approved strategic and business plans. The Executive Director was responsible for planning, development, policy, staffing, and the day to day direction of the FSCU together with the existing manager and staff. ECU submitted detailed transition arrangements in its proposal to EDWA.

The respondent's principal business is to manage the First Steps range of products and services. This consists of two linked revenue generating activities—

- The sale of intellectual property for publication; and
- The delivery of professional development training.

The business involves a number of core activities—

1. The development of intellectual property in the form of manuscripts for publications, course outlines, materials and notes for use of professional development activities;
2. The production of manuscripts for publication and sale, for which revenue is received in the form of royalties;
3. Delivery of professional development programs in Australasia for which revenue is received in the form of course fees and cost recoveries;
4. Delivery of professional development programs overseas for which revenue is received in the form of per diem payments and cost recoveries; and
5. Provision of research and other advice to EDWA regarding matters relevant to First Steps, for which revenue is received in the form of a return of the share of the operating surplus (if any), owed to EDWA.

John Doyle, the Director of Finance of ECU and later a Director of the respondent, told the Commission that he was asked to suggest a candidate for the position of Acting Executive Director. At the time ECU had employed the applicant on a series of short-term contracts usually of 3 months duration (*Exhibit Z3*). Mr Doyle told the Commission that he discussed the Acting Executive Director's position with the applicant, who was working as a Project Manager on a project named Sideship. Mr Doyle required assistance with negotiations with EDWA concerning contractual provisions regulating the outsourced FSCU commercial arm. Mr Doyle asked the applicant to prepare a schedule of roles and responsibilities (*Exhibit Z1*). It was pointed out to the Commission, that one of the tasks of the respondent's Acting Executive Director was to organise the Executive Director's recruitment. This was not included on the first document that the applicant presented to Mr Doyle but on Mr Doyle's insistence, it was included later.

The applicant viewed the arrangements differently. His biography indicates that he managed ECU's tender to EDWA for FSCU's management (*Exhibit B1)*. He claimed to be the respondent's chief negotiator and spokesman and the company's founder. He says he established all legal, tax and industrial relations systems. He claims that he broke new ground at ECU by winning the major business management contract from EDWA and established the first company structure in its history. The applicant was involved in a major organisational development assignment which included senior managers and electorate officers. The applicant asserts that it was resolved on 30 September 1998, the respondent's first Board meeting that, he would be appointed Executive Director. The Minutes of the Board's first meeting were prepared, at the applicant's direction, by a firm of solicitors prior to the meeting. It is Mr Doyle's evidence that he spoke to the applicant after the meeting to clarify that the applicant had been appointed as Acting Executive Director. It was not a substantive position. It is Mr Doyle's evidence that the applicant agreed with this. At all times during the proceedings before the Commission the applicant refused to acknowledge that such an agreement was made.

It is the applicant's evidence that after this meeting he organised the respondent's affairs, in his understanding, to everybody's satisfaction. He does not recall Mr Doyle raising with him complaints about his performance. He admitted that there had been some conflict with EDWA officers who were still working with FSCU but those problems were, in his opinion, resolvable. Specifically, he rejects complaints concerning his lack of ability to prepare financial statements.

A permanent Chairman was appointed on 18 December 1998, at a Board meeting. According to the Minutes (*Exhibit B6)*, a discussion concerning the Executive Director's appointment and remuneration took place in the absence of executive staff and the applicant. The Board agreed that the Executive Director should be subject to the normal ECU recruitment process and under the Board of Director's authority. The normal recruitment process requires that all positions be advertised and filled via merit assessment. Mr Doyle, the respondent's Secretary, was authorised to make arrangements with recruitment consultants to ensure that a substantive Executive Director was appointed to commence on 1 July 1999. Mr Doyle arranged for the recruitment consultants to provide advice regarding terms and conditions of appointment for the Board's consideration and established a panel to conduct a final interview. It was agreed that the applicant's, who was identified in the Minutes as Acting Executive Director, remuneration package was based on the permanent Executive Director's package effective from the time ECU's management of FSCU commenced, paid retrospectively. EDWA attributed this cost to FSCU's operations.

Relevantly, the Minutes record that the Chairman asked it to be noted that the Minutes of the Board Meeting held on 30 September 1998 be amended to add 'Acting' in front of Executive Director. According to Mr Doyle, this change was made to clarify the applicant's position as Acting Executive Director as discussed with him after the meeting on 30 September 1998. In the Board's opinion, the amendment did not vary the resolution. Rather, it merely noted that the Minutes of the Meeting on 30 September 1998 omitted the word 'Acting' in the description of the applicant's position, which erroneously referred to him as Executive Director. As far as the Board was concerned, the applicant had always been Acting Executive Director and never held any other status.

The Commission heard evidence from Mr Geoff Sherwin, Chairman of the respondent. Mr Sherwin has a long career in financial management. He was Deputy National Director of the Bird Cameron Group Australia until 1995 and has been a Chartered Accountant for 38 years. Mr Sherwin first met the applicant when the applicant, in his first role as Acting Executive Director, enquired as to who may be approached to serve as a member of the respondent's Board. Mr Sherwin recalled that the applicant introduced himself as the Executive Director, but he later discovered that the applicant occupied an acting position. Mr Sherwin told the Commission that a discussion, regarding the appointment of the applicant as a permanent Executive Director, took place at a Board meeting when the applicant was not present. It was determined that the position would be filled in accordance with ECU practices. When the applicant returned to the meeting, Mr Sherwin raised the applicant's position with him. The applicant believed that he was appointed Executive Director at the meeting held on 30 September 1998, but was told that an external agency would conduct a full selection process. The Board decided to amend the Minutes of the Meeting held on 30 September 1998 to remove all doubt. The applicant was present during these discussions and did not disagree with the Directors who spoke in favour of the amendment.

Mr Sherwin told the Commission that he formed the view, early in his association with the applicant, that the applicant

had very little experience with Boards particularly at the level at which he was currently engaged. He needed consistent assistance with structuring agendas and preparing and presenting reports. Mr Sherwin required standard financial and operation reports, which are matters that the Chief Executive Officer should be able to deal with, without the Chairman's involvement. Before the Board Meeting on 18 December 1998, Mr Sherwin believed that the applicant was deficient in business experience at the required level. He regarded his dealings with the applicant being "akin to a coaching exercise".

It was bought to Mr Sherwin's attention that there were difficulties with the applicant's approach. The Board considered that the applicant was being managed by subordinates rather then being a manager. His lack of expertise was also bought to the attention of the Board by external parties. In January 1999, the applicant complained to Mr Sherwin, that the Board Members were overly aggressive in their questioning of him. However, as far as Mr Sherwin was concerned, the Board was merely pursuing its task. There was nothing abnormal about its questioning of the applicant. Mr Sherwin ventured the opinion that the applicant was almost paranoid about the division of responsibilities with the Board to the extent that it began to play on his judgment. In Mr Sherwin's view, the applicant thought that the Board was undermining his responsibilities.

By the time a Board Meeting was held in January 1999, its members lacked confidence in the applicant's decision making process. There were pressing issues relating to publishing rights. The Board was concerned that the applicant was pressing on with meetings in spite of his temporary position when people were expecting long term commitments with publications and product changes. The Board needed to address the issue otherwise it might regret what could happen. It was decided that the Chairman meet with the applicant and ask him to convey a message to the publishers that the scheduled meetings would not take place. The opportunity was taken to reinforce that he was the Acting Executive Director.

In his evidence, the applicant said he complained to Mr Doyle during an informal meeting that Board meetings were held in his absence. It was during one such meeting that the Chairman arrived before the conversation between Mr Doyle and the applicant had finished. Mr Sherwin heard Mr Doyle convey to the applicant that a recruitment agency had been appointed and the Executive Director's position would be advertised.

The applicant applied for the position but did not make the shortlist. This did not surprise Mr Sherwin because he thought that the applicant was not ahead of the work at all, in fact, he was quite a long way behind. The applicant did not compare with the people on the short list in terms of experience, product and literacy knowledge. Later in a meeting with Mr Sherwin this was conveyed to him in full. Mr Sherwin sat with the applicant as long as was necessary for him to absorb what was being said to him and for him to ask all the questions that he wanted to. The applicant was told that the Board had lost confidence in his abilities as Acting Executive Director. His position was untenable. It was decided that the arrangement should finish and the applicant be paid 2 months notice.

Mr Beedham, on behalf of the applicant, encapsulated his argument in the following way. The applicant was appointed Acting Executive Director on 7 February 1998. During the course of the year, the applicant spoke with Mr Doyle who informed him that he had the job. On 30 September 1998, at the first Board Meeting, the Minutes clearly recorded that the applicant was appointed the Executive Director. If there had been a mistake, according to Mr Beedham, it was not the applicant's responsibility. According to Mr Beedham, the only conclusion one can draw from the Minutes is that the applicant was appointed Executive Director.

Mr Zilko, of Counsel for the respondent, states that the applicant was always employed in an acting capacity by ECU and thereafter by the respondent. As he had constructed the task list, he knew, as early as February 1998, that a formal advertising process had to be implemented. The first draft did not include the appointment of a permanent Executive Director, however the applicant was instructed to remedy that omission. He knew that arranging the appointment of a permanent Executive Director was a duty he had to perform. The Board reinforced this in December 1998. Additionally, the applicant discussed with Mr Doyle that staff should be informed before any advertisement was placed in the newspaper. The applicant has ignored these irrefutable facts. The applicant ignored having discussions about the matter with Mr Doyle. He knew that his position was acting and that the substantive position was to be advertised. Significantly by applying for the position, he participated in the application process. His whole application is centred on an entry in Minutes dated 30 September 1998.

The proceeding summary is a sufficient recitation of the factual matrix for the purpose of these reasons for decision. Before I discuss the law to be applied, I need to address the question of witness credibility. I had the opportunity of observing the applicant during his examination in chief and cross-examination and have read the documentation he presented. When comparing his evidence in chief with what is contained in *Exhibit B1*, it appears that the applicant may tend to exaggerate his own skills and achievements. The applicant's claimed business experience and management achievements are not supported in the evidence before the Commission. For this reason, I have some concerns about the quality of the applicant's evidence. I have no such concerns about Mr Doyle and Mr Sherwin, the respondent's main witnesses. Mr Sherwin's evidence is indicative of a very experienced businessman who evolved the respondent into an effective business which met its core objectives. Mr Doyle was unshaken in cross-examination and I have no reason to disbelieve his version of events. Where the applicant and the respondent's evidence differs, I favour the respondent's evidence.

I need to discuss the law involved. The question of probationary employment, as suggested by Mr Zilko in his submissions, does not arise. The test the Commission is required to apply is whether the respondent has acted harshly, unfairly or oppressively in its dismissal of the applicant. It is for the applicant to establish that the dismissal was, in all these circumstances, unfair. The test for ascertaining whether a dismissal is harsh, oppressive or unfair is outlined by the Industrial Appeal Court in *Undercliff Nursing Home v. Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385*. The question to be answered is whether the right of the employer to terminate the employment has been exercised so harshly, oppressively or unfairly against the applicant as to amount to an abuse of the right. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair but if the employment has been terminated in a manner which is procedurally irregular that will not, of itself, necessarily mean the dismissal is unfair (*see Shire of Esperance v. Mouritz (1991) 71 WAIG 891* and *Byrne v. Australian Airlines (1995) 65 IR 32*). In *Shire of Esperance v. Mouritz,* Kennedy J observed that whether an employer in bringing about a dismissal adopted procedures which were unfair to the employee, is but an element in determining whether the dismissal was harsh or unjust.

On the balance of probabilities, I conclude that when ECU became interested in preparing a tender for management of FSCU, Mr Doyle was looking for an experienced administrative officer. The work the applicant performed for ECU indicated that he would be able to perform this task. In that sense, he was as Mr Doyle said "the man for the job". However, the applicant did not truly portray his work experience while working for the respondent. I accept Dr Rivalland's evidence that the group of academics performed the majority of negotiations and preparation for submitting the tender.

By the time the first Board Meeting was held in September 1998, the applicant was already experiencing some difficulties with the transition process. I accept Mr Doyle's evidence that the Executive Directors appointment made during the first meeting was always intended to be an acting appointment. I find that Mr Doyle made that clear to the applicant and there was no reason for the applicant to be in any doubt. Even if it was not clear to him then, it was reiterated in the December Board meeting in the Minutes themselves and by Mr Sherwin's explanation to the applicant.

I find that there is no evidence to support the applicant's contention that he was appointed as the respondent's Executive Director. Mr Beedham contended that the appointment could have been made contrary to ECU's usual recruitment process by getting special permission from the Human Resources Department but this did not happen.

As for the termination itself, I accept Mr Sherwin's evidence that early in the arrangement a number of difficulties with the applicant's work manifested. Mr Sherwin attempts to assist the applicant by coaching him, were ineffective. The applicant engaged financial advisers but did not have the knowledge to ensure that they gave the information which the Board required. Again, Mr Sherwin corrected this deficiency. In the end, the consequences for the respondent if it did not correct the situation were so deleterious that it had to appoint a permanent Executive Director who was properly equipped to manage the respondent's affairs. Failure to do so could have caused a financial disaster for the respondent. It was entitled to protect itself against this eventuality, to make a proper appointment and to remove the applicant from a position of influence when the Board was not confident that it could protect its financial position. In short, there was nothing wrong with the applicant's termination. Unfairness did not occur even though his position was acting.

If I am wrong in finding a lack of unfairness, the applicant was given two months notice. Even if an adjudicator concluded that he was unfairly dismissed, in assessing compensation it would have to take into account the acting nature of the position. It seems to me, on the authorities, that two months compensation would be adequate in any event.

For all of these reasons, the application will be dismissed.

Appearances: Mr J Beedham appeared for the applicant.

Mr Zilko of Counsel appeared for the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Paul Marcoux

and

ECU Resources for Learning Limited.

No. 432 of 1999.

COMMISSIONER J F GREGOR.

15 November 1999.

Order.

HAVING heard Mr Beedham on behalf of the applicant and Mr Zilko, of Counsel, on behalf of the respondent, the Commission, pursuant to the powers conferred in 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.

Amanda Jane Mason

and

Horizon Ridge Pty Ltd.

No. 559 of 1999.

COMMISSIONER A.R. BEECH.

9 November 1999.

Reasons for Decision.

(Given extemporaneously at the conclusion of the proceedings as edited by the Commission.)

The claim before the Commission is a claim by Ms Mason that she was unfairly dismissed. The respondent's reasons for dismissing Ms Mason were a consistent inability to accurately complete her work causing a significant cost to the company because of her errors. My essential findings in the matter are that Ms Mason was an employee who regularly performed below average in her work. In reaching that finding I accept the evidence of Mr Turner. Indeed, given that it was Ms Mason herself who brought Mr Turner's evidence to the court I have proceeded on the assumption that Ms Mason expected me to accept his evidence. Otherwise she would not have called him. I have no reason not to accept his evidence. It was given in a straightforward and honest manner. He struck me as being relatively impartial because his evidence was at times not favourable to Ms Mason. I therefore find that Ms Mason's performance during Mr Turner's period of employment between August 1998 and the end of February 1999 was "below average although it was above poor". She "just got through" her work and her time management skills were bad.

On the evidence of Ms Hutchison and Mr Miller who gave evidence on behalf of the respondent her performance cannot be said to have improved in the period after Mr Turner's employment ended and before her dismissal. I therefore generally accept that Ms Mason made the errors which have been described including frequent banking errors, wrong delivery addresses and so on. Although other employees made mistakes I find that they were not like the mistakes that Ms Mason made. I am also satisfied from the evidence that this poor performance was often brought to her attention. Mr Turner, for example, said that he spoke to her several times to "adjust". He told her she had to "lift her game, concentrate more and do one thing at a time". The things that he said to Ms Mason are things that he did not have to say to the other staff. I am therefore prepared to accept, and I do accept, that both Ms Hutchison and Mr Miller said similar things to her as they in their own evidence suggest.

Ms Mason's performance appears from Mr Turner's evidence to have been reasonably consistently below average throughout her employment. I find it significant that Mr Turner could not even describe those jobs at which she worked the best. I also find that Ms Mason was made quite aware of her performance but if she did attempt to improve it was, to paraphrase the words of Mr Turner, only a temporary improvement. Even though Ms Mason would honestly try to improve, she would again become muddled and her poor time management skills would re-assert themselves. I therefore accept Mr Miller's perception that when he told Ms Mason of her errors it was "like water off a duck's back". Not only was there no eventual improvement but Ms Mason was likely to shrug her shoulders or be flippant about the issue. I find that this would hardly inspire confidence about her improving her performance in the future. Mr Turner admits that Ms Mason occasionally had a way of expressing her response and this I find corroborates the evidence of Mr Miller and also the evidence of Ms Hutchison, that Ms Mason was not only likely to shrug her shoulders but also likely to say "s**t happens" when errors were drawn to her attention. The use of that expression suggests to me a response which accepts that such mistakes that did occur always will occur. That is not a positive response.

I then turn to the dismissal which occurred. I find that there were two events which precipitated the dismissal. Both were occasions when customers ran out of fuel. The first occasion lead to the decision to call a staff meeting on 6 or 7 April (the date is not entirely clear). The second led to the decision to dismiss Ms Mason. I find from the evidence of Mr Miller and Ms Hutchison that on both occasions the errors were Ms Mason's errors. She had been given the customers' orders to process. She did not do so. In the case of Goldrush Tours she was even told it was an urgent order. I note the evidence that the job only takes a couple of minutes and that it is quite clear from Ms Mason's own evidence that not letting a customer, particularly a mine, run out of fuel was known to her as important.

It was after the respondent received a call from Goldrush Tours that its order had not arrived that the decision was made to dismiss Ms Mason. She complains that the dismissal was unfair. Her principal complaint is that she was not warned that her employment was in jeopardy and then given an opportunity to improve.

Fairness towards an employee means that so far as practicable before dismissing an employee for continuing poor performance the employee should be warned that their performance is unacceptable and that dismissal may occur if there is no improvement (*Margio v Fremantle Arts Centre Press*

(1990) 70 WAIG 2559 at 2561). It is not a requirement that a warning must be given in writing. If it is given in writing there can be less of a dispute later about whether it was in fact given. Here, the respondent concedes that it did not warn Ms Mason in writing. However, I find on the evidence that Ms Mason had been told for some time by Mr Turner to "lift her game" and told similarly by Mr Miller. I am inclined to believe that Mr Miller, as he says, went further and said words to the effect that "if you keep stuffing up you are going to go down the road" because that would be quite consistent with what I believe to be Mr Miller's increasing frustration at her errors. I therefore have no doubt that Ms Mason had been told she had to improve her performance.

I find that Ms Mason was indeed at the meeting held on 6/7 April and not as she says on the switchboard. It is not that she does not remember the meeting. Her evidence is that she is definite that she did not attend it. However, I prefer the evidence of Mr Miller and Ms Hutchison to the effect that Tanya had been brought in for switchboard relief. This evidence, which was not challenged and which I accept, makes it far more likely that Ms Mason was at the meeting if somebody had been brought in especially to do switchboard relief. It therefore makes it less likely that during that period of time Ms Mason was in fact on the switchboard as her evidence suggested. However, even if she was at that meeting it cannot, in all fairness to her, be relied upon by the respondent if she was not given an opportunity to improve after Mr Miller had said his words. On the evidence, the Goldrush Tours incident came to light directly after that meeting. It was that incident which precipitated the decision to dismiss and I find that Ms Mason was therefore not given an opportunity to improve after that warning was given at the meeting.

Nevertheless, I find the fact that Ms Mason had continuing poor performance over the period of her employment, that there was a lack of any improvement long-term notwithstanding the comments made to her, her attitude in either shrugging her shoulders in response or using the expression referred to earlier gave the impression, in Ms Hutchison's words, that 90% of the time it did not matter, her failure to process the fuel orders when asked to do so with the consequence that two clients ran out of fuel when she knew that clients running out of fuel was important, leads me to the conclusion that even if she had been given an opportunity to improve after that meeting it is not likely to have made a significant difference to her performance. I therefore do not find the absence of a formal warning to her that her employment was in jeopardy to be a critical issue. I find, in the circumstances, that the occasions when Mr Turner and later Mr Miller, told her that she had to lift her game and improve her performance served the requirements of fairness towards her.

I take into account that only one month before her dismissal she received a letter from her employer offering an extended term of her workplace agreement to February 2000. I accept that this may have acted as some reassurance to her of her continuing employment notwithstanding her past poor performance although her evidence is not entirely clear on this point. However, the two occasions regarding clients running out of fuel occurred after that letter and I am clear in my mind that if those two occasions had not occurred, her employment would have at least continued past the time when it did. However, those two events did occur and I believe that they then overtake the receipt by her of the letter informing her that her workplace agreement would be extended.

My conclusion in this matter is as follows. The task of the Commission is to assess, as Mr Simpson said, whether there has been a fair go all round. That assessment includes fairness to the employer as well as to the employee and should take into account all of the circumstances and the practicalities in the workplace. In the context of an employer who had shown past compassion to Ms Mason because of her circumstances, who had said to her that she did need to lift her game and whose business was undoubtedly affected when clients ran out of fuel and taking into account that Ms Mason had not improved her performance and was directly responsible for two clients running of fuel, I find no unfairness in the decision to dismiss with pay in lieu of notice, which is what occurred.

Accordingly, I find that she has not discharged the onus upon her and I will issue an order that dismisses her application.

Appearances: Mr P. Simpson (of counsel) on behalf of the applicant.

Mr G. Biddle, Director of the respondent, on its behalf.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Amanda Jane Mason

and

Horizon Ridge Pty Ltd.

No. 559 of 1999.

12 November 1999.

Order.

HAVING HEARD Mr P. Simpson (of counsel) on behalf of the applicant and

Mr G. Biddle 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.

Graham Menz

and

Ground and Foundation Supports Pty Ltd.

No. 198 of 1999.

COMMISSIONER A.R. BEECH.

12 November 1999.

Reasons for Decision.

This is an application by Graham Menz that his dismissal from the respondent is harsh oppressive and unfair. His dismissal occurred on 11 February 1999. The respondent stated in its original Notice of Answer that its dismissal of Mr Menz was summary. Accordingly the Commission required the respondent to present its evidence first (*Shire of Esperance v. Mouritz* (1991) 71 WAIG 894 (IAC); *Winkless v. Bell* (1986) 66 WAIG 847 at 848; *Federated Brick Tile and Pottery Union v. Bristile Limited* (1982) 62 WAIG 2926 at 2928; *Pastrycooks Employees, Biscuit Makers Employees & Flour & Sugar Goods Workers Union (NSW) v. Gartrell White* (1990) 35 IR 70 at 83).

It is convenient to set out some of the background to this matter. The respondent to this application is a construction contracting company which constructs sheetmetal retaining systems used to support the foundations of buildings and other structures during construction activities. The company was formed in approximately 1990 with three directors: Graham Menz (who is the current applicant), Brent Black and Phillip Patterson. These three persons are each also directors of companies which control their respective family trusts (which I shall hereafter refer to as a "family company"). The shares in the respondent are held by the family companies in the proportion of 30%, 35% and 35% respectively. Directors' meetings were regularly held on approximately a monthly basis (Exhibit G). From its inception until 1996 the day-to-day management of the respondent was undertaken by Mr Menz pursuant to an arrangement between the respondent and Mr Menz's family company.

In July 1996, the respondent decided that Mr Menz would be employed by it as the respondent's managing director with the day-to-day responsibility of managing the respondent's affairs. From July 1996, therefore, Mr Menz was an employee

of the respondent at the same time that he was a director of it and, through his family company, also a shareholder in it. Mr Menz continued to participate in directors' meetings as he had participated prior to July 1996. His salary package was the subject of negotiations between the three directors and consisted, in general terms, of a salary paid to him, a vehicle allowance, superannuation, and dividends (Exhibit H). Mr Menz's salary package was negotiable at the commencement of each financial year.

For the financial year commencing 1 July 1998 Mr Black and Mr Patterson offered Mr Menz a package comprising $45,000 salary, the provision of a leased vehicle giving a vehicle allowance of $23,200, superannuation of $10,000 and dividends of $30,000. They also offered a bonus incentive being 2.5% of the net profit of the company for the previous financial year. The two directors valued the package at $120,700, assuming a bonus of $12,500. Mr Menz was dissatisfied with the offer and approached a firm of chartered accountants for assistance. On 28 July 1998 (Exhibit J) Mr Black and Mr Patterson offered Mr Menz "a package incorporating PAYE salary, motor vehicle and superannuation components, the details of which are to be determined by you, of $100,000" reviewed annually and incorporating bonuses which may be paid after taking into account the profitability and current position at the time of the company. On 4 August 1998, at a directors' meeting, a motion was passed approving Mr Menz's salary package to the value of $100,000, with the make-up of the package to be advised by Mr Menz. At that meeting, a decision was also taken to pay Mr Patterson and Mr Black directors' fees of $20,000 per annum for the financial year to come (Exhibit K). Although Mr Menz challenged the minutes which comprise exhibit K in these proceedings, I find as a fact that the minutes accurately record the decisions that were taken even if, as he alleges, some of the decisions were not passed unanimously. Although these decisions were not recorded at the time in the official minute book I have no reason to reject Mr Patterson's explanation that directors' meetings were not necessarily held in the same office on each occasion and that if the meetings were held at an office where the minute book was not located, a minute was taken in a spiral-backed book. That evidence was not in any sense challenged by Mr Menz when he gave his evidence and I accept it.

There is no doubt from the evidence given by Mr Menz that he was dissatisfied in particular with the other two directors being paid directors' fees when he in turn would not receive directors' fees as a separately identifiable component of his salary. The evidence of Mr Black and Mr Patterson is that they saw Mr Menz's attendance at directors' meetings as being part and parcel of his duties as managing director and he should therefore not separately receive directors' fees. From the evidence I conclude that, at least from this point forward, Mr Menz's dissatisfaction was with not only the composition of his salary package, but also his salary package in comparison to his fellow directors continuing to receive directors' fees when he did not. On the evidence before the Commission, this was the first occasion when any difference of significance had occurred between the three directors. It is in this context that I accept the evidence of Mr Black that from his perspective it was becoming apparent that as three directors, it was becoming difficult to operate. This provides a background for the events which occurred subsequently.

The evidence of Mr Black is that at a time in approximately September or perhaps October 1998, Mr Menz mentioned to him that he was intending to employ his stepson, Mr Martin, in the respondent's business. Mr Black's evidence is that he was unhappy with that suggestion because he saw it as nepotism. It would potentially create difficulties in maintaining the employer-employee relationship in the event that Mr Martin would need to be disciplined. Mr Black was also of the opinion that with his knowledge of Mr Martin's background Mr Martin had little to offer the company and there was no particular reason to employ him. The evidence of Mr Patterson is that Mr Menz had mentioned to him in November 1998 that he had employed his stepson as a casual employee. Mr Patterson believed the idea was "a silly idea". I am satisfied from the evidence that both Mr Black and Mr Patterson had informally expressed reservations to Mr Menz regarding his intention to employ Mr Martin in the respondent's business. Mr Menz's own evidence acknowledges that both Mr Black and Mr Patterson showed a negative reaction in late November to the prospect of the respondent employing Mr Martin. Mr Menz, however, was of the view that he would nevertheless like to "try it" so he arranged for Mr Martin to be employed. On the evidence of Mr Menz, he believed that Mr Martin had some knowledge and experience which would be of assistance to the respondent particularly in the area of quality control. It is not necessary for the Commission to find whether or not Mr Martin's employment was appropriate. What I do find, however, is that Mr Menz employed Mr Martin in the knowledge that the other two directors did not want him to do so.

Mr Black became aware that Mr Martin was employed in the office and discussed the matter with Mr Patterson. At one subsequent directors' meeting at least, Mr Patterson stated that Mr Martin's employment was not acceptable and he was not to stay in the respondent's employment. Mr Patterson and Mr Black were also of the opinion that Mr Martin's salary of $45,000 per annum was greatly in excess of what Mr Martin's worth was to the respondent. I am satisfied that both directors indicated to Mr Menz that they wanted Mr Martin's position with the company to come to an end. I accept Mr Patterson's evidence that he had three telephone conversations with Mr Menz to this effect. Nevertheless, Mr Menz did not act to terminate Mr Martin's employment until after there had been a formal resolution at a directors' meeting on 17 December 1998 that Mr Martin is to be terminated and paid $3,000 above his entitlements upon termination. Although Mr Menz stated in evidence that he accepted the resolution of the board to dismiss Mr Martin, the point is that Mr Menz employed Mr Martin despite the knowledge of the negative reaction of the other two directors and it required a formal resolution to be passed before Mr Menz acted.

The conclusion to be drawn from the evidence concerning Mr Menz's decision to employ Mr Martin and his subsequent unwillingness to act upon the informal approaches made to him by the other two directors is that the working relationship between Mr Menz and the other two directors was such that Mr Menz would continue to act in what he thought were the best interests of the respondent notwithstanding the preferences of the other two directors. Given that Mr Menz was aware from at least November, if not October, that the other two directors were against the employment, and then the continuation in employment, of Mr Martin, it should come as no surprise that Mr Menz was eventually directed to terminate Mr Martin's employment. He would be naïve to have expected otherwise. The fact that a formal resolution of the board was necessary is an indication of deterioration in the informal working relationship which had existed between the three directors prior to at least July/August 1998.

The usual Christmas closedown then occurred. The evidence suggests that in the period following the closedown the relationship between Mr Menz and the other two directors had somewhat broken down. I accept Mr Black's evidence that Mr Menz had made it clear that he was unhappy. The evidence of Mr Patterson, which I accept, was that Mr Menz was not being frank with the other two directors in relation to the work that he was doing on behalf of the respondent. That evidence is supported by the evidence of Mr Black that Mr Menz was working on "something", but Mr Menz was not prepared to tell his fellow directors what it was that he was doing. I accept Mr Black's evidence. Indeed, that evidence is effectively corroborated by Mr Menz whose own evidence is that he was at that stage pursuing a company valuation but that he only revealed it "later on in later meetings".

A regular meeting of directors was scheduled for 11 February. On the day prior to that meeting, on the evidence of Mr Patterson, Mr Menz contacted Mr Patterson and asked if he, Mr Menz, could bring a solicitor to the meeting. Mr Patterson, himself a solicitor, agreed. Mr Patterson then received a facsimile letter from Mr Menz's legal representative. The contents of the letter will be referred to subsequently. Suffice it to say that a meeting occurred on 11 February between Mr Menz and his solicitor on the one hand, and Mr Patterson and Mr Black on the other. No agreement was forthcoming from that meeting. At its conclusion, Mr Menz's legal representative departed and the three directors convened the scheduled directors' meeting. At that meeting, a motion was put and passed that Mr Menz be dismissed from his position as Managing Director. Mr Menz left the meeting. Mr Menz claims that his dismissal

was harsh, oppressive or unfair. The respondent opposes the claim and, generally, relies upon the letter of 11 February as repudiating the contract of employment, and also relies upon the matters set out earlier in these Reasons, and other matters not yet referred to, to argue that the employment relationship had so irretrievably broken down that the dismissal was not harsh, oppressive or unfair.

The Commission turns therefore to consider the letter of 11 February (Exhibit N). I do not propose to set it out in full. I do, however, refer to the following points which are seen by the Commission as being significant. The letter was written on behalf of both Mr Menz and his family company. It noted that Mr Menz has 30% of the equity in the respondent and stated—

> "How Mr Menz came to be a minority shareholder in a company which was his brainchild and which conducts its business activities solely through his efforts may well be the subject matter of another enquiry which need not be considered at this stage".

The letter noted that Mr Menz was dissatisfied with the current arrangements regarding the "management and control" of the respondent. It referred to Mr Menz's dissatisfaction with his salary package. It noted that Mr Menz regarded the situation as—

> "now intolerable and cannot be permitted to continue. Our instructions are that there are currently negotiations on foot and Mr Menz's grievances will be properly ventilated at the meeting…later today in order to establish whether the matter can be amicably resolved".

The letter then queried whether Mr Patterson was prepared to acquire Mr Menz's equity in the respondent. It then indicated that Mr Menz's family company had obtained an opinion to the effect that it was the owner of the intellectual property currently utilised by the respondent in its business activities. The letter noted that negotiations should be conducted in regard to the question of both past and future royalties and licence fees and also that in the absence of suitable arrangements being made between the respondent and Mr Menz's family company "our client's rights" to terminate the present licence whereby the respondent utilises "our client's" intellectual property free of appropriate remuneration are strictly reserved.

It was argued on behalf of Mr Menz that the letter of 11 February cannot constitute a repudiation of the contract of employment between Mr Menz and the respondent because for a repudiation to be effective in law it must be manifested in a clear and unequivocal manner. The letter of 11 February did not indicate that Mr Menz was not prepared to continue with the contract of employment. The reference within the letter to the position regarding the salary as being "intolerable and cannot be permitted to continue" can only be seen in the context of negotiations which were occurring, or which were to occur, in an endeavour to resolve the matter. The evidence of Mr Menz is that he had no intention of severing his employment with the respondent. Accordingly, the letter of 11 February does not constitute a renunciation of or an absolute refusal on the part of Mr Menz to perform his duties pursuant to his contract of employment. Thus, if there was never any clear renunciation of the contract of employment, there was no justification for dismissing Mr Menz.

The task of the Commission is not to decide whether the evidence shows an intention on the part of Mr Menz to repudiate the contract of employment between him and his employer. The task of the Commission is to assess whether the legal right of the respondent to dismiss Mr Menz has been exercised so harshly towards him as to amount to an abuse of that right. Whether the evidence shows an intention on the part of Mr Menz to repudiate the contract of employment is only one issue to consider. The focus of the concept of repudiation of obligation is on the readiness and willingness of a promisor to perform contractual obligations. If the promisor is not ready and willing or will not, at the appointed time, be ready and willing to perform, the law treats the promisee as possessing the right to terminate the performance of the contract under the doctrine of repudiation provided that the absence of readiness or willingness satisfies the requirement of seriousness (Contract Law in Australia, J.W. Carter and D.J. Harland, Butterworths, 2nd ed, paragraph 1928). The facts of this matter are distinguishable from circumstances where one party to a written contract not involving personal service acts according to a wrong interpretation of it but may nevertheless be willing to accept a correct interpretation (*DTR Nominees v Mona Homes* (1976-1977) 138 CLR 423). The contract of employment between Mr Menz and the respondent was an oral contract and for the performance of personal service. It was an implied term of that contract that Mr Menz had a duty of fidelity and good faith towards the respondent (The Law of Employment, Macken, McCarry and Sappideen, LBC, 4th ed, page 138). Mr Menz had given notice to the respondent that the family company of which he was a director not only claimed ownership of the intellectual property currently utilised by the respondent but also that it reserved its rights "to terminate the present licence whereby the respondent utilises" that intellectual property free of appropriate remuneration. I find from the evidence before the Commission that the intellectual property utilised by the respondent was at the heart of the respondent's business operation. I accept the evidence from Mr Patterson and Mr Black that the issue regarding the ownership of the intellectual property used by the respondent in its business operations had not been raised prior to it being raised in the letter. I also accept the evidence, particularly from Mr Patterson, that the intellectual property used by the respondent, which is covered by patents, is at the core of the respondent's operations. Indeed, there is a history of the respondent taking legal action protecting the patent when it was challenged by a competitor.

I have little difficulty accepting the submission made by Ms O'Brien that for Mr Menz to allow the family company of which he is a director to threaten the respondent's continued use of the intellectual property breaches the duty of fidelity and good faith to his employer and its interests. This conclusion does not involve a piercing of the corporate veil. The conclusion recognises that the threat is posed by Mr Menz's family company. However, he is a director of that family company and will be seen as the natural person through whom the family company operates. This is, perhaps, illustrated by the reference in the letter of 11 February to Mr Menz having 30% of the equity in the respondent when in fact it is his family company which has that equity. The term in the contract of employment that Mr Menz had a duty of fidelity and good faith towards the respondent is a serious term. Mr Menz's action showed that he no longer intended to be bound by that term. Whilst Mr Menz may in his capacity as a director of his family company act in a manner which is entirely consistent with his fiduciary duty towards that family company, he is at one and the same time an employee of the respondent with a duty to act in a manner that is not contrary to his employer's interests. His action, as I find, significantly blurs the fundamental legal distinction between Mr Menz as an employee and Mr Menz as a director of his family company.

There is, therefore, evidence that the letter of 11 February is a repudiation by Mr Menz of his contract of employment. However, if I assume for the sake of argument that the submission put on behalf of Mr Menz is indeed correct and that the letter of 11 February does not, in law, constitute a repudiation by Mr Menz of his contract of employment, that does not necessarily lead to the conclusion that his dismissal was harsh, oppressive or unfair. It is quite settled that the duty of fidelity and good faith is principal among the obligations of an employee and that conduct which, in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition or conflict between his interests and his duty to his employer, or impedes the performance of his obligations, or is destructive of the necessity to have confidence between an employer and an employee is a ground of dismissal (*Blyth Chemicals v. Bushnell* (1933) 49 CLR 66 at 81). Thus, for example, if the claim made by Mr Menz in his capacity as director of his family company to the intellectual property central to the respondent's business operation involves an opposition or conflict between his interests and his duty to his employer, or is destructive of the necessity to have confidence between an employer and an employee, then his dismissal would be justified. I have little doubt that that is the case here. The evidence brought to the Commission regarding the steps taken by the respondent to secure patents over the intellectual property used and the vigorous defence of the intellectual property referred to by Mr Patterson can lead to no other conclusion that it is in the respondent's interests to protect its current ownership of that intellectual property to safeguard its very

existence. The claim made that the ownership in fact is rightly held by Mr Menz's family company places Mr Menz in a remarkably invidious position. He cannot satisfactorily discharge the obligation he has as an employee to his employer in defending his employer's position whilst at the same time satisfactorily discharge his obligations to his family company in attempting to assert ownership of the intellectual property. It would be difficult to find a clearer example of a direct conflict of interest.

Further, the letter of 11 February cannot be divorced from the circumstances surrounding it. Mr Menz was not just an employee of the respondent. He was its General Manager. He was in a confidential position. He held a position of trust. He had the responsibility of the day-to-day management of the respondent's business. He had overall supervision of the operation of the respondent's accounts and its funds. As the most senior employee of the company he was answerable directly to the board. A higher standard of trust and confidence is to be expected of the General Manager of a company than somebody who might have been employed by it in a lesser position (*Jupiter General Insurance Co v. Shroff* [1937] 3 All ER 67 at 73-74).

Furthermore, the three directors had been in a working relationship since 1990. Each of them knew the other from at least their business dealings on a regular and frequent basis over that time. The actions taken by Mr Menz need to be gauged against that knowledge. The effect to be given to his acts combined must in the end be governed by an estimate of his honesty and motives. Indeed, the motives and the intention of Mr Menz would be all-important (Blyth Chemicals, *supra*). Since August 1998, Mr Menz had been expressing dissatisfaction with his salary. He had acted in relation to the employment of Mr Martin in a manner contrary to the informal views of the other two directors. He did not act in accordance with their views until a formal resolution was passed. In his capacity as an employee, Mr Menz has an obligation to answer questions put to him by his employer concerning his day-to-day work yet he did not inform the other two directors of the work he was then currently engaged upon. He queried how he came to be a minority shareholder in a company "which was his brainchild and which conducts its business activities solely through his efforts". He expressed his dissatisfaction with the current arrangement regarding "the management and control" of the respondent. He asserted that the salary situation is now "intolerable and cannot be permitted to continue". His family company then claimed ownership of the intellectual property. All of these events in combination can lead to no other conclusion than that they destroyed the trust which the other two directors needed to have in him especially given that the respondent conducts its business activities solely through Mr Menz's efforts. In that context, the letter of 11 February was a direct challenge to the continuation of the respondent's business operations. For these reasons, I am satisfied that the dismissal of Mr Menz was not harsh, oppressive or unfair.

I have therefore not found it necessary to deal with the other matters upon which the respondent placed some reliance. These other matters go to the fact that Mr Menz continued to receive directors' fees notwithstanding the resolution of the board. Further, it was found subsequent to his dismissal that he had been paid one day's annual leave and one day's sick leave each week. I found Mr Menz's explanation of these payments that "the computer was programmed to do it" as being entirely unsatisfactory as an explanation from a general manager with the responsibility of the day-to-day operations of the respondent. It is simply unacceptable for that person to blame a computer error for payments made to him over a period of years. If those payments were justified then Mr Menz should have stated so. If they were not then he has received monies to which he is not entitled. I accept that Mr Menz has indicated a preparedness to repay any overpayments. I further accept that there has been no attempt to hide any of the payments received by him. What nevertheless remains is the fact that Mr Menz was simply unable to explain whether or not he was entitled to these payments and that is simply not acceptable as an excuse from the person who occupied the position of Managing Director. Although Mr Menz gave evidence that he had annual leave "arrears" and that he had drawn them to the attention of Mr Black, and that Mr Black had indicated he should pay himself out, his evidence is effectively countered by the evidence of Mr Black that that conversation did not occur. In any event, even if there is some excuse for the payment of annual leave not taken, I am unable to find any excuse for the payment of sick leave on a regular basis to an employee who is not sick. It is not suggested that there is a term in Mr Menz's contract of employment that he will regularly be paid sick leave whether or not he is sick. Further, there were payments of $1,250.00 received by Mr Menz in respect of his motor vehicle which have been conceded by him as an omission due to pressure of work. The sum total of these matters does not reflect well on Mr Menz's attention to detail during the course of his employment at the least.

For all of these reasons I find that the respondent has discharged the evidentiary onus upon it to show why it dismissed Mr Menz in the way that it did. Furthermore, I am unable to find that Mr Menz has discharged the onus upon him to show that the dismissal was nevertheless harsh, oppressive or unfair. An order will now issue dismissing so much of Mr Menz's claim that relates to his claim of unfair dismissal. The balance of his claim of denied contractual benefits will be adjourned *sine die*. The parties are requested to hold further discussions in relation to the remainder of the claim. The Commission, will, upon request, convene a conference of the parties to discuss the programming of any further matters concerning the contractual benefits claim that may require a decision from the Commission.

Appearances: Mr D Lenhoff (of counsel) for the applicant.

Ms S. O'Brien (of counsel) for the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Graham Menz

and

Ground and Foundation Supports Pty Ltd.

No. 198 of 1999.

12 November 1999.

Order.

HAVING heard Mr D. Lenhoff (of counsel) on behalf of the applicant and Ms S. O'Brien (of counsel) 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 claim by Graham Menz that he was harshly, oppressively or unfairly dismissed is hereby dismissed;
2. THAT the balance of the application be adjourned *sine die*.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Christopher Niblett

and

Transfield Pty Ltd.

No. 2244 of 1998.

26 November 1999.

Reasons for Decision.

SENIOR COMMISSIONER: The Respondent was engaged as a contractor to assist with the construction of the hot-briquetted plant at Port Hedland owned by BHP. Its task was to assist in the process of commissioning the plant by flushing pipes which had been installed in the plant by the head contractor. This required, amongst other things, the removal of instruments in the pipes to avoid damage to those instruments

in the flushing process and thereafter to reinstate the instruments so that the plant could be put into operation.

The Applicant was a member of the Respondent's workforce assigned to carry out the commissioning work. He was employed as an advanced rigger. His employment was terminated on or about 27 November 1998 allegedly because his services were no longer required by the Respondent. The Respondent asserts that the Applicant was a member of the crane crew and when it came time to take the crane off-site his services thereby became redundant. The Applicant on the other hand asserts that he was not part of the crane crew at that time nor had the need for his services become redundant at the time when his employment was terminated. He asserts that the commissioning work in the form of reinstatement of the instruments in the flushed pipes continued until on or about 30 March. Moreover, the Applicant contends that there were a number of riggers employed on that work who joined the Respondent's workforce well after he did. In the circumstances, their employment should have been terminated before his. Consequently, the Applicant alleges that he was unfairly dismissed from his employment and seeks relief in the form of compensation. In addition, the Applicant seeks payment of approximately 40 hours remuneration for driving the Respondent's bus when carrying employees between their camp and the workplace and between the camp and the nearby town. The Applicant also seeks payment of approximately $300.00 for the cost of obtaining scaffolding, elevated work platforms and forklift proficiency tickets which he said he used in the course of his employment and for which he asserts he had a contractual entitlement to be reimbursed.

The Respondent for its part denies that the Applicant was unfairly dismissed. It asserts that the termination of the Applicant's employment was effected in accordance with the provisions of the *Metal Trades (General) Award 1966* and the Hot-Briquetted Iron Project Agreement, principally on the grounds that the requirement for his services had become redundant. The Respondent asserts that the Applicant was employed specifically to work on the construction phase of that project. It asserts that he was assigned to the crane crew which was demobbed in November 1998 and as a consequence the Respondent took steps to dismiss most of the crane crew including the Applicant. Furthermore, it says that at the same time it invited those employees to apply for re-employment as part of the maintenance crew but the Applicant failed to do so.

The Respondent also denies that the Applicant is entitled to the contractual benefits he claims. The Respondent says that it had a "gentleman's agreement" to pay the Applicant at overtime rates for the time he spent driving the Respondent's bus conveying fellow employees between the camp and the workplace. The Respondent says that it has, in fact, paid the Applicant all that he is entitled to in this respect, having made payment at the time the Applicant's employment was terminated in November 1998. The Respondent further asserts that at no stage did it require the Applicant to undergo training for the proficiency tickets obtained by the Applicant nor did it otherwise agree to pay for the tickets. Accordingly, the Respondent denies liability for that aspect of the Applicant's claim.

It is common ground between the parties that the construction work associated with the plant had almost been completed by the end of 1998. It is also common ground that as a consequence the Respondent's commissioning workforce was totally demobilised by 23 December of that year. However, as is not in dispute, a much smaller workforce, consisting principally of members of the commissioning workforce, was re-engaged as part of the flushing process to reinstate those instruments in the flushed pipes which had not been replaced by the end of December, mainly in module number 2. As I find, this work did not involve flushing but simply involved reinstating the instruments. It is common ground that this work was completed on or about 31 March 1999. Furthermore, it is common ground that the Respondent had in the meantime contracted with BHP to provide ongoing maintenance for the plant once it was commissioned. For this purpose the Respondent maintained a separate maintenance workforce. That workforce was engaged under an enterprise bargaining agreement which was quite different in its terms and contained less attractive conditions of employment than that which applied to the commissioning workforce.

The other facts relevant to this matter are the subject of conflicting testimony. The principal conflict is between the testimony of the Applicant and that of Mr Graham, the Respondent's former mechanical supervisor at the project. Where the evidence of the Applicant conflicts with that of the others, in particular the testimony of Mr Graham, I prefer the evidence of Mr Graham as being the most reliable. In addition, I accept the evidence of the Respondent's current mechanical supervisor Mr da Silva, and that of its payroll administrator Ms Tobin, each of whom impressed me as having a good and accurate recollection of the relevant events. Likewise, except to the extent of any conflict with that of Mr Graham, I also accept the evidence of Messrs Dane and Hudston.

I am satisfied and find that the Applicant was employed by the Respondent as an advanced rigger under a written contract which amongst other things provided as follows—

> Duration of Employment/Retrenchments
>
> Your period of employment shall be determined by the labour programme requirements of this Project.
>
> When the 'programme' determines that a reduction in the work force numbers becomes necessary, by virtue of section of work being complete and/or contract completion of other circumstances which may dictate a reduction in personnel, the Company shall have the sole responsibility for determining the personnel to be retrenched.

It can readily be seen therefore that the Applicant's employment was task-specific. Indeed, the Applicant acknowledged as much albeit that he suggests that Mr Graham represented to him that he was there "for the long haul." I am far from convinced that Mr Graham made such a representation to the Applicant. It is contrary to the express provisions of his contract of employment and contrary to the evidence of Mr Graham.

Clearly, the Applicant's continued employment was dependent on "the labour programme requirements of the Project". Those requirements were governed by the extent to which, if at all, the Respondent was required to carry out the commissioning associated with the construction of the project. There seems little doubt and certainly I find it to be a fact that in or about October 1998 BHP, as owners of the plant, asked the Respondent to reduce its commissioning workforce because construction work was coming to an end. It appears not to be in dispute and I find it to be a fact that most of the workforce was demobilised on or about 27 November. Again, it is common ground that at or about that time the crane being used by the Applicant to assist with the pipe flushing was no longer required and as a consequence the crane crew along with others were demobilised at that time.

The Applicant claims that he was removed from the crew in about August. I accept the evidence of Mr Graham that he was not taken from the crew but simply relieved of his duties for a specific lift in the gas plant. He was relieved of those duties because of a difference of opinion between the Applicant and a fellow employee. Although the evidence of Mr Graham on this matter is somewhat conflicting, my impression of his evidence was that at the time of the termination of the Applicant's employment, the Applicant was not only allocated to the crane crew but was, in fact, working as part of the crew. What he says in this respect is supported in material particular by the testimony of Mr da Silva who testified that he often saw the Applicant working as a member of the crane crew in October and into November 1998. Thus, on the basis of the most credible evidence adduced in these proceedings I am satisfied that the Applicant was at the material time a member of the crane crew.

In my view therefore, prima facie there was no reason why the Applicant should not have been selected for dismissal from employment along with the rest of the crew. Certainly, I am far from convinced that he was singled out in this respect as he would have me believe. I accept that after the Applicant's employment was terminated the Respondent continued to employ riggers as part of the process of reinstating instruments into some of the piping. However, as the evidence of Messrs Graham and da Silva discloses, persons wanting to perform that work had to apply for re-employment if for no other reason than that it was treated by the Respondent as a new job and performed, initially at least, under different conditions of employment. I accept that this job was different as Mr Graham

testified. It is not the case as the Applicant asserts that the others were simply transferred by the Respondent to that work. I accept it to be a fact that the Applicant, along with others, was invited to apply for that work but for reasons best known to himself he did not make such an application. Whether or not that work could properly be seen as maintenance work or construction work the fact is that all employees who were engaged to perform that work did so under new arrangements and after entering into a fresh written contract of employment. Again, in this respect the Applicant was treated no differently from others. In any event, contrary to the assertion of the Applicant I do not accept that there was any requirement that the Respondent was obliged to select those who were to continue in its employment on the basis of the "last on first off" rule. That "rule" is not inviolable. (*see: Amalgamated Metal Workers and Shipwrights Union of Western Australia and the Operative Painters and Decorators Union of Australia, West Australian Branch, Union of Workers v. Australian Shipbuilding Industries (WA) Pty Ltd (1987) 67 WAIG 733; and see too: J. Botterill & Fraser v. The Federated Shipwrights and Ship Constructors Association of Australia and Another (1944) 53 CAR 657, 660*). Whatever the practice might have been on other construction sites, such a formula is not consistent with the express provisions of the Applicant's contract. Moreover, as the agent for the Respondent submitted, it was not sensible for the Respondent to choose employees working elsewhere on the Project given that there was only three weeks' work left for the remaining employees. Accordingly, I am far from convinced that the Applicant was unfairly selected for termination on the grounds of redundancy as he claimed.

Furthermore, I am far from convinced that the selection process was unfair. As I find, the Applicant, along with others, was informed at a toolbox meeting on or about 19 November that the commissioning workforce would be demobilised in the case of the crane crew and volunteers on 27 November, and in the case of the remainder on 23 December. The Applicant says, in effect, that his dismissal came as a surprise and he had had no prior warning of it. However, the best evidence indicates that he was at the toolbox meeting in mid-November when, as I find, the workforce was informed of the pending demobilisation. In addition, the evidence of a number of others working on the site, including that of a fellow rigger of the Applicant, is that it was common knowledge about October that the job was coming to an end. I accept the evidence of Mr Graham that it was not until shortly before then that the Respondent received confirmation from the owners of the plant that the commissioning work was to come to an end and thus was not in a position to give an indication to the employees any earlier. Moreover, I accept his evidence that before the toolbox meeting he met with union officials to explain the position which they accepted.

The Applicant's employment was terminated in accordance with the provisions of his contract. As previously stated his employment was job-specific and in those circumstances he cannot expect anything further by way of compensation for losing his job. Accordingly, in my view, the Applicant has not made out his claim that he was unfairly dismissed on the occasion in question, despite the valiant efforts of counsel for the Applicant to persuade me otherwise.

Equally, I am not satisfied on balance that the Applicant has been denied either aspect of his claim for contractual benefits. I unreservedly accept the evidence of Ms Tobin that upon termination the Applicant was paid for driving the bus between the camp and the workplace. She testified, and I accept it to be a fact, that the payment was calculated on overtime rates for the full period that the Applicant resided in the camp. She testified that the agreement regarding bus driving was confined to driving between the camp site and the workplace and return. What she said in this respect is supported by Mr Graham. I am far from convinced that it was a term of the Applicant's contract of employment that he should be reimbursed for driving employees from the camp to the townsite.

The claim with respect to reimbursement for the cost of training which lead to the additional proficiency tickets acquired by the Applicant is, to say the least, vague. I accept the evidence of Mr Graham that at no stage did he agree to pay for that training and that he did not at any stage, require the Applicant to undergo the training. Indeed, as the agent for the Respondent submitted it would be rather strange if the Applicant was required to undergo training of that nature at such a late stage in the project. Furthermore, I accept the evidence of Mr Graham that the Applicant approached him with the proposition that he would abandon his claim for reimbursement for driving the bus if he was paid the cost of the training to acquire the tickets in question. Such a proposition is inconsistent with him having an entitlement to payment for both benefits as he now claims, and is more consistent with him not having an entitlement to be paid for the cost of that training.

It follows that the application should be dismissed.

Appearances: Mr G. Droppert of counsel for the Applicant.

Mr A. J. Randles as agent for the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Christopher Niblett

and

Transfield Pty Ltd.

No. 2244 of 1998.

26 November 1999.

Order.

HAVING heard Mr G. Droppert of counsel for the Applicant and Mr A.J. Randles as agent for 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.

Tanya Ovans

and

Malibu Bay Holdings Pty Ltd t/a

Golden Health Studio.

No. 552 of 1999.

COMMISSIONER A.R. BEECH.

10 November 1999.

Reasons for Decision.

(Given extemporaneously at the conclusion of the proceedings as edited by the Commission.)

Tanya Ovans was employed as a permanent part-time gym instructor/personal trainer at the Golden Health Studio. The parties agree that her employment was regulated by the *Health Attendants' Award*. She was dismissed on 31 March 1999. She claims that her dismissal was harsh, oppressive and unfair.

I find that Ms Ovans was employed from February 1996. During that period of time it is conceded on the evidence of Mr Paisio that Ms Ovans was one of the respondent's better trainers. In fact, on his evidence she did a "sensational" job until perhaps some 6 months prior to her dismissal. I find on the evidence that over that last 6 month period Ms Ovans did have some mood swings and that she was abrupt. She effectively concedes as much. She concedes that her attitude was not as positive as it was before. She is, however, adamant that this did not affect her performance at work.

There is no evidence before the Commission that the respondent, as such, spoke to Ms Ovans about her work performance not being acceptable in the sense of giving her a warning that unless her employment improved she would be dismissed (*Shire of Esperance v Mouritz* (1991) 71 WAIG 875); *Margio v Fremantle Arts Centre Press*, (1990) 70 WAIG 2559 at 2561). If anything was said to Ms Ovans, it was said to her

by Sarah who was not only Ms Ovans' direct supervisor but also her friend. Sarah did not give evidence. I accept Ms Ovans' evidence about the extent to which Sarah spoke to her. Sarah did not speak to her at work and when she did speak to Ms Ovans she spoke more in the capacity of a friend rather than as her supervisor.

There may well have been comments made by other staff that they wanted to avoid Ms Ovans whilst at work, but in my view that cannot count towards the respondent's obligation to warn Ms Ovans if her work performance was such that it might warrant future disciplinary action. I therefore accept Ms Ovans' evidence that her performance at work was not affected. As Ms Cleland's evidence shows, even if Ms Ovans' attitude to her fellow staff members was abrupt, Ms Ovans was still fine working with her clients.

As to her dismissal, on the evidence of Mr Paisio, he reached the decision to dismiss her because of her performance in general, her mood fluctuation and the issue of the Earl Hill refund. I find on the evidence that Mr Paisio made up his mind to dismiss Ms Ovans before the meeting that he held with her. He had her pay made up prior to that meeting and he conceded in evidence that he made his mind up to dismiss Ms Ovans before he had a discussion with her. On my finding it was unfair for the respondent to take any issue of performance or mood swings into account I deciding to dismiss Ms Ovans given her "sensational" performance up to 6 months previously and not having been warned that the respondent viewed her work performance as poor enough to warrant her dismissal unless she improved.

Of the matters relied upon by Mr Paisio therefore, that leaves the issue of the refund relating to Mr Hill. Ms Ovans says that she was unaware of the refund policy regarding personal training. I am not sure that I accept that evidence. I think it is more likely that after three years' employment Ms Ovans would be aware of the respondent's refund policy and the extent to which that may have changed for different programmes such as personal training. However, the issue is really, given that there were not any warnings given to Ms Ovans regarding her work up to that point, whether or not the single issue of the refund relating to Mr Hill can justify the dismissal of Ms Ovans whether or not she knew of the refund policy.

In reaching my conclusion in the matter, I take these factors into account. It was not Ms Ovans' decision to pay the refund. She did not have that authority. It was the authority of Mr Paisio. I have no doubt that Mr Paisio could have said to Mr Hill that a refund was not due. I accept, however, Mr Paisio's professional judgement that he chose to handle the matter in a different way. He nevertheless had the authority to grant or to withhold the refund.

Next, Ms Ovans' discussion with Mr Hill arose because of what Mr Hill wanted to do, that is to train one hour per day over three times per week. On the evidence of Ms Ovans Mr Hill had said to her that he wanted sessions three times per week and she had said that is not available under the systemised personal training session in which he had enrolled which will only give you half an hour per week. Her conclusion that the systemised personal training session was for half an hour per week is in my view consistent with Mr Paisio's evidence about how the systemised personal training programme operated.

I also take into account Mr Paisio's words that if Mr Hill had wanted to workout for that period of time he had neglected to tell Ms Cleland that that is how he had wanted to train. That being the case, the initiative regarding the refund came as much from Mr Hill as it could be said to have come from Ms Ovans.

I am also unable to conclude on the evidence before me that the issue of the Hill refund is an example of a negative attitude on the part of Ms Ovans in relation to systemised personal training. Whether or not the systemised personal training programme was unsuitable for Mr Hill was in my view as much because of Mr Hill's preferences than Ms Ovans'. I think Ms Ovans believed that she was acting quite professionally in advising him that if those were his requirements the systemised personal training programme would not be able to deliver that frequency of training. And I take into account that Ms Ovans had 22 clients in systemised personal training. That was her evidence. It was not attacked in cross-examination and I accept that Mr Paisio was unaware of the exact number of clients that Ms Ovans had. In my view that evidence is hardly consistent with a negative attitude on her part to systemised personal training.

It was suggested on behalf of the respondent that in her manner towards the issue of the refund Ms Ovans was not acting in the respondent's best interests. I would accept at once that if an employee does not act in the employer's best interests that would be a serious matter. There needs to be trust between an employee and an employer that the employee will act in the employer's best interests. However, the issue must be looked at in all of the circumstances and, in my view, in the circumstances of Ms Ovans' three years' employment without any other evidence of Ms Ovans acting that way, the evidence that the dissatisfaction on the part of Mr Hill may have come as much from him not understanding the frequency with which he would train as anything Ms Ovans might have said, does not lead me to the conclusion that Ms Ovans' actions about the refund suggest that the issue is to be viewed that seriously. I tend to agree that Ms Ovans might have been wiser to have taken Mr Hill's concerns back to her employer rather than deal with them somewhat immediately herself. But on the evidence I am not satisfied that she was responsible for Mr Hill's action in seeking a refund.

In my view, at best, Ms Ovans' suggesting that there should be a refund when it was not her eventual decision would have warranted a reprimand in all of the circumstances. I find that a dismissal in all of the circumstances was harsh.

I also take into account in reaching that conclusion that the payment in lieu of notice given to Ms Ovans of approximately 2 weeks' wages was inadequate compared to the requirement under section 170CM of the *Workplace Relations Act* which requires a person with Ms Ovans' length of service receiving at least 3 weeks' notice or payment in lieu. I therefore also find that Ms Ovans' dismissal was unlawful. That does not necessarily mean that it is also unfair but it can lead to a conclusion that the dismissal was considered by the respondent in some haste. Here, on the evidence, the decision to dismiss Ms Ovans was reached by Mr Paisio fairly rapidly upon hearing of the incident regarding the refund. Furthermore, he acted without getting Ms Ovans' side of the issue and to the extent that he did so the respondent was deprived of the opportunity to reconsider its position (*Lawrie v Mount Gunsen Mines Pty Ltd* (1981) 48 SAIR 656 at 670). Although the interview (if that is the correct description) when Ms Ovans was dismissed was terminated by her leaving rather than Mr Paisio's actions I have little doubt on the evidence that Mr Paisio had decided to dismiss Ms Ovans prior to that meeting. I therefore find that even if the meeting had continued for a longer period of time it is not likely that Mr Paisio would have changed his mind.

I therefore conclude for those reasons that Ms Ovans' dismissal was unfair.

I turn to consider what is to be done about that. The primary remedy under section 23A of the *Industrial Relations Act* is the ordering of reinstatement. Reinstatement is sought by Ms Ovans. The authorities suggest that once a dismissal has been found to be unfair the onus of showing that reinstatement should not occur shifts to the respondent (*Gilmore v Cecil Bros, FDR Pty Ltd, Cecil Bros Pty Ltd* (1998) 78 WAIG 1099 at 1102). I note that there is no evidence from the witnesses who were called which suggests that they would not be able to re-establish a working relationship with Ms Ovans. I do however acknowledge from the submission that was made that the respondent may have a fear that in the same situation Ms Ovans would do the same thing. Indeed that is her evidence. In my view, that situation is able to be addressed by training to be given to her about how to handle such a situation in the future. I did not detect in the evidence hostility on the part of Ms Ovans to systemised personal training nor to the respondent as such. I would be confident that the working relationship would be able to be re-established and indeed I note the comments of Mr Paisio (when Ms Ovans took 4 days' leave just before the Hill incident) that he hoped that the respondent would get the "old Tanya" back after her time off. On the evidence before me, other than for the issue of whether or not Ms Ovans would do the same thing again in the same circumstances, it is my assessment that it is perfectly possible that the working relationship would be able to be re-established.

Accordingly, I would order that Ms Ovans be re-instated in her employment on the same terms and conditions that she held immediately prior to her dismissal. As to the issue of compensation, Ms Ovans is in my view entitled to be paid the wages she would have earned had she not been dismissed. She has an onus resting upon her to mitigate her loss (*Growers Market Butchers v Backman* (1999) 79 WAIG 1313 at 1316; *Westen v Union des Assurances* Madgwick J, Industrial Relations Court of Australia, unreported, Decision No. 660/96, 28/8/96 at p 7). She has given evidence that she has sought alternative employment, but I take into account that the opportunity for Ms Ovans to seek alternative employment in Kalgoorlie is somewhat limited in this industry. I therefore find that she has attempted to mitigate her loss.

I finally add that in my view there is no credible evidence of any act for which the respondent could be held responsible for any rumours that Ms Ovans believes have been circulating and I would not find that the respondent is in any way responsible for anything that Ms Ovans believes occurred from that point of view.

I would also, with the agreement of the parties, adjourn the balance of the application in relation to any suggestion that Ms Ovans has any entitlement outstanding.

A minute of proposed order now issues.

Appearances: Mr N. Irvine on behalf of the applicant.

Mr W. McKenzie (of counsel) on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Tanya Ovans

and

Malibu Bay Holdings Pty Ltd t/a

Golden Health Studio.

No. 552 of 1999.

COMMISSIONER A.R. BEECH.

17 November 1999.

Order.

HAVING heard Mr N. Irvine on behalf of the applicant and Mr W. McKenzie (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 Tanya Ovans was unfairly dismissed by Malibu Bay Holdings Pty Ltd t/a Golden Health Studio on 31 March 1999.
2. ORDERS THAT—
   (A) THAT within 7 days of the date of this Order Tanya Ovans be reinstated, without loss of accrued rights and privileges, in the employment of Malibu Bay Holdings Pty Ltd t/a Golden Health Studio in the position previously held by her (namely permanent part-time gym instructor/personal trainer).
   (B) THAT Malibu Bay Holdings Pty Ltd t/a Golden Health Studio shall regard the period between 31 March 1999 and the date that Tanya Ovans is reinstated as a period of proper and continuous service by Tanya Ovans under her contract of employment.
   (C) THAT Malibu Bay Holdings Pty Ltd t/a Golden Health Studio shall forthwith pay to Tanya Ovans a sum of money equal to the wages she would have earned between 31 March 1999 and the date of reinstatement in accordance with this Order as if she had worked for that period.
   (D) THAT liberty to apply is reserved to the parties for 21 days from the date of this Order in the event that they are unable to agree on the payments to be made in accordance with this Order.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Janice Faye Strickland

and

Yamatji Barna Baba Maaja Aboriginal Corporation.

No. 2129 of 1998.

COMMISSIONER A.R. BEECH.

23 November 1999.

Reasons for Decision.

The claim before the Commission by Janice Strickland is that she was unfairly dismissed on 11 November 1998. She had been employed by the respondent as a Personal Assistant/Research Officer to the Director of the respondent. She had been employed by the respondent since September 1995. She was dismissed following the decision of the respondent to make her position redundant. Ms Strickland does not challenge that her position was indeed made redundant. She argues that the dismissal was nevertheless unfair because she had never been advised that her position was to be made redundant.

The respondent denies the claim and relies heavily upon a Deed it says was freely entered into between the parties in which Ms Strickland agreed that she would not take any action against the respondent arising from her dismissal.

In relation to the Deed relied on by the respondent, I find as follows. Ms Strickland was dismissed on 11 November 1998. She was dismissed by the current Director, Mr Wolf on the direction of the respondent's executive committee. Mr Wolf was concerned at having to dismiss Ms Strickland. This was, apparently, because he had only been in the position since 5 November, he had not dismissed anyone before, and he thought his task was "awful". He arranged for a person who he understood to be a friend of Ms Strickland's, Mr Mallard, to speak with Ms Strickland about agreeing with the respondent to accept the redundancy payments payable under the federal award which applied to her employment.

The evidence of Ms Strickland is that she was contacted by Mr Mallard and as a result, travelled with him to the respondent's office where they both met with Mr Wolf. By that stage, Mr Wolf had caused to be prepared a formal document headed "Deed of Agreement". The evidence of Ms Strickland and Mr Wolf differ in relation to how this document came to be signed. In brief, Ms Strickland says that she was angry, hurt and upset at her dismissal. She was under personal stress due to an alleged assault on her by another member of the respondent's executive, that she felt pressured by Mr Mallard to sign the document in order to "get to the bank before 5pm to cash the cheque" and she did not have the opportunity to properly read the document.

Mr Wolf, in brief, says that the meeting was not rushed and that he informed Ms Strickland that he had all afternoon to deal with the matter and she should ask any questions that she wanted in relation to the Deed. He says Ms Strickland signed the Deed of her own free will. Mr Wolf then signed the Deed and affixed the respondent's seal to it. He acknowledged in evidence that this was an incorrect procedure and that the respondent's seal has not been validly fixed to the Deed.

The respondent sought to tender the Deed in evidence. The applicant opposed the tender because of the provisions of section 27(1) of the *Stamp Act 1921*. Those provisions are as follows—

> Except as otherwise provided by this Act no instrument chargeable with duty and executed in Western Australia,

> or relating, wheresoever executed, to any property situate or deemed to be situate or to any matter or thing done or to be done in Western Australia, shall, except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

Those words require little explanation. It is clear that the Deed is chargeable with duty and executed in this State. It was not stamped. Accordingly, it shall not be given in evidence or admitted to be good, useful, or available in law or equity. I have little doubt that proceedings before the Commission are proceedings in either law or equity. The Commission is a Court of Record and furthermore in determining whether an employee has been unfairly dismissed from his employment, and in considering whether, pursuant to s.23A(1)(ba), it should order the employer to pay any, and what, amount of compensation to the claimant for loss or injury caused by the dismissal, the Commission is acting judicially (*Helm v Hansley Holdings* (1999) 79 WAIG 1860 at 1861). It decides matters that come before it according to equity, good conscience and the substantial merits of the case without regard to technicality or legal form. It may not be bound by the rules of evidence although it will usually follow them (*Pastrycooks' Union v Gartrell White No. 1* (1990) 35 IR 51). In my view the purpose behind s.27(1) is that if parties wish to use the resources provided by the State to enforce the agreements they make, then they should pay the fee to the State. If the fee is not paid, the parties can hardly be heard to complain if the State does not recognise their agreement in that form (and see *re Exbea Pty Ltd; ex parte M&W Holdings* [1989] 1 WAR 287). I have little difficulty in refusing to admit the Deed into evidence.

In any event, the evidence of Mr Wolf is that he did not affix the respondent's seal to the document in accordance with its rules. It may be that the respondent cannot be seen to have validly executed the document at all in which case the respondent can hardly be heard to say that it is a binding document (cf. *ALHMWU v Gay-Dor Plastics and others* (1994) 74 WAIG 961).

Although the respondent is not able to rely upon the Deed in its opposition to the claim, the respondent is nevertheless able to bring evidence other than the Deed to establish that the parties entered into an agreement a part of which was that no legal action would be taken by Ms Strickland against the respondent. The *Industrial Relations Act, 1979* encourages parties to reach an agreement in order to settle their industrial relations differences. Correspondingly, the Commission should give due weight to agreements freely entered into between the parties and which were intended by them to finally settle their differences (*Bradbury v Jos van Baren & ors* (1995) 75 WAIG 2927; *MacLeod v Paulownia Trees* (1997) 78 WAIG 1057). On the evidence before me I find that at the meeting which occurred in Mr Wolf's office on 13 November there were discussions which, from the respondent's point of view, resulted in a payment by it to Ms Strickland of termination and redundancy payments due to her under the federal award, and in an undertaking by it to give Ms Strickland an interview for an alternate position to be established. In exchange, Ms Strickland agreed not to institute any proceedings against the respondent. Ms Strickland, while acknowledging that the meeting and the discussions occurred, argues that she was subject to duress at that meeting and that she should not be held to the bargain. Her evidence is that in the month prior to the meeting, she had been the subject of an indecent assault by a member of the respondent's executive committee which had occurred at a meeting whilst she was on the respondent's premises. Ms Strickland produced evidence in these proceedings that she had made a complaint to the police about the incident, and produced a summary of the facts as found by the police, to support her allegation. On the basis of that evidence, I accept that Ms Strickland felt distressed and upset by that incident. She took one month's sick leave as a result and it was upon her impending return from sick leave that her dismissal occurred.

Further, I accept her evidence that members of the respondent's executive committee, and indeed Mr Wolf, were aware of her allegations. Ms Strickland states that no one in the respondent's employ showed her any support or assisted her in recovering from the incident and I accept her evidence. Indeed, there is no suggestion to the contrary.

I find from the evidence that Ms Strickland was distressed following the incident. That, together with the sudden and unexpected dismissal which occurred persuades me that she was under some disability when she attended the meeting with Mr Wolf and Mr Mallard. It was not entirely clear to Ms Strickland what role Mr Mallard was to play. Given that the evidence reveals that Mr Mallard was paid by the respondent to act as some kind of "mediator" at that meeting Ms Strickland's confusion at his role has some factual foundation. Mr Mallard was not called to give evidence and his precise role remains unclear to the Commission. Ms Strickland was asked to the meeting for an uncertain purpose and was given a two-page document to read and sign. From the evidence of that meeting, I find that Ms Strickland was not given the opportunity to seek independent advice. I accept that she did not read much beyond the ninth paragraph of the document. I also accept her evidence that Mr Mallard put some pressure on her to sign the document so the money being offered by the respondent by cheque could be cashed at the bank which was due to close at 5pm. While I do not necessarily find that any pressure was exerted by Mr Wolf, who may have intended to act with the best of intentions within the terms of the instructions given to him by the executive committee, I have little doubt that it would be unfair to hold Ms Strickland to the understanding which the respondent says was reached at that meeting.

I am assisted in reaching that conclusion by the fact that other than for a promise to provide Ms Strickland with an interview for a new position yet to be announced, the money that she was paid was, apparently, nothing more than the entitlements that were due to her under the federal award upon the ordinary termination of her employment by way of redundancy.

The respondent argues that Ms Strickland should be estopped from pursuing her claim because of the agreement. However, I am not satisfied on the evidence that the respondent had either acted or abstained from acting upon the basis of any assumption that Ms Strickland would not pursue a claim against the respondent such that it would suffer a detriment if she proceeded. In the absence of any detriment the estoppel is not made out (*Commonwealth of Australia v. Verwayen* per Deane J at page 444; *Waltons Stores (Interstate) Ltd v. Maher* (1988) 164 CLR 387 at 404). I therefore do not consider that Mrs Strickland is estopped from proceeding with this application.

I therefore proceed to consider whether Ms Strickland's dismissal was unfair. Ms Strickland was dismissed by reason of redundancy. Mr Wolf was informed by the executive committee of the respondent that her position had been abolished. There is no evidence before the Commission which could safely permit a conclusion that the position was not abolished. Ms Strickland's position was Personal Assistant/Research Officer to the Director. That is, she was the Personal Assistant/Research Officer to the person who occupied the position of Director prior to Mr Wolf. Mr Wolf does not have a Personal Assistant. It is likely that the position of Personal Assistant/Research Officer to the Director has indeed been made redundant.

The Commission was invited to draw the conclusion that the position was made redundant only because Ms Strickland had lodged a complaint with the police about the assault which allegedly occurred and that the complaint was made against one of the members of the executive committee. However, it cannot be said that the evidence before the Commission allows that conclusion to be safely drawn. Ms Strickland admits that there had been discussions regarding reclassification of positions within the respondent. Whilst I accept that there had not been prior discussions of any redundancies, the evidence is simply not clear regarding the reason why the position of Personal Assistant/Research Officer to the Director was no longer required.

Although I have found that the position of Personal Assistant/Research Officer to the Director was made redundant it does not necessarily follow that the employee who held that position must be dismissed. The employee may be able to be employed elsewhere in the organisation. That is why fairness requires that there be discussions with an employee about alternatives when the decision is made to make a position redundant. There is a growing body of authority that an employer has an obligation to consult with an employee who is to be made redundant. Such a conclusion was reached by Beazley J in *Quality Bakers of Australia Ltd v. Goulding* (1995) 60 IR 327 where Her Honour concluded

that the need for consultation with employees in the case of restructuring has consistently been recognised as an essential element of fairness in the relationship between employee and employer (at p.17). I draw attention, with respect, to the cases dealt with by Her Honour in that judgement and see no need to repeat that exercise here. I also refer to *Budget Couriers Equity Management v. Beshara* (1993) 5 VIR 173 and *Shearer v. Action Mercantile Pty Ltd* (1993) 5 VIR 149 where a circumstance in which the employee was not consulted about the matter and was given no notice of the impending redundancy was described as a "callous disregard" for the employee in the conclusion being reached to dismiss him (at p.151). In this case, the requirement to hold discussions is also requirement of the federal award which applied to Ms Strickland's employment. Even if it was not, the requirement is implied into Ms Strickland's contract of employment by virtue of *The Minimum Conditions of Employment Act, 1993*. There were no such discussions with Ms Strickland. The absence of any discussions with Ms Strickland and the consequent suddenness with which her employment was terminated lead irresistibly to the conclusion that her dismissal was unfair. I find that her dismissal was indeed unfair to her.

Reinstatement is seen by both sides as being impracticable and the Commission therefore finds, also, that reinstatement is impracticable. If the position previously held by her no longer exists then there is logically no position to which she is able to be reinstated.

The Commission considers the issue of compensation to be paid to Ms Strickland. Given that Ms Strickland's position was indeed made redundant, the loss suffered by Ms Strickland is the loss of fair compensation for the redundancy which occurred (*Rogers v. Leighton Contractors*, Full Bench WAIRC, unreported, 1/11/99). Compensation for redundancy involves considerations of compensation for the loss of non-transferable credits and entitlements that have been built up through length of service and for inconvenience and hardship imposed by the termination of employment through no fault of the employee. In this case, it is acknowledged that the award covering Ms Strickland's employment contained a provision regarding redundancy. The Commission also understands that those provisions have been paid to Ms Strickland. In her case, that is the measure of the reasonable compensation due to her upon redundancy. It follows that she has not been able to establish any monetary loss as a result of her redundancy.

The Commission is also able to award compensation for injury to an employee consequent upon the dismissal. Injury includes consideration of the stress involved in the termination of an employee's employment. There will inevitably be some measure of distress to an employee in every termination. Nevertheless, in the context of Ms Strickland's termination and knowledge that the respondent had of her personal circumstances in the month leading up to her dismissal, including that she was absent on sick leave, I accept that the surprise, hurt and upset about which Ms Strickland gave evidence is an injury which requires compensation. The assessment of compensation for injury is not capable of precise calculation but is a matter for individual assessment. In exercising my discretion I take into account Ms Strickland's circumstances. I note the decision of the Full Bench in *Rogers v. Leighton Contractors* previously referred to where an amount of $2,000.00 was ordered by way of compensation for that injury. While that decision does not establish a standard for each case, I am persuaded in the circumstances of Ms Strickland's case that that is not an inappropriate level of compensation and accordingly I order that the respondent pay Ms Strickland the sum of $2,000.00 as compensation for the injury which occurred arising from her dismissal.

An application was made for costs against the respondent principally on the ground that it believed reliance on the Deed was false. However, while the reliance on the Deed was certainly misplaced, the respondent was able to rely on the fact of the meeting leading to the Deed. Its reliance on that meeting was not "false". The circumstances of this case are not an example of an "extreme" case (*Brailey v Mendex Pty Ltd t/a Mair & Co* (1992) 73 WAIG 26 at 27). The application for costs is dismissed.

A minute of proposed order now issues.

Appearances: Ms F. Tremlett (of counsel) on behalf of the applicant.

Mr A. Mackey (of counsel) on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.
Industrial Relations Act 1979.
Janice Faye Strickland
and
Yamatji Barna Baba Maaja Aboriginal Corporation.
No. 2129 of 1998.

25 November 1999.

Order.

HAVING HEARD Ms F. Tremlett (of counsel) on behalf of the applicant and Mr A. Mackey on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby—

1. DECLARES THAT Janice Faye Strickland was unfairly dismissed by Yamatji Aboriginal Corporation and that reinstatement of Ms Strickland in her employment is impracticable; and
2. ORDERS THAT Yamatji Aboriginal Corporation forthwith pay Janice Faye Strickland the sum of $2,000.00 by way of compensation for the dismissal which occurred.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.
Industrial Relations Act 1979.
Alex Terenciuk
and
Brambles Western Australia.
No. 360 of 1999.
COMMISSIONER A.R. BEECH.

12 November 1999.

Reasons for Decision.

Mr Terenciuk claims that his dismissal was harsh, oppressive and unfair. He was employed by the respondent ("Brambles") as a workshop supervisor. The position involved the control of the maintenance of Brambles' company fleet and its associated equipment. His duties included the direction, control and of workshop staff, advising workshop staff and contractors of required service and repairs, the purchase of parts, the control of maintenance costs within a budget and the quotations for outside repair work for referral to management. He was to ensure safe work practices, record working hours of staff and orders placed by them, authorise company purchase orders and authorise the payment of invoices.

On Wednesday, 17 February he was informed at a meeting of all supervisors that Brambles would be transferring its employees to Centurion Transport ("Centurion") as a result of the sale of Brambles to Centurion. Mr Terenciuk was informed that he would be transferred to the same position of workshop supervisor at Centurion and carry with him all of his entitlements. His service with Brambles would be recognised by Centurion. His evidence is that he was quite happy with that arrangement. On 19 February he met Mr Wade the workshop supervisor for Centurion. Mr Wade informed Mr Terenciuk that the Brambles workshop at Kewdale would be transferred to the Centurion workshop at South Guildford. On the evidence of Mr Terenciuk, Mr Wade informed him that the work he would be doing the following Monday for Centurion would be to grease trailers. Mr Wade, who gave evidence during the proceedings, disagrees that he told Mr Terenciuk that Mr Terenciuk would be greasing trailers.

Mr Wade's evidence is that his task following the purchase was to check the stock, that is the trucks and trailers, which had been purchased and that there would not be any greasing done at all. According to Mr Wade's evidence, he informed Mr Terenciuk that the following Monday Mr Terenciuk would be "bringing the trailers over the pit". On balance, I prefer the evidence of Mr Wade to the evidence of Mr Terenciuk

regarding this conversation. While I do not say this with any disrespect to Mr Terenciuk, it seems to me more likely that Centurion would indeed be inspecting the vehicles which it had purchased rather than immediately greasing them. Therefore, I find that Mr Terenciuk was informed that on the following Monday he would be driving trucks over the pit.

Nevertheless, Mr Terenciuk was unhappy with what he had been told. His understanding was that the position of workshop supervisor to which he would be transferred was same position of workshop supervisor as the position he had been occupying at Brambles. Mr Terenciuk's evidence is that he rarely, if ever, did manual work. He did not want to be a greaser but he believed that he would be required by Centurion to be one even if he was called "workshop supervisor". As a result of his misgivings a meeting was held on the following Monday morning between

Mr Terenciuk, Mr Wade and Mr Cardacci and Mr Richard Thompson. Mr Terenciuk's evidence is that he still believed as a result of that meeting that he would be greasing trucks. Mr Wade's evidence of that meeting, however, is that it was made clear to

Mr Terenciuk that he would be a workshop supervisor. All his conditions of employment would remain the same and that "we work as a team" which sometimes involved getting our hands dirty, but not all the time.

In fact, for the following Monday and the Tuesday and Wednesday, Mr Terenciuk did not either drive trucks or grease trailers. Mr Terenciuk continued to tidy up the paperwork attaching to his position which was left over from the sale of Brambles to Centurion the previous week. That is, for the first three days of that following week the duties Mr Terenciuk performed were the duties he had always performed.

On the Wednesday of that following week, 24 February, he informed Centurion that he would resign and 24 February was indeed his last day of work.

Mr Terenciuk's application before the Commission falls into two parts. The first part is his claim of unfair dismissal and I now turn to consider it. The first point to note is that on 24 February when Mr Terenciuk resigned he was an employee of Centurion Transport and not of Brambles. However, his claim is made against Brambles and not Centurion. However, it is clear that Mr Terenciuk was employed by Brambles at least to 19 February. On 19 February he consented to having his employment transferred to Centurion Transport. An employer cannot unilaterally transfer an employee to another employer. It requires the employee's consent. In this case, that consent was given by Mr Terenciuk. However, he gave his consent on the undertaking of Brambles that his position at Centurion would be the same position that he had held at Brambles. Therefore, if the position at Centurion was not in fact the same position that he had held at Brambles, then Mr Terenciuk should not be held to his agreement. His agreement would have been given on a false understanding. If that is the case, in the absence of any agreement from Mr Terenciuk to the transfer of his employment then he will have been dismissed by Brambles. To that extent, therefore, Mr Terenciuk was correct to bring his claim against Brambles.

The issue therefore is whether or not the position at Centurion Transport was indeed the same position that he had held at Brambles. It is agreed that the position title, salary and conditions of employment, including the provision of a motor vehicle, were the same. If there was any difference it was in the actual duties to be performed. On the evidence of Mr Wade, the duties of a workshop supervisor in Centurion Transport involve getting one's hands dirty at least some of the time, perhaps between 5-10% of the time. The evidence of Mr Terenciuk is that in the position of workshop supervisor he would rarely handle tools. At the most, he may have done so on perhaps one occasion by holding the tools for somebody who needed a hand. Mr Terenciuk did not express this as a percentage of his work overall, but it would be a small amount of his overall time. Mr Terenciuk admits that he had a toolbox at work, but that was because he had some tools that the respondent did not have and the workshop employees would occasionally use them. To this evidence must be added the evidence of Mr Thompson, who was the manager of long distance transport for Brambles at the time of the sale. He observed Mr Terenciuk in his employment. In his estimation he had seen Mr Terenciuk perform manual work for perhaps 5% of his time, or less. Further, he had been involved in the negotiations with Centurion Transport regarding the sale. I accept Mr Thompson's evidence that it was a priority for Brambles that its staff be offered positions and that redundancies be minimised. It is his evidence that, so far as Mr Terenciuk's employment with Centurion was concerned, he had not been told of any requirement to grease trucks.

Mr Thompson is in no doubt that there was an expectation of a person in Mr Terenciuk's position that if extra effort was needed then all staff would contribute to it including hands-on work. Mr Thompson's evidence is corroborated in my view by the written term in Mr Terenciuk's conditions of employment which states the "company reserves the right to change your title, duties and place of work at any time during your employment". In the context of a dramatic event, that is the sale of Brambles to Centurion which had the effect of doubling Centurion's vehicle stock, I see nothing exceptional in a requirement for Centurion's workshop supervisor to assist in the work of checking the stock it had just purchased by driving trailers over the pits. Significantly, I am not prepared to find on the evidence before me that the work that Mr Wade requested Mr Terenciuk to do at that time is in any way representative of the work that would be required of Mr Terenciuk as a workshop supervisor for Centurion in the long term. I therefore find that the position offered to Mr Terenciuk by Centurion of workshop supervisor was the same as the position he held as workshop supervisor with Brambles, particularly in view of the right which Brambles had to change his duties at any time. I am therefore of the opinion that Mr Terenciuk should be held to his consent to the transfer of his employment to Centurion. It cannot be said that Brambles dismissed him and accordingly, Mr Terenciuk's claim that he was unfairly dismissed must fail.

The second part of Mr Terenciuk's claim is the claim that he has been denied one month's salary in lieu of notice as a benefit to which he was entitled under his contract of employment. It was a provision of Mr Terenciuk's contract of employment that he would receive that payment if his employment was terminated by Brambles "due to the disposal of the business" provided he was not "offered employment by the purchaser of the business on terms and conditions similar to those under which you were employed by the Company". In the light of my finding that the position of workshop supervisor offered to Mr Terenciuk by Centurion was the same as the position he held with Brambles it follows that it was certainly "on terms and conditions similar" to those under which he was employed by Brambles. Accordingly, this part of Mr Terenciuk's claim similarly has not been made out.

An order now issues dismissing Mr Terenciuk's application.

Appearances: Mr A. Terenciuk on his own behalf as applicant.

Mr S. Anderson on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Alex Terenciuk

and

Brambles Western Australia.

No. 360 of 1999.

12 November 1999.

Order.

HAVING HEARD Mr A. Terenciuk on behalf of himself as the applicant and

Mr S. Anderson 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.

SECTION 29 (1)(b)—Notation of—

APPLICANT	RESPONDENT	NUMBER	COMMISSIONER	RESULT
Atkinson T	Mindarie Regional Council	535/1999	Beech C	Discontinued
Ballard SR	Lanier (Australia) Pty Ltd	580/1999	Kenner C	Discontinued
Bennett MN	Kleenheat Gas (Wesfarmers) Pty Ltd ACN 008 679 543	1351/99	Fielding SC	Discontinued
Berryman RN	Bunbury Trotting Club Incorporated	1349/1999	Gregor C	Discontinued
Bingham K	John Weir	1574/1999	Scott C	Dismissed
Brewer T	Morowa Golf & Bowling Club	348/1999	Beech C	Discontinued
Burke SJ	Farnsway Mining Construction Pty Ltd	1085/1999	Beech C	Discontinued
Burrows LK	I & J Machinery Sales Pty Ltd	951/1999	Gregor C	Discontinued
Callard LB	Brambles Australia Limited t/as Wreckair	1422/1999	Gregor C	Order Issued
Cane WDA	Phoenix Metalform	1419/99	Fielding SC	Discontinued
Cheney D	Canal Rocks Beach Resort	1061/1999	Scott C	Dismissed
Coskun E	Bruce Wedderburn	1053/1999	Gregor C	Discontinued
De Kraats KV	Mark Oats	1382/1999	Scott C	Withdrawn
Deza L	Dick Smith Electronics	1073/1999	Scott C	Dismissed
Dickinson K	Gumala Enterprises Pty Ltd	259/1999	Gregor C	Discontinued
Downey CL	Bel El Pty Ltd t/as Bel Eyre Tavern	1565/99	Fielding SC	Discontinued
Dyson M	Rolcol Pty Ltd (ACN 008 894 826)	1438/99	Fielding SC	Discontinued
English M	Shire of Beverley	1178/1999	Gregor C	Discontinued
Fares A	Ausbase Pty Ltd—Ezy Tan	1239/1999	Gregor C	Granted
Fleming DJ	Pantella Holdings t/a Thornlie Tavern	692/1999	Beech C	Discontinued
Francis W	Brown & Root Energy Services	1377/99	Fielding SC	Discontinued
Frew J	Alfa Enterprises (WA) Pty Ltd	1192/1998	Gregor C	Consent Order
Gleeson TW	Avtec Security Services Pty Ltd	1228/1999	Scott C	Dismissed
Glossop A	Martin Smoothy	1341/99	Fielding SC	Withdrawn
Goodwin LC	Featureline Furniture	1174/1999	Gregor C	Discontinued
Grant L	A Goodman Imports Pty Ltd	1432/99	Fielding SC	Discontinued
Green LA	FSI Marketing	1480/1999	Beech C	Withdrawn
Guy ME	Interest Recount (WA) Pty Limited and Interest Recount Corporation Pty Limited	240/1999	Coleman CC	Order Issued
Hahn JM	Straits (Nifty) Pty Ltd ACN 074 145 636	1399/99	Fielding SC	Discontinued
Hanrahan K	Mr Gourmet	1172/1999	Beech C	Discontinued
Harcombe GW	Black and White Distribution Pty Ltd	1064/1999	Gregor C	Consent Order
Hardy-Dobney M	Galleria Motors Pty Ltd t/a Galleria Toyota	1158/1999	Beech C	Discontinued
Hartley G	Sheepo Pty Ltd t/a The Vale Tavern	1346/1999	Beech C	Struck Out
Holley BR	J.R's Cleaning Services	1336/99	Fielding SC	Discontinued
Hyde TC	Byrnecut Mining Pty Ltd	1454/1999	Beech C	Withdrawn
Jackson SP	Integrated Workforce Ltd t/a Integrated Workforce WA	1459/1999	Scott C	Withdrawn By Leave
Jones BM	Achievement Holdings Pty Ltd T/A Search Equipment Rentals	1312/1999	Scott C	Dismissed
Keenan WE	Interest Recount (WA) Pty Limited and Interest Recount Corporation Pty Limited	997/1999	Coleman CC	Order Issued
Kent J	Mr & Mrs D & C Chapman	1263/99	Fielding SC	Order issued to dismiss
Kenyon CD	Impex Power Corporation Pty Ltd	1331/99	Fielding SC	Order Issued to pay
Levine JM	Media Entertainment Group Limited	826/99	Fielding SC	Discontinued
Lovett DM	Living Dolls Promotions Pty Ltd	1270/1999	Scott C	Dismissed
Lye Moy (Carol) Chin	Eurokitchens & Interiors Pty Ltd	1689/99	Fielding SC	Discontinued
Mackie B	Honda North	1415/99	Fielding SC	Discontinued
McKay MJ	PB Foods Ltd	1231/99	Fielding SC	Discontinued
McLeod J	Department of Resources and Development	1770/1999	Scott C	Withdrawn By Leave
Meldrum PJ	BTR Environment Pty Ltd	929/1999	Beech C	Discontinued
Melville R	Volona Nominees Pty Ltd and Other	1127/1999	Kenner C	Discontinued
Miles JA	Ashburton Drive Primary School P & C Association (Inc.)	1408/1999	Scott C	Withdrawn By Leave
Miles KE	Cuddles Child Care Centre Rockingham	1572/1999	Scott C	Dismissed
Mlynarz T	Spirac Engineering Pty Ltd	1046/1999	Gregor C	Discontinued
Morris CS	Northside Distributors & Finishers	972/1999	Scott C	Dismissed
Morphett SJ	Cuddles Child Care Centre Rockingham	1573/1999	Scott C	Dismissed
Naylor S	Mr Martin Smoothy	1342/99	Fielding SC	Dismissed
Niblett C	Transfield Pty Ltd	2244/98	Fielding SC	Dismissed
O'Donnell DA	Esperance Group Training Scheme Inc	1294/99	Fielding SC	Order issued to dismiss
Olsson CV	Lynfield Pty Ltd ATF Ridgeview Unit Trust t/a Midland Chrysler Jeep	365/1999	Parks C	Discontinued
Osman H	Brett Martin Australia Pty Ltd	1013/1999	Gregor C	Discontinued
Paet TJ	Freiberg Australia Pty Ltd	637/1999	Beech C	Discontinued
Parker DW	Rogers Tyre Service	1403/1999	Fielding SC	Dismissed

APPLICANT	RESPONDENT	NUMBER	COMMISSIONER	RESULT
Pearce DM	Delambre Holdings Pty Ltd	1300/99	Fielding SC	Discontinued
Prouse J	Carpentaria Marine Pty Ltd	2203/1998	Fielding SC	Discontinued
Quan CMW	P & O Services (Management) Pty Ltd	1000/1999	Gregor C	Discontinued
Reed AE	Baulderstone Clough Joint Venture	2074/1998	Scott C	Withdrawn
Roberts CR	Fremantle Football Club Ltd	1514/99	Fielding SC	Discontinued
Roma-Lee Western	96 FM Southern Cross Radio Pty Ltd	1373/99	Fielding SC	Discontinued
Russell R	Kerb Qic & Co	1671/1999	Scott C	Withdrawn
Russell SM	Spotless Services Limited	1259/1999	Scott C	Dismissed
Scholz M	Furniture First Pty Ltd t/a The Furniture Spot	1118/1999	Beech C	Discontinued
Schulz TR	Campaign IT	932/1999	Beech C	Discontinued
Shilling LR	Town Inn Pty Ltd t/a Miss Maud	1113/1999	Scott C	Dismissed
Shirley Vera Voss	Nardine Wimmin's Refuge	1189/1999	Fielding SC	Discontinued
Soltoggio B	Soltoggio Nominees Pty Ltd as trustee for the Soltoggio Unit Trust Trading as Soltoggio Bros	1313/1999	Scott C	Dismissed
St Aubyn BJ	Sittella Nominees Pty Ltd	1275/99	Fielding SC	Discontinued
Stojkovic A	Del Basso Smallgoods	1137/1999	Gregor C	Dismissed
Taylor DG	Richard Huston & Associates	556/1999	Gregor C	Discontinued
Thomas MD	Alfa Engineering Pty Ltd (A.C.N: 008 797 279)	1243/1999	Fielding SC	Discontinued
Thompson W	The Communications Group Pty Ltd	1022/1999	Scott C	Dismissed
Tin TM	Koto Sushi	1587/1999	Scott C	Withdrawn By Leave
Tilbury GD	Haircare Australia	1226/1999	Beech C	Discontinued
Traynor L	Gropak Australia Pty Ltd	1329/99	Fielding SC	Discontinued
Treacy LR	Ausmic Environment Industries Pest Managers	1129/1999	Beech C	Struck Out
Wang W	O.B.S. Equipment (Aust) Pty Ltd	1319/1999	Scott C	Dismissed
Wells P	The Communication Group Pty Ltd	1069/1999	Scott C	Dismissed
Wong-Ngiw N	Marketcroft Pty Ltd t/a The Golden Triangle Thai Restaurant	1054/1999	Beech C	Withdrawn
Wooltorton RA	Delta Electrical Group Pty Ltd	1397/1999	Kenner C	Discontinued
Worthington TM	Dewsons Donnybrook	733/1999	Scott C	Dismissed
Zerafa WV	Convenience Foods WA Pty Ltd	543/1999	Beech C	Discontinued
Zurhaar E	Nestle Australia Ltd	302/99	Fielding SC	Discontinued

CONFERENCES—
Matters arising out of—

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.

C 319 of 1999.

COMMISSIONER S J KENNER.

19 November 1999.

Recommendation.

WHEREAS on 12 November 1999 the applicant applied to the Commission for an urgent conference pursuant to s 44 of the Industrial Relations Act, 1979;

AND WHEREAS on 15 November 1999 the Commission convened an urgent conference between the parties pursuant to s 44 of the Industrial Relations Act, 1979;

AND WHEREAS on 15 November 1999 the Commission issued an order arising from the conference in relation to industrial action being taken by employees of the applicant members of the respondent in relation to the implementation and application of a drug and alcohol policy by the applicant with a correcting order issuing on 19 November 1999 ("the Orders");

AND WHEREAS a further s 44 compulsory conference was convened on 19 November 1999 for the purposes of the parties reporting back to the Commission the progress of discussions required in accordance with the terms of the Orders;

AND WHEREAS the Commission was advised that the parties had reached agreement as to the resolution of the dispute insofar as it related to the circumstances of Mr Howley but the parties remained in dispute in relation to the issue of random drug testing;

AND WHEREAS following further discussions in the conference the parties were unable to resolve their differences in relation to the issue of random drug testing but reaffirmed their commitment to continue discussions in relation to the implementation and application of the applicant's drug and alcohol policy;

NOW THEREFORE the Commission, having regard for the public interest and the interests of the parties directly involved and to prevent any further deterioration of industrial relations in respect of the matters in question and further to the issuance of the Orders pursuant to the powers vested in it by the Industrial Relations Act, 1979, hereby recommends—

(1) THAT without otherwise restricting the applicant's ability to conduct drug and alcohol testing under its policy the applicant desist from conducting any random drug testing for a period of 21 days from the date hereof to enable further discussions to occur between the parties as to resolving the matters the subject of the present dispute.

(2) THAT the application be otherwise adjourned to a further s 44 compulsory conference on a date to be fixed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Westrac Equipment Pty Ltd

and

Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers, WA.

No. C 319 of 1999.

COMMISSIONER S J KENNER.

15 November 1999.

Order.

WHEREAS on 12 November 1999 the applicant applied to the Commission for an urgent conference pursuant to s 44 of the Industrial Relations Act, 1979;

AND WHEREAS on 15 November 1999 the Commission convened an urgent conference between the parties pursuant to s 44 of the Industrial Relations Act, 1979;

AND WHEREAS at the conference the Commission was informed that the applicant and the respondent are in dispute in relation to the general implementation of a drug and alcohol policy at the applicant's work sites and specifically in relation to the alleged refusal by an employee of the applicant, Mr Howley, to comply with the drug and alcohol policy;

AND WHEREAS in support of their demands members of the respondent withdrew their labour commencing on or about 12 November 1999 with further industrial action taking place between that time and the time of these proceedings with the Commission being advised that the members of the respondent have presently withdrawn their labour;

AND WHEREAS having heard from the applicant and the respondent the Commission has formed the view that the industrial action which is occurring constitutes a breach of either or both of clause 34 – Avoidance of Industrial Disputes of the Metal Trades (General) Award No 13 of 1965 and clause 24 – Employee Resolution Process of the Westrac Equipment (Service Operations) Enterprise Agreement 1999 respectively;

NOW THEREFORE the Commission having regard for the public interest and the interests of the parties directly involved and to prevent any further deterioration of industrial relations in respect of the matters in question pursuant to the powers vested in it by the Industrial Relations Act, 1979, and in particular s 44 (5b) hereby orders—

(1) THAT each of the employees of the applicant members of the respondent engaged in work at the applicant's work sites who are engaged in industrial action concerning matters the subject of these proceedings cease such industrial action immediately to ensure a return to work no later than 8.00am Tuesday 16 November 1999 and thereafter work in accordance with their contracts of service and refrain from commencing or taking part in further industrial action in respect of this matter until this order is revoked.

(2) THAT the respondent and each of its officials shall take all necessary steps to ensure that work resumes in accordance with the terms of paragraph (1) of this order including but without limiting the generality of this obligation to—

  (a) call a meeting of members of the respondent union for no later than 7.00am Tuesday 16 November 1999;

  (b) advise the employees of the terms of this order; and

  (c) counsel the employees to return to work in accordance with the terms of paragraph (1) of this order and to refrain from engaging in any further industrial action in respect of the matters the subject of these proceedings.

(3) THAT in the interim the applicant take no action prejudicial to the employment of Mr Howley pending further negotiations between the parties and further conciliation proceedings in the Commission.

(4) THAT the application be otherwise adjourned to a further s 44 compulsory conference on Friday 19 November 1999 at 9.15am;

(5) THAT the applicant or the respondent may, on giving 24 hours notice to the other, apply to the Commission to vary, revoke or otherwise set aside the terms of this order.

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

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.

No. C 319 of 1999.

COMMISSIONER S J KENNER.

19 November 1999.

Correcting Order.

WHEREAS on 15 November 1999 the Commission issued an order arising from an urgent conference pursuant to s 44 of the Industrial Relations Act, 1979 in relation to industrial action being taken by employees of the applicant members of the respondent ("the Order");

AND WHEREAS a variation of the Order is necessary to give effect to all of the matters raised and dealt with at the conference;

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

(1) THAT immediately after paragraph (2) of the Order a new paragraph (3) be inserted in the following terms—

  "(3) THAT the parties immediately confer as to the implementation and application of the applicant's drug and alcohol policy ("the Policy") with specific reference to but not limited to random drug testing but on the understanding that the Policy is not, by this order, suspended, revoked or otherwise set aside or its validity otherwise affirmed."

(2) THAT existing paragraph (3) be varied by deleting the word "negotiations" and inserting in lieu thereof "discussions".

(3) THAT existing paragraphs (3), (4) and (5) be re-numbered (4), (5) and (6) respectively.

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

CONFERENCES—
Matters referred—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Workers' Union,
West Australian Branch,
Industrial Union of Workers

and

Newcrest Mining Ltd.

No. CR 33 of 1999.

30 November 1999.

Reasons for Decision.

(Given extemporaneously at the conclusion of the submissions, taken from the transcript as edited by the Senior Commissioner)

SENIOR COMMISSIONER: It is common ground that the Respondent mines gold by open cut process at Telfer. Amongst the people it employed to assist it in that task was Mr Neil Hack who, at all material times, was a dump truck (or haul pack) operator. The evidence indicates that Mr Hack was employed by the Respondent from June 1998 until 22 January 1999 when his employment was terminated in circumstances which the Applicant on his behalf asserts was unfair. Accordingly, by these proceedings the Applicant seeks an order that Mr Hack be reinstated in his former employment with the Respondent.

The circumstances which gave rise to the termination of Mr Hack's employment can be briefly stated. Whilst he was at work on the evening of 19 January last a fellow employee, Ms Woods, complained to her supervisor that Mr Hack was driving his dump truck over ungraded areas of the tipping or dumping area at the mine site. Driving in such places is said to be in breach of the Respondent's procedures. Indeed, Ms Woods reported that she thought Mr Hack, by his conduct, was deliberately trying to puncture or at least damage the tyres on the dump truck. As a result of that complaint the supervisor, Mr Anderson, went to make enquiries. He placed himself at a spot where he could watch what Mr Hack was doing. Mr Anderson testified that thereafter he saw Mr Hack driving his dump truck with its tray up, at speeds he estimated to be over 30 kilometres an hour, chasing a dingo off the dump area. He says that the truck was being driven in an erratic manner over the entire area of the dump in a route which was like "a figure eight". Mr Anderson says that he was "stunned", to use his words, by that activity. As a consequence, he reported the matter to his superior, Mr Hearle, the acting superintendent, who in turn reported the matter to Mr White, the mine manager. An hour and a half or so later Mr Hack was stood down after the allegations had been put to him by Messrs Hearle and Anderson. It is fair to say that on that occasion Mr Hack did not dispute driving over the ungraded areas but his explanation was that the ungraded areas were not in such a condition as to cause damage to the tyres on the dump truck. Also, he indicated that he was not driving fast and only had the truck in first gear. He said that he was herding the dingo off the mine site, not chasing it off as the Respondent alleges. At all events, the following day the same allegations were again put to Mr Hack, this time by Mr White and others. Again Mr Hack indicated that what he was doing was not a serious misdemeanour, if indeed it was a misdemeanour at all, although the evidence is that on this occasion he indicated that he might have been driving the dump truck in second gear rather than in first gear. Mr White and others reviewed the matter and again interviewed Mr Hack on 22 January 1999. At this time they put to him a further allegation, that on the preceding night, 18 January 1999, he had been seen by another fellow employee, this time Ms Fagan, to have dumped ore at the dump head area by approaching from left to right, rather than from right to left and in so doing nearly collided withor caused a collision with, the dump truck being driven by Ms Fagan. Mr Hack, so the Respondent's witnesses say, could not recall that incident nor could he offer any further explanation for his conduct on 19 January last. As a consequence his employment was terminated with pay in lieu of notice and all outstanding entitlements essentially on the grounds that his conduct on 18 and 19 January 1999 "constitutes a breach of (his) contract of employment, which states that failure to adhere to safety requirements may render you liable for dismissal". In the notice of termination, the Respondent's general manager noted that Mr Hack had admitted to "not following the correct tipping procedure (dumping from right to left)", to "repeatedly driving over ungraded parts of the dump", and to "chasing a dingo around ungraded areas of the dump with the truck tray up" and noted that he was unable to give an explanation as to why he had "ignored operating procedures".

There is, as regrettably so often happens in matters of this nature, a marked conflict in the evidence. However, the weight of evidence appears to be against Mr Hack in this matter. At least five of the witnesses contradict, to some degree, what Mr Hack had to say about the matter. Together these witnesses presented an almost uniform version of the events which led to the dismissal from employment of which the Applicant now complains.

I doubt that anyone who has had the benefit of hearing and observing Ms Fagan, Mr Anderson, Ms Woods, Mr Hearle and latterly Mr White could have been other than impressed by their spontaneity and the forthright manner in which they gave their testimony. Certainly I accept them to have been truthful and reliable witnesses. I cannot think, having heard and observed them, that they concocted their evidence to damn Mr Hack as has been suggested, at least inferentially. Rather, I take it to be that they were reciting the events as indeed they happened.

It follows therefore that I am satisfied and find that on the evening of 19 January last Mr Hack did indeed drive a dump truck around the dump area in an erratic fashion, as testified by Mr Anderson, in the process of attempting to chase a dingo off the dump. Not only is that the evidence of Mr Anderson but to some extent it is verified by what Messrs Hearle and White said. They testified that Mr Hack admitted to driving the haul pack around the dump area doing "possibly two figure eights", albeit that he disputed that he was travelling at the speed alleged, I am satisfied that he did drive the truck at speed. Mr Anderson said he was "stunned by it", said that he saw tyre marks on the dump area which were created by the manoeuvres of the dump truck being driven by Mr Hack. It is notable, certainly more than passing strange, that Mr Hack said at the first interview that he was driving in first gear and at the second interview that it was in second gear. Mr Anderson's evidence was that he heard a number of the gears change and I am satisfied that the haul pack was travelling at some speed. There is no dispute that the dump truck was travelling with the tray up. Mr Hack admitted as much. I find it somewhat difficult to accept that Mr Hack did not appreciate that, in fact, the tray was still up. He admits that driving with the tray up tends to make the dump truck more unstable. That is consistent with what Mr White and others said in this respect. Likewise, I accept and again in fairness to Mr Hack, he admitted as much, that he drove across various ungraded parts of the dump area as Ms Woods said was the case. I accept that it is contrary to the Respondent's procedures to drive over ungraded areas if it can be avoided. In addition, I accept that on 18 January 1999 as Ms Fagan has testified, Mr Hack approached the dumping area in an incorrect manner by travelling from left to right rather than right to left and in doing so nearly caused a collision with the truck being driven by Ms Fagan on that occasion. Again, I accept the evidence to be as Mr White testified, that he admitted to approaching the dump in that manner, not only on 19 January but also on the preceding night.

In my assessment the Respondent was entirely justified in terminating Mr Hack's contract of employment. Certainly I am far from convinced that it acted unfairly in doing so. Mr Hack committed a serious breach of the Respondent's procedures and certainly the safety requirements in driving the dump truck in the manner in which he did on 19 January, to drive such a heavy vehicle in the erratic manner in which he did and at speed in the process of removing a dingo, is at best, dangerous if not reckless. As Mr Bull for the Respondent said, it was not a minor concentration lapse or act of inattention but a deliberate and prolonged act which displayed a wanton disregard for the established procedures and the safety of others on the mine, to say nothing of a disregard for the proper care of the

equipment being used. For myself, I would have thought that was enough to justify the dismissal, notwithstanding that Mr Hack was an employee of some ten years with, I am prepared to accept, only minor breaches of discipline or procedures in those years. As the decided cases in this and other comparable industrial tribunals make clear, there is a need to ensure that mining is safe and there is little place in the industry for those who are not prepared to adhere strictly to safe working practices. In this case as I have said Mr Hack's failure to adhere to the safe working practices was not just a momentary lapse but something more. It was deliberate.

If the act of driving the dump truck in the erratic manner which I have outlined was not enough, the frequent driving over the ungraded areas, as I am satisfied Mr Hack did on the night of 19 January 1999, and as testified by Ms Woods, was as I find, also a clear disregard of the Respondent's procedures. I accept the position to be as Mr Llewellyn for the Applicant has put it, that from time to time dump truck operators do drive over ungraded areas but Mr Hack did not simply drive over an ungraded area, but did so in the course of driving in a manner which was in itself dangerous. This, coupled with his failure to approach the dump in the right manner on 18 January and on 19 January when taken in context of the other matters is, in my view, more than enough to justify the dismissal of which the Applicant now complains.

To the extent that the Applicant argues that the penalty is not consistent either with the penalties set out in the handbook provided to supervisors by the Respondent or with penalties imposed on others for transgressions of this nature, I make the following observations. The supervisors handbook merely provides guidelines for penalties. It expressly stipulates, as indeed is common sense, that each disciplinary breach is to be determined on its own merits and that the list of penalties are not all encompassing. On this occasion, for the reasons indicated, I cannot think that the Respondent has erred in concluding that the actions or activities of Mr Hack on the occasions in question were serious breaches of procedures involving such a marked departure from safe working practices as to justify termination of employment.

I am simply not satisfied that the Applicant has discharged the onus which it bears to show that the termination of employment, which was made in accordance with the terms of Mr Hack's contract as embodied in the relevant industrial instruments, was unfair. It follows that the application should be dismissed.

Appearances: Mr M D Llewellyn appeared on behalf of the Applicant.

Mr G E Bull appeared on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Workers' Union,
West Australian Branch,
Industrial Union of Workers

and

Newcrest Mining Ltd.

No. CR 33 of 1999.

30 November 1999.

Order.

HAVING heard Mr M D Llewellyn as agent for the Applicant and Mr G E Bull as agent for 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.

CONFERENCES—Notation of—

	Parties	Number Commissioner	Date	Matter	Result
Australian Workers Union	BHP Iron Ore Ltd	Fielding SCC218 of 1999	23/9/99	Reduction of position	Discontinued
Australian Workers Union	Cockburn Cement Limited	Kenner C C213 of 1999	12/8/99	Closure of Plant	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Argyle Diamond Mines Pty Ltd	Fielding SC C307 of 1999	4/11/99	Redundancies	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Simplot Australia Pty Ltd	Kenner C C212 of 1999	27/8/99	Closure of Plant	Referred for Hearing
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Pioneer Concrete (WA) Pty Ltd	Kenner C C245 of 1999	22/9/99	Interpretation of Clause	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Refco Solaire	Kenner C C122 of 1999	6/7/99	Termination	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Westrac Equipment Pty Ltd	Kenner C C283 of 1999	11/11/99	Alleged Unfair Dismissal	Referred for Hearing
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Roofmart WA	Kenner C C266 of 1999	—	Dispute re Enterprise Agreement	Discontinued

Parties	Number	Date Commissioner	Matter	Result	
Builders' Labourers, Painters and Plasterers Union & Other	Osborne Park Hospital Lower North Metropolitan Health Service	Kenner C C206 of 1999	2/9/99 11/10/99	Training Opportunities	Referred for Hearing
Builders' Labourers, Painters and Plasterers Union	Hanssen Constructions & Others	Kenner C C299 of 1999	18/11/99	Site Allowance	Referred for Hearing
Builders' Labourers, Painters and Plasterers Union and Other	Hanssen Pty Ltd & Others	Kenner C C259 of 1999	11/11/99	Site Allowance	Referred for Hearing
Builders' Labourers, Painters and Plasterers Union	CASC Formwork Pty Ltd & Others	Kenner C C302 of 1999	—	Fair Payment on Site and the Removal of On-site Representation	Withdrawn
Civil Service Association	The Chief Executive Officer, Fire & Emergency Services Authority	Beech C PSAC 36/1999	26/7/99 18/8/99	Fairness and Equity of Treatment during restructure	Referred
Civil Service Association	Country High Schools Hostels Authority	Scott C PSAC 42/1999	11/10/99 25/10/99	Claim for wage increases and improvements	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union	South-East Metropolitan College of TAFE	Scott C C208/1999	21/07/99	Denied Natural Justice	Referred
Liquor and Allied Industries Employees' Union	Burswood Resort (Management) Ltd and Other	Parks C C 318/1999	16/11/99	Negotiations in new agreement	Referred
Liquor, Hospitality and Miscellaneous Workers' Union	Office Cleaning Experts Pty Ltd & Others	Fielding SC C276 of 1999	5/11/99	Contract Cleaning at SCGH	Discontinued
Liquor, Hospitality and Miscellaneous Workers' Union	Homeswest	Parks C C 202/1999	26/6/98 25/9/98 23/10/98 30/11/98 4/2/99	Proposed Enterprise Bargaining Agreement	Discontinued
Media, Entertainment and Alliance	Post Newspapers Pty Ltd	Parks C C 274/1999	19/10/99	Alleged underpayment of wages	Discontinued
Independent Schools Salaried Officers' Association	Roman Catholic Bishop of Bunbury and St Anne's School	Scott C C 273/1999	N/A	Withdrawal of reprimand	Closed

PROCEDURAL DIRECTIONS AND ORDERS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

The Electrical Contractors' Association of Western Australia (Union of Employers) & Others.

No. 319 of 1999.

COMMISSIONER S J KENNER.

26 November 1999.

Direction.

HAVING heard Mr G Halliwell on behalf of the applicant and Mr J Wesley on behalf of the respondents members of the Chamber of Commerce and Industry Western Australia and Ms G Miocevich on behalf of The Electrical Contractors' Association of Western Australia (Union of Employers) the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs—

(1) THAT leave be and is hereby granted for the respondents to file and serve upon the applicant amended notices of answer and counter proposal particularising their objections to the applicant's claim by 26 November 1999.

(2) THAT the applicant file and serve a reply to the amended notices of answer and counter proposal within 7 days of the answer being served upon it.

(3) THAT the hearing of the matter be and is hereby adjourned to a date and time to be fixed.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Kenneth Charles Landwehr &
Mark Leonard Peterson

and

Wynnes Pty Ltd.

No. 366 & 367 of 1999.

COMMISSIONER S J KENNER.

1 December 1999.

Direction.

HAVING heard Ms N Aitken as agent on behalf of the applicants and Mr J Ley and Ms R Harrison of counsel on behalf of the respondents the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

(1) THAT save for evidence already given viva voce the remaining evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.

(2) THAT the applicants file and serve upon the respondent any signed witness statements upon which they intend to rely by 3 December 1999.

(3) THAT the respondent file and serve upon the applicants any signed witness statements upon which they intend to rely by 17 December 1999.

(4) THAT any signed witness statements in reply upon which the applicants and respondent intend to rely be filed and served by 31 December 1999.

(5) THAT the parties give notice to one another of those persons in respect of whom witness statements have been filed and who are required for the purposes of cross-examination by 31 December 1999.

(6) THAT the parties advise each other in writing of any objection to any part of the proposed evidence contained in the witness statements and the basis for any such objection by 12 January 2000.

(7) THAT the applications be re-listed for hearing on 13 and 14 January 2000.

(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

Burswood Resort (Management) Limited and Another.

No. 1149 of 1999.

18 November 1999.

Declaration.

WHEREAS a notice of application was lodged in the Commission by the Australian, Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch ("the ALHMWU"), on 23 July 1999, and therein the remedy claimed is "orders s 23/32" ; and

WHEREAS the essence of the claimed orders is to prohibit both Burswood Resort (Management) Limited ("Burswood") and the Federated Liquor and Allied Industries Employees' Union of Australia, Western Australian Branch, Union of Workers ("FLAIEU")—

(a) entering upon discussions for the purpose of arriving at an Industrial Agreement between them, unless the ALHMWU were notified of those discussions and afforded the opportunity to participate in them; and

(b) entering upon an Industrial Agreement which binds any employee who is not a financial member of the FLAIEU; and

(c) entering upon an Industrial Agreement which binds any employee who is eligible to be a member of the ALHMWU unless the ALHMWU is a party to such agreement; and

WHEREAS Burswood and the FLAIEU had held negotiations and agreed several new terms of employment for employees which, subject to the acceptance of those terms by a majority of such employees upon the conduct of a ballot, were to be contained in an Industrial Agreement; and

WHEREAS on 27 August 1999 the Commission conducted a conference pursuant to section 32 of the Industrial Relations Act 1979 ("the Act") whereat the matters referred to the Commission by the ALHMWU were not resolved with Burswood and the FLAIEU; and

WHEREAS at the aforementioned conference—

(a) the Commission was informed that the Australian Liquor, Hospitality and Miscellaneous Workers' Union, an organisation registered pursuant to the Workplace Relations Act 1996, has made claims for new employment terms for employees of Burswood and commenced action before the Australian Industrial Relations Commission intended to achieve the prescription of employment terms; and

(b) the ALHMWU adopted a recommendation of the Commission that it, the state organisation, notify Burswood the claims regarding terms of employment it may have regarding the employees, in writing; and

WHEREAS on 3 September 1999 the Commission delivered interim orders to the effect that—

(a) Burswood answer the ALHMWU claimed terms of employment, in writing, and that both of them thereafter attempt to conciliate upon the matters in issue;

(b) Burswood or the ALHMWU may request the Commission to reconvene and assist with the conciliation process

(c) Prohibited Burswood acting with the purpose of giving effect to the new terms of employment negotiated with the FLAIEU by means of an Industrial Agreement, or other instrument of the Commission, until the Commission was satisfied that conciliation between Burswood and the ALHMWU had been exhausted; and

WHEREAS on 22 September 1999 the result of the aforementioned ballot was declared to be that the majority of employees agreed with the new terms of employment and their inclusion in an Industrial Agreement made between Burswood and the FLAIEU; and

WHEREAS on 13 October 1999 the ALHMWU made application that the 3 September 1999 interim order be cancelled and that the Commission differently facilitate conciliation; and

WHEREAS on 27 October 1999 the Commission reconvened a conference pursuant to s32 of the Act and concluded that—

(a) conciliation between Burswood and the ALHMWU had not been exhausted; and

(b) were the prohibition upon Burswood being party to an Industrial Agreement with the FLAIEU to remain in force, such was likely to adversely affect the future industrial relations between Burswood, the FLAIEU, the ALHMWU, the employees who are members of the two organisations, and the employees who are not members of either organisation; and

WHEREAS by order on 29 October 1999 the Commission cancelled the prohibition order contained in the orders delivered 3 September 1999; and

WHEREAS Burswood has—

(a) presently declined to enter upon an Industrial Agreement with the FLAIEU to give effect to the new terms of employment declared approved by ballot on 22 September 1999; and

(b) offered new terms of employment to employees eligible to be members of the FLAIEU and the ALHMWU in the form of Australian Workplace Agreements, registered pursuant to the Workplace Relations Act 1996, inclusive of the inducement that wage increases will be applied from 16 August 1999 for each agreement be executed by 28 November 1999; and

WHEREAS written advices from the ALHMWU and from counsel for Burswood, each containing allegations against the other party, caused the Commission to decide that the conference pursuant to section 32 of the Act would be reconvened; and

WHEREAS on 10 November 1999 the FLAIEU, in reference to the refusal of Burswood to enter upon an Industrial Agreement with the that organisation—

(a) requested in writing that such matter be referred to the Commission from the current proceeding pursuant to "s 44" of the Act; and

(b) by way of remedy asks that the Commission order as terms of employment to apply to employees of Burswood, which reflect the terms of employment prescribed in Industrial Agreement No AG 164 of 1997, appropriately altered but varied to reflect the new terms of employment agreed, and approved by ballot, including the operation of wage increases from 16 August 1999; and

(c) in addition filed a Notice of Application, No C 318 of 1999, wherein the Commission is requested the conduct of a conference pursuant to section 44 of the Act for the purpose of attempting conciliation in relation to the refusal of Burswood to enter upon an Industrial Agreement, and if conciliation not be successful, that the matter be referred for arbitration and remedy ordered in the same terms as described in paragraph (b) of this recital; and

WHEREAS on 16 November 1999 the Commission reconvened a conference pursuant to s32 of the Act, followed immediately by a conference convened pursuant to s44 of the Act regarding the related application No. C 318 of 1999; and

WHEREAS the ALHMWU, by facsimile dated 11 November 1999, states that it is not opposed the order sought by the FLAIEU however the organisation reserves the right to apply at a future time to be joined as a party to the order; and

WHEREAS at the s32 conference conducted on 16 November 1999—

(a) the ALHMWU alleged that Burswood—

(i) has no intention of entering into goodwill negotiations with the organisation; and

(ii) has acted, and continues to act, to delay the process of conciliation so as not to reduce the effectiveness of the inducement to employees to enter upon Australian Workplace Agreements;

(b) ALHMWU submitted that—

(i) the request by the FLAIEU that the Commission refer for arbitration the claim for an order prescribing terms of employment, is an industrial matter arising from the application before the Commission, and is therefore able to be so dealt with by the Commission; and

(ii) that s26(2) of the Act does not restrict the Commission to the specific claim, or subject matter of the claim, of the ALHMWU application; and

(iii) that the Commission ought jointly refer the FLAIEU request for arbitration pursuant to the application of the ALHMWU and that of the FLAIEU.

(c) the FLAIEU submits that the dispute the organisation has with Burswood—

(i) is an element of the industrial matter found to exist upon the delivery of the interim orders on 3 September 1999; and

(ii) is able to be referred for arbitration out of the ALHMWU application otwithstanding the separate application No C318 of 1999, which application has been made solely as a precautionary measure; and

(iii) is not a dispute which Burswood is prepared to negotiate upon prior to employees making their election in relation to Australian Workplace Agreements, or prior to when the potential later amalgamation of the FLAIEU and the ALHMWU has been decided; and

(d) Burswood objects to a referral of the claim by the FLAIEU upon the grounds that—

(i) the Notice of Application before the Commission is an action by the ALHMWU seeking remedial orders solely in relation to that organisation; and

(ii) Burswood has expressly answered the particulars of the said application; and

(iii) The extent of the matter properly before the Commission is that identifiable from the contents of the Notice of Application and the Answer and Counter Proposal; and

(iv) notwithstanding the FLAIEU is cited as a party to the matter that organisation had no dispute with Burswood at the time

(v) The ALHMWU—

(aa) has previously opposed Burswood and the FLAIEU negotiated terms of employment and that they be given effect as an instrument of the Commission

(bb) has current claims for new terms of employment for employees, different to those negotiated with the FLAIEU; and

(cc) does not seek to be a party to the claimed FLAIEU order regarding terms of employment

(dd) has not requested that the Commission determine the subject matter of the ALHMWU application

(vi) The process of conciliation has not been exhausted

(vii) it is not in the public interest that the claim made by the FLAIEU be allowed to proceed before the Commission as the two separate actions 1149 of 1999 and C 318 of 1999; and

(e) Burswood submitted that—

(i) if the Commission be of the opinion that further conciliation with the ALHMWU would be unavailing, given that this organisation does not seek a determination of its application by orders for its relief, the application ought therefore be dismissed; or alternatively

(ii) if the application is to remain afoot the matter between the FLAIEU and Burswood is a new and different matter to that with the ALHMWU and ought therefore be dealt with separately pursuant to application C318 of 1999

THE COMMISSION being satisfied that—

(1) The application by the ALHMWU discloses a claim by the organisation that proposed terms of employment for employees of Burswood is a matter in issue, and it is the claim of the organisation, that it having the right to represent the interest of its members in relation to terms of employment, the ALHMWU should be party to whatever negotiations take place that are likely to affect the rights of those members

(2) the ALHMWU does not presently agree with the terms of employment the FLAIEU seeks to have ordered by the Commission

(3) the ALHMWU has made claims to Burswood different to the terms of employment negotiated between Burswood and the FLAIEU, which claims continue afoot and hence there is a dispute between the ALHMWU and Burswood regarding that industrial matter which remains unsolved; and

(4) neither the ALHMWU nor Burswood has requested that the Commission to proceed to arbitration upon their matters of difference; and

(5) the dispute between the FLAIEU and Burswood which arose after 22 September 1999 is separate to the subject matter of the application; and

(6) the resolution of the dispute which now exists between the FLAIEU and Burswood will not resolve the dispute raised by the ALHMWU

(7) the relationship between the ALHMWU and Burswood is such that a resolution of the matters raised by the application are unlikely to be resolved by conciliation

NOW THEREFORE the Commission, pursuant to the power conferred on it under the Industrial Relations Act, 1979, hereby declares—

THAT the claim made by the FLAIEU for an order in the terms identified herein is not one properly dealt with by the arbitration of Application 1149 of 1999; and

THAT the aforementioned claim by the FLAIEU is one which may be properly dealt with by a reference for arbitration in matter C318 of 1999; and

THAT the ALHMWU is required to notify the FLAIEU, Burswood, and the Commission, in writing within 14 days, whether the organisation seeks to further proceed with application 1149 of 1999 and if so the remedies sought.

(Sgd.) C.B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Burswood Resort (Management) Limited

and

Federated Liquor and Allied Industries Employees' Union of Australia, Western Australian Branch, Union of Workers.

No. 1545 of 1999.

12 November 1999.

Order.

WHEREAS Burswood Resort (Management) Limited ("Burswood") applied to the Commission pursuant to s49AB of the Industrial Relations Act, 1979 ("the Act") for a declaration of rights regarding entry to the premises of Burswood, by persons designated "officials" of the respondent union, as may be authorised by clause 37 of the Burswood International Resort Casino Employees' Industrial Agreement 1997; and

WHEREAS Burswood and the respondent are the parties to the said Industrial Agreement; and

WHEREAS Burswood does not question the right of the Secretary-Treasurer of the respondent, Mr David Kelly, to exercise the right of entry allowed by the said Industrial Agreement subject to that which is authorised by the Act; and

WHEREAS by letter dated 2 November 1999 the respondent requested that the Commission convene a conference pursuant to s32 of the Act; and

WHEREAS the Commission convened a conference pursuant to s32 of the Act on 4 November 1999 which immediately followed upon a hearing of the parties in relation to applications for the production of documents in this matter and application 1675 of 1999; and

WHEREAS the respondent applied to the Commissioner to make interim orders pursuant to s32 which require Burswood to allow the right of entry prescribed by clause 37 of the said Industrial Agreement to those persons appointed "temporary organisers" by the respondent and notified to Burswood in writing; and

WHEREAS Burswood contends that the Commission—

(a) does not have the power to make the interim orders sought as the Commission, constituted for the purpose of s49AB of the Act, has no power to exercise the powers conferred by s32 of the Act;

(b) to the extent that the respondent seeks to have the Commission enforce a prescribed right under the said Industrial Agreement by order such is not within the jurisdiction of the Commission;

WHEREAS the respondent claims that members employed by Burswood are presently engaged upon a consideration of industrial relations issues which encompass their terms and conditions of employment, including the method by which such may be regulated in future, in the circumstance where an exercise of choice is required of them by 28 November 1999, and in regard to which information and advice has been sought from the respondent; and

WHEREAS the respondent complains that the refusal of Burswood to recognise any person other than the Secretary-Treasurer as having a right of entry in order to meet with members in the manner authorised by clause 37, is wrongful but is also unreasonable, given that—

(a) the availability of members for consultation and the provision of information and advice to them is controlled by the continuous shift system upon which the members are engaged;

(b) the Secretary-Treasurer can not reasonably be available to meet with the members at the various times shift conclude throughout the twenty-four hours of the day;

(c) the Secretary-Treasurer has other duties and responsibilities that he is obligated to address in the conduct of business for the respondent and those members whom are employed elsewhere; and

such constitutes unreasonableness to the degree warranting the issuance of an order which temporarily grants the persons designated "temporary organisers" the right of entry for the purposes of clause 37;

AND WHEREAS the Commission being of the opinion that—

(a) the application made pursuant to s49AB of the Act raises a matter for consideration that is integral to the industrial relations between the parties and which involves associated industrial matters relating to them and the employees who are members of the respondent;

(b) the existence of the dispute between the parties and the extent to which it involves industrial matters, given the objects expressed in s6 of the Act and the requirements placed upon the Commission by s32 of the Act, the Commission has the jurisdiction and power to act pursuant to s32 of the Act;

(c) the industrial relations between the parties, and those between each of them and the employees of Burswood who are members of the respondent, are strained and are likely to become further strained;

(d) the said Industrial Agreement recognises that persons in addition to the Secretary-Treasurer may be accredited by the respondent to exercise the prescribed right of entry and hence there is plain and long standing recognition that circumstances might occur which require an additional person, or persons, be authorised by the respondent.

(e) prima facie order 3(h) of PRES 7 of 1999 validates accreditation of the 32 named "officials" for described purposes ie. "*relating to right of entry ….. in relation to awards and agreements*" and whom prima facie appear to be persons of the kind described by the phrase "*any other accredited official*" within clause 37 of the said Industrial Agreement;

(f) that in order to limit any further deterioration of industrial relations between the parties and between them and members of the respondent the Commission, ought temporarily, authorise additional

representatives of the respondent to exercise the right of entry prescribed by clause 37 of the said Industrial Agreement;

WHEREAS at a proceeding on 12 November 1999, the Commission heard Mr R. LeMiere (QC) on behalf of Burswood and Mr D. Kelly on behalf of the FLAIEU with regard to the orders to be made; and

WHEREAS Burswood applied to the Commission to have the orders operate from the prospective date of—

(a) Wednesday, 17 November 1999 on the ground that Burswood will immediately appeal the order when made, and will also apply to stay the operation thereof until the determination of the appeal, upon the ground that the Commission has acted in excess of jurisdiction; or alternatively

(b) Monday, 15 November 1999 on the ground of reasonable time is necessary, and should be allowed, to arrange practical compliance;

AND WHEREAS the Commission being of the further opinion that—

(g) the intended appeal will raise the serious issue of jurisdiction for determination;

(h) the industrial relations between the parties and the affected employees are likely to be further exacerbated should the order be given effect and thereafter be stayed;

(i) the orders of the Commission therefore should not have force and effect until time has been allowed for the lodging of the appeal and the hearing of a stay application;

NOW THEREFORE the Commission pursuant to the power conferred on it under the Act, hereby orders—

THAT for the purposes of clause 37—Right of Entry of the Burswood International Resort Casino Employees' Industrial Agreement 1997, No.AG 164 of 1997, the persons named in the schedule hereunder are duly accredited officials of the union party thereto.

Schedule.

Jeanette ANDERSON	Gayle LANNON
Steve BARRETT	Stan LIAROS
Elaine BRIDGES	Sue LINES
Alison BUNTING	Diana MACTIERNAN
Rebecca COLLOPY	Kim MAHER
Helen CREED	Gordon MITCHELL
Sue DEVERAUX	Rory NEAL
Sue ELLERY	Jane OBORN
Hayden FALCONER	Jayne REID
Janine FREEMAN	Anne REIMERS
Anne GILES	Jonric RIDLEY
Stan HARDIE	Jeffrey ROSALES-CASTANEDA
Sharryn JACKSON	Neil SAXTON
Lisa JOOSTE	Julie TAYLOR
Paul JUSTICE	Jenny TESTAR
Adrienne KENNEDY	Noel WHITEHEAD

THAT this order shall be interim and shall, subject to as hereinafter provided, operate until applications 1545 of 1999 and 1675 of 1999 are determined by the Commission.

THAT this order may be cancelled by the Commission upon the application of either party.

THAT this order shall operate from 0900 hours on 17 November 1999.

(Sgd.) C. B. PARKS,
Commissioner.

[L.S.]

JOINDER/CONCURRENCE OF PARTIES— Application for—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Aaron Follows

and

Western Australian Turf Club and
George Norman Davies.

No. 358 of 1999.

COMMISSIONER A.R. BEECH.

29 November 1999.

Reasons for Decision.

Application for Joinder.

The application before the Commission by Aaron Follows is an application to join George Norman Davies to his application to the Commission against the WA Turf Club alleging that he was unfairly dismissed by the WA Turf Club. Mr Davies opposes the application.

The Commission has the power to join Mr Davies pursuant to s.27 of the Act. Mr Follows argues that in doing so, the Commission will be effectively correcting a misdescription of Mr Follows' employer. Mr Follows contends that as an apprentice jockey, he was employed jointly by both Mr Davies and the WA Turf Club. Thus, joining Mr Davies to his current application would do nothing more than correctly name his joint employers.

Mr Davies takes a contrary view. Mr Davies does not concede that he was an employer at the time of the termination of Mr Follows. Furthermore, he points out that he is a different legal entity from the WA Turf Club. Even if he is now joined as a party to the unfair dismissal application, his joinder will have occurred more than 28 days from the day Mr Follows' employment terminated. By virtue of s.29(2) of the Act, Mr Follows' application against him will be barred. Accordingly, he maintains that the Commission should not join him to this application.

I have carefully considered Mr Follows' apprenticeship indenture of 15 March 1997 and the transfer of indenture effective 10 November 1997. I have been unable to conclude that those documents establish any joint employment of Mr Follows. I do not, at this early stage, express a conclusion regarding the correct identity of Mr Follows' employer at the time his employment was terminated. However, the indenture and the transfer of indenture, do not establish that the WA Turf Club can be seen as a "joint employer" of Mr Follows. The original indenture is between Mr Follows and a trainer licensed by the WA Turf Club. The WA Turf Club appoints a Master of Apprentices to act on its behalf in matters pertaining to the administration and control of any matter relating to this indenture and further the apprentice, his guardian and the Master (the trainer licensed by the WA Turf Club) agreed to abide by decisions and directions given by the Master of Apprentices. Even if that establishes a Master of Apprentices, acting on behalf of the WA Turf Club, having authority in matters pertaining to the administration and control of any matter relating to the indenture, I am unable to conclude that it establishes the trainer and the WA Turf Club as joint employers.

It follows that the joinder of Mr Davies to the application will not be correcting a misdescription of the employer. It will be joining a separate legal entity. To the extent that Mr Follows argues that Mr Davies was his former employer, s.29(2) of the Act bars him from now bringing a claim of unfair dismissal against Mr Davies.

For those reasons, the application to join George Norman Davies to Application 358 of 1999 is dismissed.

The substantive matter will remain adjourned for 21 days, at the conclusion of which the Commission requests to be advised by Mr Follows whether he wishes to pursue his substantive application.

Appearances: Mr K Trainer for the applicant.
Mr C Stanley for the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Aaron Follows

and

Western Australian Turf Club and George Norman Davies.

No. 358 of 1999.

29 November 1999.

Order.

HAVING HEARD Mr K Trainer on behalf of the applicant and Mr C Stanley 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 to join George Norman Davies to Application 358 of 1999 be dismissed.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

NOTICES—
Cancellation of Awards/ Agreements/Respondents—
Under Section 47—

CLERKS (COMMERCIAL, SOCIAL & PROFESSIONAL SERVICES) AWARD.

No. 14 of 1972.

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 Clerks (Commercial, Social & Professional Services) Award No. 14 of 1972, namely—

The Readymix Group (WA), 1081 Albany Highway, Bentley

on the grounds that the respondents are 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 250 on all correspondence.

Dated 6 December 1999.

J. SPURLING,
Registrar.

LIFT INDUSTRY (ELECTRICAL AND METAL TRADES) AWARD.

No. 9 of 1973.

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 Lift Industry (Electrical and Metal Trades) Award 1973, No. 9 of 1973, namely—

Boral Elevators

on the grounds that the respondents are 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 225 on all correspondence.

Dated 6 December 1999.

J. SPURLING,
Registrar.

SHEET METAL WORKERS (GOVERNMENT) AWARD 1973.

No. 31 of 1973.

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 award, namely the

Sheet Metal Workers (Government) Award 1973 No. 31 of 1973

on the grounds that there are no longer any persons employed under the provisions of that award.

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 183 on all correspondence.

Dated 6 December 1999.

J. SPURLING,
Registrar.

WESTERN AUSTRALIAN PUBLIC SECTOR (CIVIL SERVICE ASSOCIATION) ENTERPRISE BARGAINING FRAMEWORK AGREEMENT 1995.

No. PSA AG 3 of 1995.

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

Western Australian Public Sector (Civil Service Association) Enterprise Bargaining Framework Agreement 1995 No. PSA AG3 of 1995

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 184 on all correspondence.

Dated 13 December 1999.

(Sgd.) J. SPURLING,
Registrar.

PUBLIC SERVICE APPEAL BOARD—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mr R. Titelius

and

Ministry of Justice.

No. PSAB 12 of 1995

19 November 1999.

PUBLIC SERVICE APPEAL BOARD

SENIOR COMMISSIONER FIELDING
MR C. FLOATE (BOARD MEMBER)
MR D. WATSON (BOARD MEMBER).

Order.

HAVING heard Ms K.L. Shannon on behalf of the Applicant and Mr J.A. Thomson on behalf of the Respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, and by consent, hereby orders—

THAT the Appeal be upheld.

[L.S.] (Sgd.) G. L. FIELDING,
Public Service Arbitrator.