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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—
Appeals against decision of Industrial Magistrate—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mark David Pedrini and Natalie Pedrini t/as Pedrini Painting and Decorating
Appellant

and

The West Australian Builders Labourers Painters and Plasterers Union of Workers
Respondent.

No FBA 24 of 1999.

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

2 February 2000.

Order.

The Notice of Appeal herein, having been filed in the Registry of the Commission on the 15th day of October 1999, and having been served upon the respondent on the 22nd day of October 1999, and a Declaration of Service of the same having been filed in the Registry of the Commission on the 1st day of November 1999, and Counsel for the abovenamed appellant, on the 9th day of December 1999, having filed a Notice of Discontinuance in the Registry of the Commission, and the abovenamed respondent, on the 23rd day of December 1999, having advised the Commission, in writing, that the respondent consented to the appeal being discontinued by the appellant, and the Full Bench having decided that the consent to the discontinuance 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 2nd day of February 2000, ordered, by consent, as follows—

(1) THAT there be leave and leave is hereby granted for appeal No FBA 24 of 1999 to be discontinued.

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

By the Full Bench
(Sgd.) P. J. SHARKEY,
President.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Transport Workers' Union, Industrial Union of Workers, Western Australian 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.

31 January 2000.

Reasons for Decision.

THE PRESIDENT: These are the unanimous reasons for decision of the Full Bench. These were two applications made in relation to appeal No FBA 3 of 1999 by The Transport Workers' Union, Industrial Union of Workers, Western Australian Branch (hereinafter referred to as "the TWU") and Pinnacle Services Pty Ltd (hereinafter referred as "Pinnacle"). In appeal No FBA 3 of 1999, the TWU was the appellant and Pinnacle was the respondent.

The appeal was heard on 22 September 1999. Reasons for Decision and Minutes of Proposed Order were delivered on 10 November 1999. The parties waived their rights to speak to the Minutes and an order issued in terms of the Minutes of Proposed Order. The order was also perfected on 12 November 1999 by it being deposited in the office of the Registrar on that date.

By application filed on 23 December 1999 and numbered FBA 3 of 1999, the same number as the appeal, Pinnacle applied for "an interpretation of Full Bench Order No FBA 3 of 1999". The question to be answered was not expressed, as required by Regulation 14 of the Industrial Relations Commission Regulations 1985 (as amended), in the event that Regulation 14 applied to the application.

By application filed on 7 January 2000 and numbered FBA 3 of 1999, the same number as the appeal again, the TWU made an application to the Commission attaching a number of schedules which could not be properly attached to an application and could not be said to form part of it. By that application, the TWU sought "clarification of the order issued on 10 November 1999 in matter FBA no. 3 of 1999, as regards the exact number of breaches that have been found proven by the Full Bench, and the nature of those breaches."

The first question which arose was whether the Full Bench was functus officio. Mr Uphill, who appeared for Pinnacle, conceded that the Full Bench which heard and determined the appeal, was functus officio. (That is, the Full Bench as presently constituted.) Mr Ferguson, for the TWU, submitted that, whilst the doctrine of functus officio, when applied to the proceedings, prevented the Full Bench from hearing new evidence or argument or from going back a second time after it has performed its authorised function, the order was "alterable" if inconsistencies or anomalies were established to exist in it.

However, the TWU's case was that the order made by the Full Bench should not be amended in any event and, implicitly, as we understand it, that there are no anomalies or inconsistencies in it.

Mr Uphill also submitted that his application was an application pursuant to s.46 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act"), which was not defeated by the doctrine of functus officio and was a new matter in relation to which a Full Bench could be newly constituted to hear it. That the application was a s.46 application is not at all clear from the face of Pinnacle's application, which was numbered with the number of the appeal, was sought to be put before this Full Bench and was so put. Indeed, it attracted what might be said to be a counter application. Indeed, there was no suggestion that the application was a fresh application unrelated to the appeal which was not supposed to come before this Full Bench.

The doctrine of functus officio has been considered in many cases. Some of these are Department of Community Services and Others v CSA 74 WAIG 1709 (IAC), RRIA v AMWSU and Others 70 WAIG 2083 (IAC), and Jayasinghe v Minister for Immigration and Ethnic Affairs and Another 145 ALR 532 per Goldberg J.

The doctrine of functus officio in relation to statutory functions such as the exercise of the appeal jurisdiction by the Full Bench can be described as follows. The effect of the application of the doctrine is that, once the statutory function is performed, there is no further function or act for the person or persons authorised under the statute to perform. In this case, the Full Bench is functus officio. Both applications were before it. Both applications purported to relate to the appeal. At the time the applications were made, the order of the Full Bench upon appeal had been perfected on 12 November 1999. The power of the Full Bench has been spent and there were and are no further functions to perform.

That this is the case, of course, is borne out by the fact that there was no speaking to the Minutes. These matters could and should have been raised.

It was not submitted that the slip rule applied and we would doubt strongly that it could.

The order of the Full Bench, as we have observed, was already perfected and, indeed, the Industrial Magistrate has commenced hearing this matter exercising his own jurisdiction pursuant to the order of the Full Bench and its directions.

In relation to both applications, given their nature, the Full Bench, as we have said, was and is functus officio. In any event, there is very much a live question as to whether s.46 of the Act is at all applicable to a matter such as this, but that is not a matter on which we comment or have need to comment upon or make judgment upon in these proceedings.

For those reasons, the Full Bench joined in dismissing the applications.

APPEARANCES: Mr G W Ferguson, as agent, and with him Mr R K Raven, as agent, on behalf of the appellant.

Mr J N 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.

25 January 2000.

Order.

This matter having come on for a further hearing before the Full Bench on the 25th day of January 2000, and having heard Mr G W Ferguson, as agent, and with him Mr R K Raven, as agent, on behalf of the appellant and Mr J N Uphill, as agent, on behalf of the respondent, and the Full Bench having heard and determined the matter, and having determined that the reasons for decision will issue at a future date, it is this day, the 25th day of January 2000 ordered that the applications filed herein on the 23rd day of December 1999 on behalf of the respondent and the application filed herein on the 7th day of January 2000 on behalf of the appellant be and are hereby dismissed.

By the Full Bench,

(Sgd.) P.J. SHARKEY,

[L.S.] President.

DECLARATIONS—

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.

Burswood Resort (Management) Limited

and

Federated Liquor and Allied Industries Employees' Union of Australia, Western Australian Branch, Union of Workers.

No. 1675 of 1999.

6 December 1999.

Reasons for Decision.

COMMISSIONER C.B. PARKS: There are two applications before the Commission made pursuant to s.49 AB of the Industrial Relations Act 1979 (the Act). Therein the applicant requests that the Commission declare whether a number of persons authorised to act on behalf of the respondent are persons entitled to exercise a right of entry to the premises of the applicant, as is allowed to persons of a kind specified in clause 37.-Right of Entry contained in the Burswood International Resort Casino Employees' Industrial Agreement 1997 [77 WAIG 2217], an industrial agreement that is binding upon the parties to these applications (hereinafter referred to as the Industrial Agreement).

Application 1545 of 1999 seeks a declaration in relation to 32 persons whom the respondent Union, by a resolution adopted on 8 September 1999, accredited as "officials" of the Union for all purposes relating to the right of entry, posting of notices, employees representation and dispute resolution relation to awards and agreements to which the Union is a party.

Application 1675 of 1999 seeks a declaration in relation to 40 persons, 32 of whom are the same persons accredited as "officials" on 8 September 1999, whom the Union has also appointed to be "temporary Organisers" for a period of six months.

Accreditation of the 32 persons, and also the occupation of various prescribed offices by other persons, within the respondent Union, are matters that have effect according to Directions and Interim Orders, PRES 7 of 1999, made by the President of the Commission on 21 September 1999. Extracts from orders (3) and (4) adequately demonstrate their effect and are therefore reproduced hereunder—

"(3) THAT the following resolutions passed by the Committee of Management of the first respondent (the present respondent) at its meeting held on the 8th day of September 1999 and any actions taken in accordance with those resolutions are deemed valid—

(a) ———
(b) ———
(c) ———
(d) ———
(e) ———
(f) ———
(g) ———
(h) THAT the FLAIEU (the present respondent) Committee of Management hereby accredits the following persons 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 Union is a party—

(the order names herein the aforementioned 32 persons)

(4) THAT until further order the following persons shall act in the undermentioned offices of the first respondent (the present respondent) provided that the same are and as long as the same are members of and otherwise eligible to hold such office under the rules of the first respondent (the present respondent) —"

(paragraphs (a) to (g) of this order list various offices and names the persons appointed to those offices, they not being any of the persons named in order (3) (h) of the orders,)

(several of the persons named herein are referred to in application 1675 of 1999)

Both parties are agreed that, order (3) (h), of PRES 7 of 1999, has the effect of validating the accreditation of the aforementioned 32 persons by the respondent Union "for a all purposes relating to the right of entry —", that such order does not provide the right to enter upon the premises of the applicant, and that that right and the class of persons who qualify to exercise it are prescribed by clause 37 (1) of the Industrial Agreement.

The applications raise a number of matters for consideration however, the parties recognise, that the meaning of the aforementioned clause 37.-Right of Entry is crucial to both applications, and they are agreed that the Commission proceed with application 1545 of 1999 alone, and that the proceeding be limited to the presentation of argument and evidence material to determining the meaning of the clause. The Commission approved of the process agreed between the parties and proceeded accordingly.

It is apposite that the Commission firstly record the statutory framework applicable to the application, accordingly the relevant extracts from the Act are set out here under—

"49 AB (1) Where an award, order or industrial agreement empowers a representative of an organisation to enter the premises of the employer or former employer of a member of the organisation, that power may only be exercised by the representative for the purpose of dealing with an Industrial matter involving that member.

(2) ———

(3) An employer, former employer or organisation may apply to the Commission to determine any question or dispute that has arisen between the employer and the organisation as to whether a representative of the organisation is empowered to enter the premises of the employer for a purpose specified in the application.

(4) If an application is made under subsection (3) the Commission shall determine the question or dispute as if it were at application under section 46, and section 46 shall apply to a declaration made by the Commission under this section as if it were made under that section.

(5) ———
(6) ———
(7) ———
(8) ———"

"46 (1) At any time while an award is in force under this Act the Commission may, on the application of an employer, organisation, or association bound by the award—

(a) declare the true interpretation of the award; and

(b) where that declaration so requires, by order vary any provision of the award for the purpose of remedying any defect therein or of giving fuller effect thereto.

(2) ———
(3) ———
(4) ———

(5) In this section "award" includes an order, including a General Order, made by the Commission under any provision of this Act other than this section and an industrial agreement."

Clause 37.—Right of Entry of the Industrial Agreement is expressed in the following terms—

"(1) Subject to the provisions of the Casino Control Act and the Industrial Relations Act 1979 (WA), the Secretary or any other duly accredited official of the Union shall have the right to enter the Company's premises during such hours 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."

There is no dispute, that the application before the Commission made pursuant to s.49 AB of the Act is to be dealt with as though it were made pursuant to s.46 of the Act, nor that the Commission is thereby empowered to declare the meaning of the material terms of the Industrial Agreement.

The applicant asks that the Commission consider the construction of the aforestated subclause (1), of clause 37, and declare the class of person it is that falls within the description "official of the Union" and is authorised to exercise the right of entry allowed by the clause, there being a dispute between the parties whether or not the 32 persons whom are accredited "officials" fall within the class of persons described.

The principles to be applied by the Commission, when acting to interpret and declare the meaning of provisions within an award or industrial agreement, pursuant to s.46 of the Act, are those enunciated by the Industrial Appeal Court in the matter Norwest Beef Industries Limited, and another v. for West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth (64 WAIG 2124) [wherein Robe River Iron Associates v. Amalgamated Metal Workers' and Shipwrights Union of Western Australia, and others (67 WAIG 1097) and Codelfa Construction Pty Ltd v. State Rail Authority (New South Wales) (149 CLR 337) are cited with approval]. Those principles are encapsulated in the following extract per Brinsden J.—

" The meaning of a provision in the Agreement is a to be obtained by considering the terms of the Agreement as a whole. If the terms are clear and unambiguous it is not

permissible to look at extrinsic material to qualify the meaning of the particular provision being considered. Therefore, when the issue is which of two or more possible meanings is to be given to a contractual provision it is not permissible to look at actual intentions, aspirations, or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract but to look at only the objective framework of facts within which the contract came into existence, and to the parties presumed intentions in that setting: per Mason J. (re Codelfa). Should a consideration of the whole terms of this Agreement expose and ambiguity in the construction of Clause 6 (9) then resort may be made to extrinsic material and in certain circumstances any trade custom or usage."

Counsel for the applicant made mention of provisions contained within the Industrial Agreement wherein there is also reference to the same class of persons, and another class, regarding the conferral of rights however it is submitted that they contain nothing which helps to define the compass of the material class.

It is argued that it is to be presumed that the parties to the Industrial Agreement did not intend that a term of it operate unreasonably and hence a reasonable interpretation is to be given thereto. Clause 37 confers a right of entry to the premises of the applicant which Counsel submits constitutes a fundamental intrusion upon the rights of the applicant that would otherwise amount to trespass, and hence it must be presumed that the objective intention of the parties was to restrict the number of persons who may exercise the right to those of the particular prescribed class.

Applying the principle of reasonableness and that of objective intention in relation to the prescription, it is said, leads to the conclusion it was not intended that the class of persons be some unlimited number of persons and whomsoever the Union might accredit, for were that intended, the use of the generic term "person" rather than "official" would have been the more likely.

Counsel contends that the term "official" limits the class of person to the holder of an office with the Union or has a level of responsibility within the Union. In this regard the Commission was directed to the Macquarie and the Shorter Oxford dictionaries and the definitions given for the noun "official", which respectively are—

" one who holds an office or is charged with some form of official duty"

and

" one who holds a public office; as a government, municipal, or railway office"

The holding of an office, Counsel described as meaning, in essence, the holding of a position involving some administrative, executive duties of substance, or some substantial responsibilities and duties. Support for such a meaning is said to be found in the matter, Re an Election in the Australian Collieries Staff Association (NSW Branch) (26 FCR 499) [Re ACSA (NSW)], where the meaning of "official position" appearing in the rules of the Association, but not therein defined, was considered by Lockhart J. The term "official", having been used in the adjectival sense in relation to the term "position", Lockhart J. held as being "of or pertaining to an office or position of duty, trust or authority" (per the Macquarie dictionary) and found an "official position" to be one that "must carry with it some administrative or executive duties or some substantial degree of responsibility".

Counsel submits the ejusdem generis construction is that which is appropriate to the words "the Secretary or any other duly accredited official of the Union", the "Secretary" being a self evident class of official to which the words "any other duly accredited official" connect and have the purpose of extending the prescription to include others that are of the same class of official as the Secretary.

The agent for the respondent Union says there is assistance to be found in the decision PRES 11 of 1999 which stayed an interim order of the Commission made in relation to the s. 49 AB application, which, in reference to the order PRES 7 of 1999 and the 32 relevant persons expressed the view—

"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 at 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 at the Act."

On behalf of the respondent Union it is said that the words "duly accredited official" appearing in Clause 37, and also appearing in Clauses 29 and 33 of the Industrial Agreement, are to be considered together and in the context that the right of entry is conferred upon the Union, in order to discover the class of persons the entity may have exercise its right.

In the furtherance of this argument the Commission was referred to the following respective definitions of "duly", "accredit", "accredited", and that of "credentials" from the Shorter Oxford dictionary—

"Duly—In DUE manner, order, form, or season"

"Accredit—To furnish with credentials; to authorize as an envoy"

"Accredited—furnished with credentials; authoritatively sanctioned"

"Credentials—Letters or written warrants recommending or entitling the bearer to credit or confidence"

Given the definition of the word "duly" is reliant upon the word "DUE" to provide meaning to it, it is appropriate that the Commission also provide that definition ie—

"Due—Such as is requisite or necessary; adequate"

The Secretary of the Union, the person upon whom the right of entry is expressly conferred, is recognised in the capacity of principal representative for the organisation and not as an office holder or officer that he is, contends the respondent, for were it otherwise and the extension of the right is limited to an "official" in the office or officer sense the prescription would more likely have used either of the descriptions of "office holder" or "officer". The word "official" within Clause 37, being conditioned by the words "duly accredited" is said to refer to whomever, according to the requisite manner, the Union authorises to officially act for it and also exercise the same right as is conferred upon the Secretary.

In reply Counsel submitted that the view expressed in matter PRES 11 of 1999 is to be discounted in the light of it having been given in relation to what was a stay application where the argument presented on behalf of the applicant was a limited one and had a different purpose to the extensive argument presently before the Commission.

I have already observed that the Union is a party to the Industrial Agreement. There are a number of clauses within the Industrial Agreement which prescribe various rights and obligations applicable to the applicant and the Union in the conduct of their relations regarding employees of the applicant. In addition to Clause 37, the words "duly accredited official" used in reference to the Union are also contained in Clauses 29, 30, and 33, the relevant extracts of which are set out hereunder—

"29(2) The record system shall be open for inspection to a duly accredited official of the Union at the Company's office, or other convenient place, from Monday to Friday, both inclusive between the hours of 9.00 am and 5.00 pm. Such representative shall, subject to subparagraph (4), be permitted reasonable time to inspect the records and if required may take any extract or copy of the information contained therein."

"30(3) The roster shall be open for inspection to a duly accredited official of the Union at such times as the records in Clause 29 are open for inspection."

"33. The Company shall provide a notice board in a reasonably accessible place within the resort for the posting of Union notices signed by the Secretary or other duly accredited official of the Union."

It is significant to note that Clauses 29 (2) and 30 (3) use the words "duly accredited official" alone and not in association with any reference to the "Secretary" of the Union as is the case with Clauses 33 and 37. Consequently, the words cannot

be said to mean an "office holder" or "officer" of some kind in the absence of a structure which attracts the ejusdem generis rule. Although Counsel made reference to the rule, such was not a cornerstone of his argument, and it appears to the Commission that any reliance thereon brings that leg argument into direct conflict with the concession of Counsel that an "official" need not be an "officer" but one with administrative or executive duties or some substantial degree of responsibility. It is notorious that wording of the kind presently under consideration is commonly found in awards made, and agreements registered, by this Commission over many years and it is safe to assume from that the present parties are not the authors of it. Another relevant matter that is equally notorious is that this Commission and other similar tribunals have observed that the likes of the Industrial Agreement are often not drafted by legal draftspersons and hence provisions ought be construed beneficially. For these reasons I am satisfied that the words "any other duly accredited official" is a reference to a person who is not required to be, but who may be, an office holder or officer.

The applicant does not contest that it is the right of the Union to accredit, that is to authorise, persons to act on behalf of the Union provided they meet the criteria which qualifies them to be classed as "officials" ie the position of each "must carry with it some administrative or executive duties or some substantial degree of responsibility".

In the matter, Re ACSA (NSW), the term "official position" was considered in the context in which it was used in the rules of the registered organisation. Lockhart J. there observed that the word "official" was used in the adjectival sense and the dictionary defined such to mean "of or pertaining to an office or position of duty, trust or authority" and encompassed persons appointed to staff positions with the organisation, provided that to qualify as an "official position" such had to be at a level which carried "some administrative or executive duties or some substantial degree of responsibility". Cited with approval is Landeryou v. Taylor and Others (15 FLR 147) [Re Landeryou]. Both of the Judgements considered the Conciliation and Arbitration Act in force at the relevant time and that in relation to an organisation an "officer" was therein defined, but significantly held that the statute did not assist because the task of the Court was to construe the rules of the organisation given that they were not bound to reflect the statutory meaning.

Counsel sought to persuade the Commission that the word "official" is to be construed as a noun, and not in the adjectival sense also raised by the respondent, yet ironically the authority provided in support of the applicant's contention has been decided according to the adjectival meaning of the word. The task of the Commission is to construe the words used in the Industrial Agreement ie what is the meaning of "accredited official" of the Union, and not what constitutes an "official position" within the Union, yet the logic of the immediately aforementioned Judgements may not be ignored. Although each of the matters decided involved a consideration of staff positions in two organisations, the Courts held that where administrative or executive duties are performed, or there was some degree of responsibility exercised, in a position, such had the "officer" character in relation to the rules of one organisation, in Re Landeryou, and the "official" character in the rules of the other, in Re ACSA (NSW). Hence it is the conclusion of the Commission that the term "accredited official" is to be construed to mean the occupant of a role that has been validly created by the respondent that carries with it the degree of responsibility and authority necessary to act on behalf of the Union and to discharge its primary obligation to address the needs of its membership, particularly regarding their workplace relations. That is, the occupant is charged with the official duty to act for the respondent Union.

Appearances: Mr R. LeMiere, QC and with him Mr B. DiGirolami (of Counsel) on behalf of the applicant

Ms S. Jackson and with her Mr D. Kelly on behalf of the respondent.

AWARDS/AGREEMENTS— Application for—

CREATIVE AND THERAPY ACTIVITIES DISABLED GROUP INC ENTERPRISE BARGAINING AGREEMENT 1999.
No. AG 185 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Creative and Therapy Activities Disabled Group Inc

and

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch.

No. AG 185 of 1999.

Creative and Therapy Activities Disabled Group Inc Enterprise Bargaining Agreement 1999.

COMMISSIONER P E SCOTT.

24 January 2000.

Order.

HAVING heard Mr M O'Connor on behalf of the Applicant and Mr N Whitehead 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 Creative and Therapy Activities Disabled Group Inc Enterprise Bargaining Agreement 1999 in the terms of the following schedule be registered on the 14th day of January 2000.

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

———

Schedule.

1.—TITLE

This Agreement shall be known as the Creative and Therapy Activities Disabled Group Inc Enterprise Bargaining Agreement 1999.

2.— ARRANGEMENT

3.—PARTIES TO AGREEMENT

This Agreement shall be binding upon Creative and Therapy Activities Disabled Group Inc (the Employer) and the Australian Liquor Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, WA Branch (the union).

4.—DURATION OF AGREEMENT

(1) This Agreement shall operate from the day of registration for a period of three (3) years.

(2) Notwithstanding the provisions of subclause (1) above, the terms of this Agreement shall continue to operate until it is replaced by a new Agreement.

5.—DEFINITIONS

"Casual employee" means an employee engaged with no guarantee of continual or additional employment.

"Coordinator" means the person appointed as the Co-ordinator of the Creative and Therapy Activities Disabled Group Inc.

"Full-time" employee means an employee engaged to work an average of 38 hours per week.

"Part-time employee" means an employee regularly employed to work less hours than those prescribed for a full-time employee.

"Committee" means the Management Committee of the Creative and Therapy Activities Disabled Group Inc., and has the same meaning as "Employer" for the purposes of this Agreement.

"Union" means the Australian Liquor Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, WA Branch.

6.—CONTRACT OF SERVICE

(1) The employee shall be employed in the appointed classification and shall be required to work in accordance with her/his statement of duties, the policies and procedures and the Staff Code of Behaviour (Schedule A). The Employer may vary the employee's duties provided the variation is reasonable and the duties are within the employee's skill, competence and training.

(2) Employment may be on a full-time, part-time or casual basis, or may be for a limited term as specified in the employee's contract of employment.

(3) (a) Employment is conditional upon funding being granted and continued. If funding ceases or is materially affected then employment may terminate in accordance with the terms and conditions of this clause.

(b) Where a position requires the employee to hold a current driving license of a particular class or classes and the employee loses such license, the Employer reserves the right to terminate the contract if no other suitable arrangements for driving the vehicle can be found.

(4) Probation

(a) An employee may be engaged as a probationary employee during an initial probationary period of up to three months duration which may be terminated at any time during this period by either party giving one weeks notice or by the payment in lieu thereof.

(b) The Employer shall complete a final probationary review prior to the end of the probationary period specified in the contract of employment and immediately inform the employee of the outcome of this review in the following terms—

(i) Where the Employer has determined that the probationary employee has satisfactorily completed their probation, their employment will continue; or,

(ii) Where the Employer, has determined that the probationary employee has not satisfactorily met the Employer's work performance requirements, the probationary employee shall be informed of the outcome of the final review and shall be given two weeks' notice of termination of employment or payment in lieu thereof.

(iii) Notwithstanding the provisions of (ii), hereof, in lieu of the Employer terminating a probationary employee following the initial 3 months period, the Employer and the employee may agree that the probation period be extended for up to a further period of 3 months, during which the procedure shall be the same as for the initial period.

(5) Notice of Termination by Employer—

(a) In order to terminate the employment of an employee the Employer shall give the employee the following notice—

Period of Continuous Service	Period of Notice
less than 3 Years	2 weeks
3 years but less than 5 years	3 weeks
5 years and over	4 weeks

The notice period shall be increased by one week in each case where the employee is over 45 years old and has completed at least two years continuous service with the Employer.

(b) Payment in lieu of the notice prescribed in paragraph (a) of this subclause shall be made if the appropriate notice period is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

(c) In calculating any payment in lieu of notice the Employer shall pay the employee the ordinary salary for the period of notice had the employment not been terminated.

(d) Notwithstanding the provisions of this clause, the Employer may dismiss the employee without notice for serious misconduct or other reasons justifying such action.

(6) Notice of Termination by employee

(a) The notice of termination required to be given by an employee shall be the same as is required by the Employer or such lesser period as agreed between the Employer and the employee.

(b) If an employee fails to give the required notice or having given, or been given such notice, leaves before the notice expires, the employee forfeits the entitlement to any moneys owing to the employee under this Agreement except to the extent that those moneys exceed the ordinary payment for the required period of notice.

7.—HOURS OF WORK

(1) Unless otherwise specified, the ordinary hours of duty for full time employees shall be 38 hours per week Monday to Friday and shall be worked in no more than 8 hours on one day and between the hours of 7am and 6pm.

(2) The ordinary hours for a part time employee shall be less than 38 hours, but may be varied by agreement between the Co-ordinator and the employee.

(3) The employee shall be allowed an unpaid meal break of not less than half an hour during each shift to be taken at a time mutually agreed between the employer and the employee.

(4) Where the employee is required to work additional time beyond normal requirements, the employee shall be allowed time off in lieu of payment which shall be taken at such time as is mutually agreed between the Coordinator and the employee.

(5) Time in lieu may be accumulated up to a maximum of 15 hours and shall be taken at a time mutually agreed between the Coordinator and the employee within 4 weeks of accrual unless otherwise approved by the Committee.

(6) Employees may be specifically engaged to work ordinary hours on Saturdays.

Time worked on Camps

(7) Where an employee is required by the Employer to attend a camp, additional hours worked on camp shall be remunerated as time in lieu at the rate of single time for hours worked on Monday to Saturday inclusive, and double time for hours worked on Sundays and public holidays.

8.—SALARIES

(1) By application of one of the parties to the Western Australian Industrial Relations Commission, these rates shall be adjusted in accordance with State Wage Decisions.

(2) The wages and classifications of employees covered by this agreement are stipulated below.

Co-ordinator	$712.39 per week
	$18.7471 per hour.

Senior Activities Officer	$545.50 per week $14.3553 per hour.
Administration Support Officer	$503.79 per week $13.2576 per hour.
Craft Activities Officer	$503.79 per week $13.2576 per hour.

Salaries shall be paid fortnightly by cheque or electronic funds transfer, at the employer's discretion, into a bank or building society account nominated by the employee.

9.—SALARY PACKAGING

(1) Salary packaging shall be available to full-time and part-time employees. However no employee is required to opt for these arrangements. The salary package shall not increase the total cost of employment to the Employer. Where salary packaging is availed of, the terms and conditions of such a package shall not, when viewed objectively, be less favourable to the employee than the entitlements otherwise available under this Agreement.

(2) Where agreed in writing between the Committee and the employee, an employee may elect to package up to a maximum of 30% of her/his salary to a non salaried benefit. An employee may seek the approval of the Committee to increase this limit in special circumstances.

(3) The Employer shall ensure that the structure of any salary packaging arrangement complies with taxation and other relevant laws. A copy of the agreement shall be provided to the employee.

(4) The employee shall be entitled to inspect details of the payments and transactions made under the terms of the arrangement.

(5) Employees who participate in salary packaging are encouraged to seek independent financial advice prior to their entering such arrangements.

(6) The configuration of the remuneration package shall remain in force for the period agreed between the employee and Employer. Where at the end of the agreed period the full amount allocated to a specific benefit has not been utilised, by agreement between the Employer and employee, an unused amount may be carried forward to the next period or paid as salary which will be subject to usual taxation requirements.

(7) In the event that changes in legislation, Income Tax Assessment Act determinations or rulings, particularly in respect of the Employer's fringe benefit tax exempt status, remove the Employer's capacity to maintain the salary packaging arrangements offered to employees under this Agreement, the employer shall be entitled to withdraw from the salary packaging arrangements by giving notice to each affected employee with effect from the date the legislation becomes operative.

(8) Where salary packaging arrangements are to be cancelled for reasons other than legislative requirements, the employee must give two weeks notice, and the Employer must also give two weeks notice.

(9) In the event that the employee ceases to be employed by the Employer, the salary packaging arrangements will cease to apply as at the date of termination. Any outstanding benefit still due upon termination shall be paid on or before the date of termination having regard for the provisions of (4) (e) of Schedule B.

(10) The menu of items for the purposes of the salary packaging arrangements shall be as approved by the employer and attached to this agreement as Schedule B.

10.—ANNUAL LEAVE

(1) Each employee shall be entitled to four weeks annual leave at the employee's ordinary rate of pay for each completed year of service.

(2) Annual leave shall accrue pro rata on a weekly basis.

(3) Part-time employees shall be entitled to annual leave on a pro rata basis.

(4) Annual leave shall be taken as soon as practicable after falling due. Provided that leave can only held in credit beyond the year following its accrual with the approval of the Committee.

(5) The employee shall be paid for a period of annual leave at the time of going on leave.

(6) (a) If the employee lawfully leaves the employment or the employment is terminated by the Employer through no fault of the employee before the employee has taken annual leave to which he or she is entitled, the employee shall be paid for the untaken leave.

(b) If the employee leaves the employment or the employment is terminated by the Employer in circumstances other than those referred to in paragraph (a) hereof, before the employee has taken annual leave to which he or she is entitled, the employee shall to be paid for any untaken leave that relates to a completed year of service, except that if the employee is dismissed for misconduct, the employee is not entitled to be paid for any untaken leave that relates to a year of service that was completed after the misconduct occurred.

(7) Annual leave may, by agreement, be taken in advance of it having accrued. Provided that in such a case the advance payment shall be offset against any future leave accrual or against monies otherwise payable to the employee on termination.

(8) In addition to annual leave payments, an employee proceeding on annual leave shall receive a loading of 17.5% of annual leave pay. Provided that upon termination the loading shall not be paid on pro rata leave.

(9) This clause shall not apply to casual employees.

11.—PUBLIC HOLIDAYS

(1) Where the employee, other than a casual employee, is not required to work on a day solely because that day is a public holiday, she/he shall be entitled to leave on that day without loss of pay.

(2) Provided that an employee shall be entitled to a day's paid leave on a public holiday, which occurs during the employee's annual leave.

(3) "Public holiday" means any of the following days, or days observed in lieu thereof—

New Year's Day; Australia Day; Labour Day; Good Friday; Easter Monday; Anzac Day; Foundation Day; Sovereign's Birthday; Christmas Day; Boxing Day.

Where a Public Holiday falls on a Saturday or Sunday the following Monday shall be observed in lieu as the Public Holiday, but in the case where Boxing Day falls on a Sunday or Monday the following Tuesday shall be observed in lieu as the Public Holiday.

(4) An employee who is required to work on a public holiday shall be granted time off in lieu at the rate of double time.

12.—SICK LEAVE

(1) An employee who is unable to work as a result of the employee's illness or injury, is entitled to be paid for periods of absence from work resulting from the illness or injury—

(a) in the case of a full-time employee, up to 10 working days each year; or

(b) in the case of a part-time employee—

(i) who is paid a proportion of a full-time employee's pay; or

(ii) who is paid according to the number of hours worked,

the proportion of the number of hours worked each week bears the full time employee in the same category.

(2) An entitlement under subsection (1) accrues *pro rata* on a weekly basis

(3) In subsection (1), "year" does not include any period of unpaid leave.

(4) If the employee's illness or injury is attributable to—

(a) the employee's serious and wilful misconduct; or

(b) the employee's gross and wilful neglect,

in the course of his or her employment, the employee is not entitled to be paid for his or her absence from work resulting from the illness or injury.

(5) Sick leave shall accumulate from year to year with respect to any untaken entitlements up to a maximum of 40 days, provided that no provision or payment with respect to unused sick leave credits shall be made upon termination of this Agreement for any reason whatsoever.

(6) The employee shall produce a medical certificate from a registered general practitioner ("doctor") for any claim of sick

leave in excess of two (2) days. The medical certificate shall be written on the doctor's letterhead and shall identify the employee and the period during which the employee is certified to be unfit to perform his or her duties herein.

(7) In each year during the term of employment, the employee shall be entitled to not more than a total of five (5) days of sick leave without production of a medical certificate.

Thereafter a medical certificate shall be produced for any further absence due to sickness of any period whatsoever.

(8) The employee shall not be entitled to payment for leave unless the requirements of subclause (6) and (7) have been satisfied. However where the provision of a medical certificate is not practicable, evidence that would satisfy a reasonable person is sufficient.

(9) This clause shall not apply to casual employees.

13.—CARERS' LEAVE

(1) In this clause, "family member" means—

(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 living with the employee as a member of the employee's family.

(2) Sick leave entitlement of up to 5 days per annum may be used by the employee in the event that a family member is ill and requires care by the employee. The employee shall, if required, produce a medical certificate from a registered medical practitioner, or some other proof satisfactory to the employer. Unused carers leave does not accumulate.

(3) At the discretion of the Employer additional leave for the purposes of this clause may be granted where special circumstances can be demonstrated.

14.—LONG SERVICE LEAVE

(1) The employee shall be entitled to long service leave of 13 weeks paid leave after each 10 years of completed service.

(2) In the event that an employee having completed 7 years of continuous service resigns or is lawfully terminated by the employer, that employee shall be entitled to pro rata payment of long service leave.

(3) Except as provided in sub clauses (1) and (2), the provisions of the State Long Service Leave Act shall apply.

15.—PARENTAL LEAVE

(1) Parental leave shall be granted in accordance with the terms of the *Minimum Conditions of Employment Act 1993.*

(2) Casual employees are not entitled to parental leave.

16.—BEREAVEMENT LEAVE

(1) The employee is entitled to bereavement leave of up to 2 days without loss of ordinary time earnings, on the death of a spouse or de facto spouse, child or step-child, parent or step-parent, or any other person who immediately before that person's death, lived with the employee as a member of the employee's family.

(2) Payment for such leave shall be subject to the provision of reasonable proof of the death and the relationship of the deceased to the employee.

(3) The two days need not be taken consecutively.

(4) Bereavement leave is not to be taken during a period of any other kind of leave.

(5) The Committee may, at its discretion, grant additional leave for the purposes of this clause where such is justified on compassionate grounds

17.— LEAVE WITHOUT PAY

Subject to the discretion of the Employer, and provided that the employee has no accumulated leave which shall include long service leave and holiday entitlements but shall exclude sick leave, and provided further that in the reasonable discretion of the Employer the activities of the Employer shall not be inconvenienced thereby, the employee may be granted not more than twelve (12) months leave without pay from time to time by the Employer.

18.—SUPERANNUATION

(1) The Employer shall contribute on behalf of each employee in accordance with the requirements of the *Superannuation Guarantee (Administration) Act* 1992 (currently 7%).

Compliance, Nomination and Transition

(2) Notwithstanding anything contained elsewhere herein which requires that contribution be made to a superannuation fund or scheme in respect of an employee, on and from 30 June 1998—

(a) Any such fund or scheme shall no longer be a complying superannuation fund or scheme for the purposes of this clause unless—

(i) the fund or scheme is a complying fund or scheme within the meaning of the Superannuation Guarantee (Administration) Act 1992 of the Commonwealth; and

(ii) under the governing rules of the fund or scheme, contributions may be made by or in respect of the employee permitted to nominate a fund or scheme;

(b) the employee shall be entitled to nominate the complying superannuation fund or scheme to which contributions are to be made by or in respect of the employee;

(c) The employer shall notify the employee of the entitlement to nominate a complying superannuation fund or scheme as soon as practicable;

(d) A nomination or notification of the type referred to in paragraphs (b) and (c) of this subclause shall, subject to the requirements of regulations made pursuant to the Industrial Relations Legislation Amendment and Repeal Act 1995, be given in writing to the employer or the employee to whom such is directed;

(e) The employee and employer shall be bound by the nomination of the employee unless the employee and employer agree to change the complying superannuation fund or scheme to which contributions are to be made;

(f) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by a employee;

Provided that on and from 30 June 1998, and until an employee thereafter nominates a complying superannuation fund or scheme—

(g) if one or more complying superannuation funds or schemes to which contributions may be made be specified herein, the employer is required to make contributions to that fund or scheme, or one of those funds or schemes nominated by the employer;

or

(h) if no complying superannuation fund or scheme to which contributions may be made be specified herein, the employer is required to make contributions to a complying fund or scheme nominated by the employer.

19.—CONFIDENTIALITY

(1) The employee shall not, either during or after the term of employment (except as authorised or required by the employee's duties) disclose to any other person, firm, corporation or organisation or use or attempt to use in any manner which may injure or cause loss directly or indirectly to the Employer, without the previous consent in writing of the Employer, any confidential information relating to the Employer or any information concerning or relating to the business or activities of the Employer including any records or information relating to clients learned by the employee in the course of employment.

(2) During the term of employment and as far as reasonable thereafter the employee shall use the employee's best endeavours to prevent the disclosure of any confidential information relating to the Employer by a third party.

(3) All notes, memoranda, records and writings made by the employee relative to the affairs of the Employer shall be and remains the property of the Employer and shall in any event be handed over by the employee to the Employer at the end of the term of employment.

(4) The restrictions contained in this Clause shall continue to apply after the termination of this Agreement without limiting point of time but shall cease to apply to information which may come into the public domain.

20.—GRIEVANCE PROCEDURES

(1) Introduction

(a) In relation to this procedure, an employee is entitled at all stages to involve a support person. The support person can be internal or external (eg. a friend or member of the family or union officer). The complainant retains responsibility for, and ownership of the process.

(b) Employees are encouraged to raise grievances at an early stage to enable them to be resolved quickly before they become major issues. It is recommended that if an employee has any grievances about any aspect of their working conditions, duties and responsibilities or other matter/s, the following procedures will apply. An employee may omit any of the following stages if appropriate, (eg. if problem is with a superior or the Committee).

(2) Procedure

Where the employee has a question, dispute, difficulty or grievance arising out of his or her employment or relating to the application, meaning or effect of this Agreement, the matter shall be dealt within the following manner—

(3) STEPS

Step A

The employee may approach the Coordinator for discussion and advice on the issue. The discussion will be confidential.

Step B

If the problem is not resolved in Step A, the employee may put the issue in writing to the Coordinator and request that the issue be raised with the full Committee as soon as possible thereafter. The Committee shall make a decision on the issue and advise the employee in writing within 7 days of its meeting to discuss the matter.

Note: If the employee with the grievance is the Coordinator, or grievance is against the Coordinator, then Step A is to be omitted and Step B is to be followed with the issue in writing addressed directly to the Committee and not the Coordinator.

Step C

If the problem is not resolved in Step A or B, the employee may request the President of the Committee to convene a meeting of the Committee and the employee will be entitled to address that meeting on the subject of the grievance.

The employee may be accompanied by a support person of their choice.

The employee may request that the Coordinator not be present while they address the meeting.

The Committee will make a decision on the issue and advise the employee in writing of their decision within 7 days.

(4) Where the steps A, B and C fail, and if the negotiation process is exhausted without the dispute being resolved the parties, having conferred among themselves and having made reasonable attempts to resolve the question, dispute or difficulty, may jointly or individually refer the matter to the Western Australian Industrial Relations Commission for assistance in resolving the dispute.

(5) Sensible time limits shall be set by the parties in proceeding through the steps of dispute resolution.

(6) While the dispute settlement steps are in progress no industrial action shall be taken and no action prejudicial to any party shall be taken pending resolution of the matter.

(7) By mutual agreement of the parties directly involved in a dispute or grievance, one or more steps in this procedure may be bypassed in the interests of a fair or expedited resolution of the dispute.

(8) Staff Performance Dispute Procedure

The following is the procedure for dealing with a staff performance dispute not involving misconduct which would result in instant suspension/dismissal.

Step 1—Verbal Warning

Where the Employer has concerns regarding the poor work performance of an employee;

The Coordinator should inform the employee of the concerns, seek a response or explanation and determine if there are any factors which could contribute to poor performance, identify solutions and advise the employee how performance could be improved. The Coordinator and the employee should endeavour to work out a solution to the problem. This may involve both parties agreeing to do certain things within a specified time frame.

Notes should be made detailing the complaint or problem, instances when it has occurred, special factors raised, agreed strategies and time frame for improving the employee's work performance, date of any warning given and nature of warning. The note should be signed by both parties with the employee able to add his/her own comments prior to signature.

Step 2—First Written Warning

If at the end of the specified time frame set in Step 1, the employee's performance is still unsatisfactory, or the problem re-occurs the Employer shall advise the employee in writing and arrange further discussions with the employee. This will include the employee, a representative of their choice and the Coordinator. The employee shall be given an opportunity to respond either verbally or in writing.

If appropriate, a written response will be provided by the Coordinator to the employee, specifying the problem with the employee's performance, how their performance should be improved, what steps each party will take and any dates set. The notice should clearly warn the employee that failure to improve their performance as required may lead to dismissal.

The matter will be reported to the Committee by Coordinator. Either the Committee or the employee may request a meeting to discuss the problem. At such meeting the employee may be accompanied by a representative of their choice and should have ample opportunity to discuss the complaints against them.

Step 3—Final Written Warning

Should the problem still persist following step 2, the Coordinator will report this to the Committee, who will request the employee to attend a meeting to discuss the problem. The employee may choose to have a representative of their choice present at this meeting and be given the opportunity to discuss the complaints against them.

The Committee may, if appropriate, issue a written response specifying the problem, how the employee's performance must be improved, what steps each party has agreed to take and any dates set. This notice should also state VERY CLEARLY that it is the THIRD AND FINAL WARNING and that if the problem continues or occurs again, the employee is liable to be dismissed.

Step 4—Termination of Employment

If the problem continues or occurs again after the final written warning the Committee may exercise its rights to issue the employee with a written notice of dismissal.

(9) Misconduct

Misconduct includes very serious breaches of agency rules which warrant the instant dismissal of an employee.

Examples of misconduct include—

- theft of property or funds from CATA Disabled Group Inc;
- wilful damage of service property;
- consumption of alcohol or other substances during work hours;
- verbal or physical harassment of any other employee, client or member of the Committee particularly in respect of race, sex or religion;
- the disclosure of confidential information regarding the organisation to any other party without prior permission;
- the disclosure of information concerning the consumers of the organisation, other than the information that is necessary to assist consumers and to ensure their safety;

- carrying on a private business from CATA Disabled Group Inc premises or using the service's resources for private business;
- falsification of any CATA records for personal gain or on behalf of any other employee;
- refusal or failure to obey reasonable directions of the Committee;
- involving unauthorised personnel in the internal affairs of CATA;
- discrediting CATA or members of it's Committee;
- failure to follow the policies and practices of CATA.

21.—TRAINING

(1) Subject to the discretion of the Employer, an employee, after 6 months of continuous service, shall be entitled up to 4 days paid leave in each 12 months of service, to attend training directly related to the employees employment.

(2) An application for this leave shall be made in writing not less than 14 days prior to the date the leave is sought.

22.—MOTOR VEHICLE ALLOWANCE

(1) In the event that the employee is required to use their private motor vehicle in the course of their employment, they shall be reimbursed for the kilometres travelled at the appropriate State Public Service Award kilometreage rate.

(2) The employee shall ensure at times the vehicle is used in the course of their employment that the vehicle is adequately insured in respect of the purpose for which it is used.

23.—REDUNDANCY / INTRODUCTION OF CHANGE

(1) Where the Employer has decided to take action that is likely to have a significant effect on the employee or make the employee redundant, the Employer shall inform the employee as soon as practicable after the decision has been made and discuss the matter with the employee.

(2) In the event of redundancy, the employee shall be entitled up to 8 hours paid leave during the notice period to be interviewed for other employment. This leave does not have to be taken at any one time. The employee shall provide the Employer with reasonable evidence of the need for the leave.

(3) Severance Pay—

(a) In addition to the period of notice prescribed in the Contract of Service clause of the awards in Schedule A of this award, for ordinary termination and subject to further order of the Commission, 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 one year	Nil
One year but less than two years	4 weeks
Two years but less than three years	6 weeks
Three years but less four years	7 weeks
Four years and over	8 weeks

"Week's Pay" means the ordinary week rate of wage for the employee concerned. Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

(b) For the purpose of this clause continuity of service not be broken on account of—

(i) any intention or termination of the employment by the employer 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 this award or on account of leave lawfully granted by the employer, 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 time in respect of which an employee is absent from work, except time for which an employee is entitled to claim annual leave sick pay, long service leave and public holidays as prescribed by this award, shall not count as time worked.

(c) Service by the employee with a business which has been transmitted from one employer to another with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with subclause (3) of clause 2 of the Long Service Leave Provisions published in Volume 66 of the Western Australian Industrial Gazette at pages 1-4 shall also constitute continuous service for the purpose of this clause.

24.—NUMBER OF EMPLOYEES

There are 7 employees covered by this Agreement as at the date of registration of this Agreement.

SCHEDULE A—STAFF CODE OF BEHAVIOUR

The staff code of behaviour is a set of rules outlining standards of acceptable behaviour at work. It makes it clear to all people what is expected, and reduces confusion and possible conflict.

A copy of the code of behaviour should be given to all staff (paid or unpaid) on recruitment.

Failure to abide by the Staff Code of Behaviour may lead to dismissal from CATA Disabled Group Inc.

Code of Behaviour for Employees and Volunteers

Staff agree to—

- abide by the philosophy of CATA Disabled Group Inc;
- not discredit CATA or members of it's Committee;
- observe all the rules of CATA Disabled Group Inc, including those specified in the Constitution and any other determined by the Committee or the membership of the organisation;
- adhere to all the accounting procedures of CATA Disabled Group Inc;
- represent CATA Disabled Group Inc in a positive way;
- not discuss confidential issues of CATA Disabled Group Inc with people outside the organisation;
- not gossip or allow gossip to spread;
- not take illegal drugs or consume alcohol when on duty or on premises;
- discourage gifts from clients (except home garden produce);
- not enter into inappropriate sexual relationships with clients, other staff or members of CATA Disabled Group Inc;
- follow any grievance procedures set down by the Committee to try to resolve any conflicts with other staff, clients or members of CATA Disabled Group Inc;
- not harass in any form, clients, other staff or members of CATA Disabled Group Inc;
- not abuse, physically or verbally, clients, other staff or members of CATA Disabled Group Inc;
- not give unsolicited advice to clients;
- not alienate clients from their families;
- treat clients with courtesy, respect and consideration, act on complaints and provide services to the best of their ability.

Staff Code of Dress

Staff should wear neat clothes appropriate to the type of work and not offensive to the clients.

SCHEDULE B

Salary Packaging Arrangements

(1) Packaging

(a) Staff under this agreement shall be entitled to package up to a maximum of 30% of salary.

(b) Staff may elect to take the maximum rate of packaging available to them or a lesser amount by increments of 5%.

(c) Staff wishing to alter their band of packaging (subject to the determined maximum) may only do so at the end of each quarter.

(2) Administration Charge

(a) The Association will charge an administration fee of up to 3% of the amount packaged. This fee will automatically be deducted from the packaged amount. The 3% fee will be utilised only for the administration of the salary packaging scheme.

(3) Pay Advice Slips and Group Certificates

(a) Pay advice slips will indicate the gross salary and allowances and the amount that has been credited to the individual staff member's salary packaging account. This amount will appear in the "Before Tax Additions/Deductions" space on the pay slip.

(b) "Taxable Income" will be reduced by the amount packaged and the figure appearing under the "Tax" column will be the tax payable on the reduced "Taxable Income".

(c) Group Certificates will indicate the total taxable income and tax deducted for the year. The amount packaged will be shown on Group Certificates..

(4) Operation of the System

(a) Each fortnight the payroll system will calculate each staff member's non cash benefit in accordance with the agreed sacrifice percentage. Such amount will be credited to that staff member's salary packaging account.

(b) At the end of each month each staff member will receive a statement of account indicating all transactions for the previous month and the end of month balance.

(c) To pay bills through their salary packaging account staff members will be required to pay qualifying accounts (as listed below) through one designated credit card account in their name and then complete a Salary Package Payment Authority and forward this to the Salary Packaging Clerk together with the monthly credit card statement. In normal circumstances payment will be made within five working days of receipt by the Salary Packaging Clerk. Payment will be made in accordance with the Salary Package Payment Authority only according to the order listed, subject to sufficient funds being available in that staff member's salary packaging account.

(d) At the end of the financial year it will be necessary for staff to utilise any unused amount in their salary packaging account as at the 30 June, within the next 3 months. (by 30 September).

(e) When a staff member terminates employment they may elect to either use their remaining salary package balance prior to termination or to have the balance paid out as a salary and wages. Where the balance is paid out as salaries and wages income tax instalment deductions will be deducted from the salary.

(5) Superannuation guarantee charge

(a) Superannuation Guarantee payments will be based upon gross salary (see Clause.8—Salaries) as defined under the Superannuation Guarantee Charge Act 1992 as at the date of registration of the Agreement.

(6) Components of Salary Packaging

The following items will be those for which salary packaging amounts may be utilised—

- Telephone Accounts—bills from telephone service providers for the personal telephone expenses of the employee at their residence.
- Rent—personal rental expenses of the employee, such as the rent they pay for their present accommodation.
- Loan Repayments—the amount of a regular repayment required to be made to a financial or other institution or agency to repay borrowings, such as personal loans, home building mortgages.
- RAC Accounts—membership and other expenses of the employee as a result of their membership of the RAC.
- Any insurance premiums incurred by the employee, such as home and contents, motor vehicle, life and medical benefits.
- Water Corporation Accounts, personal employee expenses payable to the WA Water Corporation or any similar country agency.
- Rates—State or Local Government land rates and taxes incurred by the employee.
- Educational Expenses—any expenses incurred by the employees as part of an educational activity, undertaken by themselves or dependent child.
- Child Care Fees—expenses incurred by the employee for the care of their child/children.
- Maintenance Payments—any fixed payment incurred by an employee in respect of private or court/law enforced agreements for maintenance payments.
- Utilities (such as Western Power & Alinta Gas)—expenses incurred by the employee for these types of utility or energy purchases.
- Household Repairs and Maintenance—expenses incurred by the employee for household repairs and maintenance for which an invoice is produced.
- Domestic Support—expenses incurred by the employee in respect of a cleaner or ironing service where an invoice is produced.
- Travel and Accommodation Costs—payments to travel agents, airlines, hotels and the like would be included under this category.
- Membership Subscription—payment of expenses of membership of any organisation to which the employee belongs.
- Medical, Dental and Pharmaceutical Accounts—doctor, dentist and chemist bills (and bills from other medical service providers) incurred in respect of self, spouse or dependant.
- Veterinary Accounts.
- Credit Card Accounts—any expenses incurred by an employee and charged to them via a credit card (for example, Visa, Bankcard). The employee must have documentation to support the expenses charged to the credit card. It is important to note under no circumstances will there be payment for any cash advances. Payments made from any packaged amount will only be made in respect of expenses incurred as a the result of a purchase of goods and services and will be made to the credit card provider.
- Fleetcard is a system provided by Shell/Custom Credit whereby a credit card is issued which may be used to purchase fuel and other services for a nominated motor vehicle. Fleetcard issue a monthly bill detailing all expenses incurred. This will be payable through the employee's packaging account.
- Superannuation Contributions. Employee contributions payable to a superannuation fund.

Please note that under no circumstances will a payment from a packaged amount be made directly to an employee. All payments will be made by cheque (or direct deposit) to the designated credit card account provider only and in payment of qualifying expenses (as listed above) and only incurred by that employee as detailed on a monthly credit card statement.

SIGNATURES OF THE PARTIES

EMPLOYER

"Creative and Therapy Activities Disabled Group Inc understands it's rights and obligations under this Agreement, has freely entered into it, and wishes to have this Agreement registered."

Signed	F Mawdsley	19/10/99
Signature	President (PRINT)	Date:
Signed	G Mischin	19/10/99
Signature	Treasurer (PRINT)	Date:

UNION SIGNATURE

Signed	Helen Creed	17/11/99
Signature	Full Name (Print)	Date

DEPARTMENT OF COMMERCE AND TRADE ENTERPRISE AGREEMENT 1999/2001. No. PSG AG 4 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, WA Branch

and

The Chief Executive Officer, Department of Commerce and Trade.

No. PSG AG 4 of 1999.

Department of Commerce and Trade Enterprise Agreement 1999/2001.

24 December 1999.

Order.

HAVING heard Mr J. Ross on behalf of the Civil Service Association of Western Australia Incorporated and on behalf of the Australian Liquor, Hospitality and Miscellaneous Workers Union, WA Branch and Mr G. Robinson 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 Commerce and Trade Enterprise Agreement 1999/2001 as filed in the Commission on the 16th day of December 1999, and as amended on the 24th day of December 1999, be registered as an industrial agreement on and from the 24th day of December 1999.

(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

1.—TITLE

This Agreement shall be known as the Department of Commerce and Trade Enterprise Agreement 1999/2001 and replaces the existing Department of Commerce and Trade Enterprise Agreement 1996.

2.—ARRANGEMENT

3.—OBJECTIVES AND PRINCIPLES

The parties agree that the objectives of this Agreement are to—

- Further improve the productivity and efficiency of the Department
- Ensure that the gains achieved through this Agreement from improved productivity and changes in workplace culture continue to be shared by employees, the department and its clients and the government on behalf of the Community
- Ensure the Department continues to operate in a manner consistent with the principles outlined in Section 7 of the Public Sector Management Act 1994 (General Principles of Public Administration and Management)
- Further promote the development of trust and motivation and to continue to foster enhanced employee relations
- Facilitate greater flexibility in decision making and the allocation of human and other resources
- Promote increased job satisfaction on an ongoing basis
- Further develop and pursue changes on a cooperative basis by the use of participative practices

4.—PARTIES TO THE AGREEMENT

This Agreement shall be binding on the following parties—

(a) Civil Service Association of Western Australian Incorporated

(b) Federated Liquor and Allied Industries Employees Union of Australia, Western Australian Branch, Union of Workers

(c) Chief Executive Officer, Department of Commerce and Trade

5.—SCOPE OF THE AGREEMENT / NUMBER OF EMPLOYEES

This Agreement shall apply to all of the employees of the Chief Executive Officer of the Department who are members of, or eligible to be members of, the Civil Service Association of Western Australia Incorporated (CSA) or the Federated Liquor and Allied Industries Employees Union of Australia, Western Australian Branch, Union of Workers (FLAIEUA) not covered by a Workplace Agreement.

At the date of registration thirty four employees are covered by the Agreement

6.—DEFINITIONS

'Award': the Public Service Award 1992

the Catering Employees and Tea Attendants (Government) Award 1982

'Department': the Department of Commerce and Trade

'Employee': for the purpose of this Agreement means a person employed by the Chief Executive Officer of the Department of Commerce and Trade who are members of, or eligible to be members of, the CSA or the FLAIEUA

'Employer': the Chief Executive Officer of the Department of Commerce and Trade

'Government': the State Government of Western Australia

'Minister': the Minister of the Crown responsible for the administration of the department

'Union': the Civil Service Association (CSA); and

the Federated Liquor and Allied Industries Employees Union of Australia, Western Australian Branch, Union of Workers (FLAIEUA)

7.—DATE AND PERIOD OF OPERATION OF THE AGREEMENT

(a) This Agreement shall operate from the date of registration in the Western Australian Industrial Relations Commission and shall remain in force for a period of two years

(b) The parties will commence negotiations on a new Agreement six months prior to the expiration of this Agreement

(c) The parties agree to continue this Agreement until it is replaced by a further Agreement. Changes to rates of pay arising from this Agreement will continue to apply, providing the broad principles of this Agreement continue to be implemented.

8.—NO FURTHER CLAIMS

The parties to this Agreement undertake that for the term of the Agreement there shall be no further salary or wage increase sought or granted except for those provided under the terms of this Agreement.

This Agreement shall not operate so as to cause an employee to suffer a reduction in ordinary time earnings.

9.—RELATIONSHIP TO THE PARENT AWARDS

This Agreement shall be read and interpreted in conjunction with the Public Service Award 1992 and the Catering and Tea Attendants (Government) Award 1982.

In the case of any inconsistencies, this Agreement shall have precedence to the extent of the inconsistencies. Where this Agreement is silent the relevant award shall apply.

10.—SINGLE BARGAINING UNIT

(a) This Agreement has been negotiated through a Single Bargaining Unit.

(b) The Single Bargaining Unit is comprised of representatives from the Department and the Civil Service Association, with the Civil Service Association as the agreed representative for the Federated Liquor and Allied Industries Employees Union of Australia, Western Australian Branch, Union of Workers.

11.—EQUITY COMMITMENT

The parties are committed to promoting equal opportunity for all people in accordance with the Equal Opportunity Act (1984) of Western Australia.

12.—CORPORATE PLAN

The Department of Commerce and Trade's Mission, Key Result Areas and Strategies that comprise the Corporate Plan 1997-2000 are—

MISSION

To make a difference by maximising the contribution of commercial and trading activities to the economic well being and lifestyle of all Western Australians.

KEY RESULT AREAS

Increased Investment

Capital investment in value added activities is a key driver of economic growth. Investment directly generates employment and wealth and adds to the State's skills and technology base.

Enhanced Trade

Increasing export earnings is a key contributor to a thriving economy. Trade issues and policies are a complex inter-relationship of government relations, imports, exports, international investment, technology transfer, management and marketing.

Improved Regional Development

Regional Western Australia contributes 35% of the State's cross domestic product. Economic Growth is the foundation of development in regional areas.

STRATEGIES

Science & Technology Development—

- stimulating the establishment and development of industry-focussed research and development capability in WA;
- promoting investment in commercial research and technology adoption to enhance private sector innovation; and
- developing and implementing policies to maximise the positive economic and social impacts of science and technology on the State.

Infrastructure Development—

- identifying the need for public infrastructure in regional WA and planing its development and implementation; and
- developing and implementing public infrastructure to promote and facilitate industry expansion in WA.

Industry Sector and Trade Development—

- developing industry strategies and support programs for key industry sectors;
- assisting WA companies to become internationally competitive;
- assisting industry to promote its capabilities internationally; and
- encouraging internationally competitive companies to establish or expand their operations in WA.

Aboriginal Enterprise Development—

- assisting the planning, establishment and improvement of Aboriginal enterprises;
- facilitating commercial joint ventures between Aboriginal and non-Aboriginal parties; and
- developing strategies for Aboriginal participation in key industry sectors,

Information & Communications Development—

- developing enabling strategies for WA to become world competitive in the use of information and communications products; and
- developing Western Australian information and communications industries to achieve international competitiveness and world recognition for the quality of their products and services.

Regional Development

- influencing the services and economic activities of government affecting the regions;
- providing information and advice on economic and social development opportunities in the regions;
- minimising impediments to regional economic development;
- assisting the regions and their communities to help themselves;
- coordinating the regional activities of the three levels of government; and
- identifying the need for infrastructure and promoting its provision.

13.—DISPUTE SETTLEMENT PROCEDURE

(1) The objective of this procedure is to provide a mechanism for dealing with any question or dispute that arises between the parties about the meaning or the effect of this Agreement.

(2) In the event of any question, dispute or disagreement under subclause (1) of this clause arising between the parties, the following procedure shall apply—

(a) The matter is to be discussed between the employee and/or a representative and the employer's representative as soon as practicable but within two working days of the written/verbal notification of the existence of the dispute. Such notification shall include the parties' interpretation of the matter under dispute.

(b) if the matter is unable to be resolved through discussions within five working days of the notification, the dispute may be referred to the Western Australian Industrial Relations Commission (WAIRC) for a conference for the purpose of settling such a dispute.

(c) Where any matter is referred to the WAIRC and the matter is not resolved by conciliation, then the matter remaining in dispute may be resolved by arbitration in accordance with the State Wage Principles.

The parties agree to incorporate the outcome of any proceedings before the WAIRC in this Agreement.

14.—HOURS

(1) Prescribed Hours of Duty

Prescribed hours of duty to be observed by officers shall be *seven hours thirty six minutes per day* to be worked between 7.00 am and 6.00 pm Monday to Friday as determined by the Chief Executive Officer with a lunch interval of no less than thirty minutes to be taken between 12.00 noon and 2.00pm. Subject to the lunch interval prescribed hours are to be worked as one continuous period.

The Chief Executive Officer may vary the prescribed hours of duty to be observed by giving one months notice in writing to the division or branch officers to be affected by the change.

(2) Other Working Arrangements

(a) The Chief Executive Officer may vary the prescribed hours of duty observed in the department so as to make provision for—

(i) The attendance of officers for duty on a Saturday, Sunday, Public Holiday or on a Public Service Holiday

(ii) The nature of the duties of an officer or class of officers in fulfilling the responsibilities of their office

provided that where the hours of duty are so varied an officer shall not be required to work more than five hours continuously without a break.

(b) Notwithstanding the above, where it is considered necessary to provide more economic operations, the Chief Executive Officer may authorise the operation of alternative working arrangements in the department.

The continued operation of any alternative working arrangements, so approved, will depend on the Chief Executive Officer being satisfied that the efficient and effective functioning of the department is being enhanced by its operation.

Other working arrangements can be by agreement between management and staff and may include—

(i) the operation of flexitime as specified in subclause (3) of this clause

(ii) the operation of a nine-day fortnight as specified in subclause (4) of this clause

(iii) the operation of permanent pan-time employment as specified in Clause 9.—Part Time Employment of the Award.

(3) Flexitime Arrangements

(a) Flexitime Roster

(i) The authorisation of a flexitime roster shall be the responsibility of the Chief Executive Officer. The roster will indicate the minimum staffing and any other requirements in respect to starting and finishing times, lunch break coverage and flexi leave.

(ii) The roster shall cover a settlement period of four weeks and shall be made available to all affected officers no later than three days prior to the settlement period commencing,

(iii) The roster shall be prepared in consultation with the officers, subject to the Chief Executive Officer retaining the right to determine the needs of the department.

(iv) Subject to four weeks notice being given to affected officers, the Chief Executive Officer may withdraw the authorisation of a flexitime roster.

(b) Hours of Duty

(i) The prescribed hours of duty may be an average of 7 hours and 36 minutes per day which may be worked with flexible commencement and finishing times in accordance with the provisions of this subclause, provided that the required hours of duty for each four week period shall be 152 hours.

(ii) For the purposes of leave, Public Holidays and Public Service Holidays, a day shall be credited as 7 hours 36 minutes.

(c) Flexitime Periods

Within the constraints of the prepared roster and subject to the concurrence of the supervisor, officers may select their own starting and finishing times within the following periods—

7.30am to 9.30am

12.00 noon to 2.00pm (minimum half an hour break)

3.30pm to 6.00pm

(d) Core Period

Officers must work in the following core periods unless unavoidably absent due to illness or approved leave—

9.30am to 12.00 noon

2.00pm to 3.30pm

(e) Lunch Break

(i) An officer shall be allowed to extend the meal break between 12 noon and 2.00pm of no less than 30 minutes but not exceeding 45 minutes except as provided below.

(ii) An officer may be allowed to extend the meal break beyond 45 minutes to a maximum of 90 minutes. Such an extension is subject to prior approval of the officer's supervisor.

(f) Flexileave

(i) Within the constraints of the prepared roster and subject to the prior approval of the supervisor, an officer may be allowed a maximum of two full days or any combination of half days and full days that does not in total exceed two days in any settlement period.

(ii) Approval to take flexi leave is subject to the officer having accrued sufficient credit hours to cover the absence prior to taking the leave. In exceptional circumstances and with the approval of the Chief Executive Officer, flexi leave may be taken before accrual subject to such conditions as the Chief Executive Officer may impose.

(g) Settlement Period

(i) For recording time worked, there shall be a settlement period which shall consist of four weeks.

(ii) The settlement period shall commence at the beginning of a pay period.

(iii) The required hours of duty for a settlement period shall be 152 hours.

(h) Credit Hours

(i) Credit hours in excess of the required 152 to a maximum of 7 hours 36 minutes are permitted at the end of each settlement period. Such credit hours shall be carried forward to the next settlement period.

(ii) Credit hours in excess of 7 hours 36 minutes at the end of the settlement period shall be lost.

(iii) Credit hours at any point within the settlement period shall not exceed 20 hours.

(i) Debit Hours

(i) Debit hours below the required 152 hours to a maximum of 4 hours are permitted at the end of each settlement period.

Such debit hours shall be carried forward to the next settlement period.

(ii) For debit hours in excess of 4 hours, an officer shall be required to take leave without pay for the period necessary to reduce the debit hours to those specified on paragraph (i) of this subclause.

(iii) Officers having excessive debit hours may be placed on standard working, hours in addition to being required to take leave without pay.

(j) Maximum Daily Working Hours

A maximum of 10 hours excluding overtime may be worked in any one day, assuming a 7.30am start, 6.00pm finish and 30 minutes for lunch.

(k) Study Leave

Where study leave has been approved by the Chief Executive Officer pursuant to the provisions of Clause 25. Study Leave of the Award, credits will be given for education commitments falling within the prescribed hours of duty and for which "time off" is necessary to allow for attendance at formal classes.

(l) Overtime

(i) Officers receiving at one day's notice shall be required to work the prescribed hours of duty determined by the Chief Executive Officer under subclause (1) of this clause.

(ii) Where an officer is required to work overtime at the conclusion of a day with less than one day's notice, and

(aa) where an officer has at the commencement of the day 2 hours or more

flexitime credits, the officer shall be paid overtime after 5 hours work on that day, or for the time worked after 3.30pm, whichever is the earlier, or

(bb) where an officer has commenced duty prior to 8.30am and has, at the commencement of that day, less than 2 hours flexitime credits, the officer shall be paid overtime, for the time worked after the completion of prescribed hours of duty or after working 7 hours 36 minutes on that day, whichever is earlier, or

(cc) where that officer has commenced work after 8:30am and has, at the commencement of that day, less than two hours flexitime credits, the officer shall be paid overtime for the period worked after 5:30pm or after working 7 hours 36 minutes on that day, whichever is the earlier.

(iii) Where an officer is required to work overtime at the beginning of the day with less than one days notice, that officer shall be overtime for any time worked prior to the commencing time for prescribed hours of duty determined by the Chief Executive Officer under sub-clause (1) of this clause.

15.—FAMILY CARE LEAVE

Should an immediate family member (spouse, defacto spouse, dependent, parent) become ill and require care, employees may utilise in any one year up to 5 days of their accumulated sick leave entitlement to attend to matters of this nature. Approval for use of an amount in excess of 5 days in any one year will be at the discretion of the Chief Executive Officer, having regard for the operational requirements of the Department.

An application for sick leave under this clause exceeding 2 consecutive working days shall be supported by a certificate from a registered medical practitioner.

16.—SALARY PACKAGING

(1) An employee may, by agreement with the employer, enter into a salary packaging arrangement in accordance with the McMillan Shakespeare Group or any similar salary packaging arrangement offered by the employer.

(2) Salary packaging is an arrangement whereby the entitlements under this Agreement contributing towards the Total Employment Cost (as defined) of an employee can be reduced by and substituted with another, or other benefits.

(3) For the purpose of this clause Total Employment Cost (TEC) is defined as the cost of salary and other benefits aggregated to a total figure or TEC, less the cost of Compulsory Employer Superannuation Guarantee contributions.

The TEC for the purposes of salary packaging, is calculated by adding—

(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 separate written agreement with the employer that sets out the terms and conditions of the arrangement.

(5) The salary packaging arrangement must be cost neutral in relation to the total cost to the employer.

(6) The salary packaging arrangement must comply with relevant taxation laws and the employer will not be liable for additional tax, penalties or other costs payable or which may become payable by the employee.

(7) In the event of any increase or additional payments of tax or penalties associated with the employment of the employee or the provision of employer benefits under the salary packaging arrangement, such tax, penalties and any other costs shall be borne by the employee.

(8) In the event of significant increases in Fringe Benefit Tax liability or administrative costs relating to the arrangement under this clause, the employee may vary or cancel a salary packaging arrangement.

(9) The cancellation of salary packaging will not cancel or otherwise affect the operation of this Agreement.

(10) An employer shall not unreasonably withhold agreement to salary packaging on request from an employee.

(11) The Dispute Settlement Procedures contained in this Agreement shall be used to resolve any dispute arising from the operations of this clause. Where such a dispute is not resolved, the matter may be referred by either party to the Western Australian industrial Relations Commission.

17.—PRODUCTIVITY MEASUREMENT/PROPOSED SALARY INCRFASES

In order to measure current and future productivity, the Department of Commerce and Trade Productivity Measurement Model, which is linked to the business outputs of the Department, will continue to operate.

The parties agree that, subject to the funding capacity of the Chief Executive Officer, the measurements will be submitted to the Department of Productivity and Labour Relations for approval to pay salary increases.

Consistent with the provisions of the Government Wages Policy salary increases through this process, if achieved and able to be funded, will be confined to a maximum of 3.5% payable from the date the Agreement is registered in the Western Australian Industrial Relations Commission and a maximum of 3.5% payable twelve months later. The aggregated salary increases, if achieved, will not increase the pay rates existing at the commencement of this Agreement by more than 7%.

Salary rates payable under this Agreement are prescribed in Appendix A.

18.—SIGNATURES FOR AND ON BEHALF OF PARTIES TO THE AGREEMENT

Signed for and on behalf of Department of Commerce and Trade by—

Mr R. Muirhead

Dated the 10th day of December 1999

Signed for and on behalf of the Civil Service Association of Western Australia incorporated by Dave Robinson, General Secretary—

Ms T. Walkington

Dated the 15th day of December 1999

Signed for and on behalf of the Federated Liquor and Allied Industries Employees Union of Australia, Western Australian Branch, Union of Workers by—

Ms Helen M. Creed

Dated the 16th day of December 1999

APPENDIX A—SALARY RATES

This Appendix shall be read in conjunction with Clause 17.

The salary rates listed in Column A are the rates under the Department of Commerce and Trade Enterprise Agreement 1996 on which the proposed salary increases under this Agreement will be based.

Column B salary rates will apply from the date this Agreement is registered in the Western Australian Industrial Relations Commission.

Column C salary rates will be determined and will apply from twelve months after the date this Agreement is registered in the Western Australian Industrial Relations Commission.

LEVEL	COLUMN A	COLUMN B	COLUMN C
LEVEL 1			
Under 17	$12,229	$12,584	
17 years	$14,292	$14,707	
18 years	$16,671	$17,155	
19 years	$19,297	$19,857	
20 years	$21,671	$22,300	
1st year	$23,806	$24,496	
2nd year	$24,540	$25,252	
3rd year	$25,271	$26,004	
4th year	$25,999	$26,753	
5th year	$26,732	$27,507	
6th year	$27,464	$28,261	
7th year	$28,306	$29,127	
8th year	$28,888	$29,726	
9th year	$29,750	$30,613	
LEVEL2			
1st year	$30,782	$31,675	
2nd year	$31,572	$32,488	
3rd year	$32,403	$33,343	
4th year	$33,282	$34,247	
5th year	$34,201	$35,193	
LEVEL 3			
1st year	$35,464	$36,493	
2nd year	$36,448	$37,505	
3rd year	$37,462	$38,548	
4th year	$38,504	$39,621	
LEVEL 2/4			
1st year	$30,782	$31,675	
2nd year	$32,403	$33,343	
3rd year	$34,201	$35,193	
4th year	$36,448	$37,505	
5th year	$39,933	$41,091	
6th year	$42,204	$43,428	
LEVEL 4			
1st year	$39,933	$41,091	
2nd year	$41,052	$42,243	
3rd year	$42,204	$43,428	
LEVEL 5			
1st year	$44,421	$45,709	
2nd year	$45,921	$47,253	
3rd year	$47,478	$48,855	
4th year	$49,095	$50,519	
LEVEL 6			
1st year	$51,694	$53,193	
2nd year	$53,461	$55,011	
3rd year	$55,290	$56,893	
4th year	$57,243	$58,903	
LEVEL 7			
1st year	$60,236	$61,983	
2nd year	$62,308	$64,115	
3rd year	$64,562	$66,434	
LEVEL 8			
1st year	$68,226	$70,205	
2nd year	$70,850	$72,905	
3rd year	$74,104	$76,253	
LEVEL 9			
1st year	$78,167	$80,434	
2nd year	$80,913	$83,260	
3rd year	$84,044	$86,481	
CLASS 1	$88,780	$91,355	
CLASS 2	$93,515	$96,227	
CLASS 3	$98,247	$101,096	
CLASS 4	$102,983	$105,970	
TEA ATTENDANT (per fortnight)			
Base Rate	$668.56	$687.95	
Service Payment			
1st year	$111.85	$115.10	
2nd year	$122.14	$125.68	
3rd year	$131.15	$134.95	
Casual			
1st year	$117.06	$120.45	
2nd year	$118.60	$122.04	
3rd year	$119.96	$123.44	

HOSPITAL SALARIED OFFICERS JOONDALUP HEALTH CAMPUS ENTERPRISE BARGAINING AGREEMENT 1999.
No. AG 244 of 1999.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Joondalup Health Campus

and

Hospital Salaries Officers Association of Western Australia (Union of Workers).

No. AG 244 of 1999.

COMMISSIONER P E SCOTT.

7 February 2000.

Order.

HAVING heard Mr J Beedham on behalf of the Applicant and Ms C Thomas on behalf of the Respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Hospital Salaried Officers Joondalup Health Campus Enterprise Bargaining Agreement 1999 in the terms of the following schedule be registered on the 3rd day of February 2000.

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

HOSPITAL SALARIED OFFICERS
JOONDALUP HEALTH CAMPUS
ENTERPRISE BARGAINING AGREEMENT 1999

1.—TITLE

This Agreement shall be titled the Hospital Salaried Officers Joondalup Health Campus Enterprise Bargaining Agreement 1999.

2.— ARRANGEMENT

3.—PURPOSE OF AGREEMENT

(1) This Agreement aims to achieve improvements in productivity and efficiency and the enhanced performance of Joondalup Health Campus along with allowing the benefits from those improvements to be shared by employees and Joondalup Health Campus.

(2) This Agreement places priority on the parties at Joondalup Health Campus taking responsibility for their own labour relations affairs and reaching agreement on issues appropriate to Joondalup Health Campus.

4.—APPLICATION AND PARTIES BOUND

(1) This agreement applies to the Hospital Salaried Officers Association of Western Australia (Union of Workers) (HSOA), the Employees covered by the Hospital Salaried Officer's (Joondalup Health Campus) Award and employed by Mayne Nickless Limited, ACN 004 073 410, trading as Health Care of Australia, incorporated in Victoria, operating as Joondalup Health Campus, (hereinafter referred to as Joondalup Health Campus), and to the employer employing those employees.

(2) The estimated number of employees bound by this Agreement at the time of registration is 200 employees.

(3) This Agreement shall be read in conjunction with Hospital Salaried Officer's (Joondalup Health Campus) Award and shall replace the provisions of that Award where expressly stated herein. Where there is any inconsistency between the Agreement and the Award the Agreement shall take precedence.

(4) This agreement cancels and replaces the Hospital Salaried Officer's (Joondalup Health Campus) Enterprise Bargaining Agreement 1997 (AG36 of 1998).

5.—AWARD CONSOLIDATION

The parties agree to consolidate this Agreement and the Award during the life of this Agreement (as the award stands at today's date).

6.—TERM OF AGREEMENT

(1) This Agreement shall operate from the date of registration until 30 June 2000.

(2) The parties to this Agreement agree to re-open negotiations no later than six months prior to the expiry of this Agreement.

7.—DEFINITIONS

"Salaried Officer" means an employee who is engaged in a professional, administrative, supervisory, technical or clerical capacity.

8.—OBJECTIVES, PRINCIPLES AND COMMITMENTS

(1) The parties agree that the objectives of this Agreement are to—

(a) improve the productivity and efficiency of Joondalup Health Campus;

(b) facilitate greater decentralisation and flexibility in negotiating employment conditions and work arrangements at Joondalup Health Campus;

(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, Joondalup Health Campus and its clients;

(b) developing and pursuing changes on a co-operative basis; and

(c) ensuring that Joondalup Health Campus operates as effectively, efficiently and competitively as possible.

(3) The Hospital Salaried Officers Association and Joondalup Health Campus, Management and Employees bound by this Agreement are committed to—

(a) Support and actively contribute to heath 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 relatedapproaches to health service issues—

(iii) practices are not fixed and not restricted to an examination of costs, but also include quality and delivery issues;

(iv) is outcome rather than simply activity based;

(v) provides the processes, structures, rights and obligations which are essential to ensure that the full capacity for innovation of employees is fully and effectively used;

(vi) depends on effective training, empowerment and participation of both management and employees to acquire and utilise the skills which are necessary to effectively develop, implement and evaluate the change process; and

(vii) are to be based on the following principles—

- customer/patient focus
- management commitment
- employee participation
- leadership
- information analysis
- policies and plans
- appropriate standards
- hospital performance
- cost effectiveness
- working smarter

(b) Support the clinical, teaching, research and organisational goals of the hospital and contribute to the achievement of those goals as active members of the health service community.

(c) Support and actively contribute to the achievement and/or maintenance of ACHS Accreditation.

(d) Actively contribute to the achievement of health service budgets.

(e) Assist with achieving the hospital waiting list priorities and day surgery targets.

(f) Co-operate with the development and implementation of strategies to achieve length of stay targets.

(g) Participate in a Multidisciplinary approach to patient care.

In addition, Joondalup Health Campus is committed to facilitating and encouraging the participation and commitment of employees.

9.—RATES OF PAY AND THEIR ADJUSTMENT

(1) **Wage Adjustments**

This Agreement shall provide for salary increases as outlined in Clause 26. Salaries of this Agreement payable as follows—

(a) An increase of 3%, payable from 1 January 1999; and

(b) A further increase of 3%, payable from 1 January 2000.

10.—AWARDS, AGREEMENTS AND WORKPLACE AGREEMENTS

(1) **Relationship Between Agreements and Awards**

Consistent with the Industrial Relations Act 1979 and the State Wage Principles, this Agreement shall provide the whole of the employees' wage increases for the life of the Agreement.

(2) Subject to the Industrial Relations Act 1979 and the State Wage Principles, the parties reserve their rights to seek to

amend this Agreement to provide for further salary increases in return for productivity improvements at the Joondalup Health Campus.

(3) The Joondalup Health Campus agrees for the term of this Agreement to be bound by the provisions of this Agreement and as such, commits not to enter into Workplace Agreements under the Workplace Agreements Act, 1993, nor to enter an Australian Workplace Agreement, however subsequently legislated, with employees who would otherwise fall within the scope of this Agreement.

(4) Subject to Clause 43—Flexibility Agreements, of the Hospital Salaried Officers Award No. 39 of 1968, nothing within this Agreement prevents the employer from offering an employee employment on terms more favourable than the terms of this Agreement.

11.—NO FURTHER CLAIMS

Subject to the terms of this agreement, there shall be no further claims for the life of this Agreement, except where consistent with decisions of the Western Australian Industrial Relations Commission that reflect State Wage Decisions requiring general application.

12.—FRAMEWORK AND PRINCIPLES FOR FURTHER PRODUCTIVITY BARGAINING

(1)(a) Following the receipt of a request from the HSOA to negotiate an amendment to this Agreement with Joondalup Health Campus, a representative from Joondalup Health Campus will meet with a representative from the HSOA to discuss the request as soon as practicable but in any event within five working days of the receipt of the request.

These discussions should include process issues such as what sort of bargaining mechanism will be established, what consultative process can be used or needs to be put in place, possible initiatives to be considered and the time frame.

Negotiations will be conducted in a manner and time frame agreed by the parties to this Agreement.

(b) The negotiations should occur on the basis of a broad agenda of initiatives designed to improve efficiency, effectiveness, productivity, patient care and flexibility within Joondalup Health Campus.

(c) The agenda should include but not be limited to—

(i) changes to work organisation, job design and working patterns and arrangements;

(ii) examination of terms and conditions of employment to ensure they are suited to Joondalup Health Campus's operational requirements;

(iii) identification and implementation of best practice across all areas of service delivery;

(iv) (i), (ii) and (iii) can be achieved by means including but not limited to;

(aa) new training and skills development programs as and where required;

(bb) the optimum use of human and capital resources including new technology;

(cc) quality assurance and continuous improvement programs;

(dd) having due regard to operational requirements, allowing sufficient flexibility to enable employees to meet their family responsibilities; and

(ee) active occupational health and safety risk reduction, training and rehabilitation programs.

(2) In negotiating further salary increases in return for productivity improvements, the parties should ensure that the following issues have been addressed and/or applied.

(a) **Productivity Improvements**

Productivity improvements are changes which increase the efficiency and effectiveness of Joondalup Health Campus 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 to Agreement/Award conditions.

Without limiting any of the above, in practice, the primary focus of enterprise bargaining in the workplace is likely to be on best practice, efficiency, effectiveness, competitiveness, cost savings and quality of employment.

(b) **Sharing Gains from Productivity Improvement**

The parties accept that there is no precise formula for the sharing of gains from productivity improvements, but in any agreement, in addition to employee benefits, there must be a clear and specific return to Joondalup Health Campus. Productivity improvements may be related to work practices or arrangements, subject to acceptance that where capital expenditure requires changes in work methods and/or the number of employees and the changes are of a nature that enhances the investment, it shall qualify as a productivity improvement, provided that there is net quantifiable benefit to Joondalup Health Campus.

Any agreement reached should not rely primarily on improvements which are merely the result of new technology or financial reforms or other such initiatives. For example; in the case of capital investment (technology), changes arising from capital expenditure for which Joondalup Health Campus takes the risk and which require a reasonable return on the funds invested do not necessarily count as a productivity improvement.

The treatment of improved efficiency arising from major capital expenditure is to be agreed by Joondalup Health Campus and the HSOA and shall take into account factors such as the cost of capital.

Where employees repackage or exchange employment conditions, all or most of the saving or productivity improvement made by Joondalup Health Campus can be returned to the employees.

(c) **Identifying Productivity Increases**

To assist in such a review a model for identifying productivity increases is contained in Attachment 1. The model is included as a guide only and it is expected that it will be modified to meet the needs of Joondalup Health Campus as required.

(d) **Quantum and Timing of Increases**

The aggregate productivity gains negotiated at Joondalup Health Campus could result in increases greater than the targeted amount, however there are practical limits on how much can be paid and when the increases can be paid for specific operational improvements.

13.—RESOURCES FOR PRODUCTIVITY NEGOTIATIONS

(1) It is recognised that enterprise bargaining places considerable obligations upon the parties at Joondalup Health Campus.

(2)(a) To assist in meeting these obligations, Joondalup Health Campus will assist by providing appropriate resources having regard to the operational requirements of Joondalup Health Campus and resource requirements associated with developing amendments to this Agreement aimed at achieving further salary increases in return for productivity improvements;

(b) It is accepted that employees of Joondalup Health Campus who are involved in the enterprise bargaining process will be allowed reasonable paid time to fulfil their responsibilities in this process;

(c) Access to resources shall be negotiated with Joondalup Health Campus and shall not unreasonably affect the operation of Joondalup Health Campus;

(d) Any paid time or resource shall be provided in a manner suitable to both parties and to enable negotiations to occur and to assist in the achievement of agreement;

(e) The parties accept that the process of bargaining in good faith includes disclosing relevant information, as appropriate for the purposes of the negotiations and confidentiality and privacy in the negotiation process will be respected at all times;

(f) The parties accept that on occasions the nature of certain information may prejudice a party's position or not assist in the resolution of the matter. Subject to the rights of the parties to invoke Clause 29. Dispute Avoidance and Settlement Procedures, a decision on whether or not to exchange or divulge information will be a matter for the relevant party to decide, provided that information shall not be unreasonably withheld.

(g) Where information of a commercial or sensitive nature is exchanged, the parties agree not to use or divulge that information outside of the negotiating forums.

(3) No officer or employee will be discriminated against as a result of activities conducted in accordance with this clause.

14.—CASUAL EMPLOYEES

(1) "Casual Employee" shall mean an employee engaged by the hour for a period of less than two consecutive weeks in any period of engagement.

(2) A casual employee shall be paid one seventy-sixth of the ordinary fortnightly rate of salary prescribed for the class of work for which he/she is engaged for each hour worked, plus 20% additional loading.

15.—PART-TIME EMPLOYEES

This clause replaces Clause 34.—Part-time Employees, of the Hospital Salaried Officers Award No. 39 of 1968.

(1)(a) Notwithstanding anything contained in this Agreement an employee may be regularly employed to work less hours per week than are prescribed in Clause 16. Hours, and such hours may be worked in less than five days per week.

(b) Notwithstanding the provisions of subclause (2) of Clause 16. Hours, the employer may vary the ordinary hours of a part-time employee where the employee consents in writing provided that the employer shall give the part-time employee 48 hours notice of such variation in hours. For periods of less than 48 hours payment for the hours in addition to the ordinary hours shall be paid in accordance with Clause 18. Overtime.

(2) Part-time employees shall be paid at a rate pro-rata to the rate prescribed for the class of work for which they are engaged in the proportion to which their fortnightly hours bear to 76 hours per fortnight.

(3) Part-time employees shall be entitled to the same leave, penalties and other conditions as prescribed in this Agreement for full-time employees, with payment being in the proportion to which their fortnightly hours bear to 76.

(4) A part-time worker who has commenced employment on or after the 1 July 1996 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.

(5) 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.

16.—HOURS

This clause replaces Clause 13.—Hours, of the Hospital Salaried Officers Award No. 39 of 1968.

(1)(a) The ordinary hours of work shall be an average of thirty eight per week and shall be worked by one of the following arrangements—

(i) Ordinary hours of work of thirty eight per week;

(ii) Flexitime roster covering a settlement period of four weeks;

(iii) Actual hours of seventy six over nine days with the tenth day to be taken as a paid rostered day off;

(iv) Such other arrangements as are agreed between the employer and employee. Provided that proposed hours of duty where set outside the terms of this Agreement shall be subject to ratification of the Western Australian Industrial Commission.

(v) In addition to the above arrangements, where the employee and the employer so agree in writing, shifts of not more than 12 hours may be worked.

(b) Subject to the following, where the employer and an employee or group of employees agree in writing, shifts of up to 12 hours may be worked provided the average normal hours worked in a shift cycle or settlement period does not exceed 76 per fortnight.

(i) While recognising that in the course of an averaging process there may be some individual variances, the terms and conditions of the shift agreement shall on balance be no less favourable than those prescribed by this Agreement;

(ii) The period of the shift cycle or settlement period over which the arrangement may extend shall be clearly defined;

(iii) The arrangement shall allow for a minimum of one clear day off in each 7 days;

(iv) The arrangement may allow for additional time off in lieu of penalty rates;

(v) The arrangement may allow for salary averaging of regular penalties for working on a public holiday;

(vi) Any proposed arrangement or agreement which extends beyond these parameters must be referred to the Western Australian Industrial Relations Commission for ratification.

(c) Where the employer has made a definite decision to introduce changes to shift rosters or employees' ordinary hours, the employer shall notify the employees who may be affected by the proposed changes and the Union as soon as the decision has been made and before the changes are to be introduced. Discussion with the employees and union shall occur consistent with the provisions in Clause 32. Introduction of Change.

(d) The operation of working arrangements prescribed in paragraph (a) above, shall be consistent with the working arrangements prescribed in this clause.

(2) Ordinary Hours

Subject to the Award clauses other than those expressly replaced by this Agreement, the spread of ordinary hours will be from 6.00 a.m. to 6.00 p.m. Monday to Friday inclusive with a meal break of not less than 30 minutes nor more than 60 minutes to be taken between 12.00 noon and 2.00 p.m, provided that an employee may with prior approval of their supervisor be allowed to extend the meal break beyond 60 minutes to a maximum of 90 minutes.

(3) Other Working Arrangements

(a) The ordinary hours of duty observed may be varied in accordance with subclause (1)(a)(iv) so as to make provisions for—

(i) the attendance of employees for duty on a Saturday, Sunday, or Public Holidays;

(ii) the performance of shift work including work on Saturdays, Sundays or Public Holidays; and

(iii) the nature of the duties of an employee or class of employees in fulfilling the responsibilities of their office.

Provided that where the hours of duty are so varied an employee shall not be required to work more than five hours continuously without a break unless agreed in writing between the employee and the employer.

(b) Notwithstanding the above where it is considered necessary to provide a more economic operation, the employer may authorise the operation of alternative working arrangements in the Joondalup Health Campus.

The continuing operation of any alternative working arrangements, so approved, will depend on the employer being satisfied that the efficient functioning of the hospital is being enhanced by its operation.

Such alternative working arrangements shall be in accordance with subclause (1)(a) and (d).

(4) Flexitime Arrangements

(a) Flexitime Roster

(i) The authorisation of a flexitime roster shall be the responsibility of the employer. The roster will indicate the minimum staff and any other requirements in respect to starting and finishing times, lunch break coverage and flexileave.

(ii) The roster shall cover a settlement period of four weeks and shall be made available to all affected employees no later than three days prior to the settlement period commencing.

(iii) The roster shall be prepared in consultation with the affected employees, subject to the employer retaining the right to determine arrangements to suit the operational needs of the department.

(iv) Subject to four weeks notice being given to affected employees, the employer may withdraw authorisation of a flexitime roster.

(b) Hours of Duty

(i) The ordinary hours of duty may be an average of 7 hours 36minutes per day which may be worked with flexible commencement and finishing time in accordance with the provisions of this subclause, provided that the required hours of duty for each four week settlement period shall be 152 hours.

(ii) For the purpose of leave and Public Holidays, a day shall be credited as 7 hours 36 minutes.

(c) Flexitime Periods

Within the constraints of the prepared roster and subject to the concurrence of the supervisor, employees may select their own starting and finishing time within the following periods—

6.00 a.m. to 9.30 a.m.

11.00 a.m. to 2.30 p.m. (Minimum half an hour break)

3.30 a.m. to 6.00 p.m.

(d) Core Periods

Core periods may be set by agreement between the employer and the employee.

(e) Lunch Break

(i) An employee shall be allowed to extend the meal break between 11 a.m. and 2.30 p.m. of not less than 30 minutes but not exceeding 60 minutes except as provided below.

(ii) An employee may be allowed to extend the meal break beyond 60 minutes to a maximum of 90 minutes. Such an extension is subject to prior approval of the employee's supervisor.

(f) Flexileave

(i) Within the constraints of the prepared roster and subject to the prior approval of the supervisor, an employee may be allowed a maximum of two full days or any combination of half days and full days that does not in total exceed two days in any one settlement period.

(ii) Approval to take flexileave is subject to the employee having accrued sufficient credit hours to cover the absence prior to taking the leave. In exceptional circumstances and with the approval of the employer, flexileave may be taken before accrual subject to such conditions as the employer may impose.

(g) Settlement Period

(i) For recording time worked, there shall be a settlement period which shall consist of four weeks.

(ii) The settlement period shall commence at the beginning of a pay period.

(iii) The required hours of duty for a settlement period shall be 152 hours.

(h) Credit Hours

(i) Credit hours in excess of the required 152 hours to a maximum of 7 hours 36 minutes are permitted at the end of each settlement period. Such credit hours shall be carried forward to the next settlement period.

(ii) Credit hours in excess of 7 hours 36 minutes at the end of a settlement period shall be lost.

(iii) Credit hours at any point within the settlement period shall not exceed 20 hours.

(i) Debit Hours

(i) Debit hours below the required 152 hours to a maximum of 4 hours are permitted at the end of each settlement period.

Such debit hours shall be carried forward to the next settlement period.

(ii) For debit hours in excess of 4 hours, an employee shall be required to take leave without pay for the period necessary to reduce debit hours to those specified in subparagraph (i) of this subclause.

(iii) Employees having excessive debit hours may be required to work standard working hours in addition to not being paid for the number of hours in excess of the debit hours permitted at the end of each settlement period.

(j) Maximum Daily Working Hours

Subject to subclause (1)(b), a maximum of 10 hours may be worked in any one day.

(k) Overtime

(i) Employees receiving at least one day's prior notice of overtime shall be required to work the ordinary hours of duty determined by the employer under subclause (1) of this clause.

(ii) Where an employee is required to work overtime at the conclusion of a day with less than one day's notice, and

(aa) where the employee has at the commencement of that day 2 hours or more flexitime credits, the employee shall be paid overtime after 5 hours work on that day, or for time worked after 3.30 p.m, whichever is the later, or

(bb) where the employee has commenced duty prior to 8.30 a.m and has, at the commencement of that day, less than 2 hours flexitime credits, the employee shall be paid overtime, for time worked after the completion of ordinary hours of duty or after working 7 hours 36 minutes on that day, whichever is the earlier, or

(cc) where that employee has commenced work after 8.30 a.m and has, at the commencement of that day, less than 2 hours flexitime credits, the employee shall be paid overtime for time worked after 5.30 p.m or afterworking 7 hours 36 minutes, on that day whichever is the earlier.

(iii) Where an employee is required to work overtime at the beginning of a day with less than one day's notice, that employee shall be paid overtime for any time worked prior to the commencing time for ordinary hours of duty

determined by the employer under subclause (1) of this clause.

(5) Nine Day Fortnight

(a) Hours of Duty

(i) The employer may authorise the operation of a nine day fortnight where the ordinary hours of duty of 76 hours a fortnight are worked over nine days of the fortnight, exclusive of work performed on Saturday, Sunday and the special rostered day off, with each day consisting of 8 hours and 27 minutes.

(ii) The employer shall determine employees' commencing and finishing times between the spread of 6.00 a.m and 6.00 p.m, in order to ensure that departmental requirements are met on each day.

(b) Lunch Break

A meal break shall be allowed and taken in accordance with the standard provisions of this clause.

(c) Special Rostered Day Off

Each employee shall be allowed one special rostered day off each fortnight in accordance with a roster prepared by management showing days and hours of duty and special rostered days off for each employee.

(d) Leave and Public Holidays

For the purposes of leave and Public Holidays, a day shall be credited as 8 hours 44 minutes notwithstanding the following—

(i) When a Public Holiday falls on an employee's special rostered day off the employee shall be granted a day in lieu of the holiday prior to the conclusion of the current fortnight.

(ii) For a Public Holiday occurring during a period of annual leave, an additional day will be added to the period of leave irrespective of whether it falls on a rostered work day or special rostered day off.

(iii) A four-week annual leave entitlement is equivalent to 152 hours, the equivalent to eighteen rostered working days of 8 hours 27 minutes, and two special rostered days off.

(iv) An employee who is sick on a special rostered day off will not be granted sick leave for that day, and will not be credited with an additional day off in lieu.

(e) Overtime

The provisions of the relevant overtime clause, shall apply for work performed prior to an employee's nominated starting time and after an employee's nominated ceasing time in accordance with subparagraph (a)(ii) and on an employee's special rostered day off.

(6) Flexibility

(a) Subject to the following, at the written request of an employee or the employer, the employer and employee may agree in writing to an employee working hours outside the spread of ordinary hours in which case the employer shall not be liable to pay any shift allowances, including weekend shift allowances, which, but for such agreement, would be payable.

(b) Such agreement must be at the initiative and for the convenience of the employee and employer and must not be either directly or indirectly be reached as a result of any request, direction or pressure of the employer.

(c) The agreement will clearly set out the hours arrangement to be worked.

(d) Any hours worked, at the request of the employer, outside the parameters set out in the agreement shall be deemed to be overtime.

(e) The employee may withdraw from the special arrangements at any time by advising the employer in writing.

(f) The employer may withdraw agreement for the special arrangement at any time by advising the employee in writing.

(g) Where the arrangement is withdrawn by either party the employee will revert to the normal working hours and arrangements for their work area and shall be paid accordingly.

17.—SHIFT WORK

This clause replaces Clause 28.—Shift Work, of the Hospital Salaried Officers Award No. 39 of 1968.

(1)(a) The loading on the ordinary rates of pay for an afternoon or night shift of 7 hours 36 minutes, worked in ordinary hours, shall be the same rate as prescribed from time to time in Clause 5.—Shift Work Allowance, subclause (a) of the Public Service Shift Work Agreement, 1978, No. 24 of 1978.

(b) For the purposes of this subclause—

(i) "Day Shift" shall mean a shift which commences after 6.00 a.m. and before 12.00 midday.

(ii) "Afternoon Shift" shall mean a shift which commences at or after 12.00 midday and before 6.00 p.m.

(iii) "Night Shift" shall mean a shift which commences at or after 6.00 p.m. and before 6.01 a.m.

(2)(a) Shift work performed during ordinary hours on Saturdays or Sundays shall be paid for at the rate of time and a half and on the days prescribed in subclause (1) of Clause 20. Holidays and Annual Leave, shall be paid in accordance with subclause (3) (a) of Clause 20. hereof.

(b) The rates prescribed in this subclause shall be in substitution for and cumulative on the rates prescribed in subclause (1) of this clause.

(c) Work performed by an employee in excess of the ordinary hours of his/her shift, or on a rostered day off, shall be paid for in accordance with Clause 18. Overtime.

(d) With reference to the above subclause 1(a) and this clause, the higher of the two penalties will apply.

18.—OVERTIME

This clause replaces Clause 14.—Overtime, of the Hospital Salaried Officers Award No. 38 of 1968.

(1) Subject to the provisions of subclause (3) of this clause and, except as provided in subclause (2) of this clause, all time worked at the direction of the employer outside an employee's ordinary working hours shall be paid for at the rate of time and a half for the first three hours and double time thereafter.

(2)(a) Subject to the provisions of subclause (3) of this clause all time worked at the direction of the employer outside an employee's ordinary working hours on any day between midnight and 6.00 a.m. or on a Saturday after 12.00 noon or on a Sunday shall be paid for at the rate of double time.

(b) Subject to the provisions of subclause (3) of this clause all time worked at the direction of the employer outside an employee's normal hours of work or ordinary hours in the case of a shift worker on a public holiday observed in accordance with Clause 20. Holidays and Annual Leave, shall be paid at the rate of double time and a half of the ordinary time rate.

(3) Subclauses (1) and (2) of this clause shall not apply in respect of any day on which the time worked, in addition to the ordinary hours, is less than thirty minutes.

(4) In lieu of payment for overtime an employee, on request, may be allowed time off proportionate to the payment to which he/she is entitled but if he/she so requests in writing he/she shall be allowed such time off up to a maximum of five days in each year of service. Time off shall be taken at a time convenient to the employer.

(5) Payment for overtime shall be computed on the rate applicable to the day on which the overtime is worked which

shall include any loading for afternoon or night shift, provided that with the exception of overtime worked on pubic holidays the maximum rate payable shall not exceed double the ordinary time rate.

(6) For the purpose of assessing overtime each day shall stand-alone.

(7) An employee required to work overtime beyond 2.00 p.m., or beyond 7.00 p.m. on any day shall be allowed an unpaid break of at least thirty minutes between 12.00 noon and 2.00 p.m. or between 5.00 p.m. and 7.00 p.m. as the case may be.

(8)(a) Subject to the provisions of paragraph (b) of this subclause an employee who is recalled to work for any purpose shall be paid a minimum of two hours at the appropriate overtime rate but he/she shall not be obliged to work for two hours if the work for which he/she was recalled is completed in less time, provided that if an employee is called out within two hours of starting work on a previous call he/she shall not be entitled to any further payment for the time worked within that period of two hours.

(b) Where an employee is recalled to work for any purpose, within two hours of commencing normal duty, he/she shall be paid at the appropriate overtime rate for that period up until the commencement time of normal duty, but the employee shall not be obliged to work for the full period if the work for which he/she was recalled is completed in less time.

(c) Where an employee is recalled to duty in accordance with paragraphs (a) or (b) of subclause (8) of this clause, then the payment of the appropriate overtime rate shall commence from—

(i) In the case of an employee who is on call, from the time the employee starts work.

(ii) In the case of an employee who is not on call, time spent 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 overtime payment.

Provided that where an employee is recalled within two hours of commencing normal duty, only time spent in travelling to work shall be included with actual duty for the purpose of overtime payment.

(d) An employee shall if recalled to work:—

(i) Except as provided in placitum (ii) of this paragraph, be provided free of charge with transport from their home to the hospital and return or, be paid the vehicle allowance provided in Clause 20.—Motor Vehicle Allowances of the Hospital Salaried Officers Award No.39 of 1968.

(ii) If recalled to work within two hours of commencing normal duty and the employee remains at work, he/she shall be provided free of charge with transport from his/her home to the hospital or, be paid the vehicle allowance provided in Clause 20.—Motor Vehicle Allowances of the Hospital Salaried Officers Award No. 39 of 1968 for the journey from home to hospital.

(9) (a) (i) An employee is on call when he/she is directed by the employer to remain at such a place as will enable the employer to readily contact him/her during the hours when he/she is not otherwise on duty. In determining the place at which the employee shall remain, the employer may require the place to be within a specified radius from the hospital.

(ii) An employee shall be paid an hourly allowance equal to 18.75% of 1/38th of the minimum weekly salary rate prescribed from time to time for a Medical Laboratory Technologist. Provided that payment in accordance with this paragraph shall not be made with respect to any period for which payment is otherwise made in accordance with the provisions of this clause when the employee is recalled to work.

(iii) Where the employer determines that there is a need for an employee to be on call, or to provide a consultative service and the means of contact is to be by telephone or telepage, the employer shall where the telephone is not already installed bear the cost of such installation.

(iv) (aa) Where the employee pays or contributes towards the payment of the rental of such telephone the employer shall pay the employee an amount being a proportion of the telephone rental calculated on the basis that for each seven days on which the employee is required to be on call, the employer shall pay the employee 1/52nd of the annual telephone rental.

(bb) Provided that where as a usual feature of the work an employee is regularly required to be on call or to provide a consultative service the employer shall pay the full amount of the telephone rental.

(v) Where contact with the employee is by means of a telepage or similar device the employer shall supply the equipment at no cost to the employee.

(vi) Notwithstanding the provisions of this subclause, where the employee and the union, in writing, agree other arrangements may be made for compensation of on call work.

(10) When there is no more than two Medical Imaging Technologists employed at the hospital a Medical Imaging Technologist may be required to hold him/herself available for duty outside of normal working hours in accordance with the following provisions—

(a) No restriction shall be placed on the Medical Imaging Technologist's movements but he/she shall be required to advise the hospital of his/her whereabouts while he/she remains in the metropolitan area.

(b) Before a Medical Imaging Technologist leaves the metropolitan area he/she shall advise the hospital of where he/she may be located in his/her absence, how he/she may be contacted if necessary and the approximate duration of his/her proposed absence.

(c) Subject to paragraph (d) of this subclause the Medical Imaging Technologist shall be available to provide an emergency service only and shall only be called into work by a Doctor who is giving treatment and who, in the course of that treatment, determines that x-rays are required urgently to ensure the proper care and management of the patient.

(d) Where, because of the nature of the emergency treatment being given, it is not possible for the Doctor to personally contact the Medical Imaging Technologist, another person may contact the Medical Imaging Technologist and request the Medical Imaging Technologist's attendance on the Doctor's behalf.

(e) A Medical Imaging Technologist called into work in accordance with paragraphs (c) and (d) of this clause shall attend at the required location to perform the service as soon as practicable following receipt of the call.

(f) A Medical Imaging Technologist who is required by the employer to hold him/herself available for duty outside of normal working hours in accordance with this subclause shall be entitled to an allowance equivalent to 11.5% of the rate applicable, from time to time, in respect of classification Level 3 First Year as contained in the Salary Schedule in Clause 26 of this Agreement.

(g) A Medical Imaging Technologist who is required by the employer to hold him/herself available for duty outside of normal working hours and who is recalled

to work shall be paid overtime at the appropriate overtime rate in accordance with this clause.

(h) A Medical Imaging Technologist who is required by the employer to hold him/herself available for duty outside of normal working hours in accordance with this subclause may also be placed "on call" by the employer in accordance with the "on call" provisions contained in subclause (9) of this clause. Payment for any such "on call" duties shall be at the rate prescribed in subclause (9) (a) (ii) of this clause, and shall be in addition to the availability allowance prescribed in paragraph (f) above.

(i) Notwithstanding the foregoing provisions of this Agreement where the employer and the Union agree, in writing, emergency availability services may be provided where more than two Medical Imaging Technologists are employed.

(11) Notwithstanding the foregoing provisions of this clause, where the employer and the union agree, in writing, other arrangements may be made for compensation in lieu of payment of overtime.

(12)(a) Where an employee performs overtime duty after the time at which normal hours of duty end on one day and before the time at which normal hours of duty are to commence on the next succeeding day which results in the employee not being off duty between these times for a continuous period of not less than ten hours, the employee shall be entitled to be absent from duty without loss of salary, until from the time the employee ceased to perform overtime duty the employee has been off duty for a continuous period of ten hours.

(b) Provided that where an employee is required to return to or continue work without a ten hour break, then the employee shall be paid 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.

(c) Where an employee (other than a casual employee or an employee engaged on continuous shift work) is called into work on a Sunday or holiday preceding an ordinary working day, the employee shall, whenever reasonably practicable, be given ten consecutive hours off duty before the employee's usual starting time on the next day. If this is not practicable then the provision of paragraph (b) shall apply.

(d) The provisions of this subclause shall apply in the case of shift employees who rotate from one shift to another, as if eight hours were substituted for ten when overtime is worked for this purpose of changing shift rosters.

19.—ALLOWANCES

(1) Where an employee subject to this Agreement is paid an allowance as provided under the Hospital Salaried Officers Award No. 39 of 1968, which is calculated as a percentage of a salary rate prescribed by that Award, the allowance shall for the life of this Agreement, now be calculated using the salary rates as prescribed at Clause 26. Salaries.

20.—HOLIDAYS AND ANNUAL LEAVE

This clause replaces Clause 16.—Holidays and Annual Leave, of the Hospital Salaried Officers Award No. 39 of 1968.

(1)(a) The following days or 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.

(b) Where any of the days mentioned in subclause (1)(a) hereof falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or a Monday, the holiday shall be observed on the next succeeding Tuesday.

(2)(a) 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 cas may be after completion of that annual leave.

(b) When any of the days observed as a holiday as prescribed in this clause fall on a day when a shift worker is rostered off duty and the employee has not been required to work on that day he/she 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 employee.

(3)(a) Any employee, subject to paragraph (b) of this subclause, who is required to work on the day observed as a holiday as prescribed in this clause in his/her normal hours of labour or ordinary hours in the case of a shift worker shall be paid for the time worked at the rate of double time and a half or if the employer agrees be paid for time worked at the rate of time and a half and in addition be allowed to observe the holiday on a day mutually acceptable to the employer and the employee.

(b) (i) An employee who is instructed by the employer to hold him/herself on call in accordance with the provisions of subclause (9) of Clause 18. Overtime, on a day observed as a public holiday during his/her normal hours of labour or his/her ordinary hours in the case of a shift worker shall be allowed to observe that holiday on a day mutually acceptable to the employer and the employee.

(ii) An employee who is holding him/herself on call during the period specified in the proceeding paragraph in accordance with subclause (9) of Clause 18. Overtime, shall be paid for any time worked during the period at the rate of time and a half in accordance with the provisions of subclause (8) of Clause 18. Overtime.

(c) An employee who is required to work on a public holiday outside of the hours referred to in subclause (3) (a) hereof shall be paid in accordance with subclause (2) (b) of Clause 18. Overtime.

(4) Except as hereinafter provided, after twelve months continuous service, and for each twelve months' of continuous service thereafter, an employee is entitled to a period of four consecutive weeks' annual leave.

(5) The employee shall be paid for any period of annual leave prescribed by this clause at the ordinary rate of salary, and in the case of shift workers that rate of salary shall include the shift and weekend penalties the employee would have received had the employee not proceeded on annual leave. Where it is not possible to calculate the shift and weekend penalties the employee would have received, the employee shall be paid at the rate for the average of such payments made each week over the four weeks prior to taking leave.

(6) By mutual agreement, annual leave may be taken before the completion of each 12 months' continuous service.

(7) (a) (i) If after one calendar month's continuous service in any qualifying twelve monthly period, an employee leaves his/her employment or his/her employment is terminated by the employer through no fault of the employee, the employee

shall be paid pro-rata annual leave calculated according to the following formula:—

Completed Calendar Months' of Service	Pro-Rata Annual Leave (Working Days)
1	2
2	3
3	5
4	7
5	8
6	10
7	12
8	13
9	15
10	17
11	18

(ii) An employee provided for in subclause (7) of this clause shall, in addition to the payment prescribed in paragraph (a) (i), be paid one day's pay at his/her ordinary rate of salary in respect of each seven Sundays and/or public holidays worked in the period, provided that the maximum additional payment shall not exceed five days' pay.

(iii) An employee who commences on the first working day of the month and works' for the remainder of the month and an employee who has worked throughout a month and terminates on the last working day of a month shall be regarded as having completed that calendar month of service.

(iv) Notwithstanding paragraphs (a) (i) and (a) (ii) of this subclause, in the first and last months of an employee's service, the employee is entitled to pro-rata annual leave of one working day for each completed two weeks of service.

(b) The rate prescribed in subclause (3) hereof shall be paid in lieu of the amounts to which an employee may be entitled pursuant to Clause 17.—Shift Work.

(c) If the services of an employee terminate and the employee has taken a period of leave in accordance with this subclause and if the period of leave taken exceeds that which would become due pursuant to paragraph (a) of this subclause, the employee shall be liable to pay the amount representing the difference between the amount received by him/her for the period of leave taken and the amount which would have accrued. The employer may deduct this amount from monies due to the employee on termination of employment.

(8) A shift employee rostered to work ordinary hours on Sundays and/or public holidays shall be entitled to additional annual leave as follows:—

(a) If 35 ordinary shifts on such days have been worked—one week.

(b) If less than 35 ordinary shifts on such days have been worked—one additional day (to a maximum of five days) for each seven ordinary shifts so worked.

(9) Annual leave may by mutual agreement be taken in two portions provided that no portion shall be less than two consecutive weeks.

(10)(a) When an employee proceeds on annual leave he/she shall be paid a loading of 17.5% of his/her ordinary salary.

(b) Shift workers when proceeding on annual leave including accumulated annual leave shall be paid—

(i) shift and weekend penalties the employee would have received had he/she not proceeded on annual leave, or;

(ii) a loading equivalent to 20% or normal salary; whichever is the greater.

(c) Provided that the maximum loading payable shall not exceed the amount set out in the Australian Bureau of Census and Statistics Publication for "average weekly earnings per male employed" in Western Australia for the September quarter immediately proceeding the date the leave became due.

(d) The loading prescribed in this subclause shall not apply to proportionate leave on termination.

(e) The loading prescribed in this subclause shall be payable on Retirement, provided the employee is over 55 years of age.

(11) A full time employee who, during a qualifying period towards an entitlement of annual leave was employed continuously on both a full time and part time basis may elect to take a lesser period of annual leave calculated by converting the part time service to equivalent full time service.

(12) The provisions of this clause shall not apply to casual employees.

21.—SICK LEAVE

This clause replaces Clause 18.—Sick Leave of the Hospital Salaried Officers Award No. 39 of 1968.

(1) An employee who is unable to attend work as a consequence of illness or injury shall as soon as reasonably practicable and if possible prior to the commencement of the duty/shift advise the employer of his/her inability to attend work, the nature of the illness or injury and the estimated duration of the absence. Failure to do so shall be treated as absent without leave.

(2)(a) Absence exceeding two consecutive working days shall be supported by the certificate of a registered medical practitioner or, where the illness consists of a dental condition and the period does not exceed five consecutive working days, by a certificate of a registered dentist.

(b) The number of days granted without production of a medical certificate shall not exceed, in aggregate, five working days in any one calendar year. Days taken as Personal Leave in accordance with Clause 22 (3) (c) count as days without a medical certificate for the purposes of this paragraph.

(3)(a) Subject to the provisions of subclause (2) of this clause no paid sick leave shall be granted without the production of a medical certificate.

(b) An employee unable to resume duty on the expiration of the period shown on the first medical certificate shall furnish further certificates for each period of sick leave until resumption of duty.

(4) An employee who suffers personal illness or injury during his/her annual leave or long service leave may be paid sick leave in lieu of such leave subject to—

(a) for annual leave; confinement to his/her place of residence or a hospital for a period of at least seven days.

(b) for long service leave; confinement to his/her place of residence or a hospital for a period of at least fourteen days.

(c) the production of medical evidence to the satisfaction of the employer.

(d) the portion of annual leave or long service leave so granted is taken at a time convenient to the employer.

(5) The basis for determining the cumulative accrual of sick leave shall be—

	Leave On Full Pay Working Days
(a) On date of employment of the employee	5
(b) On completion by the employee of six months' service	5
(c) On completion by the employee of twelve months' service	10
(d) On completion of each additional twelve months' service by the employee	10

(6) When an employee is absent on account of illness/injury and his/her entitlement to sick leave on full pay is exhausted, he/she may, with the approval of the employer, elect to convert any part of their entitlement to sick leave on half pay to sick leave on full pay, but so that his/her sick leave entitlement on half pay is reduced by two days for each day of sick leave on full pay that he/she receives by the conversion.

(7) No sick leave with pay shall be granted if the illness has been caused by the misconduct of the employee or in any case of absence from duty without sufficient cause.

(8) An employee who is absent on leave without pay is not eligible for sick leave during the currency of that leave without pay.

(9) Where an employee suffers personal injuries by accident that are compensable in accordance with the provisions of the Workers' Compensation and Rehabilitation Act, 1981, and which necessitates the granting of sick leave—

(a) No charge shall be made against his/her sick leave credits until the period of leave exceeds twenty-six weeks. The employee shall receive full pay for such leave of absence; and

(b) Where the employee is unable to resume duty at the expiration of the period of twenty six weeks, he/she shall be granted on full pay or half pay as the case requires, such further leave under this subclause as is required, but half the period only of such further leave shall be charged against his/her sick leave credits on full pay or half pay, as the case may be.

(10) A pregnant worker shall not be refused sick leave by reason only that the "illness or injury" encountered by her is associated with the pregnancy.

(11) The provisions of this clause shall not apply to casual employees.

22.—FAMILY, BEREAVEMENT AND PERSONAL LEAVE

This clause replaces Clause 17.—Short Leave, of the Hospital Salaried Officers Award No. 39 of 1968.

(1) Family Leave

(a) In this subclause "family member" means the employee's spouse, defacto spouse, child, stepchild, parent, stepparent. 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 Clause 21. Sick Leave.

(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 be entitled to bereavement leave of up to three (3) days on ordinary pay, on the death of the employees spouse, defacto spouse, child, step child, parent, step parent, parents-in-law, grandchild, grandparent, brother, sister, step brother or step sister, or any other person who immediately before that person's death, lived with the employee as a member of the employee's family.

Provided that at the request of an employee the employer may exercise discretion to grant bereavement leave to an employee in respect of some other person with whom the employee has a special relationship.

(b) The employee shall produce evidence of such death if so requested.

(c) The three (3) days need not be consecutive.

(d) Reasonable additional leave may be granted where an employee has assumed significant responsibility for the arrangements to do with the ceremonies resulting from the death; or where cultural obligations necessitate a longer period of bereavement leave.

(e) An employee requiring more than three (3) 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 outstanding long service leave entitlements in weekly multiples and/or leave without pay provided all accrued leave is exhausted.

(f) Bereavement leave is not to be taken during any other period of leave.

(3) Special Personal Leave

(a) Without Pay

The employer may upon the request of an employee, grant that employee special leave without pay for any special or personal reason.

(b) Use of Annual Leave

The employer may, upon the request of an employee and with sufficient cause being shown, which may in the circumstances be with little notice, grant that employee single days of annual leave for pressing personal emergencies.

(c) The employee is entitled to use up to two (2) days per year of his/her accrued sick leave entitlement to attend to pressing personal needs, providing that a minimum of ten (10) days of sick leave remains to the employees credit.

23.—LONG SERVICE LEAVE

This clause replaces Clause 19.—Long Service Leave, of the Hospital Salaried Officers Award No. 39 of 1968.

(1) Right to Leave.

An employee shall, as herein provided, be entitled to leave with pay in respect of long service.

(2) Long Service.

(a) The long service which shall entitle an employee to such leave shall, subject as herein provided, be continuous service with one and the same employer.

(b) Such service shall include service prior to the first day of April 1958, if it continued until such time but only to the extent of the last 20 completed years of continuous service.

(c) (i) Where a business has, whether before or after the coming into operation hereof, been transmitted from an employer (herein called "the transmitter") to another employer (herein called "the transmittee") and an employee who at the time of such transmission was an employee of the transmitter in that business becomes an employee of the transmittee the period of the continuous service which the employee has had with the transmitter (including any such service of the employee with the transmittee.)

(ii) In this subclause "transmission" includes transfer, conveyance, assignment or succession whether voluntary or by agreement or by operation of law and "transmitted" has a corresponding meaning.

(d) Where, over a continuous period, a employee has been employed by two or more companies each of which is a related company as defined in subclause (9), the period of the continuous service which the employee has had with each of those companies shall be deemed to be service of the employee with the company by whom he/she is last employed.

(e) Such service shall include—

(i) any period of absence from duty on any annual leave or long service leave: Provided that where an employee takes long service leave in accordance with subclause (5), placitum (a)(iv)(aa) or (bb), leave counted as service shall be half the period of leave taken on half pay.

(ii) any period of absence from duty necessitated by sickness of or injury to the employee to the extent of the employee sick leave entitlements.

(iii) any period following any termination of the employment by the employer if such termination has been made merely with the intention

of avoiding obligations hereunder in respect of long service leave or obligations under any award in respect of annual leave;

(iv) any period during which the service of the employee was or is interrupted by service—

(aa) as a member of the Naval, Military or Air Forces of the Commonwealth of Australia other than as a member of the British Commonwealth Occupation Forces in Japan and other than as a member of the Permanent Forces of the Commonwealth of Australia except in the circumstances referred to in section 31 (2) of the Defence Act 1903—1956, and except in Korea or Malaya after 26 June 1950;

(bb) as a member of the Civil Construction Corps established under the National Security Act 1939—1946;

(cc) in any of the Armed Forces under the National Service Act 1951 (as amended).

Provided that the worker as soon as reasonably practicable on the completion of any such service resumed or resumes employment with the employer by whom he/she was employed immediately before the commencement of such service.

(f) Service shall be deemed to be continuous notwithstanding—

(i) the transmission of a business as referred to in paragraph (c) of this subclause;

(ii) the employment with related companies as referred to in paragraph (d) of this subclause;

(iii) any interruption of a class referred to in paragraph (e) of this subclause;

(iv) any absence from duty authorised by the employer;

(v) any standing down of an employee in accordance with the provisions of an award, industrial agreement, order or determination under either Commonwealth or State law;

(vi) any absence from duty arising directly or indirectly from an industrial dispute if the employee returns to work in accordance with the terms of settlement of the dispute;

(vii) any termination of the employment by the employer for any reason other than misconduct or unsatisfactory service if the employee is re-employed by the same employer within a period not exceeding six months from the date of such termination, but only if payment pursuant to subclause (3), paragraph (d) of this clause has not been made;

(viii) any reasonable absence of the employee on legitimate union business in respect of which he/she has requested and been refused leave;

(ix) any absence from duty after the coming into operation of this clause by reason of any cause not specified in this clause unless the employer, during the absence or within 14 days of the termination of the absence notifies the employee in writing that such absence will be regarded as having broken the continuity of service, which notice may be given be delivery to the employee personally or by posting it by registered mail to his/her last recorded address, in which case it shall be deemed to have reached him/her in due course of post.

Provided that the period of absence from duty or the period of any interruption referred to in placita (iv) to (ix) inclusive of this paragraph shall not (except as set out in paragraph (e) of this subclause) count as service.

(3) Period of Leave.

(a) The leave to which an employee shall be entitled or deemed to be entitled shall be as provided in this subclause.

(b) Subject to the provisions of paragraphs (e) and (f) of this subclause—

Where an employee has completed at least 15 years' service the amount of leave shall be—

(i) in respect of 15 years' service so completed—13 weeks' leave;

(ii) in respect of each 10 years' service completed after such 15 years—eight and two thirds weeks' leave;

(iii) on the termination of the employee's employment—

(aa) by his death;

(bb) in any circumstances otherwise than by his 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 13 weeks for 15 years' service.

(c) Subject to the provisions of paragraph (f) of this subclause, where an employee has completed at least 10 years' service but less than 15 years' service since its commencement and the employment is terminated—

(i) by his/her death; or

(ii) in any circumstances, otherwise than by the employer for serious misconduct;

the amount of leave shall be such proportion of 13 weeks' leave as the number of completed years of such service bears to 15 years.

(d) A lump sum payment for long service leave accrued in accordance with this clause and for pro-rata long service leave, the amount of which shall be in such proportion of 13 weeks leave as the number of completed years of such service bears to 15 years, shall be made in the following cases—

(i) To an employee who retires at or over the age of fifty five years or who has retired on the grounds of ill health, provided that no payment shall be made for pro-rata long service leave unless the employee has completed not less than twelve months' continuous service.

(ii) To an employee who has retired for any other cause: Provided that no payment shall be made for pro-rata long service leave unless the employee had completed not less than three years' continuous service before the date of his/her retirement.

(iii) To the widow of an employee or such other person as may be approved by the employer in the event of the death of an employee: Provided that no payment shall be made for pro-rata long service leave unless the employee had completed not less than twelve months' continuous service prior to the date of the death of the employee.

(e) In the cases to which paragraphs (b) (iii) and (c) of this subclause apply the employee shall be deemed to have been entitled to and to have commenced leave immediately prior to such termination.

(f) Long service leave accrued prior to the issue of this Agreement, where the employee did not elect to have his/her long service leave paid out on transfer from Wanneroo Hospital to Joondalup Health Campus, shall remain to the credit of each employee.

(4) Payment for Period of Leave.

(a) An employee shall be entitled to be paid for each week of leave to which he/she has become entitled or is deemed to have become entitled the rate of pay applicable to him/her at the date he/she commences such leave, or where applicable, the rate of salary of

an employee at the date of retirement, resignation or death.

(b) Such rate of pay shall be the rate applicable to him/her for the standard weekly hours which are prescribed by this Agreement, but in the case of casuals and part-time employees shall be the rate for the number of hours usually worked up to but not exceeding the prescribed standard.

(c) The rate of pay—

(i) shall include any deductions from wages for board and/or lodging or the like which is not provided and taken during the period of leave;

(ii) shall not include shift premiums, overtime, penalty rates, special rates, disability allowances, fares and travelling allowances or the like.

(5) Taking Leave.

(a) In a case to which placita (i) and (ii) of paragraph (b) of subclause (3) apply—

(i) Leave shall be granted and taken as it falls due but within three years next after becoming entitled thereto at such time or times as may be agreed between the employer and the employee or in the absence of such agreement at such time or times as may be determined by the Special Board of Reference having regard to the needs of the employer's establishment and the employee's circumstances: Provided that the employer may approve the accumulation of long service leave not exceeding six months.

(ii) Leave may be granted and taken in one continuous period or if the employer and the employee so agree in weekly multiples on full, half or compacted pay, provided that where an employees remaining portion of accrued outstanding leave entitlement is less than a week, such portion may be taken.

(iii) Upon application by an employee, an employer may approve of the taking by the employee—

(aa) Of double the period of long service leave entitlement on half pay, in lieu of the period of long service leave on full pay;

(bb) Of any portion of the employee's entitlement to long service leave on full pay or double such period on half pay.

(cc) A full time employee who, during a qualifying period towards an entitlement of long service leave was employed continuously on both a full time and part time basis may elect to take a lesser period of long service leave calculated by converting the part time service to equivalent full time service.

(dd) Notwithstanding the provisions of paragraph (ii) of this subclause an employee who has elected to compact an accrued entitlement to long service leave in accordance with paragraph (iii) of this subclause shall only take such leave in one period of full pay.

(iv) Any leave shall be inclusive of any public holidays specified in the Award (or Agreement) occurring during the period when the leave is taken but shall not be inclusive of any annual leave.

(v) Payment shall be made in one of the following ways:—

(aa) In full before the employee goes on leave;

(bb) At the same time as his/her wages would have been paid to him/her if the employee had remained at work, in which case payment shall, if the employee in writing so requires, be made by cheque posted to an address specified by the employee; or

(cc) In any other way agreed between the employer and the employee.

(vi) No employee shall, during any period when he/she is on leave, engage in any employment for hire or reward in substitution for the employment from which he/she is on leave, and if an employee breaches this provision he/she shall thereupon forfeit the right to leave hereunder in respect of unexpired period of leave upon which he/she has entered, and the employer shall be entitled to withhold any further payment in respect of the period and to reclaim any payments already made on account of such period of leave.

(b) In the case to which paragraph (b) (iii) or paragraph (c) of subclause (3) applies and in any case in which the employment of the employee who has become entitled to leave hereunder is terminated before such leave is taken or fully taken the employer shall, upon termination of his/her employment otherwise than by death pay to the employee, and upon termination of employment by death pay to the personal representative of the employee upon request by the personal representative, a sum equivalent to the amount which would have been payable in respect of the period of leave to which he/she is entitled or deemed to have been entitled and which would have been taken but for such termination. Such payment shall be deemed to have satisfied the obligation of the employer in respect of leave hereunder.

(6) Granting Leave in Advance and Benefits to be brought into Account.

(a) The employer may by agreement with an employee allow leave to such an employee before the right thereto has accrued due, but where leave is taken in such case the employee shall not become entitled to any further leave hereunder in respect of any period until after the expiration of the period in respect of which such leave had been taken before it accrued due.

(b) Where leave has been granted to an employee pursuant to the preceding paragraph before the right thereto has accrued due, and the employment subsequently is terminated, the employer may deduct from whatever remuneration is payable upon the termination of the employment such amount as represents payment for any period for which the employee has been granted long service leave to which the employee was not at the date of termination of employment or prior thereto entitled.

(c) Any leave in the nature of long service leave or payment in lieu thereof under a State Law or a long service leave scheme not under the provisions hereof granted to an employee by the employer in respect of any period of service with the employer shall be taken into account whether the same is granted before or after the coming into operation hereof and shall be deemed to have been taken and granted hereunder in the case of leave with pay to the extent of the period of such leave and in the case of payment in lieu thereof to the extent of a period of leave with pay equivalent thereof of the entitlement of the employee hereunder.

(7) At the request of the employee and with the agreement of the employer, an employee faced with pressing personal needs, may be paid in lieu of taking a portion of outstanding long service leave entitlements.

(8) Records to be kept.

(a) The employer shall during the employment and for a period of 12 months thereafter, or in the case of termination by death of the employee for a period of three years thereafter, keep a record from which can be readily ascertained the name and occupation of each employee, the date of the commencement of

his/her employment and the employees entitlement to long service leave and any leave which may have been granted or in respect of which payment may have been made hereunder.

(b) Such record shall be open for inspection in the manner and circumstances prescribed by this Agreement with respect to the time and wages record.

(9) Special Board of Reference.

(a) A Special Board of Reference may be constituted in accordance with Clause 33—Board of Reference of the Hospital Salaried Officers Award, 1968 for the purpose hereof to which all disputes and matters arising hereunder shall be referred and the Board shall determine all such disputes and matters.

(b) There shall be assigned to such Board the functions of—

(i) the settlement of disputes of any matters arising hereunder;

(ii) the determination of such matters as are specifically assigned to it hereunder.

(10) Related Company Definition.

For the purposes of this clause, a related Company shall be defined as follows—

(a) A Corporation shall, subject to the provisions of subsection (c) of this section, be deemed to be a subsidiary of another corporation, if,

(i) that other corporation—

(aa) controls the composition of the board of directors of the first mentioned corporation;

(bb) controls more than half of the voting power in the first mentioned corporation; or

(cc) holds more than half of the issued share capital of the first mentioned corporation excluding any part thereof which carries no light to participate beyond a specified amount in a distribution of either profits or capital; or

(ii) the first mentioned corporation is a subsidiary of any corporation which is that other corporation's subsidiary.

(b) For the purpose of subsection (a) of this section, the composition of a corporation's board of directors shall be deemed to be controlled by another corporation if that other corporation by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove all or a majority of the directors; and for the purposes of this provision that other corporation shall be deemed to have power to make such an appointment if—

(i) a person cannot be appointed as a director without the exercise in his/her favour by that other corporation of such power; or

(ii) a person's appointment as a director follows necessarily from his/her being a director or other officer of that other corporation.

(c) In determining whether one corporation is subsidiary of another corporation—

(i) any shares held or power exercisable by that other corporation in a fiduciary capacity shall be treated as not held or exercisable by it;

(ii) subject to paragraphs (iii) and (iv) of this subsection, any shares held or power exercisable—

(aa) by any person as a nominee for that other corporation (except where that other corporation is concerned only in a fiduciary capacity); or

(bb) by, or by a nominee for, a subsidiary of that other corporation, not being a subsidiary which is concerned only in a fiduciary capacity,

shall be treated as held or exercisable by that other corporation;

(iii) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first mentioned corporation or of a trust deed for securing any issue of such debentures shall be disregarded; and

(iv) any shares held or power exercisable by, or by a nominee for, that other corporation or its subsidiary (not being held or exercisable as mentioned in paragraph (c) of this subsection) shall be treated as not held or exercisable by that other corporation if the ordinary business of that other corporation or its subsidiary, as the case may be, includes the lending of money and the shares are held or power is so exercisable by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

(d) A reference to the holding company of a company or other corporation shall be read as a reference to a corporation of which that last mentioned company or corporation is a subsidiary.

(e) Where a corporation—

(i) is the holding company of another corporation;

(ii) is a subsidiary of another corporation;

(iii) is a subsidiary of the holding company of another corporation,

that first mentioned corporation and that other corporation shall for the purposes of this Act Clause be deemed to be related to each other.

24.—PARENTAL LEAVE

This clause replaces Clause 18A.—Maternity Leave, of the Hospital Salaried Officers Award No. 39 of 1968.

(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) Employees who are employed by the month are entitled to 52 weeks unpaid parental leave in relation to the birth or adoption of their child. For females maternity leave may be taken and for males paternity leave may be taken. Adoption leave may be taken in the case of adoption.

(b) Parental leave is to be available to only one parent at a time, except that both parents may simultaneously access the leave in the following circumstances—

(i) for maternity leave and paternity leave, an unbroken period of one week at the time of the birth of the child—

(ii) for adoption leave, an unbroken period of up to three weeks at the time of placement of the child.

(c) In order to demonstrate to the employer that, subject to paragraph (b), only one parent will be off on Parental leave at a time an employee shall, when applying for parental leave, provide the employer with a statutory declaration stating particulars of any period of parental leave sought or taken by his or her spouse.

(3) Maternity leave

(a) An employee will provide to the employer at least ten weeks in advance of the expected date of confinement of parental leave—

(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 (2) and unless agreed otherwise between the employer and employee, an employee 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 work on her normal duties.

(d) Where the pregnancy of an employee terminates after 27 weeks and the employee has not commenced maternity leave, the employee may take unpaid special maternity leave of 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 birth, an employee may be entitled to paid sick leave 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.

(4) Paternity leave

An employee will provide the employer at least ten weeks prior to each proposed period of paternity leave with—

(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 examination 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 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 is to be notified at lease 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 they have 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) Returning to work after a period of parental leave.

(a) An employee will notify of their intention to return to work after a period of parental leave at least four weeks prior to the expiration of the leave.

(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 (8), the employee will be entitled to return to the position they held immediately before such transfer.

(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.

(11) Return to work incentive

(a) As an incentive to return to work employees shall be eligible for six (6) weeks salary where leave is taken pursuant to the provisions of this Clause.

(b) Eligible employees shall receive payment of three (3) weeks salary commencing six (6) weeks prior to their return to work. Payment will be made fortnightly over the six (6) week period.

(c) The employee is required to complete six (6) months service after returning to work to qualify for the full payment, when such payment shall be made.

(d) Such payments shall be calculated at the employee's ordinary weekly hours applicable at the time of commencement on Parental Leave.

(e) Should the employee not complete six (6) months service from the date of return to work, the employer may recover the initial payments prescribed in paragraph (b).

(f) The provisions of this sub clause are only applicable to one parent on each occasion.

(g) These arrangements will apply to eligible employees who commence Parental Leave from the date of operation of this Agreement.

(12) Replacement employees

(a) A replacement employee is an employee specifically engaged or temporarily promoted or transferred, as a result of an employee proceeding on parental leave.

(b) A replacement employee will be informed of the temporary nature of the employment and of the rights of the employee who is being replaced.

25.—STUDY LEAVE

(1) Where an employee is engaged in a course of study which is relevant to his/her profession of work, time off without deduction of pay may be approved as follows—

(a) Full time employees—

(i) to attend to classes, lectures, or tutorials —up to 5 hours per week;

(ii) the day before the examination;

(iii) to attend final examinations

—the day of the examination.

(b) Part time employees whose normal weekly hours exceed twenty-four (24)—

(i) the day before the examination;

(ii) to attend final examinations

—the day of the examination.

Provided that the classes, lectures, or tutorials fall within the parameters of the employee's normal working hours.

26.—SABBATICAL LEAVE

(1) Eligibility

(a) Full time and part time employees with more than two (2) years continuous service are eligible to apply.

(b) Applications must be in writing and approval will be determined by the employer based on operation requirements.

(2) Period of Leave

(a) The period of leave will be for twelve (12) months and must be commenced within twelve (12) months of falling due.

(b) An employee will not be able to return to his/her same position during the twelve (12) month leave period.

(c) Should alternative employment be sought during the year of leave, the employee will advise the employer.

(3) Payment of Salary

(a) During the four year accrual period an employee shall receive eighty per cent (80%) of his/her normal fortnightly salary. Normal salary is defined as normal fortnightly salary plus any associated allowances. In the fifth year, when the leave is taken, the employee will receive the money contributed over the four (4) year period.

(b) Interest is not paid on amounts accumulated during the accrual period.

(c) The employee will be taxed only on the amount actually received.

(d) Prior to entering into the scheme, employees should discuss taxation implications and other related issues with their accountant or financial adviser.

(4) Suspension of Contributions

(a) Participation in the scheme will be suspended during any period of unpaid leave. Any period of unpaid leave will reduce payments into the fund and therefore proportionately reduce the accrued payment in the year of leave.

(b) An employee may elect to suspend contributions for a period of less than twelve months once during the accrual period. This will also reduce the accrued payment in the year of leave.

(c) The employer retains the discretionary authority to approve suspension for a period of up to twelve (12) months at the request of the employee. Accordingly, such a suspension will extend the taking of the year of leave by up to one year.

(5) Withdrawal

(a) An employee may withdraw from the scheme at any time by notifying the employer in writing. Only the exact money paid into the scheme will be paid in a lump sum on withdrawal and no interest will be paid on this amount.

(b) An employee who withdraws from the scheme will be taxed on the lump sum payment and any other salary received during that financial year.

(6) Long Service Leave, Sick Leave and Increment Entitlements

(a) An employee will accrue such entitlements at one hundred per cent (100%) of the normal accrual rate over the first four years only. The fifth year, the year of leave, is a non-accrual period.

(b) If an employee becomes eligible for long service leave during the fourth year of the deferred salary scheme, the long service leave entitlement will be deferred and may be taken in the fifth year of the scheme or taken in the final term/semester of the fourth year of the scheme, or the first term/semester of the sixth year.

(7) Workers' Compensation

(a) An employee is covered by workers' compensation during the first four years at one hundred per cent (100%) of his/her salary. An employee in receipt of workers' compensation during the first four years may elect to continue in the deferred salary scheme or suspend his/her contributions until he/she returns to full duties.

(b) Any period of suspension due to workers' compensation shall be undertaken in accordance with11' sub clause (4) hereof.

(c) During the fifth year, the year of leave, the employee is not covered by workers' compensation.

(8) Superannuation

(a) Contributions are based on one hundred per cent (100%) of the employee's normal salary over the first four years only with the year of sabbatical leave, the fifth year, being treated as a year of leave without pay for superannuation purposes.

(b) An employee may arrange with the employer to continue contributions to their superannuation from his/her pre tax pay during the period of sabbatical leave.

(9) Overtime

All overtime rates, shift allowances, on call allowances, availability allowances and any other allowances which are salary based will be based on one hundred per cent (100%) of the employees ordinary salary.

(10) Fund Management

(a) The scheme will be managed by the employer. During the four (4) year accrual period twenty per cent (20%) of salary foregone on a two (2) weekly basis will be held by the employer. The employee will receive a statement from the employer at the end of each year showing the amount accumulated in the scheme.

(b) All contributions are guaranteed by Mayne Nickless Limited operating as Joondalup Health Campus.

(11) Payment of Leave

When sabbatical leave, the fifth year, is taken, the accumulated amount may be paid on a fortnightly basis through the payroll system, or may be paid in one lump sum payment at the commencement of the leave, or in two equal payments six months apart.

27.—CLASSIFICATION AND GRADING OF EMPLOYEES

(1) The employer shall allocate a salary classification level in accordance with Clause 28. Salaries, to each position by establishing the work value of the position taking account of internal and external relativities relevant to the position, in accordance with the State Wage Principles of the Western Australian Industrial Relations Commission. In arriving at an appropriate salary level, the employer shall also have due regard for any qualification(s) which may be a prerequisite for carrying out the position.

(2) An employee may request a review of the classification allocated in accordance with subclause (1) or, at any time, where a change in duties and responsibilities has occurred. A request for review of classification shall be by—

(a) Requesting the review in writing to the employer,

(b) Setting out the grounds upon which the request is made,

(c) Detailing the classification level and/or title which is being requested, and

(d) Providing a current job description of the employee's position.

Providing that not more than one request may be made by an individual employee in any twelve-month period, the employer shall give the employee written advice of the result of the review.

(3) If the employee disagrees with the result of the review, the union may enter into negotiations with the employer with a view to settling the disagreement in accordance with Clause 31.—Dispute Avoidance and Settlement Procedures.

(4) If the parties cannot reach agreement as to the classification level of any employee, the matter may be referred to the Western Australian Industrial Relations Commission for determination.

(5) The effective date for any change in classification level shall be one month after the date upon which the letter of request is served upon the employer.

28.—SALARIES

(1) The minimum annual salaries for employees' bound by this Agreement shall be as set out hereunder.

(2) Minimum Salaries are as follows—

Levels	Existing Rate Salary P/Annum	3% Increase Effective 01 Jan 1999 Salary P/Annum	3 % Increase Effective 01 Jan 2000 Salary P/Annum
LEVEL 1			
Under 17 years of age	12237	12604	12982
17 years of age	14289	14718	15160
18 years of age	16680	17180	17695
19 years of age	19306	19885	20482
20 years of age	21681	22331	23001
1st year of full time equivalent adult service	23816	24530	26266
2nd year of full time equivalent adult service	24551	25288	26047
3rd year of full time equivalent adult service	25282	26040	26821
4th year of full time equivalent adult service	26011	26791	27595
LEVEL 2	26742	27544	28370
	27475	28299	29148
	28317	29167	30042
	28900	29767	30660
	29760	30653	31573
LEVEL 3	30777	31700	32651
	31567	32514	33489
	32399	33371	34372
	33724	34736	35778
LEVEL 4	34418	35451	36515
	35459	36523	37619
	36527	37623	38752
	38047	39188	40364
LEVEL 5	38838	40003	41203
	39926	41124	42358
	41045	42276	43544
	42196	43462	44766
LEVEL 6	44414	45746	47118
	46060	47442	48865
	48400	49852	51348
LEVEL 7	49651	51141	52675
	51237	52774	54357
	52880	54466	56100
LEVEL 8	55280	56938	58646
	57248	58965	60734
LEVEL 9	60226	62033	63894
	62298	64167	66092
LEVEL 10	64566	66503	68498
	68214	70260	72368
LEVEL 11	71128	73262	75460
	74091	76314	78603
LEVEL 12	78154	80499	82914
	80899	83326	85826
	84029	86550	89147
CLASS 1	88764	91427	94170
CLASS 2	93498	96303	99192
CLASS 3	98231	101178	104213
CLASS 4	102965	106054	109236

(a) An employee, who is 21 years of age or older on appointment to a classification equivalent to Level 1, may be appointed to the minimum rate of pay based on years of service, not on age.

(b) A Medical Typist or Medical Secretary shall be paid a medical terminology allowance of $1000 per annum.

For the purposes of this subclause 'Medical Typist' and 'Medical Secretary' shall mean those workers classified on a classification equivalent to Level 1, 2, or 3 who spend at least 50% of their time typing from tapes, shorthand, and/or Doctor's notes of case histories, summaries, reports or similar material involving a broad range of medical terminology.

(3) Salaries.—Specified Callings and Other Professionals are as follows;

(a) Employees, who possess a relevant tertiary level qualification, or equivalent as agreed between the union and the employers, and who are employed in the callings of Architect, Audiologist, Bio Engineer, Chemist, Dietitian, Engineer, Medical Scientist, Librarian, Occupational Therapist, Physiotherapist, Physicist, Pharmacist, Clinical Psychologist, Psychologist, Research Officer, Scientific Officer, Social Worker, Speech Pathologist, Podiatrist, Medical Imaging Technologist, Nuclear Medicine Technologist, Radiation Therapist, Orthotist, or any other professional calling as agreed between the Union and employers, shall be entitled to Annual Salaries as follows:

Levels	Existing Rate Salary P/Annum	3% Increase Effective 01 Jan 1999 Salary P/Annum	3 % Increase Effective 01 Jan 2000 Salary P/Annum
LEVEL 3/5	30777	31700	32651
	32399	33371	34372
	34418	35451	36515
	36527	37623	38752
	39926	41124	42358
	42196	43462	44766
LEVEL 6	44414	45746	47118
	46060	47442	48865
	48400	49852	51348
LEVEL 7	49651	51141	52675
	51237	52774	54357
	52880	54466	56100
LEVEL 8	55280	56938	58646
	57248	58965	60734
LEVEL 9	60226	62033	63894
	62298	64167	66092
LEVEL 10	64566	66503	68498
	68214	70260	72368
LEVEL 11	71128	73262	75460
	74091	76314	78603
LEVEL 12	78154	80499	82914
	80899	83326	85826
	84029	86550	89147
CLASS 1	88764	91427	94170
CLASS 2	93498	96303	99192
CLASS 3	98231	101178	104213
CLASS 4	102965	106054	109236

(b) Subject to paragraph (d) of this sub clause, on appointment or promotion to the Level 3/5 under this sub clause—

(i) Employees, who have completed an approved three academic year tertiary qualification, relevant to their calling, shall commence at the first year increment;

(ii) Employees, who have completed an approved four academic year tertiary qualification, relevant to their calling, shall commence at the second year increment;

(iii) Employees, who have completed an approved Masters or PhD Degree relevant to their calling shall commence on the third year increment;

Provided that employees who attain a higher tertiary level qualification after appointment shall not be entitled to any advanced progression through the range.

(c) The employer and union shall be responsible for determining the relevant acceptable qualifications for appointment for the callings covered by this sub

clause and shall maintain a manual setting out such qualifications.

(d) The employer in allocating levels pursuant to paragraph (b) of this sub clause may determine a commencing salary above Level 3/5 for a particular calling/s.

(4) The following conditions shall apply to employees in the callings detailed below—

Engineers—

Employees employed in the calling of Engineer and who are classified Level 3/5 under this Agreement shall be paid a minimum salary at the rate prescribed for the maximum of Level 3/5 where the employee is an "experienced engineer" as defined.

For the purposes of this paragraph "experienced engineer" shall mean—

(a) An engineer appointed to perform professional engineering duties and who is a Corporate Member of the Institution of Engineers, Australia, or who attains that status during service.

(b) An engineer appointed to perform professional duties who is not a Corporate Member of the Institution of Engineers, Australia but who possesses a degree or diploma from a University, College, or Institution acceptable to the employer on the recommendation of the Institution of Engineers, Australia, and who—

(i) having graduated in a four or five academic year course at a University or Institution recognised by the employer, has had four years experience on professional engineering duties acceptable to the employer since becoming a qualified engineer, or

(ii) not having a University degree but possessing a diploma recognised by the employer, has had five year's experience on professional engineering duties, recognised by the employer since becoming a qualified engineer.

29.—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.

30.—SUPERANNUATION

(1) The employer shall contribute on behalf of the employee in accordance with the requirements of the Superannuation Guarantee (Administration) Act 1992 of the Commonwealth ("the SGA Act").

(2) Contributions shall, at the option of the employee be paid into either;

(a) HESTA Superannuation Fund;

(b) The Private Health Care Employees Superannuation Fund (PHESS)

(c) such other complying superannuation fund or scheme nominated in accordance with the provisions of section 49C of the Industrial Relations Act 1979.

(3) The employer shall notify each employee upon engagement of their entitlement to choose a complying superannuation fund or scheme.

(4) Contributions to the nominated fund shall be paid monthly.

(5) Contributions shall continue to be paid on behalf of an employee in receipt of payments under the Workers Compensation and Rehabilitation Act 1981.

(6) Salary Sacrifice

(a) Joondalup Health Campus shall provide salary packaging for superannuation as a means by which remuneration is payable under this Agreement as provided for by Joondalup Health Campus policy as varied from time to time.

(b) Salary packaging is an arrangement for the payment of wages or salary and any other component of remuneration payable under the Agreement whereby the total remuneration is broken into a cash and non-cash component.

(c) The total remuneration shall not be less than the cumulative entitlements provided for in this Agreement. Employee payments in the form of superannuation contributions will be the only form of salary packaging available.

(d) Salary packaging is to be entered into on a voluntary basis.

(e) Employees shall be entitled to package up to a maximum of 30% of salary.

(f) Employees wishing to alter their percentile of packaging may only do so at six monthly intervals.

(g) It is the intention of Joondalup Health Campus as far as possible, to maintain a worthwhile salary packaging programme for eligible employees. All liabilities for income tax and fringe benefits tax remain the responsibility of the employee. This responsibility remains notwithstanding any variations or amendments to legislation. The discovery of impacts or potential impacts of new or varied legislation are and will continue to be the responsibility of employees.

(h) Salary packaging arrangements shall not apply to temporary or casual employees.

(i) The salary packaging arrangement shall remain in force until terminated by mutual agreement or be by either the employer or the employee providing one calendar months notice.

31.—DISPUTE AVOIDANCE AND SETTLEMENT PROCEDURES

(1) The object of this clause is to provide a set of procedures for dealing with any questions, disputes or difficulties arising under this Agreement and for dealing with any questions, dispute or difficulty between the parties during negotiations for amendments to this Agreement.

(2) In the event of any question, dispute or difficulty arising under this Agreement, the following procedures shall apply, provided that nothing in these procedures shall prevent the Secretary of the HSOA (or his/her nominee) from intervening to assist in the process—

(a) The matter is to be discussed between the HSOA employee representative and the employer representative and an attempt made to resolve the matter;

(b) If the matter is unable to be resolved through discussions between the HSOA employee representative and the Joondalup Health Campus representative, the matter is to be discussed between the employee representative and the Chief Executive Officer of Joondalup Health Campus or his/her nominee, as soon as practicable but within five working days. Notification of any question, dispute or difficulty may be made verbally and/or in writing;

(c) The parties may individually or collectively seek advice from any appropriate organisation or person in an attempt to resolve the matter;

(d) If the matter is not resolved within five working days of the date of notification in (b) hereof, either party may notify the Secretary of the HSOA (or his/her

nominee), or the Chief Executive Officer of Joondalup Health Campus (or his/her nominee) of the existence of a dispute or disagreement;

(e) The Secretary of the HSOA (or his/her nominee) and the Chief Executive Officer of Joondalup Health Campus (or his/her nominee) shall confer on the matters notified by the parties within five working days and—

(i) where there is agreement on the matters in dispute the parties shall be advised within two working days;

(ii) where there is disagreement on any matter it may be submitted to the Western Australian Industrial Relations Commission provided that all reasonable attempts have been made by the parties, in accordance with the above provisions, to resolve any difficulty, dispute or question in relation to the agreement before the matter is referred to the 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.

32.—INTRODUCTION OF CHANGE

(1) (a) 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 employees, the employer shall notify the employees who may be affected by the proposed changes and the Union.

(b) "Significant effects" include termination of employment, major changes in the composition, 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 Agreement/Award makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

(2) (a) The employer shall discuss with the employees affected and the Union, inter alia, the introduction of the changes referred to in subclause (1) 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 the Union in relation to the changes.

(b) The discussion shall commence as early as practicable after a firm decision has been made by the employer to make the changes referred to in subclause (1) hereof.

(c) For the purposes of such discussion, the employer shall provide to the employees concerned and the Union, all relevant information about the changes including the nature of the changes proposed; the expected effects of the changes on employees and any other matters likely to affect employees provided that the employer shall not be required to disclose confidential information the disclosure of which, would be inimical to his/her interests.

33.—REDUNDANCY AND REDEPLOYMENT

(1) Definitions—

(a) "Redundancy"—means a situation where a job performed by an employee ceases to exist or becomes surplus to requirements.

(b) "Suitable Alternate Employment"—means employment that provides the employee with a position which—

(i) is a permanent position with Joondalup Health Campus.

(ii) has ordinary time earnings as close as possible to that of the employee's previous position.

(iii) does not require the employee to change his/her place or residence in order to take up the position, and has regard to—

(aa) the relevance of the duties and responsibilities, to the qualifications, skills, experience and competence of the employee; and

(bb) the ordinary hours of duty being in general no less than those worked by the employee in his/her original position.

(c) The expression 'continuous service' shall mean all service of an employee with Joondalup Health Campus and Wanneroo Hospital subject to the following—

(i) It shall include any period during which an employee is absent on full pay or part pay, from duties in the hospital service;

(ii) It shall exclude any period exceeding two weeks during which the employee is absent on leave without pay;

(iii) Where an employee elects to take any portion of the period of long service leave on half pay in accordance with subclause (5)(a)(iii) of Clause 23. Long Service Leave, included shall be half the period of leave taken on half pay;

(iv) It shall include any period following any termination of the employment by the employer if such termination has been made merely with the intention of avoiding obligations in respect to long service leave or redundancy under the terms of this Agreement;

(v) It shall include any period of absence from duty necessitated by sickness or injury to the employee, to the extent of the employees sick leave entitlements; and

(vi) It shall include service with Wanneroo Hospital where an employee had no break in paid service between ceasing employment at Wanneroo Hospital and commencing employment with Joondalup Health Campus;

provided that continuity of service shall not be broken by any authorised leave of absence.

(d) Ordinary time earnings shall be defined as the rate of pay excluding allowances applicable to the employee's substantive classification but shall include allowances which represent—

(i) a relieving allowance that has been paid continuously for twelve (12) months;

(ii) a shift allowance which is paid on a regular basis and would continue to be paid during periods of annual leave.

(2) When a definite decision has been made which will/may result in an employee(s) being made redundant the employer shall, as soon as practical, notify the employees affected and the Union in accordance with Clause 30. Introduction of Change.

(3) In the event that a job performed by a employee ceases to exist or becomes surplus to requirements the employer;

(a) shall endeavour to find that employee suitable alternate employment within Joondalup Health Campus.

(b) shall provide leave and assistance to seek alternative employment in accordance with subclause (6).

(c) shall seek to identify training opportunities in accordance with subclause (7).

(d) shall, where appropriate, investigate the possibility of substituted voluntary severance in accordance with subclause (8).

(4) Where an employee is found suitable alternative employment within Joondalup Health Campus, the employee's service shall be deemed continuous and the employee shall retain all accrued and accruing rights to annual leave, long service leave and sick leave.

(5) (a) Where, as a result of the application of this clause an employee is found suitable alternate employment and the suitable alternate employment attracts a lower salary than the position made redundant, the employee shall have his/her ordinary time earnings maintained at its current dollar value for a period of 6 months; Provided that, the suitable alternate position shall not attract a salary of less than 80% nor more than 110% of the maximum pay applicable to the range of

classification of the employee's redundant position, and provided that, every effort will be made to ensure that the suitable alternate employment has ordinary time earnings as close as possible to that of the redundant position.

(b) Any period of retraining undertaken pursuant to subclause (7) shall be disregarded for the purposes of calculating the period of 6 months referred to in paragraph (a).

(6) Leave and Assistance to seek alternative employment.

(a) The employee shall facilitate redeployment by granting employees to be redeployed reasonable leave to attend interviews and career counselling without loss of pay.

(b) If the costs incurred by the employee in attending an employment interview with a potential employer are not met by the potential employer, the current employer shall meet these costs.

(c) The costs referred to at paragraph (b) are costs of travel to and from the employment interview, meals consumed, accommodation occupied and incidental expenses incurred during the course of travel or at the place of interview.

(d) By agreement between the employer and employee, leave without pay may be approved where it is sought by a redeployee as a means of exploring career options.

This period of leave without pay will not count as service for any reason. However, the employee's service shall be deemed continuous and the employee retains the right to accept the offer of severance and on return from the period of leave without pay, retains the right to have the option of redeployment pursued.

(7) Retraining of employees occupying a position declared redundant.

(a) The employer may arrange for an employee occupying a position which is declared redundant to be employed for retraining purposes in a position other than his or her present or former position within Joondalup Health Campus, or by agreement, at another location.

(b) The arrangements for the retraining of an employee occupying a position which is declared redundant which are to apply to the retraining, shall be as agreed between—

the employee (and/or his/her representative), and

the employer;

Provided that an employee whose position is declared redundant shall not be employed for retraining purposes indefinitely and shall retain the right to be redeployed to a permanent position.

(c) Where, within 6 months of the employee's position being declared redundant an employee has not been found a permanent position, the employee shall be given the option of severance;

Provided that, by mutual agreement, an employee may take severance before the expiry of 6 months.

(d) Where the employer arranges for an employee to be employed for retraining purposes under this clause, the employer shall bear the whole cost of that arrangement.

(8) Substituted Voluntary Severance

(a) If

(i) an employee is willing to be transferred to the position of an employee who wishes to resign his/her position ("the other employee"); and

(ii) the making of a severance payment to the other employee has been approved by the employer

the other employee may, resign his/her position.

(b) On the resignation by the other employee the employer shall forthwith—

(i) transfer the employee to that position; and

(ii) make a severance payment to the other employee in accordance with this clause, as if the other employee was redundant.

(9) In the event that suitable alternate employment cannot be found or where an employee elects to be made redundant rather than accept redeployment to an alternate position or retraining, the employee, on termination, shall receive a severance payment calculated on the employees ordinary time earnings in accordance with the following formula—

(a) Two weeks pay for each completed year of service up to a maximum entitlement of 45 weeks salary.

(10) In addition to this severance payment the employee shall also receive—

(a) pro rata annual leave (with loading) calculated in accordance with this Agreement.

(b) pro rata long service leave calculated on each completed 12 months of service on the basis provided by this Agreement.

(c) at least one month's formal notice of termination or payment in lieu thereof.

(11) In the event that an employee is offered a suitable alternate position within Mayne Nickless Limited but not within Joondalup Health Campus and the employee elects to accept the position, the employee's service shall be deemed continuous and annual leave, long service leave and sick leave accrued prior to the date of redeployment, shall be calculated in accordance with this Agreement and/or any relevant Award, and shall be transferred to and credited by the new employer.

(12) Nothing in this clause shall be construed as preventing the parties from agreeing to alternative redundancy and/or redeployment arrangements which are not less advantageous to an employee than those provided for by this clause.

(13) Where any dispute arises over the application of this clause, such dispute shall be addressed in accordance with Clause 31. Dispute Avoidance and Settlement Procedures.

(14) Any arrangements made in accordance with this clause and agreed between the parties shall be put in writing, with a copy of such written arrangements given to the employee.

(15) The provisions of this clause shall not apply to casual employees.

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

President, for and on behalf of the Hospital Salaried Officers Association of Western Australia (Union of Workers)

_____

Date

_____

Daniel Hill

Secretary, for and on behalf of the Hospital Salaried Officers Association of Western Australia (Union of Workers)

_____

Date

_____

Ron Thompson

Chief Executive Officer, Joondalup Health Campus, for and on behalf of Mayne Nickless Ltd, ACN 00407341, trading as Health Care of Australia, incorporated in Victoria and operating as Joondalup Health Campus.

_____

Date

ATTACHMENT 1—MODEL FOR IDENTIFYING PRODUCTIVITY INCREASES

The following model is to be used as a guide only and it is expected that it will be modified to meet the needs of Joondalup Health Campus as required.

A Model for Identifying Productivity Increases

The primary focus of Enterprise Bargaining in the workplace will be on best practice, efficiency, effectiveness, competitiveness and cost saving.

Employees to focus on the following areas—

- **Productivity Improvements which can be made:** Identification of all possibilities for improving productivity through looking at possible changes in what work is done, how the work is done, who does the work, who could better do the work, when the work is done, whether the work should be done (i.e. whether a particular task can be performed less often and still achieve a satisfactory output) possibilities for multiskilling and opportunities to reduce costs (including financial costs) and reduce waste.
- **Barriers to Productivity Improvements:** Identification of any significant barriers to improving productivity, such as, need for training, need for equipment, problems with computer programs, demarcation problems and arguments about who should do what, award constraints, information or guidelines problems, problems in regard to supervision, whether too much or not enough, or of poor quality, opportunities and barriers to self management, physical barriers such as the location of various functions which interact with each other and barriers to communication.

Employers, in consultation with their Employees, to focus on all of the above plus macro issues impacting on productivity—

- **Structural Matters:** Management may need to look at the structures within which the work is done and how they can be improved upon.
- **Management Style:** Management style and its appropriateness may need to be examined at both an organisational and departmental level.
- **Best Practice, Benchmarking, Continuous Improvement and New Opportunities:** Initiatives in these areas will in general need to be initiated by management. This is an important area given that one of its outcomes should be improved competitiveness.

  Where barriers to competitiveness beyond the control of the employer/health service are identified, these should be drawn to the attention of the Health Department so that they can be addressed on an industry basis.
- **Culture and Environment:** Management culture and organisational culture may need to be examined in light of the overall direction of health management and where appropriate programs and training be introduced to address any identified problems.

Quality of Employment—Issues to be Examined by Both Employees and Employers—

This area does not necessarily impact on productivity, as such, but may have a positive impact financially and/or an improvement in the non-wage rewards of employment and is therefore a very valuable, win-win, area for both employees and employers. Matters to be examined under this heading include, but are not confined to—

- Occupational Health and Safety
- Unplanned Absences
- Health and Welfare of the Workforce
- Family needs and other demands on workers: better ways to accommodate and acknowledge these without losing focus on the main objectives in regard to responsibility for service to the employer.
- Use of Leave
- Equal Opportunity
- Career paths, including access to special project work, providing opportunities for development and recognition
- Employee Recognition, through feedback, support, acknowledgment, ennoblement, empowerment, consultation and non-financial rewards
- Training and Development
- Equity Issues

OFFICE OF HEALTH REVIEW ENTERPRISE BARGAINING AGREEMENT 1999. No. PSA AG 1 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer,
Office of Health Review.

No. PSA AG 1of 2000.

Office of Health Review
Enterprise Bargaining Agreement 1999.

4th February 2000.

Order.

HAVING heard Ms L J Doyle on behalf of the Applicant and Mr S Majeks on behalf of the Respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the agreement made between the parties lodged in the Commission on the 25th day of January 2000 entitled Office of Health Review Enterprise Bargaining Agreement 1999 be registered in the terms of the following Schedule as an industrial agreement in replacement of the Office of Health Review Enterprise Bargaining Agreement 1997 (PSA AG 16 of 1997) which is hereby cancelled.

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissoner/
Public Service Arbitrator.

Schedule.

1.—TITLE

This Agreement shall be known as the "Office of Health Review Enterprise Bargaining Agreement 1999" and shall replace the "Office of Health Review Enterprise Bargaining Agreement 1997".

2.—ARRANGEMENT

3.—SCOPE

This Agreement shall apply throughout the State of Western Australia to all officers employed by the Office of Health Review who are members of or eligible to be members of the Civil Service Association Inc.

4.—PARTIES TO THE AGREEMENT

This Agreement is made between the Office of Health Review and the Civil Service Association of Western Australia.

5.—NUMBER OF EMPLOYEES COVERED

As at the date of registration the approximate number of employees covered by this Agreement is 9.

6.—DEFINITIONS

"The Employer" means the Chief Executive, Office of Health Review

"Employee" has the same meaning as provided for in the Industrial Relations Act 1975 and who is referred to within the provision of Clause 3—Scope of the Agreement.

"Family" in relation to a person, means a person who is related to the employee by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the employee (as defined in the Equal Opportunity Act (1984) of Western Australia).

"Ordinary Rate of Pay" means the rate of pay as specified in the Schedules attached to this Agreement

"Agreement" means this Enterprise Bargaining Agreement

"Parties" means the Employer and Union when referred to jointly in this Agreement

"Union" means the Civil Service Association of Western Australia Inc.

"WAIRC" means the Western Australian Industrial Relations Commission

7.—RE-OPEN NEGOTIATIONS

The parties undertake to re-open negotiations at least six months prior to the expiry of the period of this Agreement with a view to negotiating and settling any replacement Agreement.

8.—AVAILABILITY OF AGREEMENT

1. Every employee shall upon request to the employer be entitled to a copy of this Agreement. In addition, a copy or copies of this Agreement will be kept in an easily accessible place or places within the Agency, and the location of the copies will be clearly communicated to all employees.

2. The employer may utilise computer resources to disseminate this Agreement. However, where information technology is not available or is limited within the workplace the requirements of sub-clause (1) will apply.

9.—SALARY INCREASES

1. Employees will receive the salary as contained in the Schedules attached to this Agreement.

2. The following salary increases are payable under this Agreement—

a) The first increase of 4% shall be payable from the date this Agreement is registered.

b) The second increase of 2.5% shall be payable from 12 months following the first payment.

3. Employees will not be disadvantaged if targets are not achieved due to factors outside of their control.

4. Salaries payable under this Agreement are set out in Schedules 1 and 2 attached to this Agreement.

10.—TERM OF AGREEMENT

1. This Agreement shall operate from the date of registration in the WAIRC and shall remain in force for two (2) years.

2. 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.

3. This Agreement may be varied, renewed, replaced or cancelled as appropriate within the term of this Agreement, by consent between the parties.

11.—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.

12.—RELATIONSHIP TO THE PARENT AWARD

This Agreement shall be read in conjunction with the Award that applies to the parties to this Agreement. In the case of any inconsistencies, this Agreement shall have precedence to the extent of any inconsistencies. Where this agreement is silent the award shall apply. The relevant award is the Public Service Award 1992.

13.—SINGLE BARGAINING UNIT

This Agreement has been negotiated through a SBU. The SBU comprised the Union who is party to this Agreement and the employer.

14.— CONTINUOUS IMPROVEMENT

Employees are expected to contribute to a continuous Improvement Program in the Office of Health Review by—

(i) making regular and continuous suggestions to improve performance and productivity of the Office as a whole and to improve service to the public;

(ii) participating in project teams;

(iii) periodically planning, initiating and implementing innovative practices, subject to approval by the Chief Executive.

15.—IMPROVED PRODUCTIVITY

A. OBJECTIVES AND PRINCIPLES

The shared objectives of the parties are—

1. To satisfy the requirements of clients and customers through the provision of reliable, efficient and competitive services.
2. To achieve the Office of Health Review mission and improve productivity and efficiency in the Office of Health Review through ongoing improvements.
3. To promote the development of trust and motivation and to continue to foster enhanced employee relations.
4. To promote participative decision making processes and practices.
5. To promote increased satisfaction from jobs and secure employment opportunities.
6. To develop and pursue changes on a cooperative basis by using participative practices

B. SPECIFIC MEASURES TO IMPROVE PRODUCTIVITY

Since the expiration of the existing Agreement, the Office of Health Review has absorbed without additional resources a 14% increase in complaints received and has increased the existing rate of case closures by approximately 30%. The first payment of 4% is in recognition of this increase in productivity.

A further 2.5% payment will be made 12 months following the first payment, provided the following objectives have been met—

Peer review of cases

Implementation of a peer review process whereby staff exchange strategies for dealing with individual complaints and review the outcomes of each other's cases, to facilitate decision making and ensure equitable outcomes for all parties to a complaint.

The target date for this initiative is three months after registration of this Agreement.

Resource directory

Establishment of a directory of medical/legal precedents and sources of expert advice for use as a ready reference in case management.

Target date: six months after registration.

Training

A training module for new and existing investigative staff will be established in-house. This will maximise efficiency and effectiveness of investigations and save on costs that would otherwise be expended externally.

Target date: nine months after registration.

Public awareness

Staff will make themselves available for a minimum of 40 hours, within a 12-month period and outside of normal working hours, in order to promote public awareness of the office and its functions.

A Register will be kept of additional hours worked.

Timely closure of cases

Staff will continue to ensure they take the least possible number of days to finalise a complaint.

16.—PRODUCTIVITY MANAGEMENT

1. The parties agree that the measurement and monitoring of productivity improvements provides critical feedback on the performance of the Office of Health Review to management, employees and other relevant stakeholders.

2. The parties agree to assess organisational performance according to the extent to which the objectives of the Office of Health Review are achieved. The parties agree that performance indicators assist in the attainment of corporate goals in the interests of clients, employees, the Office of Health Review and the government on behalf of the community.

3. During the life of this Agreement, key performance indicators will be developed in consultation with the parties to this Agreement to measure the initiatives contained in Clause 15.

4. Where the circumstances of the agency change and the productivity measures are no longer appropriate or relevant, then parties agree to develop productivity measures relevant to the new circumstances. This will not reduce the salary increases payable under this agreement.

5. Where productivity exceeds the targets set in this agreement the amount of productivity in excess of the targets shall be included for the calculation of pay increases in the next agreement.

6. The parties agree that payment of the second tier (2.5%) increase should not be prevented if failure to achieve any of the listed milestones is beyond the control of the employees.

17.—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 the Office of Health Review. The initiatives are detailed in clause 15 of this Agreement.

18.—IMPLEMENTATION OF EBA INITIATIVES

1. The parties will develop an agreed process for the implementation of the initiatives outlined in this Agreement.

2. 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

3. Government decisions or policies which impact directly on the achievement of milestones outlined in the Agreement will not disadvantage employees.

19.—HOURS OF DUTY

Flexible Working Hours

This Clause is to be read in conjunction with Clause 16—Hours, Public Service Award 1992.

1. It is agreed that the provision of flexible working hours will take account of customer needs, business flexibility and the preferences of employees.

2. Subject to concurrence with the Manager, affected employees may select their own starting and finishing 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	6.30 pm

3. Employees may elect at the beginning of the agreement to work a 37.5-hour week or a 40-hour week and the Director may agree to a change if the circumstances warrant. There will be two Schedules, 37.5 and 40 hours, and the increments will be added to both schedules.

4. Unless in the Manager's opinion exceptional circumstances prevail, employees utilising flexitime provisions will not accrue more than 16 hours of flexi-time debits or credits in any four weekly (two pay period) cycle. Credits and debits may be carried over to the next pay period.

Ordinary Hours of Work

1. Ordinary hours of work may be worked between 7.00 am and 6.30 pm Monday to Friday and count towards the required hours of work per week.

20.—WORKING FROM HOME

With the agreement of both parties working from home may be considered. Working from home would only be agreed to if it did not inhibit service to customers and is cost effective for the Office of Health Review. Before any working from home employment practices are implemented a policy regarding Telecommuting will be negotiated between the Union and the employer.

21.—PUBLIC HOLIDAYS

The provisions of Clause 20 of the Public Service Award 1992 will apply with the exception of Clause 20 (1)(b), which relates to the Public Service holidays at New Year and Easter. The Public Service Holidays and any days substituted for them will not be allowed as holidays for an employee under this Agreement.

22.—EFFECT OF AGREEMENT ON ACCRUED LEAVE ENTITLEMENTS

1. Annual leave, long service leave and sick leave (expressed as days) accrued from earlier Public Sector employment will be carried over and be recognised for the purpose of this Agreement.

2. Accrued annual leave, long service leave or sick leave entitlements paid during the term of this Agreement is to be at the appropriate rate the employee is entitled to under this Agreement.

23.—LONG SERVICE LEAVE

1. An employee is entitled to 13 weeks long service leave after a period of seven years continuous employment.

2. By agreement in writing by the parties, an equivalent benefit, in payment, can be accepted by the employee instead of taking long service leave. The rate of pay is the rate applicable in this Agreement.

3. By agreement in writing by the parties and subject to the Office of Health Review's operational requirements, long service leave may be taken at half the normal rate of pay and hence for double the period of time.

4. Employees may also elect to take long service leave in weekly portions.

24.—PARENTAL LEAVE

1. Definitions

'employee' includes full time, part time, permanent and fixed term contract employees.

'replacement employee' is an employee specifically engaged to replace an employee proceeding on parental leave.

2. Eligibility for Parental Leave

a) An employee is entitled to a period of up to 52 weeks unpaid parental leave in respect of the birth of a child to the employee or the employee's spouse/partner.

b) Where an employee applying for the leave is a partner of a pregnant spouse one week's leave may be taken at the birth of the child concurrently with parental leave taken by the pregnant employee.

c) An employee seeking to adopt a child under the age of five years shall be entitled to three weeks parental leave at the placement of the child and a further period of parental leave up to a maximum of 52 weeks. Where both partners are employed by the Agency Name, the three-week period may be taken concurrently.

d) An employee seeking to adopt a child shall be entitled to two days unpaid leave for the employee to attend interviews or examination required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional days leave. The employee may take any paid leave entitlement in lieu of this leave.

3. Other Leave Entitlements

a) An employee proceeding on parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of parental leave.

b) i) Upon return to work employees will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skills and abilities as the one held immediately prior to commencement of leave.

ii) Any period of leave without pay must be applied for and approved in advance and will be granted on a year by year basis. Where both parents work for the agency the total period of leave without pay following parental leave will not exceed two years.

c) An employee on parental leave is not entitled to paid sick leave.

d) Should the birth or adoption result in other than the arrival of a child, the person concerned shall be entitled to such period of paid sick leave or unpaid sick leave for a period certified as necessary by a registered medical practitioner.

e) Where a pregnant employee not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the employee may take any paid sick leave to which the employee is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.

4. Notice and Variation

a) The employee shall give not less than four week's notice in writing to the Chief Executive) of the date the employee proposes to commence parental leave stating the period of leave to be taken.

b) An employee seeking to adopt a child shall not be in breach of subclause (a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.

c) An employee proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period of leave elect to reduce or extend the period stated in the original application provided four weeks written notice is provided.

5. Transfer to a Safe Job

Where illness or risks arising out of pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue in her present duties, the duties shall be modified or the employee may be transferred to a safe position at the same classification level until the commencement of parental leave.

6. Replacement Employee

Prior to engaging a replacement employee the Agency Name 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.

7. Return to Work

a) An employee shall confirm the intention to return to work by notice in writing to the employer not less than four weeks prior to the expiration of parental leave.

b) An employee on return to work from parental leave shall be entitled to the position which the employee occupied immediately prior to proceeding on parental leave. Where the employee was transferred to a safe job the employee is entitled to return to the position occupied immediately prior to transfer.

c) Where the position occupied by the employee no longer exists the employee shall be entitled to a position at the same classification level with duties similar to that of the abolished position.

8. Effect of Leave on the Employment Contract

a) An employee employed for a fixed term contract shall have the same entitlement to parental leave, but the period of leave granted shall not extend beyond the term of that contract.

b) Absence on parental leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose under the relevant award or agreement.

c) An employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with the relevant award or agreement.

d) An employer shall not terminate the employment of an employee on the grounds of the employee's application for parental leave or absence on leave but otherwise the rights of the employer in respect of termination of employment are not affected.

25.—FAMILY LEAVE

1. For the purposes of this clause, the definition of family shall be the definition contained in the Equal Opportunity Act 1986. That is, a person who is related to the employee by blood, marriage, affinity, or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the employee.

2. An employee with responsibilities in relation to members of their household or immediate family shall be entitled to 5 days per annum family leave without loss of pay to provide care and support for such persons when they are ill or otherwise attend to urgent family responsibilities.

3. The employee shall elect family leave entitlements to be deducted from annual leave, accrued sick leave or short leave entitlements.

4. Family Leave may be taken as single day absences or part of a single day.

5. The employee shall, wherever practicable, give the employer notice of the intention to take family leave and the estimated length of absence. If it is not practicable to give prior notice of absence the employee shall notify the employer as soon as possible on the day of absence.

6. The employee shall provide, where required by the employer, evidence to establish the requirement to take family leave.

26.—BEREAVEMENT LEAVE

Replaces Short Leave of Public Service Award 1992.

1. The employee is entitled to paid leave for up to two days on the death of a family member.

2. The two days need not be consecutive and are not to be taken during a period of any other kind of leave.

3. A request for such leave must be made as soon as possible and include the expected time away from work.

4. If requested, reasonable proof must be provided by the employee of the death and the relationship between the employee and the deceased.

27.—SKILLS DEVELOPMENT LEAVE

1. The Chief Executive may grant the employee paid skills development leave for accredited and non-accredited courses of study and TEE study.

2. In the case of accredited courses of study at Public Institutions the Chief Executive may agree to pay the required HECs fee through more flexible use of the training budget. However, if the employee does not attain satisfactory results from the study, the Chief Executive is entitled to seek reimbursement of these fees from the employee.

3. Paid development leave will normally be granted where the activity being undertaken—

a) is directly relevant to the duties being undertaken by the employee; or

b) is directly relevant to the business needs of the Office of Health Review; and

c) enhances the career development opportunities of the employee; and

d) does not unduly affect or inconvenience the operations of the Office of Health Review.

4. To obtain skills development leave for accredited courses and TEE study, the employee must demonstrate his/her personal commitment to learning and studying by undertaking an acceptable formal study load in his/her own time.

28.—PERFORMANCE MANAGEMENT

1. The Chief Executive and employee after consultation with the Union, shall enter into a Performance Agreement which outlines the major functions of the employee's positions, the goals to be achieved by the employee, and assistance the employer will provide to ensure the goals are achieved. The Performance Agreement will be for a set period of time with reasonable review dates, as negotiated by the employer and employee.

2. A relevant Performance Management System will be negotiated and sub clause 30.1 will be achieved as soon as practicable after the signing of this Agreement.

3. Appropriate training will be provided to all employees and management to enable them to negotiate relevant Performance Agreements.

29.—EMPLOYEE FUNDED EXTRA LEAVE

1. Subject to the approval of the Chief Executive, staff may opt for an additional four weeks leave per annum.

2. Where such agreement is reached**,** an employee shall be entitled to receive 48 weeks salary spread over the full 52 weeks of the year. The employee will be entitled to take four weeks extra leave in addition to their normal leave entitlements.

3. The additional four weeks per year will not be able to be accrued. In the event that the employee cannot take the leave, his/her salary will be adjusted at the completion of the 12-month period to take account of the time worked during the year that was not included in salary.

4. The additional four weeks per year will not attract leave loading.

5. The employer will ensure that superannuation arrangements and taxation effects are fully explained to the employee by the relevant Authority. The employer will put any necessary arrangements into place.

30.—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. 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.

3. 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.

4. 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 forgone to that time but will not be entitled to equivalent absence from duty.

5. The employer will ensure that superannuation arrangements and taxation effects are fully explained to the employee by the relevant Authority. The employer will put any necessary arrangements into place.

31.—PAID PARENTAL LEAVE

1. A person who has completed 12 months service with the employer will be entitled to six weeks paid parental or adoption leave. This leave must be taken within 12 months of the date of the birth or adoption.

2. Paid leave of six weeks will only be available to an employee who gives birth.

3. Paid leave of six weeks will be available to the employee whose partner gives birth, provided that for the period of the leave the employee is the child's primary care giver. Where an employee is not the primary care giver they will be entitled to one week's paid leave.

4. Paid leave of six weeks will be available where an employee adopts a child, provided that for the period of leave the employee is the child's primary care giver. Where an employee is not the primary care giver they will be entitled to one week's paid leave.

5. Should the birth or adoption result in other than the arrival of a child, and the person concerned has commenced paid leave under this clause, the entitlement to paid leave remains intact.

6. A person who has completed more than 40 weeks, but less than 12 months service with the employer at the date of birth or adoption, will be eligible for paid leave on the basis of the following formula—

6 - (52 - number of weeks of completed service) = number of weeks of paid leave.

7. All other conditions relating to parental leave apply as per this Agreement.

32.—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.

6. Ceremonial/cultural leave shall be available, but not limited to Aboriginal and Torres Strait Islanders.

33.—NOTIFICATION OF SIGNIFICANT CHANGE

In cases where significant change in the workplace causes reduced job opportunities, less chance for promotion, less job security, more or fewer hours of work, a need for retraining or transfer, or a need for a restructuring of jobs, the Chief Executive is obliged to consult with the Union and employees as soon as is reasonably practicable before the decision has been made.

34.—DISPUTE SETTLEMENT PROCEDURE

1. In the event of any question, dispute or difficulty between the parties as to the interpretation and implementation of this Agreement the following procedures shall apply—

(a) The CSA representative and/or the employee/s concerned shall discuss the matters with the immediate supervisor in the first instance. An employee may be accompanied by a CSA Representative.

(b) If the matter is not resolved within five working days following the discussion in accordance with sub clause (a) hereof the CSA Representative shall refer

the matter to the employer or his/her nominee for resolution.

(c) If the matter is not resolved within five working days of the CSA Representative's notification of the dispute to the employer either party may refer it to the Western Australian Industrial Relations Commission.

2. Nothing in this clause prevents a member of the Union approaching the Union to represent them at any stage of the dispute.

35.—SIGNATORIES

Signed on behalf of
CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
TONI WALKINGTON (Signed) Date: 25/01/00
Acting Branch Secretary
COMMON SEAL

Signed on behalf of
OFFICE OF HEALTH REVIEW
D KERSLAKE (Signed) Date: 24/01/00
Chief Executive

SCHEDULE 1—SALARY RATES—40-HOUR WEEK

CLASSIFICATION	EBA Current Salary Rate per annum	4% on Registration per annum	4% on Registration per fortnight	2.5% 12 months After Registration per annum	2.5% 12 months After Registration per fortnight
Level 1					
Under 17	12,440	12938	497.60	13261	510.04
17 years	14,538	15120	581.52	15498	596.06
18 years	16,958	17636	678.32	18077	695.28
19 years	19,629	20414	785.16	20925	804.79
20 years	22,044	22926	881.76	23499	903.80
21 years or 1st year of adult service	24,215	25184	968.60	25813	992.82
22 years or 2nd year of adult service	24,947	25945	997.88	26594	1022.83
23 years or 3rd year of adult service	25,677	26704	1027.08	27372	1052.76
24 years or 4th year of adult service	26,403	27459	1056.12	28146	1082.52
25 years or 5th year of adult service	27,133	28218	1085.32	28924	1112.45
26 years or 6th year of adult service	27,864	28979	1114.56	29703	1142.42
27 years or 7th year of adult service	28,704	29852	1148.16	30598	1176.86
28 years or 8th year of adult service	29,285	30456	1171.40	31218	1200.69
29 years or 9th year of adult service	30,145	31351	1205.80	32135	1235.95
Level 2					
1st year	31,174	32421	1246.96	33231	1278.13
2nd year	31,962	33240	1278.48	34071	1310.44
3rd year	32,792	34104	1311.68	34956	1344.47
4th year	33,668	35015	1346.72	35890	1380.39
5th year	34,585	35968	1383.40	36868	1417.99
Level 3					
1st year	35,845	37279	1433.80	38211	1469.65
2nd year	36,826	38299	1473.04	39257	1509.87
3rd year	37,838	39352	1513.52	40335	1551.36
4th year	38,877	40432	1555.08	41443	1593.96
Level 4					
1st year	40,302	41914	1612.08	42962	1652.38
2ne year	41,419	43076	1656.76	44153	1698.18
3rd year	42,568	44271	1702.72	45377	1745.29
Level 5					
1st year	44,780	46571	1791.20	47735	1835.98
2nd year	46,276	48127	1851.04	49330	1897.32
3rd year	47,830	49743	1913.20	50987	1961.03
4th year	49,442	51420	1977.68	52705	2027.12
Level 6					
1st year	52,035	54116	2081.40	55469	2133.44
2nd year	53,798	55950	2151.92	57349	2205.72
3rd year	55,622	57847	2224.88	59293	2280.50
4th year	57,570	59873	2302.80	61370	2360.37
Level 7					
1st year	60,557	62979	2422.28	64554	2482.84
2nd year	62,623	65128	2504.92	66756	2567.54
3rd year	64,872	67467	2594.88	69154	2659.75
Level 8					
1st year	68,526	71267	2741.04	73049	2809.57
2nd year	71,144	73990	2845.76	75840	2916.90
3rd year	74,390	77366	2975.60	79300	3049.99
Level 9					
1st year	78,444	81582	3137.76	83621	3216.20
2nd year	81,182	84429	3247.28	86540	3328.46
3rd year	84,306	87678	3372.24	89870	3456.55
Class 1	89,030	92591	3561.20	94906	3650.23
Class 2	93,753	97503	3750.12	99941	3843.87
Class 3	98,475	102414	3939.00	104974	4037.48
Class 4	103,198	107326	4127.92	110009	4231.12

SCHEDULE 2—SALARY RATES—37.5-HOUR WEEK

CLASSIFICATION	EBA Current Salary Rate per annum	4% on Registration per annum	4% on Registration per fortnight	2.5% 12 months After Registration per annum	2.5% 12 months After Registration per fortnight
Level 1					
Under 17	11,688	12156	467.52	12459	479.21
17 years	13,659	14205	546.36	14560	560.02
18 years	15,933	16570	637.32	16985	653.25
19 years	18,443	19181	737.72	19660	756.16
20 years	20,711	21539	828.44	22078	849.15
21 years or 1st year of adult service	22,751	23661	910.04	24253	932.79
22 years or 2nd year of adult service	23,438	24376	937.52	24985	960.96
23 years or 3rd year of adult service	24,125	25090	965.00	25717	989.13
24 years or 4th year of adult service	24,807	25799	992.28	26444	1017.09
25 years or 5th year of adult service	25,493	26513	1019.72	27176	1045.21
26 years or 6th year of adult service	26,179	27226	1047.16	27907	1073.34
27 years or 7th year of adult service	26,969	28048	1078.76	28749	1105.73
28 years or 8th year of adult service	27,515	28616	1100.60	29331	1128.12
29 years or 9th year of adult service	28,322	29455	1132.88	30191	1161.20
Level 2					
1st year	29,289	30461	1171.56	31222	1200.85
2nd year	30,030	31231	1201.20	32012	1231.23
3rd year	30,809	32041	1232.36	32842	1263.17
4th year	31,632	32897	1265.28	33720	1296.91
5th year	32,494	33794	1299.76	34639	1332.25
Level 3					
1st year	33,678	35025	1347.12	35901	1380.80
2nd year	34,600	35984	1384.00	36884	1418.60
3rd year	35,551	36973	1422.04	37897	1457.59
4th year	36,527	37988	1461.08	38938	1497.61
Level 4					
1st year	37,866	39381	1514.64	40365	1552.51
2ne year	38,915	40472	1556.60	41483	1595.52
3rd year	39,994	41594	1599.76	42634	1639.75
Level 5					
1st year	42,073	43756	1682.92	44850	1724.99
2nd year	43,478	45217	1739.12	46348	1782.60
3rd year	44,938	46736	1797.52	47904	1842.46
4th year	46,453	48311	1858.12	49519	1904.57
Level 6					
1st year	48,889	50845	1955.56	52116	2004.45
2nd year	50,545	52567	2021.80	53881	2072.35
3rd year	52,259	54349	2090.36	55708	2142.62
4th year	54,089	56253	2163.56	57659	2217.65
Level 7					
1st year	56,896	59172	2275.84	60651	2332.74
2nd year	58,837	61190	2353.48	62720	2412.32
3rd year	60,950	63388	2438.00	64973	2498.95
Level 8					
1st year	64,383	66958	2575.32	68632	2639.70
2nd year	66,843	69517	2673.72	71255	2740.56
3rd year	69,893	72689	2795.72	74506	2865.61
Level 9					
1st year	73,701	76649	2948.04	78565	3021.74
2nd year	76,274	79325	3050.96	81308	3127.23
3rd year	79,209	82377	3168.36	84437	3247.57
Class 1	83,647	86993	3345.88	89168	3429.53
Class 2	88,085	91608	3523.40	93899	3611.49
Class 3	92,521	96222	3700.84	98627	3793.36
Class 4	96,959	100837	3878.36	103358	3975.32

SWAN CHRISTIAN EDUCATION ASSOCIATION INC. NON-TEACHING (ENTERPRISE BARGAINING) AGREEMENT 1999.
No. AG 230 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

Swan Christian Education Association Inc.

and

The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch.

No. AG 230 of 1999.

Swan Christian Education Association Inc. Non-Teaching (Enterprise Bargaining) Agreement 1999.

COMMISSIONER P E SCOTT.

1 February 2000.

Order.

HAVING heard Mr N Briggs on behalf of The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers, Mr A Campbell on behalf of Swan Christian Education Association Inc. and Ms D MacTiernan on behalf of The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Swan Christian Education Association Inc. Non-Teaching (Enterprise Bargaining) Agreement 1999 in the terms of the following schedule be registered on the 24th day of January 2000.

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

———

Schedule.

1.—TITLE

This Agreement shall be known as the Swan Christian Education Association Inc. Non-Teaching (Enterprise Bargaining) Agreement 1999.

2.—ARRANGEMENT

3.—PARTIES TO THE AGREEMENT

(1) This Agreement is made between the Swan Christian Education Association Inc (SCEA) 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, Western Australian Branch (the LHMU), (the parties).

(2) The Swan Christian Education Association Inc. administers Armadale Christian College, Beechboro Christian School, Kalamunda Christian School, Midland Christian School, Mundaring Christian School and Swan Christian College, (the schools).

4.—SCOPE OF AGREEMENT

(1) This Agreement shall apply to employees who are employed within the scope of the awards listed in Clause 7.

(2) The number of employees employed within the scope of the awards is 56.

5.—DATE AND DURATION OF AGREEMENT

This Agreement shall come into effect on the 1 January 1999 and shall apply until 31 December 2000.

6.—EXPIRATION OF AGREEMENT

On the expiration of this Agreement and in the absence of the registration of a subsequent Enterprise Agreement the provisions of this Agreement shall apply until such time as a new Agreement is registered and takes effect.

7.—RELATIONSHIP TO PARENT AWARDS

This Agreement shall be read and interpreted in conjunction with the following awards—

Independent Schools' Administrative and Technical Officers' Award 1993

School Employees (Independent Day & Boarding Schools) Award 1980

Teachers' Aides' (Independent Schools) Award 1988

Where there is any inconsistency between this Agreement and the relevant awards, this Agreement will prevail to the extent of the inconsistency.

8.—SINGLE BARGAINING UNIT

The parties to this Agreement have formed a single bargaining unit.

The single bargaining unit has conducted negotiations with representatives of employees in the schools and with representatives of the SCEA.

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 SCEA and its employees become genuine participants and contributors to the Schools' aims, objectives and philosophy of the Association and its Schools.

(3) Safeguard and improve the quality and productivity of services by establishing a review procedure through which work practices are considered and by upgrading of professional skills and knowledge. SCEA and the employees acknowledge that this upgrading of skills and experience can best occur when both the Schools and employees share responsibility for professional development.

(4) Comply with SCEA policy regarding the Christian belief and lifestyle criteria for all employees.

(5) Recognise that SCEA schools are established and maintained to give access to affordable Christian Education to as wide a cross-section of the community as possible.

(6) Acknowledge that SCEA schools facilitate the constructive involvement of parents in the life of the schools and exist to provide learning and teaching opportunities that will support the Christian ethos of SCEA and its Christian member families.

(7) Acknowledge that each school is managed within the SCEA policy framework supplemented by policies of the relevant schools.

10.—SALARY RATES

(1) Each employee shall be placed in one of the following levels, dependent upon classification, qualification and experience prescribed in subclause 3 Classifications, as follows—

(a) Independent Schools Administrative, Technical Officers and School Employees.

	1 January 1999 $ pa	1 January 2000 $ pa
Level 1	22,440	23,114
	22,950	23,640
	23,460	24,164
	23,970	24,690
Level 2	24,480	25,214
	25,500	26,265
	26,520	26,286
	27,540	28,274
Level 3	28,560	29,416
	29,886	30,782
	31,370	32,311
	32,640	33,620
Level 4	30,090	30,990
	32,150	33,115
	33,650	34,660
	35,700	36,770

(b) Teachers' Aides'

	1 January 1999	1 January 2000
Level 1	$14.00/hr	$14.42/hr
Level 2	$16.00/hr	$16.48/hr

(2) In the event of any safety net adjustment being applied in future to any or all of the relevant awards, such adjustments shall have no effect on the salary rates prescribed by this Agreement.

(3) Classifications

(a) Each employee shall be placed in one of the following levels dependent upon classification, qualification and experience.

(i) Independent Schools Administrative, Technical Officers and School Employees.

Level 1—No formal qualifications. Working mostly under supervision. Examples: general office duties, laboratory attendant, grounds and maintenance duties, cleaning, library duties.

Level 2—Experience with relevant training and is competent to perform their duties with minimal supervision. Examples: general office duties, laboratory attendant, grounds and maintenance duties, cleaning, library duties.

Level 3—Experienced competent skilled officer most likely with TAFE/Tertiary or equivalent qualifications. Examples: general office duties, laboratory attendant, grounds and maintenance duties, technician employed in audio visual, computer media, library or laboratory departments, head groundsperson and maintenance officer, secretary, computer system supervisor, senior computer operator.

Level 4—Experienced with qualifications or job responsibility and is fully competent working with high degree of autonomy, initiative and discretion in the work program and may have responsibility for the supervision of others. Examples: assistant bursar, senior laboratory technician, principal's secretary and office manager with supervisory duties.

Casual—A relief officer shall be paid a loading of 20% in addition to the salary as prescribed.

(ii) Teachers' Aides'

Level 1—Teachers Aides

Level 2—Teachers' Aides working with minimal supervision and preparing and implementing lessons on behalf of the teacher.

Casual—A casual employee shall be paid 20% in addition to the rates prescribed.

(4) An employee appointed to a salary rate shall proceed by annual increments to the maximum of that classification level.

(5) If during progression through the salary steps, and at least two months prior to the employee's next annual increment, the employer considers such increment to be inappropriate due to work performance and as such does not recommend or authorise further progression, then the employer shall state the reasons in writing to the employee concerned.

Such reasons should indicate the areas where the employer considers improvement is required. If the improvement required is achieved, then the employee shall proceed to his/her appropriate salary level.

(6) An employee shall only progress from one level to another in accordance with the provisions prescribed in subclause (3) Classifications of Clause 10. – Salary Rates of this Agreement.

The new structure further recognises that individual employees may be asked to assume greater responsibility and as such, their classification will be examined to determine the correct level. It is agreed that the acquisition of additional skills and/or recognised qualifications may lead to a review of an employee's classification. In such cases, a greater degree of responsibility for the job or for other employees will normally be expected.

(7) For the purpose of determining weekly or fortnightly salary, the annual salaries shall be divided by 52.16 or 26.08 respectively.

11.—AGREED EFFICIENCY IMPROVEMENTS

(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 3 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.

(2) Review of Work Practices

The parties agree to work together to establish a procedure for the review of work practices.

(3) Appraisal

There will be an annual performance appraisal of all employees.

(4) Part-Time Employees

(a) Part-time employees shall have the expectation of continuity of service.

(b) The School may vary the hours of employment of part-time employees in an annual basis.

(c) The part-time employee shall be given at least six weeks written notice of any variation, unless otherwise agreed by the School and the employee.

(d) In determining the hours of a part-time employee, the School acknowledges that such employees may wish to seek other employment and agrees to negotiate hours of duty which, as far as practicable, suit the circumstances of the employee and the School.

(5) Professional Development

The parties accept a mutual responsibility to share in the employee's professional development and recognise that courses outside of school hours should be made available to employees.

(6) Flexible Working Hours

(a) The ordinary full-time hours of work of Teachers' Aides' shall be 32.5 hours per week and School Employees, Administration and Technical Officers shall be 37.5 hours per week and shall normally be worked between Monday to Friday inclusive.

(b) If an employee is required to work more than normal or contracted hours per week or on weekends the employee may agree with the employer to be paid additional salary at the pro rata rate or take time off in lieu of extra hours served.

(7) Policies

All employees agree to abide by the policies, rules and regulations of the School as determined by the Board and the School Council.

(8) Consultation

(a) There shall be established a Consultative Committee with representation of SCEA and employees covered by this Agreement. The Committee shall provide a forum in which to discuss matters that relate directly to the conditions of employment of non-teaching employees.

(9) Salary Packaging

(a) For the purposes of this clause—

(i) "Benefits" means the benefits nominated by the employee from the benefits provided by the School and listed in subparagraph (iv) of subclause (9)(c) of this clause.

(ii) "Benefit Value" means the amount specified by the School as the cost to the School of the benefit provided including Fringe Benefit Tax, if any.

(iii) "Fringe Benefit Tax" means tax imposed by the Fringe Benefits Tax Act 1986.

(iv) The cost of any Fringe Benefits Tax to the school will be borne by the employee and not the school.

(b) Conditions of Employment

(i) Except as provided by this clause, employees 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.

(ii) For all purposes of the Agreement, salary shall be deemed to include the value of any benefits provided under this clause.

(c) Salary Packaging

The School may offer to provide and the employee may agree in writing to accept:

(i) salary packaging of up to 40% of gross salary in the form of expense benefit payments;

(ii) the Benefits nominated by the employee and approved by the employer;

(iii) a salary equal to the difference between the Benefit Value and the salary which would have applied to the employee or under subclause (9)(b) of this clause, in the absence of an agreement under this subclause;

(iv) the available Benefits are those made available by the School from the following list—

(aa) Superannuation;

(bb) Motor Vehicle; and

(cc) other benefits as agreed between the teacher and the School;

(v) the School must advise the employee in writing of the Benefit Value before the agreement is entered into.

(d) During the currency of an agreement under subclause (9)(c) of this clause:

(i) Any employee who takes paid leave on full pay shall receive the Benefits and salary referred to in subparagraphs (i) and (ii) of subclause (9)(c) of this clause.

(ii) If an employee takes leave without pay the employee will not be entitled to any Benefits during the period of leave.

(iii) If an employee takes leave on less than full pay he or she shall receive—

(aa) the Benefits; and

(bb) the amount of salary calculated as agreed between the School and the employee.

(e) Renewal of the salary package will be on an annual basis by agreement between the parties.

(10) Long Service Leave

(a) Employees who have completed eight years of continuous service with SCEA shall be entitled to take ten weeks long service leave on full pay. This leave shall normally be taken as a full-term or otherwise agreed with the SCEA's delegate.

(b) After seven years of service where employment is terminated by the employee's death or in circumstances other than serious misconduct, the leave entitlement shall be pro rate for the years of service completed as a proportion of eight years.

12.—REDUNDANCY PROVISIONS

(1) Should a position in a SCEA school become redundant then the following provisions shall apply.

(a) In calculating the years of service of an employee, all continuous service within the SCEA will be considered and not only the service completed at the current school.

(b) Where a school proposes to make one or more employee positions redundant the SCEA shall make redundancy payments to the employee made redundant—

(i) if an employee is under 45 years of age—

Period of Service	Weeks of severance pay
Less than 1 year	Nil
One year and less than two years	4 weeks
Two years and less than three years	6 weeks
Three years and less than four years	7 weeks
Four years and above	2 weeks per year of service to a maximum of 12 weeks.

(ii) if an employee is 45 years of age or older—

Period of Service	Weeks of severance pay
Less than 1 year	Nil
One year and less than two years	4 weeks
Two years and less than three years	6 weeks
Three years and less than four years	7 weeks
Four years and above	2 weeks per year of service to a maximum of 14 weeks.

(c) When the SCEA identifies a potential redundancy and before an employee is named as the employee whose position has been declared redundant, the SCEA shall offer all employees at that school the opportunity to take leave without pay for a period of one school year or such a period to resolve the potential redundancy. Where a suitable application is received that resolves the potential redundancy, then the employee shall be granted leave without pay for the period. At the end of the voluntary period of leave the employee shall be reinstated on an equivalent basis to the existing at the commencement of leave.

(d) If during the life of this Agreement the Australian Industrial Relations Commission moves to a new redundancy standard in excess of the provisions of this clause, then the new standard will apply and as such the parties agree to amend this Agreement accordingly.

(e) Notwithstanding the other provisions of this clause, nothing shall prevent the parties from negotiating a redundancy settlement in excess of the provisions as determined in subclause (1)(b) subparagraphs (i) and (ii) of this clause.

13.—NO REDUCTION

Nothing herein contained shall entitle the School to reduce the salaries or conditions of an employee which prevailed prior to entering into this Agreement, except where provided by this Agreement.

14.—OTHER MATTERS

The parties agree to discuss such matters that are of relevance to either the School or the employee.

15.—NO FURTHER CLAIMS

It is the condition of the 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 Agreements, whether they involve the School or not.

17.—DISPUTE RESOLUTION PROCEDURE

(1) A dispute is defined as any question, dispute or difficulty arising out of this Agreement.

(2) The parties to the dispute shall make reasonable attempts to resolve the matter by mutual discussion and determination.

(3) If the parties are unable to resolve the dispute, the matter, at the request of either party, shall be referred to the Grievance Committee of SCEA which will seek to resolve the matter in accordance with the SCEA's dispute resolution procedure.

(4) If the matter is not then resolved it shall be referred to the Western Australian Industrial Relations Commission.

(5) While this procedure is being followed work shall continue as normal.

18.—SIGNATORIES

.....Signed.....
(Signature)

…ALAN JAMES CAMPBELL…
(Name of signatory in block letters)

Swan Christian Education Association Inc.

.....Signed..... *Common Seal*
(Signature)

.....T I HOWE.....
(Name of signatory in block letters)

The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers

.....SHARRYN JACKSON.....
(Name of signatory in block letters)

Australian Liquor, Hospitality & Miscellaneous Workers Union, Western Australian Branch.

WATER CORPORATION PAY AND ALLOWANCES AGREEMENT 2000. No. AG 3 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Water Corporation

and

Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australia Branch and others.

No. AG 3 of 2000.

Water Corporation Pay and Allowances Agreement 2000.

4th February 2000.

Order.

HAVING heard Mrs S A Turnley on behalf of the Applicant and Mr J A Ridley on behalf of the Australian Liquor, Hospitality and Miscellaneous Worker's Union, Miscellaneous Workers Division, WA Branch and the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch and Ms J van den Herik on behalf of The Civil Service Association of Western Australia Incorporated and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the agreement made between the parties lodged in the Commission on the 14th day of January 2000 entitled Water Corporation Pay and Allowances Agreement 2000 and as subsequently amended by direction of the Commission be registered in the terms of the following Schedule as an industrial agreement in replacement of the Water Corporation Pay and Allowances Agreement 1997 (AG 331 of 1997) which is hereby cancelled.

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissioner.

Schedule.

Water Corporation Pay and Allowances Agreement 2000

CLAUSE 1 TITLE

This Agreement shall be known as the Water Corporation Pay and Allowances Agreement 2000. This Agreement is to be read in conjunction with the Water Corporation Conditions Agreement 1997 and those clauses of the Water Corporation Pay and Allowances Agreement 1997 that are specified in Clause 4 of this Agreement.

CLAUSE 2 ARRANGEMENT

CLAUSE 3 PARTIES BOUND

This Agreement is an agreement made under Part VI B of the Workplace Relations Act 1996 in respect of—

- the Australian Liquor, Hospitality and Miscellaneous Workers Union,
- WA Branch and;
- the Australian Workers Union, for those classifications prescribed in Table (B), Clause 2.2—Rates of Pay of the Water Corporation Pay and Allowances Agreement 1997.

This Agreement is an agreement made under Section 41 of the Industrial Relations Act 1979 in respect of—

- the Civil Service Association of Western Australia (Inc) for those classifications prescribed in Table (A), Clause 2.2—Rates of Pay of the Water Corporation Pay and Allowances Agreement 1997, and;
- the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch for those classifications prescribed in Tables (B) and (C), Clause 2.2—Rates of Pay of the Water Corporation Pay and Allowances Agreement 1997, and;
- the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia for those classifications prescribed in Table (C) Clause 2.2—Rates of Pay of the Water Corporation Pay and Allowances Agreement 1997, and;
- the Australian Liquor, Hospitality and Miscellaneous Workers Union,
- WA Branch for those classifications prescribed in Tables (C) and (D), Clause 2.2—Rates of Pay of the Water Corporation Pay and Allowances Agreement 1997.

This Agreement binds the Water Corporation during the operation of this Agreement and also binds the following organisations—

- Australian Liquor Hospitality and Miscellaneous Workers Union, WA Branch (ALHMWU)

- The Australian Workers Union, (AWU)
- Civil Service Association of Western Australia (Inc) (CSA)
- Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch (AMWU)
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division, Western Australian Branch (CEPU)

CLAUSE 4 SCOPE

This Agreement applies to all persons (except those in managerial positions who are or become parties to common law contracts) who are employees of the Water Corporation.

CLAUSE 5 NUMBER OF EMPLOYEES

This Agreement will cover an estimated 2 155 employees at the date of registration.

CLAUSE 6 TERM OF AGREEMENT

This Agreement shall operate from the beginning of the first pay period to commence on or after the date on which it is certified under Part VIB of the Workplace Relations Act 1996 and registered under Section 41 of the Industrial Relations Act 1979, or if it is so certified and so registered on different dates, the later of the two dates, and remain in force until 31 December 2000.

CLAUSE 7 TRANSITIONAL ARRANGEMENTS

The following clauses of the Water Corporation Pay and Allowances Agreement 1997 shall continue to operate during the term of this Agreement—

Clause 1.4	Precedence Over Awards
Clause 1.8	No Further Claims
Clause 2.2	Rates of Pay
Clause 2.3	Special Rates and Provisions
Clause 2.4	Adjustment of Allowances
Clause 2.5	Higher Responsibility Allowance
Clause 3.1	Copies of Agreement
Clause 3.2	Dispute Resolution Procedure

CLAUSE 8 RENEWAL OF AGREEMENT

At least 6 months prior to the expiry of this Agreement the parties shall enter into intensive negotiations aimed at reaching agreement on a replacement for this Agreement. The parties will use their best endeavours to have a new Agreement certified under Part VIB of the Workplace Relations Act 1996 and registered under Section 41 of the Industrial relations Act 1979 before 31 December 2000. Rates of pay contained within this Agreement shall continue after the expiry of this Agreement until such time as it is replaced.

CLAUSE 9 RATES OF PAY

The rates of pay set out in Schedules (A), (B), (C) and (D) of Clause 2.2 Rates of Pay of the Water Corporation Pay and Allowances Agreement 1997 shall be increased by 3% from the beginning of the first pay period to commence on or after 1 January 2000. The new rates applicable from that date are set out in the Schedule to this Agreement.

CLAUSE 10 SIGNATORIES

Signed for and on behalf of Water Corporation.

(Undecipherable) (Signed)

Dated: 14/01/00

Signed for and on behalf of The Civil Service Association of Western Australia Incorporated.

COMMON SEAL

Toni Walkington (Signed)

Dated: 11/01/00

Signed for and on behalf of the Australian Liquor, Hospitality and Miscellaneous Worker's Union, Miscellaneous Workers Division, WA Branch.

COMMON SEAL

Helen M. Creed (Signed)

Dated: 11/01/00

Signed for and on behalf of the Australian Workers Union.

Michael Llewellyn (Signed)

Dated: 11/01/00

Signed for and on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Western Australian Branch.

COMMON SEAL

John Sharp-Collett (Signed)

Dated: 13/01/00

Signed for and on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division, Western Australian Branch.

COMMON SEAL

William Game (signed)

Dated: 13/01/00

Schedule.

Level	Salary Point	12/12/98 Annual	12/12/98 F/Night	08/01/2000 Annual	08/01/2000 F/Night
	Salary Point 1	14908	571.56	15355	588.71
L 1	Salary Point 2	17136	656.98	17650	676.69
	Salary Point 3	19703	755.42	20294	778.08
	Salary Point 4	22537	864.06	23213	889.98
	Salary Point 5	25099	962.27	25852	991.14
	Salary Point 6	27403	1050.60	28225	1082.12
	Salary Point 7	30469	1168.15	31383	1203.19
	Salary Point 8	32696	1253.53	33677	1291.14
	Salary Point 9	34082	1306.69	35105	1345.89
L 2	Salary Point 10	37162	1424.76	38277	1467.50
	Salary Point 11	39083	1498.40	40255	1543.35
L 3	Salary Point 12	42210	1618.29	43476	1666.84
	Salary Point 13	43919	1683.80	45236	1734.31
L 4	Salary Point 14	46799	1794.22	48203	1848.05
	Salary Point 15	48074	1843.10	49516	1898.39
L 5	Salary Point 16	53193	2039.36	54789	2100.54
	Salary Point 17	55818	2140.02	57493	2204.22
L 6	Salary Point 18	61857	2371.54	63713	2442.69
	Salary Point 19	64974	2491.03	66923	2565.76
L 7	Salary Point 20	70767	2713.15	72890	2794.54
	Salary Point 21	73198	2806.35	75394	2890.54
L 8	Salary Point 22	80616	3090.75	83035	3183.47
	Salary Point 23	83920	3217.39	86437	3313.91
SPECIFIED CALLINGS					
L2/4	SP Call YR 1 (WCSC1)	37162	1424.76	38277	1467.50
	SP Call YR 2 (WCSC2)	39083	1498.40	40255	1543.35
	SP Call YR 3 (WCSC3)	42210	1618.29	43476	1666.84
	SP Call YR 4 (WCSC4)	46799	1794.22	48203	1848.05
	SP Call YR 5 (WCSC5)	48074	1843.10	49516	1898.39

Description	12/12/98 Annual	12/12/98 F/Night	08/01/2000 Annual	08/01/2000 F/Night
WIW Level 1	27843	1067.49	28678	1099.51
WIW Level 2.1	28047	1075.32	28889	1107.58
WIW Level 2.2	28515	1093.24	29370	1126.04
WIW Level 2.3	29146	1117.45	30021	1150.97
WIW Level 2.4	29799	1142.48	30693	1176.75
WIW Level 3.1	30041	1151.75	30942	1186.30
WIW Level 3.2	30575	1172.24	31493	1207.41
WIW Level 4.1	31296	1199.85	32235	1235.85
WIW Level 4.2	32013	1227.35	32973	1264.17
WIW Level 5.1	32730	1254.85	33712	1292.50
WIW Level 5.2	33458	1282.76	34462	1321.24
WIW Level 5.3	34183	1310.57	35209	1349.89
WIW Level 5.4	34912	1338.49	35959	1378.64
WIW Level 6.1	35621	1365.68	36690	1406.65
WIW Level 6.2	36357	1393.90	37448	1435.72
WIW Level 6.3	37797	1449.11	38931	1492.58
WIW Level 6.4	39232	1504.11	40409	1549.23
WIW Level 7.1	39957	1531.92	41156	1577.88
Tradespersons Painter				
On engagement	29928	1147.42	30826	1181.84
After 1 year	30277	1160.81	31185	1195.63
After 2 years	30557	1171.52	31473	1206.67

Engineering Tradespersons	12/12/98		08/01/2000	
	Annual	F/Night	Annual	F/Night
Level C13	24856	952.96	25602	981.55
Level C12	26368	1010.95	27160	1041.28
Level C11	27781	1065.12	28615	1097.07
Level C10	29928	1147.42	30826	1181.84
Level C9	31346	1201.80	32287	1237.85
Level C8	32755	1255.88	33740	1293.56
Level C8.5	33576	1287.28	34583	1325.90
Level C7	34173	1310.16	35198	1349.46
Level C6	36994	1418.31	38104	1460.86
Level C5	38404	1472.39	39556	1516.56
Instrument/ Electrical				
Level DC10	33700	1292.03	34711	1330.79
Level DC9	35712	1369.18	36784	1410.26
Level DC8	37115	1422.95	38228	1465.64
Level DC7	38541	1477.64	39698	1521.97
Level DC6	40631	1557.77	41850	1604.50
Level DC5	42042	1611.85	43303	1660.21

PUBLIC SERVICE ARBITRATOR— Awards/Agreements— Variation of—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of
Western Australia (Incorporated)
and

Commissioner of Aboriginal Affairs and Others
Public Service Award 1992.
No. P 7 of 1999.

and

Albany Port Authority and & Others
Government Officers Salaries, Allowances
and Conditions Award 1989.
No. P 8 of 1999.

PUBLIC SERVICE ARBITRATOR

COMMISSIONER J F GREGOR.

1 February 2000.

Reasons for Decision.

THE COMMISSIONER: On 8 July 1999, the Civil Service Association of Western Australia (Incorporated) (the CSA) applied to amend the Public Service Award 1992 and the Government Officers Salaries, Allowances and Conditions Award 1989 (the Awards) by varying respectively Schedule C—Camping Allowance and Schedule I—Travelling, Transfer and Relieving Allowance and Schedule F—Camping Allowance and Schedule I—Travelling Transfer and Relieving Allowance.

The applications are identical and the matters were heard conjointly on 24 November 1999. The Awards have been subject to routine amendments since 1976 when the matters were arbitrated before the then Public Service Arbitrator, Mr N G Malley (1976) 56 WAIG 1060). An agreed formula has since been applied to calculate the variations. The formula was set out in a File Note presented to Commission (*Exhibit R2).* Each year a representative of the government employers, in this case the Department of Productivity and Labour Relations (DOPLAR), has conducted a survey in accordance with the formula. The results of that survey are discussed with the CSA and when agreement is reached the parties seek consent amendments to the applicable causes. Since the advent of the State Wage Principals, these amendments have been allowable under Principle 5.

From the information before the Commission, the parties have privately dealt with the changes in star ratings of hotels and changes in meal allowance prices to produce consent variations to the Awards. The methods by which the rates are fixed are known to the parties and have been applied on a yearly basis.

What is different in the instant applications is that DOPLAR declined to do the survey. According to Mr Sims, the CSA performed the survey in exactly the same way as DOPLAR had in the past. The CSA attempted to have discussions about the results with the DOPLAR and the department declined.

Mr Kirwan advised that the respondents have concerns regarding taxation implications if travel allowances prescribed in the Awards exceeded those which are deemed reasonable for taxation purposes by the Australian Taxation Office (ATO). The Commission had its attention drawn to Taxation Ruling No. TR 1999/7. This ruling advises that Subdivision 900-B of the Income Tax Assessment Act, 1997, provides that the substantiation requirement to obtain written evidence of expenditure does not apply to claims by employee tax payers for expenses that are covered by an overtime meal allowance paid under an industrial instrument, or domestic travel allowance or overseas travel allowance, whether or not the allowance is paid under an industrial instrument, when the amount of claim for losses or outgoings incurred does not exceed the amount that the Taxation Commissioner considers reasonable. If the claim does exceed the amounts deemed reasonable then the taxation ruling requires that the allowance be treated as remuneration rather than as a reimbursement of expenses and taxation is therefore payable on the excess component above the reasonable amount.

The Commission was told that the rates in the taxation ruling are based on those paid in the Australian Public Service (APS). These rates are calculated under the auspices of a tripartite committee. An officer of the Department of the Workplace Relations Employment and Small Business, Ms Carole Salisbury, gave evidence about how the calculations are made. The travel allowance rates apply widely in the APS. Apparently, some public sector agencies are able to determine their own rates through agency agreements but many of them continue to apply the allowances calculated by the tripartite committee. Ms Salisbury described the survey methodology. I do not intend to summarise the methodology here, it is contained in *Exhibit K8,* other than to say, that the basis is an accommodation survey carried out twice a year. A survey sample takes account of both capital cities and country towns. There are minium standards applied to each category. Coupled with the accommodation survey information collected to establish breakfast, lunch and dinner rates. The result is that for all country towns, other than in high cost country towns, the same rate is set for the whole of Australia.

According to the evidence before the Commission, the APS rates will, if adopted, result in significant reductions in country travelling allowances in some centres in Western Australia. The respondents say that the existing clauses provide that Chief Executive Officers may allow reimbursement of actual expenses. In effect the amount set in the Awards is a minimum rate and there should be no loss to employees.

It was argued by Mr Kirwan that the suggestion to change to the travelling allowance rates fixed for the APS has nothing to do with the reasonable rate provisions of Taxation Ruling No. TR 1999/7. As I understand the submission, it is claimed the APS rates reflect an appropriate level of reimbursement of expenses, however, no evidence at all was called to justify this assertion. What the Commission has before it is an application from the CSA for what might be called a 'routine amendment' to significant public service awards to reflect increases in travelling expenses, which are permitted by Principle 5 of the Wage Principles. In response the respondents say that the system used by the APS should be adopted, but it is clear from the evidence that the respondents have been selective about what they wish this Commission to apply out of that APS system. There were also submissions about the taxation affects of the failure to adopt allowances which are not within the level described by the ATO as reasonable. However, the respondent's say that is not the reason why the change should be made, rather it should be made on merit.

The Commission has considered the submissions dealing with taxation in context of the decision in *Hospital Salaries, Salary Officers Association of Western Australia and Royal Perth Hospital and Others, and Civil Service Association Incorporated and Albany Port Authorities and Others, (1998) WAIG 2346* where the Commission in Court Session observed:

"the Commission was presented with submission and argument regarding the attitude of the Australian Taxation Office to the salary packaging arrangements as a reason for refusing these clients. We take the view that it is not the role of the Commission to decide matters on the basis of taxation issues, which may (or may not) arise. The form of any salary packing arrangements, and whether they are seen as satisfactory under the relevant taxation legislation, or by the taxation authorities, is for others to decide".

In the absence of cogent reasons to the contrary the Commission constituted singularly, is bound by the pronouncement of the Commission in Court Session, and if the argument had been pursued on the basis of compliance with the taxation ruling alone, the respondent's case would fail. However, they say, the real reason is that there is more merit in the scheme adopted by the APS for assessment of travel allowances than there is in the existing scheme.

There was no evidence at all called to support this contention. The only evidence called was to appraise the Commission of how the methodology of the APS scheme works. In the face of long standing practice, there would have to be some persuasive arguments presented to the Commission to merit the suggested. It is relevant to note that the adoption of the APS rates would cause reductions in the current level of travelling allowance payments in high cost towns in Western Australia. It is argued that reimbursement of actual expenses could cover the difference but the difficulties in running a hybrid scheme and its additional administrative costs are obvious and are at odds with the suggestion that the APS rates should be adopted for administrative convenience.

The respondents have not raised any substantive argument why the change should be made. The application by the CSA to vary will be allowed in principle. It appears that there are some aberrant movements in the proposed schedule and those issues should be debated between the parties with an aim of reaching a consent amendment to the Awards. The parties are hereby directed to have such negotiations as are necessary to produce agreed schedules of amendments to the Commission. The schedule should be filed within thirty (30) days of the date of these Reasons. In the event agreement cannot be reached, the matter will be re-listed for hearing.

Appearances: Mr E Rae appeared for the Applicants.

Mr B Kirwan appeared for the Respondents.

AWARDS/AGREEMENTS— Variation of—

BAKERS (METROPOLITAN) AWARD.
No A 13 of 1987.

BAKERS (COUNTRY) AWARD.
No R 18 of 1997.

PASTRYCOOK'S AWARD.
No A 24 of 1981.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division, Western Australian Branch

and

Baking Industry Employers' Association of WA.

No. 316 of 1993.

Bakers' (Metropolitan) Award No. A 13 of 1987.

The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division, Western Australian Branch

and

ACME Bakery and Others.

No. 362 of 1993.

Bakers' (Country) Award No. R 18 of 1977.

The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division, Western Australian Branch

and

Bakewell Pies (1978) Pty Ltd and Others.

No. 363 of 1993.

Pastrycooks' Award No. A 24 of 1981.

COMMISSION IN COURT SESSION
COMMISSIONER C B PARKS
COMMISSIONER P E SCOTT
COMMISSIONER S J KENNER.

25 January 2000.

Reasons for Decision.

COMMISSION IN COURT SESSION: These applications before the Commission in Court Session seek a variation to awards in the baking and pastrycook industry to reflect redundancy provisions as contained in the TCR test case decision of the then Australian Conciliation and Arbitration Commission in the *Termination, Change and Redundancy Case* (1984) 8 IR 4 *("TCR Test Case")*. The awards sought to be varied by the Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division, Western Australian Branch ("the applicant") as it was known at the time of these proceedings, include the Bakers (Metropolitan) Award No A 13 of 1987, the Bakers (Country) Award No A 18 of 1997 and the Pastrycook's Award No A 24 of 1981 ("the Awards"). The latter two awards already contain provisions in relation to introduction of change, reflecting that component of the TCR "standard" provisions, which were inserted into those awards in 1992.

Mr J Ridley appeared on behalf of the applicant.

A number of respondent employers, represented by Mr Beros as agent, opposed the applicant's claims in their entirety.

Dismissal for Want of Prosecution

At the commencement of the hearing, the respondents sought to have the applications dismissed for want of prosecution. The basis of the application to dismiss being that the applications were some six and a half years old and that they were originally filed on the basis of some urgency, given the decision of the Industrial Appeal Court in *Kounis Metal Industries Pty Limited v Transport Workers Union of Workers* (1992) 45 IR 392 as it impacted at that time, on redundancy matters before the Commission. The only action taken in respect of

the applications, other than conferences convened by the Commission in 1995 and 1998, was said by the respondents to have been in response to enquiries by the Commission. It was submitted that otherwise, the applicant had not actively prosecuted the claims. Further, it was submitted that only when the Commission summonsed the applicant to show cause why the applications should not be dismissed, that the applicant progressed the matters.

The respondents submitted that in all of these circumstances, the applications should be dismissed.

The record of the Commission discloses that the applications were listed for mention on the Commission's own motion on 22 October 1998. The notices of hearing indicated that the applicant was to show cause why these matters should not be dismissed pursuant to s 27 of the Industrial Relations Act, 1979 ("the Act"). This hearing was convened. The record shows that the applicant attended the hearing and informed the Commission that it wished to proceed with the applications and requested that they be listed for hearing.

It is the case that the applicant has not, with any particular degree of diligence, prosecuted these applications over a considerable period of time. Additionally, it is relevant to note however, that the respondents appear also to have been content to leave the matters in abeyance.

There is an onus on a party seeking to have an application dismissed for want of prosecution, to demonstrate serious prejudice by reason of the delay. Whilst Mr Beros submitted that there was prejudice in that the applications may succeed, that is not, in our view, sufficient of itself. Once the matters had been listed for the applicant to show cause why they should not be dismissed, the applicant requested that they be listed for hearing and determination. The Commission listed them and the hearing commenced before this Commission in Court Session, with the parties ready to proceed. At the time of the hearing, when the application for dismissal was made, there was no lack of prosecution and it was appropriate to proceed to hear the applications and for them to be determined on their merits. Accordingly, the application for dismissal for want of prosecution was dismissed.

Contentions of the Parties

Mr Ridley for the applicant, submitted that the applications sought a standard in relation to termination, change and redundancy, which has been in operation federally and at the State level for 15 years. He said that whether or not there should be reference to a "test case standard" or a "community standard", the prescription of redundancy and related provisions was appropriate. The submission was that with the significant shift in the industrial relations system since the introduction of termination, change and redundancy provisions, awards now form a safety net, with the focus of the system on enterprise level bargaining. The applicant submitted it has been seeking to negotiate such agreements with a range of employers in the baking industry, but these endeavours had not resulted in enterprise agreements.

The applicant referred to the decision of the Commission in Court Session in the July 1999 State Wage Case ((1999) 79 WAIG 1847), and in particular, to the notion of the award safety net as being the linchpin in the wage fixing system. It was said that it would be sufficient to rely on Principle 2 of the State Wage Principles ("the Principles") in the present applications however, acknowledges that the Commission in this case has made a determination that the matter needs to be addressed in the context of Principle 10.

Mr Ridley submitted that Principle 1—The Role of Arbitration in the Award Safety Net, assumes that existing wages and conditions in the awards are sufficient to protect the employees who are unable to reach industrial agreements. Without the provisions claimed, it was said that the Awards cannot be seen as a safety net that protect employees covered by them. Reference was made to the Workplace Relations Act 1996 (Cth)("WRA"), which prescribes notice of termination as part of the safety net. The applicant said that Western Australia should not be any different from elsewhere in Australia, in terms of how it actually construes what constitutes the safety net.

The decision of the Commission in Court Session in relation to the variation of the Metal Trades Award 1966 to insert the "TCR" provisions was referred to by the applicant: (1986) 66 WAIG 580 *("Anchorage")*. It was submitted that if the decision of the Commission in *Anchorage* cannot be characterised as a test case, it was at least a "community standard". On this basis, the applicant says that there does not appear to be any substantive difference in terms of whether one refers to a test case standard or a community standard, and that the practical effect was the same.

Principle 10 requires that due consideration is given to s 26(1) of the Act. In this regard, the applicant submitted that if the Commission was to act according to equity and good conscience, then it must grant the applications. As to costs, in the case of an employer who has to pay a redundancy benefit where currently the employer does not pay that benefit, the cost would be no more than what is constituted by a 15-year old standard, so the submission went. There is, in any event, the applicant submitted, provision within the proposed clauses, for an employer to make application if there is an incapacity to pay.

As to the requirement to consult about change, the applicant said that the costs, if any, of such consultation would be minimal, but in any event such cost would be more likely to ensure a more cost effective and responsible change management process. Consultation would better promote the possibility of reducing or eliminating the social and economic costs of unemployment arising from any proposed change, and such provisions are in keeping with enterprise bargaining and the principle of employers and employees working co-operatively together at the local or workplace level.

Further, the applicant submitted that s 41 of the Minimum Conditions of Employment Act 1993 ("MCEA"), provides for employees to be informed about change and recognises the principle that there should be some form of consultation. The thrust of what is sought by the present applications is in keeping with the MCEA and, will ensure some degree of parity across the industry, in respect of the need to consult and inform employees about change. It was submitted that having all of the provisions contained in the Awards would make the less well informed parts of the industry better able to look at one document to satisfy themselves as to their rights and obligations. The applicant said that this should be so, notwithstanding that s 5 of the MCEA provides that the consultation provisions prescribed by it are to be implied into any award of this Commission.

Mr Beros submitted that Principle 10 of the Principles required that in the making or varying of an award or issuing of an award which has the effect of varying the wages or conditions above or below the safety net, the party making the application must support the application with material showing why the matter has not been progressed and/or finalised pursuant to s 41 of the Act. It was said that in the discharge of its statutory function, the Commission in Court Session should take account, to the extent it is relevant, each of the factors identified in s 26(1) of the Act. The respondents noted that whilst there is an aim to encourage enterprise bargaining and for the Commission to facilitate the registration of industrial agreements at the enterprise level, there was no mandatory requirement for any business to pursue such an arrangement.

Mr Beros submitted from the bar table, that he was not aware of any redundancy agreement that had been registered by the Commission, in the industry covered by the Awards. Further, it was submitted that the vast majority of employees employed in hot bread shops are so employed by employers of less than 15 employees, and would thus not be affected by these claims.

As to the requirements of s 26(1) of the Act, the respondents submitted that the claims should be dealt with through the enterprise bargaining process. It was conceded by the respondents, that whilst this industry constitutes a fairly large sector of employment, there was probably not a large impact on the state or national economies, arising from the claims.

As to s 26(1)(d)(iii) of the Act, dealing with the capacity of individual employers or the employers as a whole to deal with the cost, the respondents did not submit that there was such incapacity in this case.

The respondents further submitted that there was not the same degree of nexus between the industry awards in this state and elsewhere, as was the case in *Anchorage*.

In summary, the respondents submitted that there was no evidence to substantiate the applicant's submission that the

TCR provisions constitute a standard. It was said that federal and State legislation contain provisions which are adequate for the purposes of dealing with the requirements to notify of change and notice periods for termination of employment.

Evidence

The applicant called Mr Stephen Douglas Barrett, an organiser with the applicant, to give evidence. Mr Barrett has been an organiser with the applicant since in or about July 1993 and has specifically had the responsibility for the baking and pastrycook industry over the last five years. He gave evidence generally as to his duties and responsibilities in relation to the baking and pastrycook industry. His evidence was that as a part of his duties, he is required to negotiate with employers in the industry in relation to terms and conditions of employment, including redundancy matters.

Mr Barrett referred to his role on a peak council associated with training in the industry and a requirement accordingly, that he be aware of trends and developments in the industry.

Mr Barrett's witness statement relevantly provided as follows—

"7. Over the last five years I have endeavoured to negotiate enterprise bargaining agreements with employers in the baking and pastrycook industry, including the following—

Tip Top Bakeries Pty Ltd
Buttercup Bakeries
Bakers Delight—shop front stores
Bakewell Foods
Brumby—shop front stores

Included in our enterprise bargaining claims are redundancy and termination provisions.

These negotiations have been largely unsuccessful, yielding no signed and registered Industrial Agreements with the Termination, Change and Redundancy provision incorporated.

8. The technology in the industry continues to change in the following ways—

- *More automation in the doughmaking and mixing area;*
- *Larger faster automatic ovens*
- *Pre Mixes.*

Effects—

- *Less skilled (ie qualified bakers and pastrycooks) employees required.*
- *"Assistants" taking on more trades work in place of qualified employees (ie. "bakers" and "pastrycooks")*
- *Reduction in staff through terminations and redundancies.*

9. The nature of the workforce is as follows—

- *Stable in the larger sites such as Tip Top and Buttercup with the majority of employees being in the 40 year old plus bracket.*
- *The smaller type hot bread shops seem to have a young unqualified and more itinerant workforce.*
- *Hot bread shops seem to be the area where business have a high turnover of ownership. When this happens employees have to struggle for any entitlements when they are terminated.*

10. Some employers already have a redundancy severance pay policy, as follows—

Buttercup—2 weeks for every year of service, capped at a maximum payout of 52 weeks;

Tip Top—2 weeks for every year of service, capped at a maximum of 40 weeks."

Mr Barrett further testified that agreement had been reached at Buttercup Bakeries for pay increases, and an agreement to continue to negotiate in good faith. There also exists an agreement with Bakewell Foods, which has been registered. It deals with the use of casuals and also provides for wage increases. Otherwise, there has been virtually no success in getting any form of documents agreed and registered with other employers. Mr Barrett referred to other bakeries such as Aristocrats and Queen of Hearts, where the applicant had made approaches but without success. The applicant had also, on the evidence, sought, without success, redundancy provisions similar to those applicable in New South Wales, which provided for two weeks pay for each year of service, with a maximum of 65 weeks. Mr Barrett gave evidence that Tip Top Bakeries had an internal policy that provided a redundancy payment to a maximum of around 40 weeks pay.

As to the effect of automation, Mr Barrett gave examples of automation causing change within the industry, particularly in relation to dough making and mixing. Additionally, he referred to the increased use of pre-mixes, with the effect that many shops no longer required dough makers. Additionally, larger ovens have been introduced which can produce more units per hour, reducing the need for certain shifts. There has also been a change in the structure of the industry, in that there has been the development of small "hot bread shops", with many more employees now employed in this sector of the industry. Accordingly, the need for bakers in these particular areas was reduced.

Mr Barrett noted that TipTop and Buttercup sites have tended to have stable workforces, but that where there are closures or loss of contracts, it may mean that a complete line or a complete shift is lost. He gave an example of redundancies at Buttercup, due to the loss of particular contracts. He testified that all of the Bunbury operation of the company was closed down, because it could be serviced from the metropolitan area.

It was Mr Barrett's evidence that most employees in the industry expected that they would get redundancy benefits. He said that from his experience, employees are generally aware of what applies in the larger bakeries and what others have received in the past. There was, he said, a general perception that redundancy provisions apply to all employees.

As to the stability of employment in the industry as a whole, Mr Barrett confirmed that the baking industry was quite stable, with the two large employers being Tip Top and Buttercup. Where there have been redundancies at these companies both have policies that are applied. However, he said that at some of the other large bakeries such Mias and De Campo's, no such policies or agreements existed.

In re-examination, Mr Barrett said that it was a concern of the applicant that there was nothing preventing companies changing the policies they have implemented regarding redundancy. He noted that there was for example, no standard policy across the George Weston group, rather each business had its own policies that they were entitled to change.

His evidence also suggested that there are a considerable number of employers in the industry who employed less than 15 employees.

The respondents did not call any evidence.

Consideration

"TCR" Provisions

In the TCR Test Case, the then Australian Conciliation and Arbitration Commission formulated guideline principles in relation to termination, change and redundancy, ultimately leading to a variation of the federal Metal Industry Award to reflect these provisions. Subsequently, the terms of the "standard" TCR provisions and variations of it have been extended into many federal awards and the thrust of the provisions have been generally adopted in State awards in the respective State jurisdictions. Additionally, some State statutes also reflect provisions of this character.

In Western Australia, the terms of the federal TCR provisions, as applying at the time to the Metal Industry Award, were adopted by way of a variation to the State Metal Trades (General) Award No 13 of 1965, as a result of a decision of the Commission in Court Session in *Anchorage.* In this case, the Commission in Court Session, by majority, concluded that the applicant union in that case had established a proper basis to vary the Metal Trades (General) Award 1966 to insert the TCR provisions. In so concluding, the majority observed at 584—

> "It is apparent that the Australian Conciliation and Arbitration Commission, the New South Wales Parliament, the Industrial Commission of New South Wales and the Industrial Relations Commission of Victoria have had no difficulty in accepting on a merit basis the concepts on termination of employment, introduction of change and redundancy which are manifested in the several decisions

which have been drawn to the Commission's attention and in other material submitted as exhibits in this case. We respectfully agree with the Australian Commission that the traditional week's notice of termination included in awards provides no practical opportunity for those who have been in a particular job for some time to adjust to the proposed change in circumstances, reorganise their lives and seek alternative employment. It is self-evident that persons in higher age groups often find it more difficult to obtain and adapt to comparable work elsewhere. The improvement in this area which the Federal Commission has decreed for metal tradesmen under the Federal Metal Industry Award is fair and reasonable for employees under the instant award.

With respect to the provisions granted under the heading "Introduction of Change" by the Australian Commission it was stressed that those proposals were consistent with the NLAC guidelines... We see no problem whatever in endorsing those proposals in principle as fair and reasonable for application to employees working under the State Metal Trades Award."

The Commission in Court Session then considered the redundancy provisions the subject of the claim in that case. In this regard, the majority further noted at 584—

"Turning now to the redundancy provisions we respectfully endorse the finding of the Australian Commission that the primary reason for the payment of severance pay does not relate to the requirement to search for another job and/or to tide over an employee during a period of unemployment. It is justified as compensation for the inconvenience and hardship imposed on employees and for loss of certain non-transferable credits... All in all the provisions granted by the Federal Tribunal are, as a matter of merit, fair and reasonable for application to metal trades employees in this State."

In commenting on the previously adopted "case by case" approach of the Commission to redundancy, the majority continued at 584—

"We would turn now to consider the observations made by the Commission in Court Session in its May 1985 decision. The Commission then commented that whether its practice of dealing with redundancy matters on a case by case basis should be supplanted by a general prescription in awards is a matter which must be the subject of independent judgement based upon the consideration of the merits and demerits of the proposal. As mentioned earlier this application deals with one award and one award only.

While the Commission does not appear to have had any great difficulty in dealing with retrenchment problems on a case by case basis it is difficult to see how job protection relating to notice of termination by the employer and introduction of change can be dealt with as effectively on a case by case basis as it can by general award prescription. We have reached the conclusion that it is better for all parties to know in advance their rights and obligations should termination become necessary and when definite decisions are made to introduce major changes in production, programme, organisation, structure or technology, that are likely to have significant effects on employees. The "case by case" approach leads too much chance of employees and their unions being faced with a *fait accompli."*

It has been subsequently recognised that the terms of the TCR "standard" provisions, whilst perhaps not constituting a test case in this jurisdiction as a result of the variation to the Metal Trades (General) Award, have come to be regarded as a "community standard*": Boultons Pty Ltd and Others v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 1014; *The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch v Master Builders Association of Western Australia (Union of Employers) and Others* (1995) 75 WAIG 2699.

With the passage of time since the TCR Test Case, and its subsequent adoption in 1986 in *Anchorage*, there have been significant changes in the wage fixing system, the legislative environment, and indeed, in the area of community standards and expectations, impacting on redundancy. These changes necessitate, in our opinion, some reconsideration of the approach of the Commission in Court Session in *Anchorage* or, at least, viewing that decision in the context of the circumstances prevailing at that time. Before considering these matters however, it is necessary to first turn to the Principles and in particular, Principle 10. Principle 10 relevantly provides as follows—

"An application or reference for a variation in wages or conditions above or below the safety net will be referred to the Chief Commissioner for determination by the Commission in Court Session.

A party making such an application should support it with material showing—

- Why the matter has not been progressed and/or finalised pursuant to section 41 of the Act;
- Why the matter has not been pursued under any other Principle set out in this Statement; and
- How in the discharge of its statutory function to consider varying above or below the safety net the Commission in Court Session should take into account, to the extent that it is relevant, each of the matters identified in section 26 (1) of the Act."

We will deal with each of the issues raised by the applicant in relation to the requirements of Principle 10, later in these reasons.

Wage Fixing Generally

Since the decision of the Commission in Court Session in *Anchorage*, and particularly of more recent years, the focus of wage fixing systems adopted by industrial tribunals, and supported by legislative amendment, have placed a far greater emphasis on bargaining at the enterprise level, with the award system being regarded as a safety net. This trend throughout the Commonwealth, accelerated in particular following the *National Wage Case, October 1991* (1991) AILR 369 and subsequently the *National Wage Case, October 1993* (1993) AILR 335. Most State jurisdictions have adopted the same or a similar approach, having due regard to their particular legislative schemes. Most recently, the Commission in Court Session in the July 1999 State Wage Case, considered the application of the Principles in the State wage fixing system. In particular, in abolishing the Enterprise Bargaining Principle and the Special Case Principle, the Commission in Court Session affirmed the importance of the role of s 26 of the Act in the operation of the Principles. The Commission, in characterising the award safety net as the linchpin of the wage fixing system, observed at 1849—

"From time to time the award safety net is adjusted in accordance with the National Wage Decision but applications for movements in wages or conditions not in accordance with the National Wage Decision attracts particular attention. In this jurisdiction applications can be dealt with and s 26(1)(a) of the Act would make that view inevitable. What is important is that while the Principles exist, these cases should not be decided by the Commission sitting alone in disregard of the Principles and their objectives (see Confederation of WA v. FMWU and others (1989) 69 WAIG 3219 at 3222 per Brinsden J.). In this respect the Commission should not be in a position any different from the AIRC in its consideration of a "special case" under s 107 of the Workplace Relations Act. We believe that this can be achieved by a Commission in Court Session being able to exercise jurisdiction pursuant to s 26 of the Act after satisfying itself that the application does not fit within the Principles. Within this framework, the objects of encouraging enterprise outcomes, maintaining the award safety net and limiting the extent to which labour costs can be increased or decreased beyond the level established under the award safety net can be met. As is the case with the AIRC, Commissioners sitting alone are obliged to apply the wage fixing Principles and the Commission in Court Session, consistent with the Full Bench's discretion under s 107 of the Workplace Relations Act, can determine an outcome which does not fit within the principles after taking into account the Principles, their objectives and s 26 of the Act. The Special Case Principle as such is inappropriate given the framework of the Act."

In our opinion, it is implicit in the Principles, in the context of the Commission in Court Session's decision, with particular regard to the terms of s 26 of the Act and the continued focus on enterprise bargaining with the award system as the safety net, that the safety net be maintained to reflect, from time to time, changes in economic, social and industrial conditions. As we apprehend it, this is, at least in part, the intent of Principle 10, when read with s 26 of the Act and the observations of the Commission in Court Session to which we have referred. This must of course be applied in such a way so as to continue to encourage bargaining at the enterprise level.

Legislative Setting

Additionally, since the decision of the Commission in *Anchorage* in 1986, there have been substantial legislative changes at both the federal and State levels, in areas the subject of the instant applications. As noted above, the applicant, during the course of its case, referred to a number of these.

At the federal level, the Industrial Relations Reform Act 1993 (Cth), introduced substantial amendments to the then Industrial Relations Act 1988 (Cth) to introduce various redundancy provisions. Those amendments were subsequently incorporated with the amendments in 1996 giving rise to the WRA, specifically as contained in Division 3 of Part VIA of that Act.

It is to be noted that subject to specific statutory exclusions, these provisions in Division 3 of Part VIA of the WRA have application to all employees, not just those employees covered by federal awards. In particular, these provisions provide that—

(1) under s 170 CL an employer is required to notify the Commonwealth Employment Service of the proposed termination of 15 or more employees for reasons of an economic, technological, structural or similar nature;

(2) under s 170 CM an employee is required to be given a specified period of notice or payment in lieu of notice, depending upon the employee's length of service;

(3) under s 170 FA the Federal Commission is empowered to make orders in relation to severance payments to give effect to Article 12 of the Termination of Employment Convention;

(4) under s 170 GA the Federal Commission may make orders to ensure that employee's representatives are informed of terminations made for reasons of an economic, technological, structural or similar nature, in giving effect to Article 13 of the Termination of Employment Convention; and

(5) under s 170 GB the Federal Commission is empowered to make orders where an employer has failed to consult the relevant trade union (s) or failed to give such trade union an opportunity to discuss with the employer measures to avert the terminations.

Similarly, at the State level in Western Australia, Part 5 of the MCEA requires that employees, whether covered by awards or industrial agreements or not, be notified in advance by an employer, in relation to employment changes with significant effects and in the case of redundancy. By the terms of s 5(1) of the MCEA, these minimum conditions of employment as prescribed in Part 5 are taken to be implied into any award of the Commission. Therefore, employers and employees bound by and party to the Awards are, by reason of these various statutory obligations, already subject to many of the rights and obligations sought to be conferred by the present applications. However, as noted by the applicant, those rights and obligations are contained in disparate legislation, both State and federal, independent of the terms of the Awards that directly apply to the employers and employees in the industry.

In our opinion, this being the case, it makes good sense that the parties covered by the Awards, have contained in them what are, in effect, many of their existing rights and obligations under the law. This would in our view, enable the parties to be aware of their minimum legal obligations, as contained in the one instrument. This may also avoid potential disputation in relation to these obligations, if they are all contained in the Awards, that govern the industry. Such an approach in our view, does no violence to any of these statutory obligations and in the main, reflects contemporary industrial standards in these areas. This is not to say that this alone should be justification for the insertion of statutory provisions into awards of the Commission. However, in the context of the present applications, it is a relevant consideration in our opinion.

Community Standards

Much was made by the applicant during the course of these proceedings, of the "community standard" in relation to redundancy. As we have observed above, it was the applicant's primary submission that the TCR Test Case should also be regarded as a test case in this Commission. It is perhaps questionable as to whether this is not so. However, and regardless of the "test case" status issue, the conclusion is inescapable that with the passage of time, having regard to the developments that we have referred to above, it is reasonable to conclude that there is now generally a community expectation that in the event of a redundancy, some form of compensation is warranted. This is again, a relevant consideration for the purposes of applying s 26 of the Act to the circumstances of this case, in our view.

Conclusions

The Commission is required in these proceedings, to consider the applicant's claims in the context of Principle 10 of the Principles. In this respect, the applicant addressed each of the three elements as set out in Principle 10. In relation to the issue as to why the subject of redundancy has not been progressed and/or finalised pursuant to s 41 of the Act, the applicant referred to the evidence of Mr Barrett.

Having regard to all of the circumstances in this case, we are satisfied that the applicant has established on credible evidence, which evidence was not seriously contested, that it has not, to-date, been successful in pursuing redundancy benefits by way of industrial agreements under s 41 of the Act.

As to the evidence in relation to the existence of redundancy policies, this of itself does not afford a complete answer to the applications in our view, even if they were widespread on the evidence, which it appears they are not. The legal status of policies and procedures in the workplace, and specifically their enforceability, is a problematic area in industrial and employment law. Whether such policies have contractual effect depends very much on the manner of their implementation and other issues. Also, there are difficult issues in terms of whether such provisions may be changed unilaterally by one party. Even if such arrangements have contractual effect, this may require an aggrieved employee to have to bring a contractual benefits claim and establish a case on the balance of probability, for a benefit which appears to be now broadly accepted as a community standard.

We are satisfied, having considered all of the submissions and the evidence and, in particular, having regard to s 26(1) of the Act, that the applicant has established a case for the variation to the Awards, in accordance with the Principles. The circumstances now prevailing, in terms of the wage fixing environment, legislative changes, and community expectations, to which we have referred in some detail above in these reasons, all support in our view, as a matter of equity and good conscience, the need for minimum conditions as to redundancy to be prescribed in the Awards, to cater for circumstances of genuine redundancy.

Specifically, in terms of s 26(1)(a), the granting of the applicant's claims is consistent with equity and good conscience as it maintains the award safety net, in view of legislative, community and social changes, in order that the award safety net remains the linchpin of the wage fixing system.

In terms of s 26(1)(c), the granting of these applications is also consistent with the interests of the parties immediately concerned. In the case of employees covered by the Awards, these provisions will provide a minimum level of protection in the case of genuine redundancy. In the case of employers affected by the relevant provisions, the insertion of these provisions will provide a degree of consistency and certainty in terms of outcomes in a redundancy situation. We pause to note, that this was an important consideration of the Commission in Court Session in *Anchorage*.

As to s 26(1)(d), there was no evidence before the Commission and indeed no real submission by the respondents, that the introduction of these benefits into the Awards would have an adverse economic effect on either of the economies referred

to in ss 26(1)(d)(i) or (ii) or that the respondent employers did not have the capacity to bear any costs associated with the claims in accordance with s 26(1)(d) (iii). In any event, if the latter circumstance did arise, the "incapacity to pay" provisions will provide an avenue for these matters to be addressed.

Accordingly, for all of the above reasons, in our opinion, the applications should be granted.

The parties are directed to lodge with the Commission minutes of proposed order, reflecting these reasons for decision by 4.00pm Thursday 27 January 2000. In doing so, the parties' attention is drawn to the fact that it appears that there will need to be amendments to the schedules presently before the Commission, in order that the minutes of proposed order are consistent with the existing terms of the Awards.

Appearances: Mr J. Ridley on behalf of the applicants

Mr M. Beros on behalf of the respondents

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch

and

Baking Industry Employers Association of Western Australia.

No. 316 of 1993.

COMMISSION IN COURT SESSION
COMMISSIONER C B PARKS
COMMISSIONER P E SCOTT
COMMISSIONER S J KENNER.

31 January 2000.

Order.

HAVING heard Mr J. Ridley and subsequently Mr D. Kelly on behalf of the applicant and Mr M. Beros on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Bakers' (Metropolitan) Award No. A 13 of 1987 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 25 January 2000.

(Sgd.) C. B. PARKS,
[L.S.] Commission in Court Session.

Schedule.

1. Clause 2.—Arrangement—

Delete this clause and insert in lieu thereof—

2.—ARRANGEMENT

2. Clause 13—Termination of Employment: Delete this clause and insert in lieu thereof—

13.—CONTRACT OF SERVICE

(1) (a) A contract of service may be terminated in accordance with the provisions of this clause and not otherwise but this subclause does not operate so as to prevent any party to a contract from giving a greater period of notice than is hereinafter prescribed, nor to affect an employer's right to dismiss an employee without notice for conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, and an employee so dismissed must be paid for the time worked up to the time of dismissal only.

(b) Subject to the provisions of this clause, a party to a contract of service may, on any day give to the other party the appropriate period of notice of termination of the contract prescribed in subclause (2) of this clause and the contract terminates when that period expires.

(2) Notice of Termination by Employer

(a) In order to terminate the employment of an employee (other than a casual employee) the employer must give the employee the following notice—

PERIOD OF CONTINUOUS SERVICE	PERIOD OF NOTICE
During the first month	1 day
More than one month but less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than5 years	3 weeks
5 years and over	4 weeks

(b) An employee who at the time of being given notice is over 45 years of age and who at the date of termination has completed two years' continuous service with the employer, must be entitled to one week's notice in addition to the notice prescribed in paragraph (a) of this subclause.

(c) Payment in lieu of the notice prescribed in paragraphs (a) and (b) of this subclause must be made if the appropriate notice period is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

(d) In calculating any payment in lieu of notice the employer must pay the employee the ordinary wages for the period of notice had the employment not been terminated.

(e) The period of notice in this subclause must not apply in the case of casual employees, apprentices or employees engaged for a specific period of time or for a specific task or tasks.

(f) (i) For the purpose of this clause continuity of service must not be broken on account of—

(aa) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding obligations hereunder in respect of leave of absence;

(bb) any absence from work on account of personal sickness or accident for which an employee is entitled to claim sick pay as prescribed by this award or on account of leave lawfully granted by the employer; or

(cc) any absence with reasonable cause, proof whereof must be upon the employee;

Provided that in the calculation of continuous service under this subclause any time in respect of which an employee is absent from work except time for which an employee is entitled to claim annual leave, sick pay, long service leave and public holidays as prescribed by this award must not count as time worked.

(ii) Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with Clause 2(3) of the Long Service Leave Provisions published in Volume 79 of the Western Australian Industrial Gazette at pages 1-4 must also constitute continuous service for the purpose of this clause.

(3) Notice of Termination by Employee

(a) The notice of termination required to be given by an employee must be the same as that required of an employer, save and except that there must be no additional notice based on the age of the employee concerned.

(b) If an employee fails to give the required notice or having given, or been given, such notice leaves before the notice expires, the employee forfeits the entitlement to any moneys owing to the employee under this award except to the extent that those moneys exceed the ordinary wages for the required period of notice.

(4) Time Off During Notice Period

Where an employer has given notice of termination to an employee who has completed one month's continuous service, that employee must, for the purpose of seeking other employment be entitled to be absent from work up to a maximum of eight ordinary hours without deduction of pay. The time off must be taken at times that are convenient to the employee after consultation with the employer.

This subclause does not apply to a casual employee.

(5) Statement of Employment

The employer must, upon receipt of a request from an employee whose employment has been terminated, provide to the employee a written statement specifying the period of employment and the classification or the type of work performed by the employee.

(6) Notification on Engagement

On the first day of engagement an employee must be notified by his employer or by the employer's representative, whether the duration of his employment is expected to exceed one month and, if hired as a casual employee must be advised accordingly.

(7) Casual Employees

(a) (i) The period of notice of termination in the case of a casual employee must be one hour.

(ii) If the required notice of termination is not given one hour's wages must be paid by the employer or forfeited by the employee.

(b) An employee must for the purpose of this award be deemed to be a casual employee—

(i) if the expected duration of the employment is less than one month, or

(ii) if the notification referred to in subclause (6) of this clause is not given and the employee is dismissed through no fault of the employee within one month of commencing employment.

(8) Absence From Duty

The employer must be under no obligation to pay for any day not worked upon which the employee is required to present for duty, except when such absence is due to illness and comes within the provisions of Clause 16.—Absence through Sickness of this award or such absence is on account of holidays to which the employee is entitled under the provisions of this award.

(9) Standing Down of Employees

(a) (i) The employer is entitled to deduct payment for any day or part of a day on which an employee (including an apprentice) cannot be usefully employed because of industrial action by the union party to this award, or by any other association or union.

(ii) If an employee is required to attend for work on any day but because of failure or shortage of electric power work is not provided, such employee must be entitled to two hours' pay and further, where any employee commences work he/she must be provided with four hours' employment or be paid for four hours' work.

(b) The provisions of subclause (9)(a) of this clause also apply where the employee cannot be usefully employed through any cause which the employer could not reasonably have prevented but only if, and to the extent that, the employer and the union concerned so agree or, in the event of disagreement, the Board of Reference so determines.

(c) Where the stoppage of work has resulted from a breakdown of the employer's machinery the Board of Reference, in determining a dispute under subclause (9)(b) of this clause, must have regard for the duration of the stoppage and the endeavours made by the employer to repair the breakdown.

3. Delete Clause 16.—Breakdowns

4. Delete the numbering of clauses 17 to 29 inclusive and renumber such clauses 16 to 28 respectively.

5. Clause 7.—Hours—

Delete from subclause (4), paragraph (b), the number and title 20.—Allowances and insert in lieu thereof the number and title 19.—Allowances.

6. Clause 10.—Holidays

A. Delete from subclause (5), paragraph (b), subparagraph (ii), placitum (aa), the number and title 26.—Income Maintenance Allowance and insert in lieu thereof the number and title 24.—Income Maintenance Allowance.

B. Delete from subclause (5), paragraph (b), subparagraph (ii), placitum (bb), the number and title 20.—Allowances and insert in lieu thereof the number and title 19.—Allowances.

C. Delete from subclause (5), paragraph (c), subparagraph (ii), the number and title 20.—Allowances and insert in lieu thereof the number and title 19.—Allowances.

7. Clause 26.—Superannuation

Delete from subclause (1), paragraph (b), the number and title 20.—Allowances and insert in lieu thereof the number and title 19.—Allowances.

8. Clause 27. Enterprise Hours of Work

Delete from the preamble to this clause the number and title 30.—Enterprise Agreements and insert in lieu the number and title 28.—Enterprise Agreements.

9. After Clause 28.—Enterprise Agreements, insert the following new clauses—

29.—INTRODUCTION OF CHANGE

(1) Employer's Duty to Notify

(a) Where an employer has made a definite decision to introduce major changes in production, programme, organisation, structure or technology that are likely to have "significant effect" on employees, the employer must notify the employees who may be affected by the proposed changes and their Union.

(b) "Significant effects" include termination of employment, major changes in the composition, 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 the restructuring of jobs. Provided that where the award makes provision for alteration of any of the matters referred to herein an alteration must be deemed not to have "significant effects".

(2) Employer's Duty to Discuss Change

(a) The employer must discuss with the employees affected and their 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 must give prompt consideration to matters raised by the employees and/or their Union in relation to the changes.

(b) The discussion must commence as soon as is practicable after a definite decision has been made by the employer to make the changes referred to in subclause (1) of this clause.

(c) For the purpose of such discussion, the employer must provide in writing to the employees concerned and their union, all relevant information about the changes including the nature of the changes proposed; the expected effect of the changes on employees and other matters likely to affect employees provided that any employer must not be required to disclose confidential information the disclosure of which would be inimical to the employer's interests.

30.—REDUNDANCY

(1) Discussions Before Terminations

(a) Where an employer had 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 must hold discussions with the employees directly affected and with their union.

(b) The discussion must take place as soon as is practicable after the employer has made a definite decision which will invoke the provisions of paragraph (a) of this subclause and must cover among other things, any reasons for the proposed termination, measures to avoid or minimise the termination and measures to minimise any adverse affect of any terminations on the employees concerned.

(c) For the purpose of such discussion the employer must provide in writing to the employees concerned and their union, all relevant information about the proposed terminations including the reasons for the proposed termination, 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 any employer must not be required to disclose confidential information the disclosure of which would be inimical to the employer's interests.

(2) Transfer to Lower Paid Duties

Where an employee is transferred to lower paid duties for reasons set out in subclause (1)(a) of this clause the employee must 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 employer may at the employer's 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 subclause (2)(a) of clause 13—Contract of Service of this award, for ordinary termination, and subject to further order of the Commission, an employee whose employment is terminated for reasons set out in subclause (1)(a) of this clause must 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 one year	nil
one year but less than two years	four weeks
two years but less than three years	six weeks
three years but less than four years	seven weeks
four years and over	eight weeks

"Weeks pay" means the ordinary weekly rate of wage for the employee concerned.

Provided that the severance payments must not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

(b) For the purpose of this clause continuity of service must not be broken on account of—

(i) Any interruption or termination of the employment by the employer 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 this award or on account of leave lawfully granted by the employer; or

(iii) Any absence with reasonable cause, proof whereof must be upon the employee.

Provided that in the calculation of continuous service under this subclause any time in respect of which an employee is absent from work except time for which an employee is entitled to claim annual leave, sick pay, long service leave and public holidays as prescribed by this award must not count as time worked.

(c) Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with Clause 2(3) of the Long Service Leave provisions published in Volume 79 of the Western Australian Industrial Gazette at pages 1-4 must also constitute continuous service for the purpose of this clause.

(4) Employee Leaving During Notice

An employee whose employment is to be terminated for reasons set out in subclause (1)(a) of this clause may terminate employment during the period of notice and, if so, must be entitled to the same benefits and payments under this clause had the employee remained with the employer until the expiry of such notice. Provided that in such circumstances the employee must not be entitled to payment in lieu of notice.

(5) Alternative Employment

An employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied if the employer 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 an employer, an employee whose employment is to be terminated for reasons set out in subclause (1)(a) of this clause that employee must 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 must, at the request of the employer, be required to produce proof of attendance at an interview or the employee must not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

(7) Notice to Centrelink

Where a decision has been made to terminate employees in the circumstances outlined in subclause (1)(a) of this clause, the employer must notify Centrelink thereof as soon as possible giving relevant information including the number and categories of the employees likely to be affected and the period over which the terminations are intended to be carried out.

(8) Superannuation Benefits

(a) Subject to further order of the Commission where an employee, who is terminated receives a benefit from a superannuation scheme, the employee must only receive under subclause (3) of this clause the difference between the severance pay specified in that subclause and the amount of the superannuation benefit the employee receives which is attributable to employer contributions only.

(b) If the superannuation benefit is greater than the amount due under subclause (3) of this clause then the employee must receive no payment under that subclause.

(c) Provided that benefits arising directly or indirectly from contributions made by an employer in accordance with an award, agreement or order made or registered under the Industrial Relations Act, 1979 must not be taken into account unless the Commission so orders in a particular case.

(9) Employees With Less Than One Year's Service

This clause must not apply to employees with less than one year's continuous service and the general obligation on employers 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 employees of suitable alternative employment.

(10) Employees Exempted

This clause must 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 specified task or tasks.

(11) Incapacity to Pay

An employer, in a particular redundancy case may make application to the Commission to have the general severance pay prescription varied on the basis of the employer's incapacity to pay.

(12) Employers Exempted

Subject to an order of the Commission, in a particular redundancy case, this clause does not apply to employers who employ less than 15 employees.

(13) Dispute Settling Procedures

Any dispute under these provisions must be referred to the Commission.

10. Schedule B—Appendix—Buttercup Bakeries Malaga—

A. Delete from clause 1. Payout of Income Maintenance Allowance, the number and title 26.—Income Maintenance Allowance and insert in lieu thereof the number and title 24.—Income Maintenance Allowance.

B. Delete from clause 2.—Averaging of Penalty Structure, the number and title 20.—Allowances and insert in lieu thereof the number and title 19.—Allowances.

11. Schedule C—Appendix—Tip Top Bakeries Canning Vale

A. Delete from clause 1. Income Maintenance Allowance—Definition, Subclause (i), the number and title 26.—Income Maintenance Allowance and insert in lieu thereof the number and title 24.—Income Maintenance Allowance.

B. Delete from clause 2.—Payout of Income Maintenance Allowance, the number and title 26.—Income Maintenance Allowance and insert in lieu thereof the number and title 24.—Income Maintenance Allowance.

———

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch

and

ACME Bakery and Others.

No. 362 of 1993.

COMMISSION IN COURT SESSION
COMMISSIONER C B PARKS
COMMISSIONER P E SCOTT
COMMISSIONER S J KENNER.

31 January 2000.

Order.

HAVING heard Mr J. Ridley and subsequently Mr D. Kelly on behalf of the applicant and Mr M. Beros on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Bakers (Country) Award No. R18 of 1977 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 25 January 2000.

(Sgd.) C. B. PARKS,
[L.S.] Commission in Court Session.

———

Schedule.

1. Clause 2.—Arrangement. Delete this clause and insert in lieu thereof—

2.—ARRANGEMENT

2. Clause 13.—Contract of Service. Delete this clause and insert in lieu thereof—

13.—CONTRACT OF SERVICE

(1) (a) A contract of service can only be terminated in accordance with the provisions of this clause and not otherwise, but this subclause does not prevent any party to a contract from giving a greater period of notice than is prescribed, nor to affect an employer's right to dismiss an employee without notice for conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, and an employee so dismissed must be paid for the time worked up to the time of dismissal only.

(b) Subject to the provisions of this clause, a party to a contract of service may, on any day give to the other party the appropriate period of notice of termination of the contract prescribed in subclause (2) of this clause and the contract terminates when that period expires.

(2) Notice of Termination by Employer

(a) In order to terminate the employment of an employee (other than a casual employee) the employer must give the employee the following notice—

PERIOD OF CONTINUOUS SERVICE	PERIOD OF NOTICE
During the first month	1 day
More than one month but less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than5 years	3 weeks
5 years and over	4 weeks

(b) An employee who at the time of being given notice is over 45 years of age and who at the date of termination has completed two years' continuous service with the employer, must be entitled to one week's notice in addition to the notice prescribed in subclause (2)(a) of this clause.

(c) Payment in lieu of the notice prescribed in paragraphs (a) and (b) of this subclause must be made if the appropriate

notice period is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

(d) In calculating any payment in lieu of notice the employer must pay the employee the ordinary wages for the period of notice had the employment not been terminated.

(e) The period of notice in this subclause must not apply in the case of casual employees, apprentices or employees engaged for a specific period of time or for a specific task or tasks.

(f) (i) For the purpose of this clause continuity of service must not be broken on account of—

(aa) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding obligations hereunder in respect of leave of absence;

(bb) any absence from work on account of personal sickness or accident for which an employee is entitled to claim sick pay as prescribed by this award or on account of leave lawfully granted by the employer; or

(cc) any absence with reasonable cause, proof whereof must be upon the employee;

Provided that in the calculation of continuous service under this subclause any time in respect of which an employee is absent from work except time for which an employee is entitled to claim annual leave, sick pay, long service leave and public holidays as prescribed by this award must not count as time worked.

(ii) Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with Clause 2(3) of the Long Service Leave Provisions published in Volume 79 of the Western Australian Industrial Gazette at pages 1-4 must also constitute continuous service for the purpose of this clause.

(3) Notice of Termination by Employee

(a) The notice of termination required to be given by an employee must be the same as that required of an employer, save and except that there must be no additional notice based on the age of the employee concerned.

(b) If an employee fails to give the required notice or having given, or been given, such notice leaves before the notice expires, the employee forfeits the entitlement to any moneys owing to the employee under this award except to the extent that those moneys exceed the ordinary wages for the required period of notice.

(4) Time Off During Notice Period

Where an employer has given notice of termination to an employee who has completed one month's continuous service, that employee must, for the purpose of seeking other employment be entitled to be absent from work up to a maximum of eight ordinary hours without deduction of pay. The time off must be taken at times that are convenient to the employee after consultation with the employer.

This subclause does not apply to a casual employee.

(5) Statement of Employment

The employer must, upon receipt of a request from an employee whose employment has been terminated, provide to the employee a written statement specifying the period of employment and the classification or the type of work performed by the employee.

(6) Notification on Engagement

On the first day of engagement an employee must be notified by his employer or by the employer's representative, whether the duration of his employment is expected to exceed one month and, if hired as a casual employee must be advised accordingly.

(7) Casual Employees

(a) (i) The period of notice of termination in the case of a casual employee must be one hour.

(ii) If the required notice of termination is not given one hour's wages must be paid by the employer or forfeited by the employee.

(b) An employee must for the purpose of this award be deemed to be a casual employee—

(i) if the expected duration of the employment is less than one month, or

(ii) if the notification referred to in subclause (6) of this clause is not given and the employee is dismissed through no fault of the employee within one month of commencing employment.

(8) Absence From Duty

The employer must be under no obligation to pay for any day not worked upon which the employee is required to present for duty, except when such absence is due to illness and comes within the provisions of Clause 16.—Absence Through Sickness of this award or such absence is on account of holidays to which the employee is entitled under the provisions of this award.

(9) Standing Down of Employees

(a) (i) The employer is entitled to deduct payment for any day or part of a day on which an employee (including an apprentice) cannot be usefully employed because of industrial action by any of the unions party to this award, or by any other association or union.

(ii) If an employee is required to attend for work on any day but because of failure or shortage of electric power work is not provided, such employee must be entitled to two hours' pay and further, where any employee commences work he/she must be provided with four hours' employment or be paid for four hours' work.

(b) The provisions of subclause (9)(a) of this clause also apply where the employee cannot be usefully employed through any cause which the employer could not reasonably have prevented but only if, and to the extent that, the employer and the union concerned so agree or, in the event of disagreement, the Board of Reference so determines.

(c) Where the stoppage of work has resulted from a breakdown of the employer's machinery the Board of Reference, in determining a dispute under subclause (9)(b) of this clause, must have regard for the duration of the stoppage and the endeavours made by the employer to repair the breakdown.

10. (a) An employer may direct an employee to carry out such duties as are within limits of the employee's skills; competence and training, provided that such duties are not designed to promote deskilling.

(b) An employer may direct an employee to carry out such duties and use such tools and equipment as may be required, provided that the employee has been trained in the use of such tools and equipment.

(c) Any direction issued by an employer pursuant to paragraphs (a) and (b) of this subclause must be consistent with the employer's responsibilities to provide a safe and healthy working environment.

11. This clause shall not apply to jobbers.

3. Clause 15.—Breakdowns. Delete this clause.

4. Delete the numbering of clauses 16 to 28 inclusive and renumber such clauses 15 to 27 respectively.

5. After Clause 27.—Enterprise Hours, insert the following new Clause.

28.—REDUNDANCY

(1) Discussions Before Terminations

(a) Where an employer had 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 must hold discussions with the employees directly affected and with their union.

(b) The discussion must take place as soon as is practicable after the employer has made a definite decision which will invoke the provisions of paragraph (a) of this subclause and must cover among other things, any reasons for the proposed termination, measures to avoid or minimise the termination and measures to minimise any adverse affect of any terminations on the employees concerned.

(c) For the purpose of such discussion the employer must provide in writing to the employees concerned and their union, all relevant information about the proposed terminations including the reasons for the proposed termination, 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 any employer must not be required to disclose confidential information the disclosure of which would be inimical to the employer's interests.

(2) Transfer to Lower Paid Duties

Where an employee is transferred to lower paid duties for reasons set out in subclause (1)(a) of this clause the employee must 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 employer may at the employer's 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 Clause 13(2)(a).—Contract of Service of this award, for ordinary termination, and subject to further order of the Commission, an employee whose employment is terminated for reasons set out in subclause (1)(a) of this clause must 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 one year	nil
one year but less than two years	four weeks
two years but less than three years	six weeks
three years but less than four years	seven weeks
four years and over	eight weeks

"Weeks pay" means the ordinary weekly rate of wage for the employee concerned.

Provided that the severance payments must not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

(b) For the purpose of this clause continuity of service must not be broken on account of—

(i) Any interruption or termination of the employment by the employer 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 this award or on account of leave lawfully granted by the employer; or

(iii) Any absence with reasonable cause, proof whereof must be upon the employee.

Provided that in the calculation of continuous service under this subclause any time in respect of which an employee is absent from work except time for which an employee is entitled to claim annual leave, sick pay, long service leave and public holidays as prescribed by this award must not count as time worked.

(c) Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with Clause 2(3) of the Long Service Leave provisions published in Volume 79 of the Western Australian Industrial Gazette at pages 1-4 must also constitute continuous service for the purpose of this clause.

(4) Employee Leaving During Notice

An employee whose employment is to be terminated for reasons set out in subclause (1)(a) of this clause may terminate employment during the period of notice and, if so, must be entitled to the same benefits and payments under this clause had the employee remained with the employer until the expiry of such notice. Provided that in such circumstances the employee must not be entitled to payment in lieu of notice.

(5) Alternative Employment

An employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied if the employer 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 an employer, an employee whose employment is to be terminated for reasons set out in paragraph (a) of subclause (1) of this clause that employee must 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 must, at the request of the employer, be required to produce proof of attendance at an interview or the employee must not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

(7) Notice to Centrelink

Where a decision has been made to terminate employees in the circumstances outlined in subclause (1)(a) of this clause, the employer must notify Centrelink thereof as soon as possible giving relevant information including the number and categories of the employees likely to be affected and the period over which the terminations are intended to be carried out.

(8) Superannuation Benefits

(a) Subject to further order of the Commission where an employee, who is terminated receives a benefit from a superannuation scheme, the employee must only receive under subclause (3) of this clause the difference between the severance pay specified in that subclause and the amount of the superannuation benefit the employee receives which is attributable to employer contributions only.

(b) If the superannuation benefit is greater than the amount due under subclause (3) of this clause then the employee must receive no payment under that subclause.

(c) Provided that benefits arising directly or indirectly from contributions made by an employer in accordance with an award, agreement or order made or registered under the Industrial Relations Act, 1979 must not be taken into account unless the Commission so orders in a particular case.

(9) Employees With Less Than One Year's Service

This clause must not apply to employees with less than one year's continuous service and the general obligation on employers 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 employees of suitable alternative employment.

(10) Employees Exempted

This clause must 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 specified task or tasks.

(11) Incapacity to Pay

An employer, in a particular redundancy case may make application to the Commission to have the general severance pay prescription varied on the basis of the employer's incapacity to pay.

(12) Employers Exempted

Subject to an order of the Commission, in a particular redundancy case, this clause does not apply to employers who employ less than 15 employees.

(13) Dispute Settling Procedures

Any dispute under these provisions must be referred to the Commission.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch

and

Bakewell Pies (1978) Pty Ltd and Others.

No. 363 of 1993.

COMMISSION IN COURT SESSION
COMMISSIONER C B PARKS
COMMISSIONER P E SCOTT
COMMISSIONER S J KENNER.

31 January 2000.

Order.

HAVING heard Mr J. Ridley and subsequently Mr D. Kelly on behalf of the applicant and Mr M. Beros on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Pastrycooks' Award No. A24 of 1981 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 25 January 2000.

(Sgd.) C. B. PARKS,
[L.S.] Commission in Court Session.

Schedule.

1. Clause 2.—Arrangement: After the number and title 31.—Enterprise Hours insert the following number and title—

32.—Redundancy.

2. Clause 6—Contract of Service: Delete this clause and insert in lieu thereof—

6.—Contract of Service

(1) (a) A contract of service may be terminated in accordance with the provisions of this clause and not otherwise but this subclause does not operate so as to prevent any party to a contract from giving a greater period of notice than is hereinafter prescribed, nor to affect an employer's right to dismiss an employee without notice for conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, and an employee so dismissed must be paid for the time worked up to the time of dismissal only.

(b) Subject to the provisions of this clause, a party to a contract of service may, on any day give to the other party the appropriate period of notice of termination of the contract prescribed in subclause (2) of this clause and the contract terminates when that period expires.

(2) Notice of Termination by Employer

(a) In order to terminate the employment of an employee (other than a casual employee) the employer must give the employee the following notice—

Period of Continuous Service	Period of Notice
During the first month	1 day
More than one month but less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than5 years	3 weeks
5 years and over	4 weeks

(b) An employee who at the time of being given notice is over 45 years of age and who at the date of termination has completed two years' continuous service with the employer, must be entitled to one week's notice in addition to the notice prescribed in paragraph (a) of this subclause.

(c) Payment in lieu of the notice prescribed in paragraphs (a) and (b) of this subclause must be made if the appropriate notice period is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

(d) In calculating any payment in lieu of notice the employer must pay the employee the ordinary wages for the period of notice had the employment not been terminated.

(e) The period of notice in this subclause must not apply in the case of casual employees, apprentices or employees engaged for a specific period of time or for a specific task or tasks.

(f) (i) For the purpose of this clause continuity of service must not be broken on account of—

(aa) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding obligations hereunder in respect of leave of absence;

(bb) any absence from work on account of personal sickness or accident for which an employee is entitled to claim sick pay as prescribed by this award or on account of leave lawfully granted by the employer; or

(cc) any absence with reasonable cause, proof whereof must be upon the employee;

Provided that in the calculation of continuous service under this subclause any time in respect of which an employee is absent from work except time for which an employee is entitled to claim annual leave, sick pay, long service leave and public holidays as prescribed by this award must not count as time worked.

(ii) Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with Clause 2(3) of the Long Service Leave Provisions published in Volume 79 of the Western Australian Industrial Gazette at pages 1-4 must also constitute continuous service for the purpose of this clause.

(3) Notice of Termination by Employee

(a) The notice of termination required to be given by an employee must be the same as that required of an employer, save and except that there must be no additional notice based on the age of the employee concerned.

(b) If an employee fails to give the required notice or having given, or been given, such notice leaves before the notice expires, the employee forfeits the entitlement to any moneys owing to the employee under this award except to the extent that those moneys exceed the ordinary wages for the required period of notice.

(4) Time Off During Notice Period

Where an employer has given notice of termination to an employee who has completed one month's continuous service, that employee must, for the purpose of seeking other employment be entitled to be absent from work up to a maximum of eight ordinary hours without deduction of pay. The time off must be taken at times that are convenient to the employee after consultation with the employer.

This subclause must not apply to a casual employee.

(5) Statement of Employment

The employer must, upon receipt of a request from an employee whose employment has been terminated, provide to the employee a written statement specifying the period of employment and the classification or the type of work performed by the employee.

(6) Notification on Engagement

On the first day of engagement an employee must be notified by his employer or by the employer's representative, whether the duration of his employment is expected to exceed four weeks and, if hired as a casual employee must be advised accordingly.

(7) Casual Employment

(a) The contract of service of a casual employee may be for a maximum of thirty-eight hours per week of ordinary hours and may be terminated by either the employee or the employer giving at least one hour's notice of such termination. If an employee or an employer fails to give the required minimum notice one hour's wages must be forfeited by the employee or paid by the employer as the case may be.

(b) At the time of engagement an employee must be notified in writing that the engagement is on a casual basis.

(c) A casual employee must not be employed for less than three hours per day and if employed for more than 7.6 hours in

one day, the employee must be paid overtime in accordance with Clause 8.—Overtime of this award.

(d) A casual employee must be paid a base rate of one hundred and twenty per cent of the appropriate wage rate found in Clause 10.—Wages of this award for the work on which the casual employee is engaged.

(e) A casual employee who has been advised to attend for work must be paid a minimum payment of three hours pay at the casual employee's base rate.

(f) A casual employee must not be employed for longer than four weeks without agreement between the employer and the Union.

(g) (i) The period of notice of termination in the case of a casual employee must be one hour.

(ii) If the required notice of termination is not given one hour's wages must be paid by the employer or forfeited by the employee.

(h) An employee must for the purpose of this award be deemed to be a casual employee—

(i) if the expected duration of the employment is less than four weeks, or

(ii) if the notification referred to in subclause (6) of this clause is not given and the employee is dismissed through no fault of the employee within four weeks of commencing employment.

(8) Absence From Duty

The employer must be under no obligation to pay for any day not worked upon which the employee is required to present for duty, except when such absence is due to illness and comes within the provisions of Clause 17.—Sickness and Injury of this award or such absence is on account of holidays to which leave the employee is entitled under the provisions of this award.

(9) Standing Down of Employees

(a) (i) The employer is entitled to deduct payment for any day or part of a day on which an employee (including an apprentice) cannot be usefully employed because of industrial action by any of the unions party to this award, or by any other association or union.

(ii) If an employee is required to attend for work on any day but because of failure or shortage of electric power work is not provided, such employee must be entitled to two hours' pay and further, where any employee commences work he/she must be provided with four hours' employment or be paid for four hours' work.

(b) The provisions of paragraph (a) of this subclause also apply where the employee cannot be usefully employed through any cause which the employer could not reasonably have prevented but only if, and to the extent that, the employer and the union concerned so agree or, in the event of disagreement, the Board of Reference so determines.

(c) Where the stoppage of work has resulted from a breakdown of the employer's machinery the Board of Reference, in determining a dispute under paragraph (b) of this subclause, must have regard for the duration of the stoppage and the endeavours made by the employer to repair the breakdown.

(10) (a) An employer may direct an employee to carry out such duties as are within limits of the employee's skill, competence and training, provided that such duties are not designed to promote deskilling.

(b) An employer may direct an employee to carry out such duties and use such tools and equipment as may be required, provided that the employee has been trained in the use of such tools and equipment.

(c) Any direction issued by an employer pursuant to paragraphs (a) and (b) of this subclause must be consistent with the employer's responsibilities to provide a safe and healthy working environment.

3. After Clause 31.—Enterprise Hours, insert the following new clause—

32.—REDUNDANCY

(1) Discussions Before Terminations

(a) Where an employer had 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 must hold discussions with the employees directly affected and with their union.

(b) The discussion must take place as soon as is practicable after the employer has made a definite decision which will invoke the provisions of paragraph (a) of this subclause and must cover among other things, any reasons for the proposed termination, measures to avoid or minimise the termination and measures to minimise any adverse affect of any terminations on the employees concerned.

(c) For the purpose of such discussion the employer must provide in writing to the employees concerned and their union, all relevant information about the proposed terminations including the reasons for the proposed termination, 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 any employer must not be required to disclose confidential information the disclosure of which would be inimical to the employer's interests.

(2) Transfer to Lower Paid Duties

Where an employee is transferred to lower paid duties for reasons set out in subclause (1) of this clause the employee must 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 employer may at the employer's 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 Clause 6(2)(a).—Contract of Service of this award, for ordinary termination, and subject to further order of the Commission, an employee whose employment is terminated for reasons set out in subclause (1)(a) of this clause must 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 one year	nil
one year but less than two years	four weeks
two years but less than three years	six weeks
three years but less than four years	seven weeks
four years and over	eight weeks

"Weeks pay" means the ordinary weekly rate of wage for the employee concerned.

Provided that the severance payments must not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

(b) For the purpose of this clause continuity of service must not be broken on account of—

(i) Any interruption or termination of the employment by the employer 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 this award or on account of leave lawfully granted by the employer; or

(iii) Any absence with reasonable cause, proof whereof must be upon the employee.

Provided that in the calculation of continuous service under this subclause any time in respect of which an employee is absent from work except time for which an employee is entitled to claim annual leave, sick pay, long service leave and public holidays as prescribed by this award must not count as time worked.

(c) Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with Clause 2(3) of the Long Service Leave provisions published in Volume 79 of the Western Australian Industrial Gazette at pages 1-4 must also constitute continuous service for the purpose of this clause.

(4) Employee Leaving During Notice

An employee whose employment is to be terminated for reasons set out in subclause (1) of this clause may terminate employment during the period of notice and, if so, must be entitled to the same benefits and payments under this clause had the employee remained with the employer until the expiry of such notice. Provided that in such circumstances the employee must not be entitled to payment in lieu of notice.

(5) Alternative Employment

An employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied if the employer 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 an employer, an employee whose employment is to be terminated for reasons set out in paragraph (a) of subclause (1) of this clause that employee must 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 must, at the request of the employer, be required to produce proof of attendance at an interview or the employee must not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

(7) Notice to Centrelink

Where a decision has been made to terminate employees in the circumstances outlined in subclause (1)(a) of this clause, the employer must notify Centrelink thereof as soon as possible giving relevant information including the number and categories of the employees likely to be affected and the period over which the terminations are intended to be carried out.

(8) Superannuation Benefits

(a) Subject to further order of the Commission where an employee, who is terminated receives a benefit from a superannuation scheme, the employee must only receive under subclause (3) of this clause the difference between the severance pay specified in that subclause and the amount of the superannuation benefit the employee receives which is attributable to employer contributions only.

(b) If the superannuation benefit is greater than the amount due under subclause (3) of this clause then the employee must receive no payment under that subclause.

(c) Provided that benefits arising directly or indirectly from contributions made by an employer in accordance with an award, agreement or order made or registered under the Industrial Relations Act, 1979 must not be taken into account unless the Commission so orders in a particular case.

(9) Employees With Less Than One Year's Service

This clause must not apply to employees with less than one year's continuous service and the general obligation on employers 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 employees of suitable alternative employment.

(10) Employees Exempted

This clause must 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 specified task or tasks.

(11) Incapacity to Pay

An employer, in a particular redundancy case may make application to the Commission to have the general severance pay prescription varied on the basis of the employer's incapacity to pay.

(12) Employers Exempted

Subject to an order of the Commission, in a particular redundancy case, this clause does not apply to employers who employ less than 15 employees.

(13) Dispute Settling Procedures

Any dispute under these provisions must be referred to the Commission.

CLEANERS AND CARETAKERS (GOVERNMENT) AWARD, 1975.
No. 32 of 1975.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division, Western Australian Branch

and

The Honourable Minister for Education.

No. 1897 of 1998.

Cleaners and Caretakers (Government) Award, 1975.
No. 32 of 1975.

COMMISSIONER P E SCOTT.

24 January 2000.

Order.

HAVING heard Mr D Kelly on behalf of the Applicant and Mr D Husdell 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 Cleaners and Caretakers (Government) Award, 1975 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 and from the 12th day of January 2000.

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

Schedule.

1. Clause 7—Hours: After subclause (1)(c) of this clause insert new paragraph (d) as follows—

(d) (i) Notwithstanding the provisions of paragraph (a) where the majority of school cleaners, including the Cleaner-In-Charge request, the start time may be varied to allow cleaners to start earlier than 6.00am with the written permission of the Principal. Under no circumstances are cleaners allowed to start work more than 4.5 hours before the official opening time of the school at which they are employed.

(ii) In considering a request made in accordance with provision (i) the Principal will take into account but is not limited to, such factors as—

- operational needs of the schools;
- natural and artificial lighting;
- safety and security of the cleaning staff; and,
- security of school premises and property

(iii) Where the request of cleaners to start earlier than 6.00am is granted, the loadings prescribed in Clause 9 of the Award will not apply.

(iv) In the event that the Cleaner-In-Charge does not agree to an earlier start time, but the majority of cleaners do, another cleaner may

volunteer to take responsibility for opening the school and switching off the security alarm system. Under such circumstances no additional allowances are payable to the cleaner who elects to undertake this duty.

(v) The starting times for cleaners will be reviewed at the end of Term 1 and Term 3 each year.

EGG PROCESSING AWARD 1978.

No. R 42 of 1978.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

General Manager, Western Australian Egg Marketing Board

and

The Food Preservers' Union of Western Australia, Union of Workers.

No. 1102 of 1999.

Egg Processing Award 1978.

No. R 42 of 1978.

CHIEF COMMISSIONER W.S. COLEMAN.

7 February 2000.

Order.

HAVING heard Mr S. Majeks on behalf of the applicant and Mr J. Kelly with Mr P. Winter on behalf of the respondent union, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Egg Processing Award 1978 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 the 5th day of January, 2000.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

Schedule.

1. Clause 2.—Arrangement: Delete this clause and insert in lieu thereof the following—

2.—ARRANGEMENT

2. Clause 1B—Minimum Adult Award Wage: Renumber this clause to read Clause 1A.—Minimum Adult Award Wage.

3. Clause 2A.—State Wage Principles—September 1989: Delete this clause.

4. Clause 6.—Definitions: Delete this clause and insert in lieu thereof the following—

6.—DEFINITIONS

Food Processing Employee—Level F1

(Relativity 78%)

Employees who are recruited at this Level perform simple routine duties, work under direct supervision and receive detailed instruction. Level F1 employees exercise minimum judgement and are responsible for the quality of their own work within the scope of this level.

1.1 Typical Tasks

Indicative of the tasks an employee at this level may perform are the following—

1.1.1 Undertaking induction training.

1.1.2 Performing a range of general labouring and cleaning duties.

1.2 Promotional Criteria

Employees remain at this level until such time as they have satisfactorily completed an induction program which enables them to meet the competency requirements of Level F2. An induction program is conducted over a period of 3 months.

An induction program covers—

1.2.1 Basic occupational health and safety.

1.2.2 Basic food hygiene requirements.

1.2.3 Conditions of employment.

1.2.4 Board policies/objectives.

1.2.5 Plant layout and material location.

1.2.6 Workplace training to meet the requirements of being able to competently perform work within the scope of a Food Processing Employee—Level F2.

Food Processing Employee—Level F2

(Relativity 82%)

Employees at this Level perform a range of tasks and in so doing, work above and beyond the skills of an employee at Level F1 and to the level of their training—

Work under direct supervision either individually or in a team environment.

Understand and undertake basic quality assurance procedures including the ability to recognise basic quality deviations and faults.

Communicate with team members in minimal decision making.

Exercise discretion within their level of skills and training.

2.1 Typical Tasks

Indicative of the tasks which an employee at this level may perform are the following—

2.1.1 Undertaking training to enable entry into Level F3.

2.1.2 Apply basic food safety practices including Personal and Food hygiene and maintain a clean and orderly work area.

2.1.3 Manual packing of products to meet company standards.

2.1.4 Using manual handling equipment following OH &S and Food safety principles.

2.1.5. Stack and prepare for storage raw and finished products.

2.1.6. Stocktaking of raw and packaging material within the scope of training at level F2.

2.1.7 Identify basic machine faults and report to appropriate employee.

2.1.8 Machine packaging of product within the scope of Level F2 (would not include machine operation or adjustment.

2.1.9 Assembling products for customer orders applying safe handling practices and basic mathematical concepts.

2.1.10 Candling/cracking of product using automatic and semi-automatic machinery applying basic quality assurance principles (would not include machine operation or adjustment).

2.1.11 Packing, stacking and shrink wrapping of product using any fixed or mobile equipment as aids to the task (would not include machine operation or adjustment).

2.1.12 Assist communication in the workplace by maintaining basic production records.

2.2 Promotional Criteria

Employees may be promoted to Level F3 when—

2.2.1 They can competently carry out all tasks of a Level F2 employee.

2.2.2 A position becomes available and they are selected to fill the vacancy,

Food Processing Employee—Level F3

(Relativity 87.4%)

Employees at this Level have completed training to enable the employees to perform work within the scope of this Level.

Employees at this Level—

Are responsible for the quality of their own work subject to routine supervision.

Work under supervision either individually or in a team environment.

Exercise discretion within their Level of skills and training.

May coordinate small work teams of Level 2 employees.

3.1 Typical Skills

Indicative of the tasks which an employee at this Level may perform are the following—

3.1.1 Undertake training to enable entry into Level F4.

3.1.2 May be required to perform any of the duties of a lower level.

3.1.3 Use information technology (eg basic keyboard skills).

3.1.4. Implement the quality system (monitor quality of product to specifications).

3.1.5 Implement the Food Safety plan.

3.1.6 Implement OH&S principles.

3.1.7 Collect, present and apply routine workplace data (includes sampling products, recording test results and presenting results to appropriate personnel).

3.1.8 Participate in teams (including assisting supervisors in training of employees at a lower level).

3.1.9 Conduct routine preventative maintenance (minor adjustments within the scope of this level).

3.1.10 Operate a mixing/blending process.

3.1.11 Drive forklift trucks (to licence standard)

3.2 Promotional Criteria

3.2.1 They can competently carry out all tasks of a Level 3 employee.

3.2.2 A position becomes available and they are selected to fill the vacancy.

Food Processing Employee—Level F4

(Relativity 92.4%)

Employees at this Level have completed training to enable the employees to perform work within the scope of this Level.

Employees at this Level—

Work from instructions and procedures.

Assist in the provision of on the job training.

Have good supervision and interpersonal skills.

Co-ordinate work in a team environment or work individually under general supervision.

Enter production information into the computer system.

4.1 Typical Tasks

4.1.1 May be required to perform any of the duties of a lower level.

4.1.2 Use information technology (eg intermediate keyboard skills).

4.1.3 Participate in teams (including supervising and allocating tasks to employees at a lower level).

4.1.4 Operate a unit of production equipment within the scope of this Level.

4.1.5 Plan to meet work requirements.

4.1.6 Clean and sanitise equipment.

4.2 Promotional Criteria

4.2.1 They can competently perform all the tasks of a Level 4 employee.

4.2.2 A position becomes available and they are selected to fill the vacancy.

Food Processing Employee—Level F5

(Relativity 100%)

Employees at this level have completed approved courses in the development of supervisory skills. For example; TAFE Supervision Certificate or equivalent.

Employees at this Level—

Work from instructions and procedures.

Plan and deliver on and off the job training.

Are competent in the supervision of employees.

Facilitate work in a team environment.

Enter production information into the computer system.

Exercise good interpersonal skills appropriate to this level.

Would be expected to organise and control the work output of a section.

5.1 Typical Tasks

5.1.1 May be required to perform any of the duties of a lower level.

5.1.2 Analyse and convey workplace information.

5.1.3 Monitor the implementation of OH&S.

5.1.4 Monitor the implementation of the quality system.

5.1.5 Monitor the implementation of the food safety plan.

5.1.6 Operate a production system.

5.1.7 Participate in a HACCP Team.

5.1.8 Diagnose and rectify equipment faults.

5.1.9 Undertake training to Category 1 level.

5. Clause 10.—Part Time Workers: Delete subclause (1) and insert in lieu thereof the following—

(1) A part time worker as defined in Clause14 (2) — Wages hereof, shall be paid at the rate of one thirty eighth of the ordinary rate of wage prescribed by this award for the class of work performed for each hour worked each week during the hours prescribed in Clause 7.—Hours of this Award.

6. Clause 14.—Wages: Delete this clause and insert in lieu thereof the following—

14.—WAGES

(1) Adult Employees

The following rates shall apply from the first pay period commencing on or after the date of amendment.

	Relativity	Weekly Rate	$12 ASNA	Total Weekly Rate
Level F5	100%	$465.20	$12	$477.20
Level F4	92.4%	$429.80	$12	$441.80
Level F3	87.4%	$406.60	$12	$418.60
Level F2	82%	$381.50	$12	$393.50
Level F1	78%	$362.90	$12	$374.90

The rates of pay in this award include the arbitrated 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 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.

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, excepting those resulting from enterprise agreement, are not to be used to offset this arbitrated safety net adjustment of $12 per week or $10 per week.

(2) Part Time Employee shall mean a worker who works regularly from week to week, less than 38 hours each week.

(3) Casual Employee shall mean a worker engaged as such.

Casual Employees shall be paid 20 per cent in addition to the rate prescribed in this clause for the work performed.

7. Appendix.—Resolution of Disputes Requirement: Renumber this as Appendix 1.

8. Appendix.—S.49B—Inspection of Records Requirements Renumber this as Appendix 2.

Immediately following this Appendix, insert a new Appendix, Appendix 3—Old Definitions, as follows—

APPENDIX 3—OLD DEFINITION

(1) "Sectional Supervisor" shall mean a worker appointed as a Sectional Supervisor by the employer in any of the following branches of the operations of the Board—

(a) Receival
(b) Materials
(c) Pulping
(d) Floor

(2) "Other Supervisor" shall mean a worker appointed as another Supervisor by the employer in any of the following branches of the operations of the Board—

(a) Cleaning
(b) Cases and Trolleys
(c) Machine
(d) Quality Control
(e) Floors (Depot)

(3) "Leading Hands" shall mean a worker appointed as such by the employer and who, in addition to ordinary duties is required to supervise other workers.

(4) "Freezer Room Attendant" shall mean a worker required by the employer to work in a temperature between 0° and minus 15.5° Celsius.

(5) "Machine Operator" shall mean a worker employed as a machine operator by the employer to operate the Gluer-Sealer.

(6) "Quality Controller" shall mean a worker appointed as a quality controller by the employer and employed in the quality control section on quality control.

(7) "Part Time Worker" shall mean a worker who works regularly from week to week for not less than 15 hours and not more than 30 hours each week.

(8) Casual Worker shall mean a worker engaged as such.

9. Appendix 3.—Old Definitions

Immediately following this Appendix, insert a new Appendix, Appendix 4—Transitional Arrangement, as follows—

APPENDIX 4.—TRANSITIONAL ARRANGEMENT

Award Title	Proposed new level	Current Award Rate	MRA Rate	Special Payment
Machine Operator	Level F3	$423.67	$418.60	$5.07
Quality Controller	Level F3	$422.44	$418.60	$3.84
Freezer Room Attendant	Level F2	$415.47	$393.50	$21.97
Candler and/or Oiler	Level F2	$413.01	$393.50	$19.51
Bench Hand	Level F2	$398.46	$393.50	$4.96
Trainee Candler and/or Oiler	Level F1	$398.05	$374.90	$23.15
Packer and/or Cracker	Level F2	$398.05	$393.50	$4.55
Floor Hand	Level F2	$390.26	$393.50	Nil

METAL TRADES (GENERAL) AWARD 1966.

No. 13 of 1965.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Communications, Electrical, Electronic, Energy Information, Postal,

Plumbing & Allied Workers Union of Australia

and

Lombardi Bros & Others.

No. 1563 of 1999.

Metal Trades (General) Award 1966.

No. 13 of 1965.

COMMISSIONER S J KENNER.

8 February 2000.

Order.

Having heard Mr J Fiala on behalf of the applicant and Mr M Borlase 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 Metal Trades (General) Award 1966 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 3 February 2000.

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

Schedule.

1. Second Schedule—List of Respondents: Delete this Schedule and insert the following in lieu thereof—

SECOND SCHEDULE.

LIST OF RESPONDENTS

Abattoirs—

Anchorage Butchers Pty Ltd

Accounting Machine Distributors—

National Cash Register Coy. Pty Ltd., The

Acoustic Material Manufacturers—
Bradford Insulating (W.A.) Ltd
Colonial Sugar Refinery Co. Ltd
Aerated Water and Cordial Manufacturers—
Coca Cola Bottlers (Perth) Pty Ltd
Golden Mile Aerated Water Co. Ltd
Air Conditioning Installations—
Hart, S.W. & Co. Pty Ltd
Lyons, J.C. & Co.
Aluminium Fabricators—
H.L. Brisbane & Wunderlich Ltd
Aluminium Manufacturers—
Comalco Aluminium (Western Australia) Limited
Asbestos Cement Manufacturers—
James Hardie & Coy. Ltd
Ball and Roller Bearing Specialists—
Manners, W.G. & Co.
Battery Manufacturers—
Industrial Storage Batteries Pty Ltd
Vesta Battery Company Ltd
Biscuit Manufacturers—
Mills & Ware Biscuits Pty Ltd
Blacksmitths and Farriers—
Baldocks Spring Works Pty Ltd
Hislop Bros.
Boat Builders and Repairers—
Southern Cross Slipways Pty Ltd
Boilermakers—
Baguley F. & Co.
Hart, S.W. & Co. Pty Ltd
McLarty, James & Son
Tomlinson Steel Limited
Brass Finishers—
Chernco Products
Goerke, Paul
Henderson & Gribble
Keaughran, R.M. & Co.
Westralian Engineering Works
Brass and Non-ferrous Founders—
Henderson & Gribble
S.S. Engineering & Foundry Pty Ltd
Breweries—
Swan Brewery Company Limited
Union Malters Limited
Brick Manufacturers—
Bresser Vibrapac Masonry (W.A.) Ltd
Calsil Ltd
Metropolitan Brick Co. Pty Ltd
Building Contractors—
Concrete Industries
Butter Factories—
Peters Creameries (W.A.) Pty Ltd
Sunny West Co-op Dairies Ltd
Watson's Foods Pty Ltd
Canners and Food Processors—
Plaistowe & Co. Ltd
Cement Manufacturers—
Cockburn Cement Pty Limited
Swan Portland Cement Ltd
Cheese Factories—
Peters Creameries (W.A.) Pty Ltd
Cold Storage—
Arctic Cold Storage Ltd
Fremantle Cold Storage Co. Pty Ltd
Richmond Cold Store Pty Ltd
Confectionery Manufacturers—
Plaistowe & Co. Ltd
Coppersmiths—
Bolton & Milner
Crown Seal Manufacturers—
Australian Seal Co. Pty Ltd
Cycle Manufacturers and Repairers—
Flash Cycles
Swanseas
Dairies and Milk Vendors—
Brownes Dairy Ltd
Masters Dairy Limited
Sunny West Co-operative Dairies Ltd (Trading as Sunny West Milk)
Die-casters—
Grant's Diecasting
Diemakers—
Bennett, E.J.
Cumpston's Engraving Works Pty Ltd
Press and Die Company
Die Sinkers—
Crumpston's Engraving Works Pty Ltd
Wilson's Engraving Works
Diesel Engine Manufacturers—
English Electric Company of Australia Pty Ltd
Domestic Appliances Manufacturers and Repairers—
Vax Appliances (Australia) Pty Ltd
Drum Manufacturers—
Rheem (Australia) Pty Ltd
Earth Moving Contractors—
Bell Bros. Pty Ltd
Earth Moving Equipment Distributors—
Moore Road Machinery (W.A.) Pty Ltd
Wesfarmers Tutt-Bryant Pty Ltd
Electric Motor Manufacturers and Repairers—
English Electric Company of Aust. Pty Ltd
Westate Electrical Industries Ltd
Electrical Contractors—
A.C. Electrical Engineering Pty Ltd
Hine, C.A. & Co. Pty Ltd
Strickfuss Pty Ltd
Electroplaters and Anodisers—
City Plating Company
Premier Plating Company
Dimet (W.A.) Pty Ltd
Dunn Bros.
Anodisers (W.A.)
Engineers—Agricultural—
Wallace Engineering Co.
Engineers—Automotive—
Taylor P.E. & T.
Kyle Motors
Engineers—Constructional—
Tremain, A. & Sons
Holland, John, Constructions Pty Ltd
South Fremantle Engineering Works
Forward Johns Pty Ltd
International Combustion Australia Ltd
F.T.S. O'Donnell Griffin (W.A.) Pty Ltd
Engineers—Diesel—
Kent, L.H. & Co.
Engineers—General—
Alma Engineering Pty Ltd
Baguley, F. & Co.
Eilbeck T. & Son Pty Ltd

Engineers—General—*continued*
Noyes Bros. Pty Limited
Tomlinson Steel Limited
Vickers Hoskins Pty Ltd
Forward Down (W.A.) Pty Ltd
Gray, E.M.
Geraldton Building Co. Pty Ltd
Engineers—Insulation—
Bradford Insulation (W.A.) Ltd
Engineers—Marine—
Baguley, F. & Co.
Fremantle Foundry & Engineering Co. Pty Ltd
McLarty, James & Son
Austin & Son
Wallace Engineering Co.
Engineers—Refrigeration—
Kean, P.
Engineers—Structural—
Saunders & Stuart Ltd
The Structural Engineering Co. of W.A. Pty Ltd
Melville Engineering Co.
Engravers—
Cumpston's Engraving Works Pty Ltd
"Sheridans"
Sun Industries Pty Ltd
Wilson's Engraving Works
Fertiliser Manufacturers—
David Gray & Co. Ltd
Fibre Glass Manufacturers—
Plastics Ltd
Fibrous Plaster Manufacturers—
H.B. Brady Co. Pty Ltd
Flour Millers—
City Milling Pty Limited
Peerless Roller Flour Mills Pty Ltd
Footwear Manufacturers—
Regina Footwear Pty Ltd
Forgers—
Doncaster Hadfields Pty Ltd
Foundries—
Bradford, Kendall Ltd. (inc. in NSW)
Fremantle Foundry & Engineering Co. Pty Ltd
Glass Manufacturers—
Australian Glass Manufacturing Co.
Ice Cream Manufacturers and Distributors—
Peters Ice Cream (W.A.) Ltd
Ice Manufacturers—
Perth Ice Works
Peters Western Cold Stores Pty Ltd
Industrial Gas Manufacturers—
C.I.G. (Western Australia) Pty Ltd
Instrument Makers and Repairers—
Brooking, J.R. Eades Pty Ltd
Tough Instrument Service Co.
Henderson Instrument Co. Pty Ltd
National Instrument Company Pty Ltd
Local Government Authorities—
Bassendean Shire Council
Albany Shire Council
Perth Shire Council
Perth City Council
Machinery Manufacturers—
Chamberlain Industries Pty Ltd
Machinery Merchants: (See also Engineers' Equipment and Material Distributors)
Moss, George Pty Ltd
Meat Exporters and Suppliers—
Anchorage Butchers Pty Ltd
Globe Meats Pty Ltd
Borthwick, Thomas & Son (A/asia) Ltd
Milk Treatment Plants—
Brownes Dairy Ltd
Masters Dairy Ltd
Peters Creameries (W.A.) Pty Ltd
Sunny West Co-operative Dairies Ltd
Monumental Masons and Sculptors—
Karrakatta Monumental Works
Perth Monumental Works
Motor Body Builders—
Bosich, M.
Howard Porter
M.B.B. Pty Ltd
Martin Nixon Pty Ltd
Motor Chassis Aligners—
Lombardi Bros
Motor Cycle Sales and Service—
Bull, Les Motor Cycles
Motor Garages & Service Stations—
Attwood Motors Pty Ltd
Dependable Motors Pty Ltd
Diesel Motors Pty Ltd
Howard Motors
Bignells Garage
Fennessy Motors Pty Ltd
Parker's Service Station
Motor Tyre Dealers, Retreaders and Manufacturers—
Beaurepaire Tyre Service Pty Ltd
Hardie Rubber Co.
Motor Vehicle Distributors—
M.S. Brooking Pty Ltd
Ford Motor Company (Australia) Pty Ltd
General Motors Holdings Ltd
Mortlock Bros.
Dorsett Motors Holdings Pty Ltd
Nail Manufacturers—
Eilbecks Wire Products
W.A. Nails Pty Ltd
Patternmakers—
B.T. Patterns
Futura Formwork
Oborne Patternmakers
Pattern Making Services
Tibbett & Coote Pattern Makers
Plastic Mould Manufacturers—
Pipe and Pipe-fittings—Cast Iron—Manufacturers—
Metters Ltd (inc. in S.A.)
Pipe and Pipe-fittings—Concrete—Manufacturers—
Humes Ltd
"Fibrolite", James Hardie & Co. Pty Ltd
Pipe and Pipe-fittings—Earthenware—Manufacturers—
H.L. Brisbane & Wunderlich Ltd
Plumbers and Sheet Metal Workers—
Hart, S.W. & Co. Pty Ltd
Poole, R. Pty Ltd
Printers—
Quarries—
Australian Blue Metal Limited (A division of the Readymix Group of W.A.)
Refrigerator—Manufacturers—
Arcus Metal Products Pty Ltd
Baker, A.J. & Sons

Refrigerator Repairers and Services—
Kelvinator Australia Limited
Retail and Wholesale Stores—
Boans Ltd
Rope and Cordage and Twine Manufacturers—
Kinnears Pty Ltd
Safe Manufacturers—
Chubb
Makutz, B.
Sawmillers—
Bunning Bros. Pty Ltd
Millars' Timber & Trading Co. Ltd (inc. in England)
Swan Timber Pty Ltd
Scales—Sales and Service—
Supreme Scale Service Pty Ltd
Toledo Berkell Pty Ltd
Scrap Metal Merchants—
Krasnostein J. & Co. Pty Ltd
Sewing Machine Distributors—
Bernina Sewing Machines of Australia
Brother International (Aust) Pty Ltd
Elna WA Sales & Service
Husqvarna Pty Ltd
Janome Sewing Machine Co. (Aust) Pty Ltd
W.A. Sewing Machines Pty Ltd
Spring Makers—
Baldocks Spring Works Pty Ltd
Taxi Services—
Black & White Taxis
Swan Taxis Co-op Ltd
Tile—Roofing—Manufacturers and Layers—
H.L. Brisbane & Wunderlich Ltd
Tin Miners—
Austin Bros.
Tractor Manufacturers—
Chamberlain Industries Pty Ltd
Transformer Manufacturers—
English Electric Co. of Aust. Pty Ltd
Radix Pty Ltd
Westralian Transformers Pty Ltd
Two (2) Stroke Engine Component Prototype—
Orbital Engine Company (Australia) Pty Limited
Typewriter Distributors and Servicers—
Edwards Business Machines Pty Ltd
Lamson Paragon (W.A.) Ltd
Tyre and Tube Manufacturers—
The Olympic Tyre & Rubber Co. Pty Ltd
Washing Machine Manufacturers—
Email Ltd
Lightburn & Co. Ltd
Washing Machine Repairers and Servicers—
Email Ltd
Kelvinator Australia Ltd
Lightburn & Co. Ltd
Mattinson, J.L. Pty Ltd
Welders—
Bosich, M.
Window Frame Manufacturers—
Stegbar Windowalls (W.A.) Pty Ltd
Crewe & Sons Pty Ltd
Crittall Manufacturing Co. (Aust.) Pty Ltd
Wrought Iron Workers—
Floreat Iron Works
Notley & Co.
King, K.G.

AWARDS/AGREEMENTS—Interpretation of—

EDUCATION DEPARTMENT OF WESTERN AUSTRALIA (CSA) ENTERPRISE BARGAINING AGREEMENT 1998.
No. PSA AG 32 of 1998.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Director General, Education Department of Western Australia and The Minister for Education.

No. P 18 of 1999.

COMMISSIONER P E SCOTT.

24 January 2000.

Reasons for Decision.

THE COMMISSIONER: This application seeks the true interpretation of the terms of the Education Department of Western Australia (CSA) Enterprise Bargaining Agreement 1998 PSA AG 32 of 1998 ("the Agreement") with regard to whether—

> "The provisions of Clause 24 [Personnel 2000] and Schedule C [Personnel 2000] have the effect of setting aside the provisions of Clause 27 [Annual Leave Loading] thereby enabling the Respondent to annualise payment of annual leave loading during the term of the Agreement?"

The evidence before the Commission includes that of Colin Frances Best, an accounts clerk in the finance branch of central office of the Education Department who was involved in the negotiations of both the previous and current enterprise bargaining agreements in the capacity of chief negotiator for the Applicant's members at the central office of the Department. The Commission also heard evidence from Bevan Allan Doyle, currently the Manager Technology and Communications of the Education Department but who was Director of Personnel 2000 during the preparation of a report which became Exhibit D. From the evidence of these witnesses several documents were produced.

A number of the terms of the Agreement are significant in dealing with this matter. Clause 6—Date and Operation of the Agreement states that the Agreement was to operate from the date of registration which was 19 March 1998.

According to Clause 8—Relationship to Parent Awards and Agreements, the Agreement is to be read in conjunction with the Public Service Award 1992; the Government Officers Salaries, Allowances and Conditions Award 1989 ("GOSAC"); Education Department Ministerial Officers' Salaries, Allowances and Conditions Award 1983 ("EDMOSAC"); Residential Supervisors Staff Agreement 1995; and Technical Officer—Agricultural Instruction Staff Agreement 1997. The Agreement is to take precedence over any of those Awards or Agreements were there is inconsistency. I note at this point that none of those awards or agreements defines any of the relevant terms in a way such as to assist with this interpretation.

Clause 18.—Annualised Hours provides—

> "(1) Employees covered by the PSA and the GOSAC may work within an annualised hours arrangement subject to operational requirements and agreement between the employee and their line manager. Employees under an annualised hours arrangement and who are covered under the above awards shall be required to account for a total of 1,950 hours in a 12-month period. These hours consist of 1,800 working hours (including time counted as if worked eg. public holidays, LSL, sick leave, etc.) based on 48 working weeks and 150 hours (4 weeks) annual leave.

(2) Subject to departmental requirements and authorisation by their line managers, employees shall have the ability to work their hours on a 7-day a week basis. Any hours credited to the annualised hours shall not attract any additional payment.

All employees participating in this arrangement shall be required to record times accurately on a timesheet with a continuous total for hours worked over the settlement period. The line manager will verify these times. Employees working under this arrangement shall not be coerced into working any hours outside their normal hours of duty

(3) The normal hours of duty shall not exceed 10 hours per day. No employee shall be expected to work without a 10 hour break between the completion of work on one day and commencement of work on the next day.

(4) One month's notice shall be given by an employee, or by the employer, for cessation of the annualised hours arrangements. The parties agree that such employees will clear any debit hours or that the employer will give sufficient time off to clear any credit hours, on a pro-rata basis, prior to the cessation of this arrangement."

Clause 24.—Personnel 2000 provides—

"(1) Personnel 2000 is expected to be implemented across the Education Department in June 1998.

(2) Where any implementation issues impact on this Agreement, they will be discussed by the Steering Committee.

(3) The Department will continue to work towards the following outcomes as set out in Schedule C—Personnel 2000—

— Standardising leave entitlements where possible;

— Providing flexibility for leave arrangements within broad guidelines; and

— Development of a fully automated, streamlined process for processing leave.

(4) Details of specific administrative arrangements will be conveyed to employees as the Personnel 2000 system is implemented.

(5) Where employees are able to use the Personnel 2000 system to apply for leave, this will be subject to management approval. All leave will be based on the principle of accrual according to actual hours worked.

(6) Where necessary, appropriate training and support arrangements will be implemented to assist school based employees in the implementation of Personnel 2000."

Clause 27.—Annual Leave Loading provides—

"(1) Employees entitled to annual leave shall receive an annual leave loading.

(2) The annual leave loading shall be paid as a lump sum amount in the first pay period of December. This will be an amount equivalent to the loading which would have been paid had the employee taken all the leave accruing for that calendar year. Shift employees' annual leave will be in accordance with the relevant award.

(3) The parties will negotiate arrangements for the payment of accrued annual leave loading so as to facilitate these payments within six months of the commencement of this Agreement."

Clause 38.—Clearance of Accrued Annual Leave provides—

"The parties agree that the clearance of annual leave is an important element of effective workforce planning.

The parties agree that annual leave accrued prior to 1 January, 1998 will be acquitted prior to 1 January, 2000. Those employees who wish to take the accrued leave after 1 January 2000 must negotiate an alternative date with their line manager."

The Section of Schedule C—Personnel 2000 which relates to the annual leave loading provides—

ITEM	DESCRIPTION
ANNUAL LEAVE	
Annual Leave Loading	Annualisation of annual leave loading

The Commission has heard a significant amount of information from the parties as to the background to this matter. The Applicant says that the meaning of the term "annualisation of annual leave loading" is the issue of contention between the parties. In the Applicant's view, the term "annualisation" has several meanings and this constitutes an ambiguity. However, within the terms of the Agreement, and based on what was discussed between the parties together with all of the documentation associated with the formulation of the Agreement, the term is clear. It is based on the Respondent's desire to have annual leave loading paid within the year in which it falls due, thus limiting its obligation. The Applicant says that the meaning to be applied is that the annual leave loading is to be paid when it falls due, ie annually, and that is the basis upon which the annual leave loading is "annualised". Annualising the annual leave loading simply means paying it once a year, in this case in December rather than having it incorporated into fortnightly pay. The Applicant says that Clause 24.—Personnel 2000 does not oust the requirements of Clause 27.—Annual Leave Loading.

The Applicant says that there is no requirement under the agreement to implement Schedule C but that Clause 24—Personnel 2000 merely provides that the Respondent will continue to "work towards" the outcomes set out in Schedule C.

In effect, the Applicant argues that the agreement read as a whole provides that annualisation of annual leave loading means that the payment of the loading is to be made once per year, in December, as prescribed by Clause 27(2). If that is not its meaning, then Clause 27(2) is superfluous.

The Applicant says that because the parties are in dispute about the meaning to be attributed to the annualisation of annual leave loading, it is permissible to go to extrinsic material to ascertain the true meaning.

The Respondent says that there is no ambiguity, that the meaning is clear. However, the meaning espoused by the Respondent is not the same as that of the Applicant. The Respondent says that "if the choice is between two strongly competing interpretations … the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms with the legislative intention". (*Australian Electrical, Electronics, Foundry and Engineering Union (WA Branch) and Minister for Health, (IAC) per Rowland J. (71 WAIG 2253 at 2255*).

The Respondent argues that there are two possible options for annualising the loading. These options were discussed between the parties during the negotiations for the enterprise bargaining agreement. The agreement which resulted provides for annualisation of the loading firstly, by the paying out of any accrued annual leave loading in December 1998, (this being the December referred to in Clause 27(2), ie the December following the registration of the Agreement) and that Clause 24 envisages the continued implementation of outcomes set out in Schedule C—Personnel 2000 which includes the annualisation of the annual leave loading. This means the inclusion of annual leave loading in salary, and it being paid each pay.

The parties produced witness and documentary evidence to support their respective cases as to their intentions in the negotiations, and in the case of the Respondent, in the preparation of strategy and in the review of outcomes of the series of agreements which culminated in this Agreement. There is also evidence as to the conduct of the parties subsequent to the registration of the Agreement when the Respondent moved to include the annual leave loading into salary and pay it each pay.

It is interesting to note at this point that all of this material would appear to be extrinsic material and of use only where there is ambiguity. Very little was put to the Commission as to the actual meaning by reference to the words used in the Agreement.

The Commission's role in interpretation and in particular, the use of extrinsic material, is set out and well summarised by Acting President Fielding in *Ralph M Lee Pty Ltd and Others and Metal and Engineering Workers Union—Western Australia and Another (1994) (74 WAIG 1722 at 1724)* where he said—

> "The principles regarding the use of extrinsic material as an aid to interpret industrial instruments are well settled. That material can only be used where there is an ambiguity and cannot be used to undermine an unambiguous term, even if that leads to a result which may seem inconvenient or unjust (see: Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch) v. The Minister for Health (1991) 71 WAIG 2253). In this regard, as pointed out by Brinsden J in Robe River Iron Associates v. Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others (1987) 67 WAIG 1097, the rules for interpreting industrial agreements are essentially no different from those applicable to the interpretation of awards. Nonetheless, industrial instruments are to be interpreted against the background that they "frequently result ... from an agreement between the parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draftsmanship which one expects to find in an Act of Parliament" and that "therefore in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it meaning consistent with the general intention of the parties to be gathered from the whole award" (see: Geo A. Bond & Co Ltd (In Liquidation) v. McKenzie [1929] AR (NSW) 498 at 503). The reluctance of courts to adopt a strict interpretation in relation to awards was endorsed in City of Wanneroo v. Holmes (1989) 30 IR 362. Thus, as Einfeld J observed in BWIU NSW Branch v. Dylalo Pty Ltd trading as Alpine Erections [1992] AILR 274, the courts should not be too reluctant to admit the possibility that there is an ambiguity in an award, nor should courts be too artificial or legalistic in a search for its meaning. The court should only refuse to consider extrinsic material which supports one interpretation when the alternative interpretation being argued for was quite incapable of being supported by the words. More recently in Short v. F.W. Hercus Pty Ltd (supra) the Federal Court held that even where the provision was unambiguous, the Court should not deny itself the guidance of intrinsic material where it can be seen that more is needed than the immediate context of the provision to interpret it properly. In this context, Burchett J observed at p 134—
>
> > "The context of an expression may thus be much more than the words that are its immediate neighbours. Context may extend to the entire document of which it is a part, or to other documents with which there is an association. Context may also include, in some cases, ideas that gave rise to an expression in a document from which it has been taken. When the expression was transplanted, it may have brought with it some of the soil in which it once grew, retaining a special strength and colour in its new environment. There is no inherent necessity to read it as uproot and stripped of every trace of its former significance, standing bare in alien ground. True, sometimes it does stand as if alone. But that should not be just assumed, in the case of an expression with a known source, without looking at its creation, understanding its original meaning, and then seeing how it is now used. Very frequently, perhaps most often, the immediate context is the clearest guide, but the court should not deny itself all other guidance in those cases where it can be seen that more is needed. In literature, Milton and Joyce could not be read in ignorance of the source of their language, nor should a legal document, including an award, be so read."

Much the same view was taken by the Full Bench of the Industrial Court of South Australia in Aitco Pty Ltd v. FLAIEU (SA Branch) (supra) where the Court observed—

> "It should be remembered that we are here construing not an award of the Commission but an industrial agreement, which results from consensus between the parties. In construing such a document we must, by viewing the matter broadly and giving heed to every part of the agreement, endeavour to give it a meaning which is consistent with the general intention of the parties to be gleaned from the document as a whole.""

The first issue to be determined is the meaning of the term "annualised". The Shorter Oxford English Dictionary on Historical Principles defines Annual as—

> **"Annual** late ME, [Earliest form *annuel*—(O)Fr. *annuel*—late L. *annualis*, for L. *annuus* and *annalis*, f *annus* year; see—AL[1].] **A**. *adj*. Of, belonging to, or reckoned by, the year; yearly. **2.** Recurring once every year 1548. **3.** Repeated yearly and occupying the whole year 1635. **4.** Lasting for a year only, late ME.
>
> **1. T**hree thousand Crownes in annuall fee *Haml.* II. ii 73. Annual Register 1650. **2.** So stears the .. crane Her a. Volage MILT. P.L. VII, 431, 3. the a. course of the sun FROUDE. 4. A. parliaments STUBBS, plants BACON. Hence **Annually** *adv*. yearly.
>
> **B**. *sb*, 1. In *R.C. Ch*. A mass said either daily for a year after, or yearly on the anniversary of, a person's death; *also*, the payment for it.
>
> **2.** A yearly payment, tribute, allowance, etc. *Obs.* exc. in *Sc. Law*, where *annual* = quit-rent. 1622. 3. Anything that lasts only for a year; *esp.* an annual plant (perpetuating itself by seed) 1710. 4. A book published once a year; a year-book 1689.
>
> **3.** Oaths are the children of fashion; they are .. almost annuals SWIFT. Like an a. in a garden, which must be raised anew every season DE Foe, Hence **Annualist**, a contributor to an a. **Annualize** *v.* to write for an a. SOUTHEY."

The Macquarie Dictionary—Revised Edition, defines it as—

> **"annual** *adj*. **1.** of, for, or pertaining to a year, yearly. **2.** occurring or returning once a year: *an annual celebration*. **3.** *Bot*. living only one growing season, as beans or maize. **4.** performed during a year: *the annual course of the sun*. —*n* **5.** a plant living only one year or season. **6.** a literary production published annually. **7.** *Colloq*. a bath; ablutions."

According to these definitions, the term annual has a number of possible meanings, the first being belonging or pertaining to a year, or reckoned by the year; the second being recurring once every year, or repeated yearly; and the third meaning occupying the whole year.

The second such meaning supports the Applicant's contention of payment once per year. The third meaning supports that of the Respondent in that the loading would become part of pay and paid throughout the year, i.e. to occupy the whole year.

As the dictionary definitions do not resolve the matter, it is necessary to examine the remainder of the Agreement to see if guidance can be found. Clause 18.—Annualised Hours does not define the term "annualised". However, it would appear to mean that all of the hours which would normally have been worked over a twelve month period are added together and can be worked in ways which do not require the normal limitations associated with daily, weekly, fortnightly or monthly hours arrangements. The hours are arranged on the basis of what would normally be worked throughout the year. Hours which are usually accounted weekly, fortnightly or monthly are calculated on a yearly basis. This does not help with how annualising is to be applied to annual leave loading because this loading is normally paid when annual leave is taken, and according to the terms of the Award, (the effect of which is modified by the Agreement) annual leave accrues yearly but does not have to be taken yearly. It can accrue for a number of years. Therefore annual leave loading, save for the terms of the agreement, is not necessarily paid yearly.

As to Clause 24.—Personnel 2000, this clause when read in total appears to sanction the Respondent's implementation of

the Personnel 2000 programme across the Department and any issues regarding the impact of implementation on the Agreement are to be discussed by the Steering Committee, i.e. those items contained in Schedule may be implemented by the Respondent. The impact is to be discussed, not necessarily agreed upon. Once again this does nothing to assist with defining the meaning of "annualised annual leave loading".

As to Clause 27.—Annual Leave Loading, it is noted that subclause (2) provides that "the Annual Leave Loading shall be paid as a lump sum amount in the first pay period in December. This will be an amount equivalent to the loading which would have been paid had the employee taken all the leave accruing for that calendar year." This subclause makes no reference to whether the December is to be December of each year or only the first December of the operation of the Agreement which would be December 1998.

Subclause (3) of Clause 27 indicates that it is the parties' intention that, subject to negotiations, accrued annual leave loading will be paid out. The next step would be for the annual leave loading owing for the year to December 1998 to be paid as a lump sum in December 1998. Due to the provisions of Clause 38 – Clearance of Accrued Annual Leave, which provides for accrued leave to be taken by 1 January 1998, employees will have taken all accrued annual leave and will start with a clean slate. The question remains as to what is to happen from then. Is the loading annualised by its payment each December, or is it annualised by its inclusion with salary and paid each pay?

An examination of the whole of the document which constitutes the Agreement does not assist in a determination of the meaning to be ascribed to the annualisation of annual leave loading. It is clear that an ambiguity arises, therefore, in accordance with *Ralph M.Lee and MEWU* (*supra*), recourse to extrinsic material is appropriate.

Other uses of the term in its industrial applications may offer some guidance. A search of the Commission's records shows that reference to annualisation of particular benefits and entitlements varies according to the particular entitlement. This is consistent with what I have observed regarding the annualisation of hours in this Agreement. Another example is the annualisation of pay. This is often an arrangement whereby the normal weekly rates of pay plus an average of the overtime, shift penalties and allowances earned over a period of a year are combined for the purpose of determining an annual payment. This annual payment is then divided into the appropriate number of pays within the year so that pay does not vary according to various shifts and overtime worked. This benefits employees as they have a regular and easily anticipated income each pay, and benefits employers in terms of record keeping and pay administration.

In the case of annual leave loading, the Commission was referred to one Agreement only (*Agriculture Western Australia Enterprise Agreement—1998 No. PSA AG 9 of 1998 78 WAIG 3029 at 3033 and 3038*) which provides for annualisation of annual leave loading.

Clause 14.12—Annual Leave Loading provides—

> "Employees covered by the Agreement shall have their annual leave loading, provided by the relevant parent Award as specified in Clause (6), annualised as detailed in Schedule B— Salaries."

Schedule B—Salaries is a table which sets out the current rate of pay being the annual salary, the fortnightly pay, the annual leave loading and the annual rate including the loading. The annual rate including the annual leave loading is then used for the purposes of calculating the pay rises which arise during the life of this Agreement. As pointed out by the parties, this agreement quite clearly indicates the intention of the parties is to include the annual leave loading in the annual rate of pay. However, as the Applicant points out, no such specific provision is contained within the Agreement the subject of this interpretation.

The Commission has examined a number of registered agreements which provide for annualised annual leave loading, some of which are agreements to which this Applicant is a party. Some of those agreements assume, according to the words used, that the annualising of annual leave loading is merely the first step in a process where another step provides for the annualising "into the base rate", with a third step being payment at particular intervals such as weekly or fortnightly. For example, the Fire and Emergency Services Authority Enterprise Bargaining Agreement PSA AG 6 of 1999 seems to assume two steps being firstly, annualisation, and secondly, payment weekly or fortnightly. The Metropolitan Health Services Board AMA Medical Practitioner's Agreement PSA AG 25 of 1999 (and other Health Services Board Enterprise Bargaining Agreements) refers to a two stage approach—ie (1) annualised (2) into the base salary. The Department of Training Public Service and Government Officers Enterprise Agreement 1998 PSA AG 12 of 1998 provides that the rate of salary "incorporate(s) the annualised value of annual leave loading into the base rate of pay". The Office of the Auditor General Enterprise Bargaining Agreement 1998 PSA AG 59 of 1998 provides that "the annual leave loading is annualised with an additional 1.3 per cent incorporated into the employees fortnightly pay".

Some agreements assume that annualising means all of those steps without defining the steps. The Legal Practitioners Agreement (Tasmanian State Service) 1996 Agreement, (T 7939 of 1998) under the heading of Clause 14—Annualisation of Annual Leave Loading, provides that employees will cease to accrue the annual leave loading and "the leave loading will be incorporated as salary and paid as such." One might assume from the title of the clause that this whole process constitutes the annualisation. The South East Metropolitan College of TAFE Engineering Trades Enterprise Bargaining Agreement 1999 AG 138 of 1999 (and other TAFE College Engineering Trades Enterprise Bargaining Agreements) provides that the rates contained in particular rates of pay reflect the current salary with the annualised leave loading.

Most of these agreements make provision for the annual leave loading accrued up to a particular day to be paid out at some specified time. None of these Agreements provides for annualisation without the loading being included in base salary or wage, or alternatively, without it being paid fortnightly or weekly ie in these agreements "annualised" annual leave loading arrangements provide for the loading to be paid as part of, or together with, normal weekly or fortnightly pay, once there has been a pay out of the accrued loading.

In considering all of the material before the Commission as to the meaning of the words, I note that this has been a very difficult interpretation in that there is no clear indication from the terms of the Agreement as to the meaning to be ascribed to the term. It would appear that the parties each had a different understanding of the meaning of the term when they went into the Agreement. I do not intend to recite all of the material submitted by the parties dealing with their negotiations, or with the Respondent's strategy and comparison of achievements with strategy, or of the minutes of meetings conducted during negotiations. There is evidence regarding the parties' respective communications with their employees/members. There is also evidence regarding the communication between the parties, which arose subsequent to the registration of the agreement. I note the weaknesses in some of this evidence, such as some minutes being stamped "Draft". However, for the purposes of this interpretation, I accept that they record the parties' discussions. I conclude that the Respondent originally intended to introduce a system of annualising the loading by incorporating it into salary or by paying it as a lump sum (Draft Minutes of meeting 25 July 1996). The Applicant indicated a preference for a once yearly payment provided it "attributes value to the agreement" (Minutes of meeting 7 August 1996). The Respondent was to assess the administrative savings and their value.

There is nothing further in the record of negotiations between the parties which is before the Commission to indicate the reasons why the agreement finally registered is expressed in the way it is. However, it is clear from Exhibit 4—the Form 1 Notice of Application for the registration of the Agreement, at Schedule B Summary of Changes that the Applicant saw the loading being paid as a lump sum. It makes no reference to inclusion in salary and paid each pay.

As noted by Rowland J. in *AEEFEU (71 WAIG 2253 at 2255)*, "where there is a choice between two strongly competing interpretations, the advantage may lie with that which produces the fairer and more convenient operation as long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and

grammatical sense, it will only be displaced if its operation is perceived to be unintended." In this case, the two likely and possible interpretations to be placed on the words are incompatible. The parties each take the opposite view.

Meaning needs to be given to the term. The competing views of the parties have considerable merit. Therefore, it is necessary to conclude in favour of that which is fairer and more convenient, subject to the legislative intent. In taking account of this, I do not conclude that the most convenient operation is based on the fact the Respondent has already implemented its interpretation. It may be the most convenient operation for the Respondent, but it is not necessarily the fairest, nor is it convenient for the employees concerned. As to the legislative intent, this is the intention of the parties in their agreement. One of the major factors to be taken into account is that the provision is contained in an agreement. In arriving at that agreement there must be some common ground between the parties. The application of what was common ground may bring about the fairest and most convenient operation.

The only common intention was payment in December as a first step. There appears to be no agreement beyond that. I am not satisfied that it was ever agreed by the Applicant that "annualisation", if that means the total package of an annual accrual, followed by inclusion in salary and payment with each pay, was part of this Agreement. I conclude that only the annual accrual and payment annually in December was common to the parties. Although inclusion in salary and payment with each pay may have been the intention of the Respondent, it is not clearly identified in the terms of the Agreement to be the agreed concluded meaning.

Accordingly, I conclude that the answer to the question posed is—

1. The term "annualisation of annual leave loading" in Schedule C—Personnel 2000 means payment annually.
2. It does not set aside or oust the provisions of Clause 27—Annual Leave Loading.

It is noted that the Respondent has already implemented its interpretation. Action will need to be taken to address that.

Appearances: Mr E. Rae on behalf of the Applicant

Ms L. O'Brien on behalf of the Respondent

WATER CORPORATION CONDITIONS AGREEMENT 1997.
No. AG 332 of 1997.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of
Western Australia Incorporated

and

Managing Director, Water Corporation.

No. P 24 of 1999.

4 February 2000.

Reasons for Decision.

Parties to these proceedings are parties to the Water Corporation Agreement 1997 and industrial agreement registered pursuant to Section 41 of the *Industrial Relations Act 1979*. Clause 5.7 of that Agreement provides as follows—

> "It is the intention of the parties to vary this Agreement during its term to give effect to the results of—
>
> (A) Review of Remote Location Conditions & Allowances
>
> It is the intention of the parties to consolidate, where appropriate, remote location conditions and allowances in effect at the operative date of this Agreement. The review will commence as soon as practicable after the implementation of this Agreement and, subject to agreement being reached between parties, the results of the review shall be implemented from the beginning of the first pay period commencing on or after 1 July 1998."

The parties are at odds as to the proper interpretation of that Clause, particularly as it governs the operative date for the implementation of any adjustments resulting from the review referred to in the Clause. As a consequence, the Applicant has made application to the Commission seeking a declaration of the true interpretation of the Agreement. Specifically, the Applicant asks—

> "Does Clause 5.7 (A) of the Water Corporation Conditions Agreement 1997 require that where the parties reach agreement after 1 July 1998, on the quantum of any increase in allowance rates arising from a review of Remote Location Conditions and Allowances, the increase must be backdated to the beginning of the first pay period after 1 July 1998."

The Applicant suggests that the Clause should be interpreted as requiring any adjustments made as a consequence of the results of a review to be effective from the beginning of the first pay period on or after the 1 July 1998. The agent for the Applicant argues that the Clause should be read literally so that the words "subject to agreement being reached between the parties" qualifies only the implementation or otherwise of the results of the review, and not the date of the implementation. The Clause is said to reflect the fact that the parties were in agreement that a review of the remote location conditions and allowances should be undertaken as soon as possible, with any changes resulting from the review being implemented on the date stipulated in the Clause. As the results of the review at the time the agreement was made were unknown, it was not possible to stipulate in the Clause what changes were to be made. Rather, that was later to be the subject of agreement between the parties.

The Respondent argues that the Clause should be read as providing that the operative date of the first pay period commencing on or after the 1 July 1998 was to apply only if agreement was reached regarding the changes before 1 July 1998. The Clause should not be read as authorising a retrospective adjustment. The agent for the Respondent relies upon the fact that the Clause refers to changes being implemented from the beginning of the pay period "commencing" on or after 1 July 1998. This, he suggests, supports a pay period in the future rather than a pay period which has already passed. Support for this interpretation, the Respondent argues, lies in the fact that it would be administratively difficult to implement changes contemplated by the Clause, retrospectively. The agent for the Respondent also relies on notes made by him during the negotiations suggesting that the agreement was to be reached prior to 1 July 1998. In any event, the operative date mentioned in the Clause applies only to the results of the review contemplated by that Clause and not any review of location conditions and allowances. Moreover, the Respondent says that changes made as a result of the review only come into effect when the Agreement is actually amended.

The principles governing the interpretation of awards and industrial agreements are now well settled. It is sufficient to observe that the document is to be read as a whole with the words used therein being given their ordinary and natural meaning. Extrinsic material may only be relied upon as an aid to interpretation when applying the ordinary and natural meaning of the language if any ambiguity remains. (See: *Norwest Beef Industries Limited & Anor. v. West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth (1984) 64 WAIG 2124*)).

In my view the Clause can, and in this instance, should be interpreted without regard to extrinsic material. The Clause is capable of being given a sensible meaning by applying the ordinary and natural meaning of the language used in the Clause.

It is beyond question that the Clause indicates that it is the intention of the parties to "consolidate", where appropriate, remote location conditions and allowances in effect at the operative date of the Agreement. Further, the Clause envisages that preparatory to such a consolidation, a review of those conditions and allowances will be undertaken. The Clause provides that such a review shall "commence as soon as practicable

after the implementation", presumably the registration, of the Agreement. Thereafter, and subject to agreement being reached between the parties, the results of the review will be implemented from the beginning of the first pay period commencing on or after 1 July 1998.

In my view, the qualifying words "subject to agreement being reached between the parties" should be read as applying only to the results of the review and not to the implementation date. The sentence in which the words appear is punctuated in such a way that, read literally, the qualification does not apply to the operative date, but only the results of the review. Furthermore, such an interpretation results in an outcome which accords with a common sense application of the language. As the agent for the Applicant submitted, it is not sensible to fix a precise operative date, the use of which depends on the agreement of the parties. Were it otherwise, the parties may just as well have omitted the date and stipulated only that the operative date was subject to agreement. It is more in accord with the structure of the Clause taken as a whole to interpret the Clause as providing that the results of the review are to be implemented only after agreement between the parties regarding the results of the review and with effect from the commencement of the first pay period commencing on or after 1 July 1998. There is no warrant on the basis of the language used in the Clause to hold that such an operative date is conditional upon agreement being reached prior to the 1 July 1998. Such an interpretation not only requires an abnormal interpretation to be placed on the language used in the Clause but requires, in effect, additional words. In my view, nothing turns on the use of the word first pay period "commencing" on or after 1 July 1998. That expression is as relevant to a retrospective adjustment as it is to a prospective one. It is a formula commonly used in respect to changes to awards and agreements which apply retrospectively. Furthermore, it is trite to say that in interpreting awards and agreements, allowance should be made for the fact that that document may have been drafted by laymen rather than skilled draftsmen. Thus, there should not be too literal adherence placed on the strict technical meaning of words. (See: *Robe River Iron Associates v. Amalgamated Metal Workers' and Shipwrights Union of Western Australia & Ors (1987) 67 WAIG 1097).*

Were it appropriate to refer to extrinsic material the result would not be any different. Indeed, the extrinsic material tendered during the proceedings leads me to conclude that the Clause should be interpreted in the way I have indicated. It appears that concern was expressed during the negotiations leading to the Agreement now in question, apparently by the Applicant's representatives, that the review of the remote location conditions and allowances contemplated by the parties might not proceed in an orderly and expeditious manner. As a consequence, towards the end of the negotiations the agent for the Respondent wrote to the Applicant as follows—

> "Concern was expressed that the review of remote area conditions and allowances might not proceed in an orderly and expeditious manner. We are prepared to include in the Agreement an undertaking that the review will commence as soon as practicable after the implementation of the new Enterprise Agreement and, subject to agreement being reached between the parties, the results of the review will be implemented from the beginning of the first pay period commencing on or after 1 July 1998."

Of course, one way to allay those concerns was to fix an operative date for the introduction of the changes which was not independent of the time when the negotiations regarding any proposed changes were completed. That is a formula which increasingly applied in the course of negotiating agreements of this nature. It may well have been the intention of the Respondent to confine the operation of the stipulated operative date to an agreement reached prior to 1 July 1998, but that is not, what on any normal interpretation, the Clause says. Nor indeed, was there any evidence to indicate that was what was agreed between the parties.

Having regard to the terms of the question put to the Commission, and the arguments advanced by the parties during the course of these proceedings, I feel bound to make the following observations which, though not the subject of the question, appear to be material. The Clause does not authorise the parties to make any alteration to the remote location conditions and allowances effective from the first pay period commencing on or after 1 July 1998. Rather, it applies only to adjustments agreed on as the result of the review contemplated by the Clause of those conditions and allowances. If it be that the review is incomplete, or if there is otherwise no agreement between the parties regarding the results of that review then, of course, there is nothing to be implemented under and by virtue of the provisions of that Clause. Furthermore, the parties accept that mere agreement on the outcome of such a review is not sufficient to implement the changes but rather, that must follow a variation of the Agreement albeit with retrospective effect to the first pay period commencing on or after 1 July 1998.

In summary, the question posed by the Applicant should be answered in the affirmative but only in so far as it concerns changes resulting from the results of the review contemplated by Clause 5.7.

Appearances: Mr J.N. Dasey as agent for the Applicant

Mr S.W. Rooke as agent for the Respondent.

CONCILIATION ORDERS—

ACTIV FOUNDATION ENTERPRISE AGREEMENT 1997.

No. AG 35 of 1998.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Activ Foundation Inc.

and

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch and Anor.

No. 157 of 2000.

4 February 2000.

Order.

WHEREAS pursuant to section 32 of the Industrial Relations Act 1979, the Applicant sought a conference to consider the implications arising out of the pending retirement of the Australian Liquor, Hospitality and Miscellaneous Worker's Union, Miscellaneous Workers Division, Western Australian Branch from the Activ Foundation Inc. Enterprise Agreement 1997;

AND WHEREAS I, the undersigned, the Senior Commissioner of the Western Australian Industrial Relations Commission, on 3 February 2000, presided over a conference between the parties to consider the matters in issue;

AND WHEREAS I am of the opinion that to prevent the deterioration of industrial relations in respect of the matter and to encourage the making of a new Agreement, it is desirable that the existing conditions of employment continue to apply for the time being;

NOW THEREFORE: pursuant to the powers conferred by the said Act, and by consent, I do hereby order—

> THAT notwithstanding the retirement of the Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch from the Activ Foundation Inc. Enterprise Agreement 1997, employees eligible for membership of the Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch continue to be employed under and subject to the terms and conditions of that Agreement until and including the 29th day of February, 2000.

(Sgd.) G. L. FIELDING,
[L.S.] Senior Commissioner.

PUBLIC SERVICE ARBITRATOR— Matters Dealt With—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Patrick John Glynn

and

Chief Executive Officer, Office of Energy.

No. P 10 of 1999.

PUBLIC SERVICE ARBITRATOR

COMMISSIONER P E SCOTT .

27 January 2000.

Reasons for Decision.

THE COMMISSIONER: The Applicant alleges that Regulation 23 of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 ("the Regulations") has been unfairly and improperly applied to him. The schedule to the application sets out the details of the Applicant's case as follows—

"1. Prior to being employed by the Office of Energy (OOE) as Senior Information Officer (A2), Level 5 the applicant was employed by the State Energy Commission of Western Australia (SECWA) at Level 8 (SECWA Award).

2. On the 1st January 1995 the OOE was established and selected SECWA employees were asked to transfer to 'like' positions within the OOE. The applicant was provided with the opportunity to apply for a level 5 position within the new OOE structure on the understanding his pay rate would be maintained. This position was not advertised. The applicant was subsequently appointed to this position.

3. At the time of appointment the applicant was being paid at the highest point on the level 8 SECWA salary scale and had an expectation of a 3% pay increase.

4. The applicant was offered salary maintenance of PSA level 7.1 when appointed to the substantive PSA level 5 position within OOE as per the agreement undertaken.

5. Due to a restructure within OOE the applicant's substantive position has been abolished and the applicant registered as a redeployee.

6. The applicant has been advised, by letter 16th July 1999, that pursuant to Regulation 23 of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 his pay will be reduced from level 7.1 to level 5.4. Regulation 23 entitles the applicant (being a registered employee) to the rate of pay to which he was entitled in respect of the position that has been abolished.

7. The applicant is of the view the rate of pay to which he is entitled, whilst a registered employee is level 7.1 (the rate of pay he was paid in respect of the abolished position) not level 5.4.

8. The applicant claims that Regulation 23 of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 has not been fairly and properly applied.

9. The applicant seeks a determination that Regulation 23 of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 has not been fairly and properly applied."

The Respondent says that the rate paid to the Applicant in his position at the Office of Energy constituted the rate of pay for the position which was Level 5.4, and that he received an allowance to maintain the rate he had previously been paid from SECWA. However, the Respondent says that the allowance does not constitute an allowance for the purposes of Regulation 3 of the Regulations and therefore the rate of pay applicable to the Applicant, in accordance with Regulation 3, is the rate in respect of the office, post or position which had been abolished, which was at level 5.4.

The Commission has received into evidence a number of documents. Exhibit 1 is a letter to the Applicant from the Department of Resource Development advising him that there was a new office to be established called the Office of Energy which would be offering positions to potential employees. The second and third paragraphs of that letter set out the essential information for this matter. They state—

> "It is with great pleasure that I am able to extend an invitation for you to apply for the position of Senior Information Systems Officer at the Office of Energy. A statement of the duties of this new position are attached, as well as an organisational structure and a job application form.
>
> The classified level of this position is level 5 with a salary range of $38,660 to $42,815 per annum. If your application is successful, the following will apply. Based on your current classification and personal allowance at SECWA, your OOE commencing salary rate would be $52,721 per annum fixed to level 7 step 1. You would receive any future pay increases at this level and step, however you will not be entitled to progress further in the range. Other entitlements, benefits or debts that you may have at SECWA would be transferred as per the table below:"

Exhibit 2 is a letter from SECWA to the Applicant dated 23 February 1990 which provides information about the salary/classification structure following the introduction of broadbanding. It confirmed the classification for his function as level 8 of the SECWA rates of pay. The schedule attached to this letter demonstrates that the level within the Public Service rates would have placed the classification of level 8 at which the Applicant was allocated at SECWA at between the top of level 6 and the bottom of level 7 of Public Service rates.

Exhibit 3 is a letter to the Applicant from the Chief Executive Officer, Department of Resources Development dated 21 October 1994 advising him of his transfer to a position of Senior Information Systems Officer (A2) Level 5, Corporate Services. The letter advised that he was to be transferred to that office effective from 1 January 1995. The essential part of the letter is contained at paragraph 2 and states—

> "The salary range for this position is $38 660 to $42815 per annum. Due to your classification and personal allowance your commencing salary rate will be $52 721 per annum fixed to Level 7 step 1. You will receive any future pay increases at this level and step, however you will not be entitled to progress further in the range."

Exhibit A tendered by the Respondent is a letter from the Assistant Director General, Public Sector Management to the Director, Corporate Operations, for the Office of Energy dated 5 March 1999 confirming that the Applicant had been registered with the Office of Redeployment effective from 15 February 1999.

As correctly identified by the parties in their submissions, the question to be determined by the Commission is whether Regulation 23 of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 provides for the Applicant to be paid at the level 7.1 rate of pay or whether the rate of pay applicable to him is the rate allocated to the position he held, being level 5. Regulation 23 provides—

> "**23. Rate of pay of surplus employees**
>
> The rate of pay of an employee, whether a registered employee or not—
>
> (a) whose office, post or position has been abolished; but
>
> (b) who is for the time being entitled to payment until his or her resignation, redeployment or other arrangement has effect under these regulations,
>
> is the rate of pay to which the employee was entitled in respect of the office, post or position that has been abolished."

Other relevant sections of the Regulations include Regulation 3, Interpretation, and the definition of "pay" which is—

" **"pay"** means—

(a) the award rate of pay, excluding allowances, applicable to the substantive classification of the recipient of the pay or, where the recipient does not have a substantive classification, the rate of pay, excluding allowances, under his or her contract of employment;

(aa) an allowance —

(i) that is always paid with the award rate of pay applicable to the substantive classification of the recipient of the pay or, where the recipient does not have a substantive classification, with the rate or pay under his or her contract of employment; and

(ii) the payment of which is not subject to any condition relating to the time, place or circumstances at or in which the recipient of the pay is employed, or to any other condition;

(b) an enterprise bargaining allowance;

(c) an allowance for an employee being in charge of other employees; and

(d) a tally or piece rate,

but does not include an allowance of any other kind unless the Minister has approved the allowance for the purposes of this definition;"

The Commission was also referred by the Applicant to Regulation 18 which deals with benefits to which registered employees accepting offers of offices, posts or positions are entitled. Both parties agreed that this is not relevant to the Applicant's circumstances except it is referred to for the purpose of ascertaining the meaning to be ascribed to Regulation 23.

I conclude that the rate of pay appropriate for the Applicant's situation, upon his office being abolished is level 5. This is because Regulation 23 prescribes that the rate of pay of an employee in the circumstances in which the Applicant has found himself is the rate of pay to which the employee was entitled "in respect of the office, post or position that has been abolished". The office, post or position which has been abolished was a level 5 office, post or position. What applied to the Applicant by virtue of the letter of employment provided to him (Exhibit 3) was due to his previous classification and personnel allowance. In accordance with the authorities referred to by the Respondent, an allowance is a "payment additional to ordinary pay as compensation for unusual conditions of service" (*Latham CJ Mutual Acceptance Co Ltd v Federal Commissioner of Taxation (1944) 69 CLR 389 @ 397).* These circumstances describe the rate of pay which was provided to the Applicant in addition to the rate which attached to the office, post or position he held prior to its abolition.

The rate of pay to which an employee is entitled in respect of the office, post or position relates not to what the particular employee might receive but to that which attaches to the office, post or position. The distinction drawn by the Respondent between the words used in Regulation 23 of the rate of pay to which the employee was "entitled in respect of the office, post or position" and those contained within Regulation 18 clarifies this, ie Regulation 18 (4) refers to the rate of pay the registered employee "received" in respect of the previous office, post or position. It is the words used in Regulation 23, not those in Regulation 18, which are relevant in this matter.

As to the question of whether the amount received by the Applicant constituted an allowance which formed part of "pay" as defined by Regulation 3, I conclude that the Applicant received a personal allowance subject to conditions related to his former position at SECWA, and subject to certain limitations in respect of his employment with Office of Energy. Accordingly, he did not meet the criteria set out in Regulation 3(1), which would otherwise allow consideration of an allowance as part of pay.

In all of the circumstances of this matter, it has not been demonstrated that Regulation 23 of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 has been unfairly or improperly applied. The application is to be dismissed.

Appearances: Mr E Rea for the Applicant

Ms J Pritchard (of Counsel) for the Respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Patrick John Glynn

and

Chief Executive Officer, Office of Energy.

No. P 10 of 1999.

PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT.

27 January 2000.

Order.

HAVING heard Mr E Rae on behalf of the Applicant and Ms J Prichard (of Counsel) on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby dismissed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia Incorporated

and

Chief Executive Officer, Department of Productivity & Labour Relations.

No. P23 of 1999.

4 February 2000.

Order.

WHEREAS an application was lodged in the Commission pursuant to section 80E of the *Industrial Relations Act, 1979*;

AND WHEREAS the applicant subsequently advised the Commission that it wished to discontinue this application;

AND HAVING HEARD Mr R. Lindsay on behalf of the respondent and there being no appearance on behalf of the applicant;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order—

THAT the application be discontinued.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner..

WORKPLACE AGREEMENTS—Matters Pertaining to—

IN THE MATTER OF A PRIVATE ARBITRATION

Julie O'Donoghue

and

Argyle Diamond Mines Pty Ltd.

No.WAG 7 of 1998.

ARBITRATOR J F GREGOR.

22 December 1999.

Reasons for Decision.

UNDER THE ARGYLE DIAMOND MINES PTY LTD

FAIR TREATMENT SYSTEM

Argyle Diamond Mines Pty Ltd (Argyle) introduced a Human Resource Policy on 16 August 1996, incorporating a grievance procedure for employees who believe they have been subject to unfair decisions or treatment. It recognised the importance of employees believing that Argyle 'encourages trust and cooperation between employees', equal employment opportunities and harassment free workplace.

The policy states that all employees will be treated in a fair, open and honest manner by their managers and other employees. Argyle and its employees agree to abide by the laws and recognised community standards that apply where Argyle conducts its business. Where appropriate Argyle seeks to promote equal opportunity work environment.

This policy is embodied in the Argyle Fair Treatment System which is given to each employee. The system seeks to address workplace concerns promptly, simply, effectively and in an accessible manner. The Human Resources policy embodied in each contract of employment sets out a resolution procedure. Ultimately, if a matter remains unresolved an arbitrator, can be appointed by the Chief Commissioner of the Western Australian Industrial Relations Commission. The arbitrator's decision will be final and binding. I was appointed under this system, to arbitrate Julie O'Donoghue's complaint concerning the termination of her employment with Argyle.

The parties and I entered into a Deed enabling them to call evidence and make submissions to support their claims. The dispute is detailed in Annexure 1 of the Deed—

> *'The Applicant claims that, in all the circumstances of the case, fairness requires that the respondent should pay her a payment equivalent to a payment for redundancy. The applicant says the circumstances include an agreement made between herself and the General Manager of the respondent that the applicant would be made redundant'.*
>
> *The respondent denies the claim and says that—*
>
> *(1) the claim has been withdrawn and therefore there is no matter to be arbitrated; and*
>
> *(2) it the Arbitrator determines that the claim has not been withdrawn, the respondent should not pay the applicant the equivalent to a payment of redundancy as she has no entitlement to a payment, either legally or as a matter of fairness, or at all'.*

In a letter dated 25 September 1998, Argyle by Debra Wilson, Manager of Human Resources, requested the Chief Commissioner appoint an Arbitrator to deal with Ms O'Donoghue claim that Argyle had unfairly treated her by not offering her a redundancy package. After utilising the Fair Treatment System the dispute remained unresolved in September 1998. A controversial conference which took place in Perth on 30 October 1998, became the subject of proceedings before Senior Commissioner Fielding. He issued a decision, on 27 May 1999. Senior Commissioner Fielding believed that the Arbitrator should deal with the matter under the Fair Treatment System.

I believe that the events of the conference on 30 October 1998 were incorrectly presented to the Senior Commissioner. Ms Debra Wilson's statement indicates this (*Exhibit L4).* She did not expect arbitration to result in Argyle having to pay an employee an award. According to Ms Wilson, Ms O'Donoghue was not entitled to any payments. She contended that the Arbitrator was to decide whether the decision was fair not whether Ms O'Donoghue was contractually entitled to a redundancy payment, nor the quantum of that entitlement.

In the conference before the Arbitrator, Argyle did not consent to the Arbitrator determining whether an agreement to pay redundancy existed. It was prepared for the Arbitrator to determine the fairness of what occurred without giving the applicant a remedy. This rendered the Arbitration futile. Argyle refused to have the question of whether Ms O'Donoghue had an agreement with Argyle arbitrated on merit.

This deficiency was later remedied. Annexure A to the Deed, executed on 27 August 1999, states that the matter to be Arbitrated is whether fairness requires the respondent to pay Ms O'Donoghue an amount equivalent to a payment equivalent to a payment for redundancy. This issue was addressed before the Arbitrator in a hearing on 6 December 1999.

During the hearing the Arbitrator heard evidence from Ms O'Donoghue and a work colleague, Mr Lewis Hawkins. Mr Matt Keogh, the applicant's advocate in the proceedings on 30 October 1999, also gave evidence. Argyle called evidence from Mr Brendan Hammond, General Manager of Operations of Argyle and from the Human Resources Manager, Ms Debra Wilson.

The meeting between Mr Hammond and Ms O'Donoghue, which discussed her future involvement with Argyle, is fundamental to the determination of this issue. Mr Hammond told the Arbitrator that as General Manager of the Operations Division he reviewed all activities within the division to increase efficiency. He told the Arbitrator that Argyle Mine Site works on a commute basis mainly two weeks on and two weeks off. A small number of employees work on an even time roster consisting of 3.5 days of equal duration. Mr Hammond reviewed Ms O'Donoghue's role of Superintendent of Community Relations. She was one of two superintendents who worked two on/two off commute roster back to back. Mr Hammond decided that proper governance required the superintendent working conditions be changed to an even working time commute. When a role is significantly changed Argyle formally offers the conditions to the employees, if they decline the company considers alternatives before approving redundancy. Such approval must come from the Managing Director. The Managing Director will not approve the redundancy unless it is clearly justified.

In September 1998, Mr Hammond discussed the challenges and opportunities with Ms O'Donoghue stating that Argyle did not want to lose her services. She stated that she wanted the same offer given to Lewis Hawkins, who was her back to back and was offered a redundancy while on leave. Initially Mr Hammond agreed and advised that he would provide a written change in conditions offer together with a redundancy estimate. This was the usual procedure and was not a formal offer. Mr Hammond made this clear to Ms O'Donoghue stating that it was an estimate only. Mr Hammond instructed the Human Resource Department to prepare a formal letter of offer which was created and given to Ms O'Donoghue. Mr Hammond said that he stressed when handing the documentation to Ms O'Donoghue she should not consider the estimate as being definitive. It was not a final offer.

Ms O'Donoghue rejected the offer in writing and requested a redundancy. Mr Hammond reviewed the situation and considered other options. Pursuant to Argyle's policy Mr Hammond must seek the Managing Director's approval before making a formal offer of redundancy.

As a result of the review Mr Hammond decided that Ms O'Donoghue possessed vital and irreplaceable corporate knowledge. Additionally, resources were limited due to poor leave planning with only one person staffing the area and some tasks specifically required her skill and knowledge. A new departmental manager had been appointed who would require assistance.

Mr Hammond concluded that it was Argyle's best interest to retain Ms O'Donoghue's services and not insist on her changing to a weekly commute. On 4 September 1998, by telephone he advised Ms O'Donoghue accordingly. Mr Hammond directed her to return the following week on her usual commute. They would discuss community relations and her roles and tasks when she returned. Mr Hammond said Ms O'Donoghue was upset as she had told people that she was taking a redundancy.

He believed that she did not want to continue with the job. This telephone conversation was subsequently confirmed in writing.

On 8 September 1998, Ms O'Donoghue lodged a Fair Treatment claim. She alleged that her redundancy was stipulated in a legally binding agreement. Mr Hammond was surprised, as prior to offering the change role, he believe she would accept it because she lived in Kununurra and had been working a weekly commute for a considerable time. A meeting with Ms O'Donoghue on 9 September 1998 did not resolve the issue. She indicated that she intended to pursue the Fair Treatment meeting. The Fair Treatment meeting was short, as Mr O'Donoghue believed that her discussion with Mr Hammond on 2 September 1998 amounted to a binding agreement for redundancy. Mr Hammond acknowledged that redundancy would normally result where a role is changed and the person rejects it. However, it was not final until the Managing Director's authority is obtained. This authority is granted after reviewing other options. The employee is then offered, in writing, a formal offer of redundancy.

Mr Hammond concluded that Argyle needed Ms O'Donoghue to remain in her role and advised her of that. In accordance with the Fair Treatment System, Ms O'Donoghue met with the Managing Director, Mr Gilchrist. Later Mr Gilchrist advised Mr Hammond that Ms O'Donoghue did not have a binding agreement for redundancy. She was offered a change in conditions which she rejected. As required, other options to redundancy were considered; one being found for Ms O'Donoghue.

Mr Hammond expected Ms O'Donoghue to continue in her role. He offered to send her to a Rio Tinto Group Business Unit in New Guinea as a business development exercise which she rejected when she returned to work on 30 September 1998. Due to the resignation's tone Mr Hammond decided that she did not have to work out her notice period. She was paid one (1) months pay in lieu of notice.

Ms O'Donoghue's resignation is before the Arbitrator (*Exhibit L4)*. Ms O'Donoghue passionately details her view of Argyle's community relations policy. It refers to judgement errors and damaging decisions. She alleges that Argyle has the worst relationship with the local community in documented history due to lack of consultation. It details concerns, mistrust and hostility and the deterioration of world class programs. She alleges that there was a lack of communication with her and that Mr Hammond inadequately or inappropriately understated and evaluated the impact of decisions. It alleges that Argyle's polices, implemented by Mr Hammond, take the companies relationship with indigenous people back 20 years. Additionally, Ms O'Donoghue alleges unreasonable task targets which may cause stress and performance problems and states that she is not prepared to take that risk or potentially damage her professional reputation.

The letter is a thorough rejection of Argyle's policy. It describes Ms O'Donoghue clear and rational thought process which led her to conclude that it was not in her professional interest to continue to be an employee of Argyle and she resigned. She contends, notwithstanding her resignation, that she had a contract or at least an arrangement with Mr Hammond that she would be paid redundancy.

As I understand Ms O'Donoghue's evidence she alleges that she has been unfairly treated on the issue of redundancy. She had been on leave for a number of weeks prior to the issue being raised and was not aware of the serious situation in community relations until she returned to work. She believed that Argyle and her had a binding agreement concerning redundancy, which Argyle reversed. She stated that at a meeting with Mr Hammond they discussed the changes in her role and she was offered a four/three commute which she rejected. They verbally agreed to Ms O'Donoghue accepting a redundancy and Mr Hammond wished her well for the future. She received a letter offering a weekly commute. She formally declined the offer in writing thinking that she would automatically qualify for redundancy. She then received a hostile phone call from Mr Hammond saying that he was not proceeding with her redundancy and she was to remain on her current employment contract. She thought that he had broken their agreement.

Ms O'Donoghue met with the Manager Director, Mr Gilchirst during which, Mr Gilchrist told Ms O'Donoghue that she was on a two on/two off commute and was offered a weekly commute which she rejected. Therefore, under company policy they considered other alternatives. Ms O'Donoghue refusal of the alternate commute did not automatically qualify her for redundancy. Mr Gilchirst told Ms O'Donoghue that if attempts to find her an alternative position were inadequate, he would require that work to be completed before approving redundancy. On his understanding, the Fair Treatment System reviews whether people have unnecessary lost their employment. That is a check and balance on corporate decision making. It is not about whether a person wants redundancy and has not go it. Mr Gilchrist stated that it would be remiss of him to approve a redundancy when there was an alternative position.

In her evidence before the Arbitrator, Ms O'Donoghue conceded that the final decision about when redundancy is offered rests with the Managing Director, Mr Gilchrist.

The proceeding is a sufficient summary of events to contextualise the decision in this matter.

Annexure A to the Deed requires the Arbitrator determine as a matter of fairness whether the respondent should pay the applicant an amount equivalent to a payment for redundancy. The circumstances which ought to be taken into account include an agreement between Ms O'Donoghue and Argyle's General Manager that she would be made redundant.

I deal first with this last proposition. Mr Hammond reviewed the Community Relations Section's work. The group's financial arrangements were different to the rest of the departments which concerned Mr Hammond. The Community Relations Section dealt with bodies outside the Argyle site with freedom not enjoyed by any other department. Mr Hammond believed that the Community Relations Section needed to have checks and balances to ensure proper governance of the operation. To address this problem, he wanted to restructure the section. He restricted who the Community Relations Officers could contact and restricted their areas of operation, thereby changing their role. Mr Hammond discussed this with Mr Lewis Hawkins, Ms O'Donoghue's back to back, and who as a result left Argyle. Mr Hammond believed a different commute arrangement might be suitable. He canvassed this with Ms O'Donoghue which she refused. He then reconsidered the situation. In his early consideration of redundancy he did not place the matter before the Managing Director. I find that it is well known to all of the parties that a redundancy cannot be granted without the Managing Director's approval. According to the papers he stated to Ms O'Donoghue that redundancy was only available in genuine circumstances not on demand. The redundancy requirements, as per Argyle's policy, were not met in this case. Mr Hammond initially described the offer to Ms O'Donoghue but had good reason to review his decision. A contract for redundancy between Argyle and Ms O'Donoghue was not formed. Any undertaking that Mr Hammond made could not form the basis of a contract because he lacked the authority. Redundancy had to be approved by the Managing Director and it was not.

I conclude that Ms O'Donoghue was concerned about the change in Community Relations. She had enjoyed great professional freedom as a Community Relations Senior Officer. Mr Hammond limited these freedoms to which Ms O'Donoghue objected and details in her letter of resignation. Ms O'Donoghue was concerned about Mr Hammond's policies when they discussed altering working arrangements, prior to her resignation. Ms O'Donoghue decided that she did not want to be professionally involved with Argyle and resigned. As a result of a genuine disagreement between Ms O'Donoghue and Argyle, she exercised her right to end the contract of employment. Therefore, she can not allege Argyle was unfair when alternative position was offered to her. By offering her a trip to Liher Gold in Papua New Guinea, Argyle illustrated their desire to retain her services. I conclude that the offer was a genuine attempt to retain her services. However, she rejected it as she intended to resign. Where an employee deliberately decides their future, it is difficult to conclude that the company has been unfair when they wished to retain her services albeit in a different role. Ms O'Donoghue was not asked to resign and she was not dismissed. She was asked to work a specific work regime which she rejected. On that basis, there has been no unfairness.

Argyle contends that the claim was withdrawn and there is no matter to Arbitrate. As previously stated in these Reasons

for Decision, I conclude otherwise. Additionally, Mr Keogh's evidence rejected the proposition of a withdrawal. At most the applicant retired to considered her position after the conference on 30 September 1998

In view of my findings, I have no need to address the issue raised in paragraph 2 of the respondent's denial as set out in Annexure A to the Award.

In summary, the applicant was not made redundant. A contract was not formed between her and Argyle to that effect. No unfairness has arisen as Ms O'Donoghue made a conscious and measured decision to resign. The contract of employment, had she wished it to continue would properly still be in existence.

Appearances: Mr D Schapper, of Counsel, appeared on behalf of the applicant

Mr T Lucev, of Counsel, and Mr D Cronin of Counsel, appeared on behalf of the respondent.

UNFAIR DISMISSAL/ CONTRACTUAL ENTITLEMENTS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

David Michael Betteridge

and

Spotless Services Australia Limited t/a SSL Nationwide Field Catering.

No. 1677 of 1998.

20 January 2000.

Reasons for Decision.

COMMISSIONER C.B. PARKS: David Michael Betteridge (the applicant) claims that he was forced to resign from employment with Spotless Services Australia Limited t/a SSL Nationwide Field Catering (the respondent) as the Supermarket Manager, managing a supermarket at Pannawonica, and therefore he was unfairly dismissed from the employment. Additionally he claims that his employment had been for a fixed term of three years and that the dismissal occurred 103 weeks prior to the expiration of that term, and was therefore effected in breach of his contract of employment. The Notice of Application asserts that the relationship between the parties has irretrievably broken down, hence reinstatement in employment is impracticable. The nature of remedy sought, as expressed in the particulars of the filed claim, involves both the payment of compensation and the recovery of contract benefits;

in the form of compensation covering—

"Re-imbursement of removal costs $2, 400 plus $350 Ins.

Cost of transporting family from Pannawonica to Perth $527;

Balance of contract price—103 wks x $40,000 per annum;

Costs and disbursements;

Damages for breach of contract—in the alternative",

and denied contractual benefits in the nature of —

"($) 2,400 Removalist charges -Ridgeways
527 Transport costs Pannawonica to Perth
79,230 Balance of contract (103 weeks)
82,157 Total"

At or about Easter of 1998 the applicant, being dissatisfied with the level of support he had been afforded by the respondent, indicated his inclination to resign from his employment. Management of the respondent informed him of the wish that he remain and sought to dissuade him from the course he had suggested. It came to pass that no resignation was submitted.

On 10 June 1998 the applicant was counselled regarding aspects of his performance by Robert Ian Leighton, the Operations Support Manager for the respondent, when on a visit to Pannawonica from Perth. During another visit of Mr Leighton, on or about 3 July 1998, he raised matters with the applicant regarding his performance and that was followed by the immediate local superordinate of the applicant, Gavin Alexander Braithwaite, the Project Manager, issuing to the applicant a written warning regarding aspects of his performance. At the behest of Mr Betteridge the content of the warning was altered in relation to one issue, and about three days later he then formally signified receipt of it, however he viewed this formal warning to be unwarranted and was upset by it. His state of mind at the time was also said to have been affected by advice from Darren Ham, the second in charge to Mr Braithwaite, who told him on 12 June 1998 he was to be replaced by a Supermarket Manager from Groote Eylandt.

Mr Betteridge departed Pannawonica and commenced a period of annual leave on 13 July and returned to the town on 30 July 1998, so as to recommence his duties the following day. The taking of leave had been arranged in the vicinity of four to six weeks prior, however the length of the leave was reduced at the request of Mr Leighton shortly before the applicant departed on leave.

According to the applicant, when he received the amended written warning, Mr Braithwaite indicated it was inevitable he would receive further warnings to either excite his resignation or justify his dismissal and suggested he seek alternative employment during the period of his planned annual leave. Furthermore, on or about 8 July, Mr Braithwaite indicated that were he to resign the respondent would agree to pay his removal costs, to which he replied that he would think about the matter while on leave and he would attempt to discuss it with Mr Leighton, it was said. Mr Braithwaite denies he said anything of the kind alleged and asserts that the applicant announced to him an intention to resign. That he says he then conveyed to Mr Leighton whom he understood arranged with Mr Betteridge to meet him in Perth to discuss the matter during his annual leave. Mr Leighton confirmed that he telephoned the applicant and requested that he meet with him in Perth when en route to Tasmania during his annual leave, and that he says he did because of what Mr Braithwaite had conveyed to him and because, in the material telephone conversation, Mr Betteridge also gave him to believe he might leave the employment. Mr Betteridge concedes that he had a telephone discussion with Mr Leighton in which there had been mention of him meeting Mr Leighton in Perth however he says no definite arrangement to meet was made and they would meet if he could manage to do so. The applicant was not expressly put to confirming or denying the allegation that he raised the suggestion of resignation, or leaving the employment, with Mr Braithwaite and then with Mr Leighton shortly before proceeding on leave.

On 31 July 1998, the day following the return of the applicant to Pannawonica after his annual leave, he submitted a written resignation to Mr Braithwaite who, in turn, transmitted it by facsimile to Mr Leighton. The resignation caused Mr Leighton and Mr Mills, another senior management person, to engage in a joint telephone conversation with the applicant regarding the matter later the same day and that led to him submitting a reworded resignation. Mr Leighton visited Pannawonica on 4 August 1998 and discussed the reworded and second resignation with Mr Betteridge. During that discussion there were several occasions that Mr Leighton said to Mr Betteridge that the respondent wished him to remain. The discussion concluded with Mr Leighton accepting the resignation on behalf of the respondent.

Mr Betteridge says that shortly after his return on the evening of 30 July 1998 he was visited by Mr Ham who told him to expect a visit from Mr Braithwaite that night and who, acting on instruction from Mr Leighton, would demand that he resign. And that, on the next day when he arrived to commence work, he was met by Mr Braithwaite who told him that Mr Leighton required his resignation that day, and that situation, together with the difficulties he expected he would face in the future, caused him to return to his accommodation, prepare a written resignation, and then submit it.

Mr Leighton denies he wanted the employment of the applicant terminated and that he acted to achieve, or caused Mr

Braithwaite to demand, his resignation. He says that given the possibility of Mr Betteridge resigning having been raised by him in early July, and that he had failed to meet with him, Mr Leighton, and discuss the matter at the commencement of his leave he was anxious to know definitely whether the applicant intended to resign and he therefore instructed Mr Braithwaite to ascertain that when Mr Betteridge returned from leave. Mr Braithwaite denies he demanded of the applicant that he resign. Although his version of what occurred is in some respects plainly inaccurate, and confused, the essence I distil from it is that he raised with Mr Betteridge that he had previously spoken of resigning, and if that remained his position, he was required to submit a resignation in writing that day.

There is no dispute that in the telephone conversation between Messrs Betteridge, Leighton, and Mills, relating to the first resignation, the applicant was informed they wished him to continue his employment, it was said to him that the tenor of it displayed anger, and it was conditional, and hence the resignation would not be accepted. According to Mr Leighton, it was also the case that the applicant spoke of the written warning he had been given and felt he had received "a raw deal", additionally, he said he had obtained another job, and that he intended to leave and would not retract his resignation, and it was against this background that he was told that an appropriately worded resignation would be accepted. Mr Betteridge says he did not indicate that he had obtained another job but that he did speak of seeking one.

The second resignation contains reference to another job and states, "Due to a position becomming (sic) available in Perth I am unable to give you more notice". Mr Betteridge says that a female friend in Perth had told him of a job and had arranged for him to be interviewed, when he enquired on 31 July 1998, but he had not obtained another job and the statement contained in his resignation was included because it was what management wanted to hear. There is no evidence that those in management who discussed resignation with the applicant either requested or intimated that a statement of this kind be included. Mr Betteridge apparently chose to include it on his own initiative, and given the tenor of it, I think it probable that what he said to Messrs Leighton and Mills regarding another job carried such an inference.

Mr Betteridge was replaced at Pannawonica by a person transferred from Groote Eylandt, a Mr Greg Dempsey, in mid August 1998. Mr Braithwaite denies any contact with Mr Dempsey, or knowledge of any arrangement involving him, in June 1998. Mr Leighton says the first occasion he took any action relating to the potential replacement of the applicant was when he contacted the respondent's Sydney office during July 1998, and that was an enquiry prompted by the possibility of Mr Betteridge resigning having been raised in the first week of that month and because the applicant had not met him in Perth it remained a live issue. According to Mr Leighton he was informed of Mr Dempsey through the Sydney office, and it was not until toward the end of July he made contact with him in Groote Eylandt.

Both of the written resignations are dated 31 July 1998 and the applicant is adamant that the second resignation was submitted following his telephone discussion with Messrs Leighton and Mills, and on the same day. It is the recollection of Mr Braithwaite that between the first resignation and the second he received another written document from the applicant, and that he did not receive the second resignation until a few days after the first resignation. Mr Leighton says he did not sight the second resignation until he visited Pannawonica on 4 August 1998. On 1 August 1998 Mr Betteridge issued a memorandum addressed to Mr Leighton, and copied it to Mr Braithwaite (exhibit 7), which refers to their telephone conversation the previous day, that the resignation of that date had not been accepted and requests written reasons for the non acceptance, and states, "Once I have received this (the written reasons) I will then consider all the options then left open to me". It does not appear logical to the Commission that the applicant would request reasons in order that he might consider some other option if it were that the original resignation was no longer relevant because it had been superseded by another, and particularly given that the terms of the second resignation reveal that resignation remained the chosen course and for differently recorded reasons. This, coupled with my belief that the memorandum (exhibit 7) is the document Mr Braithwaite recollects receiving between the two resignations, causes me to conclude that the second resignation was not submitted on the date it bears but on a subsequent date.

I find no reason to disbelieve that the consideration of Mr Dempsey as a possible replacement for Mr Betteridge did not arise until during July and therefore I am satisfied that what Mr Ham is alleged to have said to the applicant in that regard must have occurred in that month. Mr Betteridge had the timing of his discussion with Mr Ham wrong just as he did with the second resignation. There is no evidence that Mr Leighton wanted the applicant gone and that he acted, or instructed Mr Braithwaite, to achieve that by persuading Mr Betteridge to resign. On the contrary, Mr Leighton clearly stated to the applicant on more than one occasion that he wanted him to remain, in the conversations which followed the two resignations. Given there is inaccuracy and confusion in some aspects of Mr Braithwaite's testimony it is possible that what he put to the applicant that led to the provision of his resignation may have lacked clarity. If however the applicant was somehow misled there is no evidence that he said or did anything to indicate to either Mr Leighton or Mr Mills that his resignation was not at his initiative. The applicant has not convinced me that his resignation was forced upon him and therefore I find that he was not dismissed by the respondent. Hence the claim of unfair dismissal and the claim for compensation in relation to alleged financial loss on that ground will be dismissed.

The applicant contends that his contract of employment is for a fixed term of three years and hence he is entitled to the payment of the remuneration prescribed therein for that part of the term remaining from the date of termination. If it were sustainable that the contract is for a fixed term the situation is that the employment under the contract was terminated by the applicant and not by the respondent and hence the respondent would not be liable for such a benefit in any event. The contract is not however for a fixed term requiring its observance for a period which is certain, as is readily evidenced by the extracts from the contract of employment (exhibit 2) hereunder—

"SALARY You understand that your remuneration consists of .....

These components, totalling $ 908.00 gross per week ....

The service bonus is only paid .....

You will be paid by Friday for work .....

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.

You understand and agree that your salary .....

Should you be transferred .....

You understand that this position ....."

"TRIAL PERIOD Subject to the provisions contained herein it is understood that you will be on a six (6) month's initial trial 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 is that in the case of misconduct ....."

"INITIAL TRAVEL 1. You understand that the cost of travel from Point of Hire to Place of Employment and return is your responsibility. However, on completion of twelve (12) calendar month's service with the Company, we will reimburse you the cost of travel to the place of employment up to .....

2. On completion of each twelve (12) calendar month's service ....

3. Travel back to site after leave .....

4. If for any reason your services with the company cease prior to the end of any period mentioned above, you shall not be entitled to a refund.

5. You are aware that the cost of travel .....

Should SSL Nationwide advance your initial travel costs ....."

"REMOVAL EXPENSES

Removal expenses to place of employment of up to $ 3000.00 will be paid by the Company. Should you resign or be terminated prior to eighteen (18) months service, these costs would be paid by yourself and/

or deducted from your termination pay. Return removal costs back to your point of hire, up to the above amount would be paid by the Company after completion of thirty six (36) months continuous employment or at Contract expiration, whichever occurs first. Should you resign or be terminated prior to thirty six (36) months service, these costs will be paid by yourself and/or deducted from your termination pay. In all circumstances three (3) quotes must be obtained ....."

It is argued for the applicant that the primary promise contained in his contract of employment is that of three years employment, and that the termination thereof by means of twenty-eight days of notice is a secondary promise, and the latter being a separate provision which conflicts with the former, is severable per Attwood v. Lamont (1920 AER 55) and does not detract from the former. The respondent contends that the expressed terms of the contract are to be read as a whole and although a term is expressed, the contract provides a mechanism for its termination during that term upon notice from either party, and in addition, prescribes certain contingent entitlements and obligations, and hence the contract per British Broadcasting Corporation v. Ioannou (1975 AER 999) ["BBC"] is not one that is for a fixed term.

At first sight the contract of employment, according to the SALARY clause (para five), commits the parties to an employment relationship for a term of three years, subject to some common law exceptions not presently relevant. The TRIAL PERIOD clause authorises the respondent to terminate the employment upon giving seven days notice during the initial six months of the employment, and in addition, the TERMINATION clause (para one) authorises either party to terminate the employment by the means of giving twenty-eight days notice of such intention. In the INITIAL TRAVEL clause (subclause 4.) the wording contemplates the occurrence of employment terminating within the prescribed term, ie before the completion of twelve calendar months of service (subclause 1.), and furthermore, the REMOVAL EXPENSES clause also contemplates that either party may terminate the employment within the term and prescribes certain rights and obligations which are thereupon applicable to removal expenses. In the opinion of the Commission, although there is inelegant drafting, the contract contains the aforementioned several express provisions which plainly disclose an intention to authorise, and to regulate, the termination of employment by either party at any time. There is no cause to consider the doctrine of severance. Lord Denning MR, with whom Stephenson LJ agreed, in the "BBC" matter held that although a contract of employment contains a specified term is not one for a fixed term when such is determinable within the term upon the giving of appropriate notice.

The claim for 103 weeks remuneration on the ground that such is a benefit due to the applicant by reason of his contract of employment being for a fixed term will therefore also be dismissed.

Appearances: Mr B. Stokes on behalf of the applicant
Mr R. Bath on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.
Industrial Relations Act 1979.
David Michael Betteridge
and
Spotless Services Australia Limited t/a SSL Nationwide Field Catering
No. 1677 of 1998.
20 January 2000.

Order.

HAVING heard Mr B. Stokes 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, 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.
Robyn Bull
and
Mobilecom Pty Ltd.
No. 1671 of 1998.
21 January 2000.

Reasons for Decision.

COMMISSIONER C.B. PARKS: It the claim by Ms Bull (the "applicant"), that she was unfairly dismissed from her employment with Mobilecom Pty Ltd (the "respondent"), and that the respondent did not pay to her benefits she was due. Sought in remedy is, monetary compensation for the loss of twenty-one weeks of remuneration at the rate of $250.00 per week, and the loss superannuation contributions and the value of pro-rata annual leave for the same period, and for injury. The applicant, who asserts that she commenced employment with the respondent on 17 June 1998 and was dismissed on 7 August 1998, contends that reinstatement in employment with the respondent is not practicable on the ground that she has obtained new employment which commenced in January 1999, ie twenty-one weeks after the dismissal.

The respondent asserts that Ms Bull commenced her employment on 29 June 1998 and that she was dismissed on 4 August 1998 because of her unsatisfactory performance and therefore the circumstance of the dismissal was not unfair.

There is common ground on a number of the facts—

- In or about March 1998 the applicant inquired of the respondent regarding a clerical and administrative position of employment which her sister had informed her might be available. At the time Ms Bull met with Walter Laybourne and lodged her resume with him, and in June 1998, that led to her being invited to an interview for employment with the respondent.
- An interview was conducted with the applicant at which Mr Laybourne and Sonny Rajah, a director of the respondent, were present and at which the applicant, conceded she had minimal experience in the use of a computer spreadsheet, "Excel", and upon request, she demonstrated her level of skills in the use of a computer and also by formulating a handwritten mock application for employment. The work of "telemarketing" was referred to during the interview.
- Employment was offered to the applicant, and accepted by her, on the basis she would serve a trial and be paid at an hourly rate the quantum of which was not stipulated.
- The wage paid to Ms Bull was $250.00 weekly, except in a week she was absent for one day when she was paid $200.00.
- On several occasions during the employment Ms Bull and Mr Rajah argued regarding her role which he maintained was that of a "telemarketer" whereas she held it was not and was clerical and administrative.
- The employment ended at or about 3.00 pm on a Tuesday.
- No income taxation deductions were made by the respondent from the remuneration paid to the applicant throughout the employment.
- An Employment Declaration for taxation purposes was submitted to the respondent by the applicant on 11 August 1998.
- A letter of complaint from the Australian Municipal, Administrative, Clerical and Services Union (the "Union"), dated 10 August 1998, was directed to the respondent on behalf of the applicant and contains claims regarding her employment recorded as commencing on 29 June 1998.

Ms Bull denies she was engaged as a "telemarketer", that is, selling a product by means of telephone canvassing, and says she was engaged to perform, and did perform, clerical and

administrative work which involved typing, filing, answering the telephone and recording messages if necessary, and telephoning all customers, approximately 500, once per month to speak to them regarding their account ie payment was due, overdue, or had been received, and that she did at the rate of at least 300 per day. Her normal hours of work, it is said, were worked between 9.00 am and 5.30 pm, Monday to Friday, and 10.00 am and 3.00 pm on Saturday, however she did not work three Saturdays in the period of employment. Ms Bull says she included an offer to undertake a two week trial period in the mock application for employment she wrote at her interview and believes that Mr Rajah accepted that to be the period of trial.

The applicant claims that early in July 1998 an argument occurred with Mr Rajah regarding the nature of her employment and at his direction she created a typed statement of what, according to her, were her duties. That statement is said to have been presented to Mr Rajah and accepted and signed by him, and the applicant denies that Mr Rajah presented her with a letter containing a different statement. Ms Bull says that two weeks after her dismissal she was requested to submit the Employment Declaration which she did, to Mr Rajah, on the same day.

Messrs Laybourne and Rajah say that when the applicant was interviewed for employment she was informed that she was not suitable for the position sought but that the respondent required a "telemarketer" to telephone debtors, in relation to which she indicated she was keen to obtain work, and accepted the job on the basis it involved around thirty hours per week and that was flexible, and in addition she would undergo a four week trial.

It is also the evidence of Mr Laybourne that the applicant was not able to cope with the rebuttals from debtors and that he informed her on at least seven occasions in the last two weeks of her employment, which according to his recollection was only for the length of the trial period, that her employment was nearing its end. He asserts that remuneration owed to the applicant when dismissed was held until she provided an Employment Declaration, which declaration she is said to have handed to him in exchange for the cheque he handed to her for the remuneration owing.

According to Mr Rajah it was on 13 July 1998 that the applicant and he argued regarding the nature of her employment, and there having been previous arguments, he decided to explain in writing the role for which she had been engaged and that he did on that day in the form of a letter which was handed to her. It is his claim that Ms Bull was told by him, in the three weeks prior to her dismissal, he did not wish to employ her on clerical and administrative work, that her role was temporary, and if she wanted a clerical position she ought seek employment elsewhere. Mr Rajah referred to having 700 customers. He also expressed the opinion that a "telemarketer" will, on average, complete 15 telephone calls per hour and therefore the applicant could not have completed 300 calls in her working day. It is denied by him that Ms Bull handed her Employment Declaration to him when she submitted it on 11 August 1998.

It is self evident that the employment of Ms Bull did not end on 7 August 1998 as she alleges in her application, and as she maintained until informed such was a Friday, she having conceded the employment ended on a Tuesday. Hence I find such ended on Tuesday, 4 August 1998, as the respondent asserts. The letter to the respondent from the Union, dated 10 August 1998, states the commencement date of Ms Bull to be that alleged by the respondent, that date she claims is not correct and occurred because she provided a date to the Union which she had wrongly assessed to be her commencement date.

According to the applicant her working days Monday to Friday were each 7.5 hours, and less on a Saturday, and on the basis she claims to have dealt with 300 customers in a day, that would have required that each call be completed on an average every 1.5 minutes of any weekday. Given the purpose of the calls I do not accept that such is feasible and I believe such to be an exaggeration by her. However I accept that she dealt with the calls she was required to make in concentrated periods and that at other times she did additional work of a clerical nature. If the opinion of Mr Rajah is correct and an average of 15 calls per hour was expected, again on his basis of 30 hours work per week, the 700 customers he quoted could have been dealt with in 1.6 such weeks. Even allowing a margin for error, and given the alleged shorter working week, such leads to the conclusion that Ms Bull had to have been also occupied with other duties during the undisputed minimum of the 5 weeks and 2 days that she worked for the respondent.

On both versions there was to be a trial, which on either version concluded without extension, and hence its only significance is in reference to credibility. Ms Bull asserts that Mr Rajah accepted the length of trial contained in her mock letter of application she created, yet she also said he did not comment on the content of the mock letter. Messrs Laybourne and Rajah both claim it was said to be 4 weeks. There was reference to "telemarketing" in the interview, and therefore it was plainly a matter relevant to a possible engagement. The word is wrongly used by Mr Rajah however I am satisfied that the role to which he applies it was identified to Ms Bull before her engagement. The applicant certainly understood the job described to her involved telephoning all the customers of the respondent, however it is apparent that at the time she did not comprehend such to be the "telemarketing" that had been mentioned. No weekly wage was discussed and it was accepted payment would be at an hourly rate, and from that I believe it reasonable to conclude that the weekly hours of work offered would not equate with a standard working week. Plainly Ms Bull submitted her Employment Declaration to the respondent one week after her dismissal and not the two weeks after as she asserted, the primary purpose of which was to show the respondent had been remiss delaying payment of her final remuneration for a lengthy time. I am not satisfied that the applicant's recollection of the basis of her employment and in other respects is accurate.

There was plainly dissension between her and Mr Rajah throughout the employment regarding the role he intended for her, and the description of it. He reached the conclusion the intended arrangement had not been successful. As he correctly stated, it was the right of the respondent to set the parameters of a position of employment, and hence I accept that prior to the dismissal he forewarned the applicant that her role would be ending then brought it to an end. No express reasonable period of notice was given to Ms Bull and the dismissal is therefore procedurally faulty however that, by itself, is not enough to render the dismissal unfair. No other ground supporting the allegation of unfair dismissal has been established and hence the application will be dismissed.

Appearances: Mr R. Dhue on behalf of the applicant

Mr S. Rajah on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Robyn Bull

and

Mobilecom Pty Ltd.

No. 1671 of 1998.

21 January 2000.

Order.

HAVING heard Mr R. Dhue on behalf of the applicant and Mr S. Rajah 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.

Ray Furfaro

and

The Wrigley Company Pty Ltd.

No. 2098 of 1998.

COMMISSIONER S J KENNER.

10 December 1999.

Reasons for Decision.

THE COMMISSIONER: This is an application under s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") by which Mr Ray Furfaro ("the applicant") alleges that he was harshly, oppressively and unfairly dismissed by the Wrigley Company Pty Ltd ("the respondent") on or about 29 October 1998. The applicant does not seek reinstatement but seeks compensation as a remedy, in the event that the Commission upholds his claim.

The respondent contests the claim and denies that the applicant was harshly, oppressively or unfairly dismissed and moreover, says that there was no dismissal to found jurisdiction in the Commission to entertain the application in any event.

This matter was heard over six days and occupied some 722 pages of transcript. The applicant called five witnesses to give evidence in support of his claim, including his own testimony. The respondent called four witnesses in support of its defence to the application. The evidence in total before the Commission was quite voluminous with the applicant alone tendering some 80 exhibits.

Background

The respondent is an international company which has its Australian head office based in Sydney, New South Wales. The Australian operations are managed by a chief executive officer to who report respective state sales managers in each of the States. The Western Australian office is managed by a state manager, Mr J Niehus, and also is staffed by a number of sales and merchandising staff who report to Mr Niehus. The respondent sells chewing gum products to wholesalers and retailers.

The applicant commenced work with the respondent as a merchandising representative on or about 8 August 1984. His duties required him to service designated sales areas in the metropolitan and country regions of Western Australia. He was provided with a company motor vehicle and merchandising equipment in order to fulfil these tasks. The applicant's working hours each week varied. As at termination he was paid a salary of $51,452.65 and as a part of his remuneration package, had the unlimited use of the company motor vehicle.

According to the applicant, the events that led to the termination of the employment relationship commenced on or about 9 June 1995, when the sales team at the time wrote a letter to Mr Niehus, outlining their concerns with, in essence, Mr Niehus' style of management ("the Letter"). It was from this date according to the applicant, that there was a change in the working environment, in particular Mr Niehus' conduct and behaviour towards the sales team, that ultimately led the applicant to tender his resignation.

The Contentions

Counsel for the applicant argued that by reason of the conduct of Mr Niehus on and after the receipt by him of the Letter, the applicant was subjected to a campaign of harassment by Mr Niehus, that ultimately forced the applicant to leave his employment. It was submitted that this constituted a constructive dismissal. The applicant argued that the respondent's conduct was without proper justification and therefore the dismissal was harsh, oppressive and unfair.

Counsel for the respondent submitted that the respondent never dismissed the applicant. It was argued that the respondent had no intention of dismissing the applicant and had satisfied itself that it had done all that it could to appease the applicant's concerns. Counsel therefore submitted that as the respondent did not dismiss the applicant for the purposes of s 29(1)(b)(i) of the Act, the claim should fail for want of jurisdiction. As an alternative submission, it was put by counsel for the respondent that should the Commission find that the applicant was dismissed, then by reason of the applicant's performance such a dismissal was not harsh, oppressive or unfair.

Applicant's Evidence

As noted above, the evidence adduced in this matter was very extensive. Whilst in reaching my decision in this matter I have had regard for all of the evidence before the Commission, for the purposes of these reasons, I only propose to refer to those aspects of the evidence that I consider relevant to the central issues raised in the proceedings.

On behalf of the applicant, evidence was adduced from Ms Maynart, a psychologist registered with the Australian Psychologists' Board. She has had 14 years experience in this field. She gave evidence that the applicant came to see her from in or about February 1998, as arranged by the respondent. She said that the applicant raised with her difficulties that he was experiencing with his superior in the workplace and that the situation was causing him some stress. Ms Maynart considered, from her various consultations with the applicant, that he was suffering from stress and recommended various ways of dealing with this including relaxation exercises; cognitive reconstruction; and support from family and friends. Ms Maynart prepared a report of her dealings with the applicant in response to various questions posed by the applicant's solicitors, that report being dated 11 May 1999 and tendered as exhibit A1. I pause to note that the report was prepared sometime after the event of the applicant's consultations with Ms Maynart and was answering specific questions raised by the applicant's solicitors.

In cross-examination Ms Maynart said that the concept of stress was a nebulous one and varies from individual to individual in terms of a person's capacity to deal with events around him or her. Apart from Ms Maynart's opinion that the applicant was suffering some stress, her evidence has otherwise not been of great assistance to me in resolving this matter. In general, her evidence and exhibit A1 was based on what she was told by the applicant by way of client narrative, rather than any diagnosis or other assessment as to the cause of the applicant's stress.

Counsel for the applicant also called three former sales representatives of the respondent to give evidence. These included Mr Adrian Mills, Mr Errol Stone and Mr Allesandro Tedesco. These three former employees of the respondent were co-authors of the Letter.

The respondent employed Mr Mills for two years between 1991 and 1993. I note therefore that he had left the respondent's employment prior to the Letter coming into existence. He said that his relationship with Mr Niehus was difficult and that Mr Niehus was somewhat demeaning to him in the manner in which he dealt with him. He said that often being around Mr Niehus made him uncomfortable and nervous. It was Mr Mills' evidence that he did not like Mr Niehus and moreover, it appeared from the evidence, that Mr Mills left the respondent's employment in somewhat controversial circumstances, in relation to allegations that Mr Mills had falsified work records.

The respondent from June 1989 to October 1995 employed Mr Stone as a sales representative. Mr Stone said that initially his working relationship with Mr Niehus was a good one but deteriorated after the sales team provided the Letter to him. He said that thereafter his working relationship with Mr Niehus became more difficult. Mr Niehus was more directly involved in the day-to-day work of the sales representatives and his style of management changed to the extent that communications were more formal. Generally he said that a more authoritarian style of management was exhibited. It was Mr Stone's evidence that he had reached the view that Mr Niehus had made it a personal ambition of his to make Mr Stone's working life as difficult as possible in order to force Mr Stone to leave the respondent. Mr Stone said that he then pursued other employment opportunities and obtained a position with a large confectionery manufacturer. In cross-examination, Mr Stone conceded that the position he obtained was a better position than the one that he held at the respondent. Moreover, he agreed that Mr Niehus' style of communication did change sometime after June 1995, whereby communications became more formal and were put in writing more often. Additionally,

Mr Stone said that Mr Niehus did raise with him legitimate issues with regard to his work performance.

The other former sales representative was Mr Tedesco. He had been employed by the respondent between December 1989 and October 1996. He said that during the first five years of his employment his working relationship with Mr Niehus was a good one. However, he testified that on his return from a trip to Darwin sometime in 1995, after he and the other sales representatives wrote the Letter, Mr Niehus' relationship with him became strained. He said that the Letter upset Mr Niehus and asked the representatives to retract the statements made in it. Mr Tedesco gave evidence that thereafter in his view, Mr Niehus did not treat him particularly well. He said that this continued for approximately two years. The respondent accepted Mr Tedesco's resignation in October 1996. He said that he had no respect for the senior management of the respondent. In cross-examination however, Mr Tedesco conceded that Mr Niehus did have concerns with his work performance. Also, he said that prior to approximately August or September 1995 he had respect for Mr Niehus and described him as "the best boss that he had."

The applicant gave his evidence in chief over a period of almost two days. Regrettably, and contrary to the Commission's directions, the vast majority of this evidence was not contained in the applicant's witness statement, which if it had been, would have significantly reduced the length of time to hear this matter.

The respondent first employed the applicant in August 1984. His total period of employment with the respondent was slightly in excess of 14 years and two months. He testified that prior to June 1995 his working relationship with Mr Niehus was a positive one. He gave examples where Mr Niehus attended various social events with the applicant and the applicant regarded Mr Niehus as a friend and a good work colleague.

On or about 9 June 1995 the applicant said that he and other sales representatives, which included Mr Stone, Mr Tedesco and a Mr Guerriero, presented the Letter to Mr Niehus. It outlined what the sales representatives considered to be concerns in relation to safety and management procedures that the sales representatives wished to have addressed. He said that the Letter was not intended to be antagonistic. At this point I observe that the applicant said that it was the intention of the sales representatives, in writing the Letter, to keep the matter "in-house and informal." This is however, somewhat at odds with taking the step to produce the Letter, particularly given the applicant's evidence and evidence of at least two of the other sales representatives, that up until this time their working relationship with Mr Niehus was a good one and there appeared to be no difficulties in raising any matters on a day-to-day basis.

The Letter was tendered as exhibit A5. As it was a central part of the applicant's allegations against the respondent, at least in terms of the starting point of the applicant's alleged difficulties with Mr Niehus, I set out the Letter, formal parts omitted as follows—

> *"The WA Office of the Wrigley Company has always been known for its good team environment and hard working sales representatives who are dedicated to the company and at the same time appreciative of all the benefits that are offered. However we have some concerns and feel these should be brought to your attention as we believe they are affecting our working environment. These concerns need to be considered for the future to keep the team working effectively and to enhance the working environment.*
>
> *We, the sales representatives of Wrigleys WA have prepared this report due to genuine concerns in the work place. We are all proud of the company we work for, and the standard of our personal work in the field. Because of the above reasons, we jointly have decided to voice our opinions to create positive open discussion.*
>
> *The following areas need to be addressed—*
>
> ***Communication***
>
> *We understand this is a broad area, which results in the occurrence of most problems, possible misunderstandings, mixed messages and confusion.*
>
> *Points—*
>
> - *Team meetings/discussions—Open discussions with all team members, we should avoid separate discussions where possible with individual reps, if an issue has to be raised it should be done so with all team members present.*
> - *If there are changes in routine (ie-supermarkets, territories) open group discussion should occur to try and avoid closed door decisions.*
> - *We should be able to express our views without feeling our comments will be held against us at a later date.*
> - *Any issues that need to be raised with regard to a team member's performance should be done on a one to one basis so as not to destroy the credibility of the individual.*
> - *Personal remarks can cause considerable embarrassment and we feel that they are unnecessary.*
> - *We would prefer your views, concerns and problems to be conveyed directly by you and not through other channels.*
>
> ***Country Work***
>
> *We believe we give you our absolute best on all country work. We understand as reps we have to be flexible in different working environments and conform to the added pressures on these workings.*
>
> *We understand that we have made agreements as to country workings ie-Sunday driving and credits for trips, and we feel other issues have to be considered.*
>
> - *Start time—We would like to set a reasonable, safe time to start driving to a country destination. Our recommendation is approx 6.00 am (this start time is flexible), which would involve itineraries to be planned around this. Our concern is about safety practises, which one day could be the cause of fatality or serious injury.*
> - *Reimbursement of time for extra hours eg: north west working, a fair return of time! When you take into consideration valuable time lost, from families, weekend work (driving), and early starts, these all account for a huge amount of our time.*
>
> ***Conclusion***
>
> *We would like this report to be taken seriously, anticipating a positive result, to be discussed with us as a team. We hope to maintain, and improve our friendship in this working relationship. This report is not designed to divide the team, but, to ensure the continued success, both on a business and personal level of the WA sales team."*

The applicant contended that after the Letter was given to Mr Niehus, his attitude changed markedly so as to be harsh and hostile to him. Ultimately, he put undue pressure on the applicant which in the applicant's perception, forced him to tender his resignation in October 1998. When Mr Niehus received the Letter, he asked the applicant and the other sales representatives to withdraw it in order that the matters could be discussed and remain within Western Australia. This did not occur. I deal with the consequences of this when considering the evidence of Mr Niehus. I note that in cross-examination, the applicant said that neither he nor the other sales representatives had ever given such a Letter to Mr Niehus before and nor were any of the issues raised in the Letter discussed with Mr Niehus prior to the Letter being handed to him. The applicant also accepted that after the Letter was given to Mr Niehus, Mr Niehus put his communications to the applicant and the other sales representatives in writing, so that there would not be any misunderstandings.

The applicant said that the pressure which he said commenced after the Letter, led in the applicant's opinion, to Mr Stone resigning in October 1995. Thereafter, the applicant said that Mr Niehus turned his attention to Mr Tedesco, which ultimately led to Mr Tedesco being dismissed in late 1996. Once Mr Tedesco's employment was terminated, the applicant testified that in his view, Mr Niehus then started putting undue pressure on himself. In general terms, the applicant said that Mr Niehus was constantly critical of his work performance, which on many occasions was not justified, and the applicant never received any complimentary remarks or constructive criticism from Mr Niehus in any meetings or written communications.

Furthermore, it was the applicant's evidence that Mr Niehus dealt with him in a hostile manner by often raising his voice in meetings with him. He said that in his opinion, all of what was occurring as he saw it was directed at forcing him out of the respondent's employment.

A matter that the applicant placed some emphasis on his evidence was a supermarket manual that he prepared in relation to attending to supermarket clients of the respondent. The supermarket manual, which the applicant prepared in or about July to August 1996, was tendered as exhibit A14. This document entitled "Supermarket Working In the Nineties" was sent to various members of the respondent's senior management, including Mr Ray Connell, and copied to others including Mr Niehus. The applicant's evidence was that he spent some time researching and preparing this manual which was based in part, on the practical experience of the sales representatives in Western Australia. It was the applicant's complaint that this work which he did, largely went unnoticed and unrewarded from senior management of the respondent in particular Mr Niehus. In relation to supermarket working generally, the applicant conceded that in or about 1996 to 1997, there was a change in strategic direction from the senior management of the respondent, to focus more on supermarkets and shopping centre trade than previously. This shifted the sales focus from small stores in particular and also required an increasing focus from sales representatives on time usage on sales calls.

The applicant was taken by his counsel through a very large number of communications to both himself and other sales representatives from Mr Niehus. Some of the communications from Mr Niehus were critical of aspects of the applicant's performance. Others were complimentary, despite the applicant's evidence that he never received any praise or encouragement in particular from Mr Niehus. The applicant conceded in his evidence that there were some aspects of these communications that were critical of his performance that he agreed with and some that he did not. In relation to those matters that the applicant did not agree with, in many cases, the applicant responded to Mr Niehus with his viewpoints on the issues raised. An issue raised by Mr Niehus, which appeared to occur on a number of occasions, was Mr Niehus' concern that the applicant was not adequately following the respondent's instructions as to working his territory. This was, in particular, related to the requirement for example, to work small stores in shopping centres when working a supermarket customer. There were also other occasions concerns expressed as to the state of a number of the applicant's calls, in that there were stock problems and some ticketing and presentation issues raised.

Additionally, the applicant received from Mr Connell on a regular basis, print outs of sales representative performances in the Western Australian branch. These representative activity reports set out a number of performance indicators that the respondent used as an aid in determining the activities of sales representatives and their relative performance one to each other and against previous time periods. In this regard, I refer to exhibits A35, A36, A37, A48, A50, A64, A67 and A68. Many of these activity reports carried handwritten notations from Mr Connell, indicating areas of concern in relation to productivity levels, in particular call times, and seeking feedback from the applicant as to these issues. I pause to observe that it was Mr Connell's evidence that these performance reports issued to sales representatives were a part of his responsibility to provide sales representatives in the various states with feedback as to their ongoing performance in their respective territories. Many of these activity reports record, for example, the applicant's performance on average call rates as being less than that of other sales representatives. I should hasten to add however, that this was not always the case in relation to all of the reports tendered.

The applicant testified that receiving these memorandums and written reports in relation to his performance led him to feel under pressure and led him to think that Mr Niehus was establishing a "paper trail", to be used against him in an attempt to force him to leave the respondent's employment. In or about February 1997, the applicant said that he became so concerned as to his position that he spoke with Mr Brian Hutchins, the respondent's personnel manager. The applicant said that he explained to Mr Hutchins that it was his impression that Mr Niehus was conducting a "vendetta" against him and other sales representatives arising out of the Letter. It was Mr Hutchins' advice to him to speak directly to Mr Niehus about his concerns, to see whether they could resolve the matter amongst themselves.

The next significant event took place on or about 10 March 1997, when a meeting occurred between the applicant, Mr Niehus and Mr Connell, who had come to Western Australia as a part of a state visit. The purpose of the meeting was for Mr Connell to see whether he could attempt to resolve the issues between Mr Niehus and the applicant. The applicant's impression of the meeting that took place was not favourable, and it was his view that the meeting was more of a "witch hunt" and a critique of his work performance. Following the meeting, Mr Connell sent to the applicant a memorandum (exhibit A23) which set out from his point of view, the matters discussed at the meeting on 10 March. The matters recorded in the memorandum as being raised by the applicant as his concerns, included the respondent not using his expertise on planning and supervisory skills; no recognition by Mr Niehus for the supermarket manual; a Mr Clarke receiving favourable treatment in the Western Australian sales team; that the applicant and another sales representative were close to resigning; concerns in relation to country working and a complaint as to the way in which Mr Niehus had spoken to the applicant following a recent country trip.

In the memorandum, Mr Connell set out the matters discussed in relation to each of these issues and indicated the respondent's viewpoint on them. Importantly, the memorandum from Mr Connell specifically indicates the respondent's concerns in relation to the applicant's Geraldton territory, because of the state of the territory as a result of a visit by Mr Niehus. The memorandum concluded with a note to the effect that Mr Connell hoped that both the applicant and Mr Niehus could "start afresh" in their working relationship and also invited future discussions about these matters should further issues arise. Attached to the memorandum was a memorandum from Mr Niehus to Mr Connell (copied to Mr Furfaro), setting out the problem areas in relation to the applicant's Geraldton supermarket working (see exhibit A24).

The applicant responded to both Mr Connell's memorandum regarding the meeting on 10 March, and Mr Niehus' memorandum regarding the Geraldton working (see exhibits A25 and A26). At this point, I observe that the applicant's response in relation to the Geraldton working (exhibit A26) states that Mr Niehus left out some important matters in relation to Geraldton, but did not specifically address the issues identified in Mr Niehus' memorandum.

As a consequence of Mr Niehus' visit to the Geraldton area, and in view of previous concerns expressed by him as to the applicant's workings, a decision was taken by the respondent to remove the applicant from the Geraldton territory. The applicant said that this distressed him. Whilst I will return to it when considering Mr Niehus' evidence, I note that Mr Niehus said that he sent his memorandum to Mr Connell in relation to Geraldton, in order that he could show Mr Connell the issues arising in relation to the applicant's performance from his perspective. It was also his view that given the tension between he and the applicant, it would be prudent to have an independent person from the management team reviewing the matter from time to time. I also note that it was Mr Niehus' evidence that the shortfalls in the applicant's Geraldton performance were serious matters and needed to be raised.

The next significant event appeared to occur on or about 3 June 1997, when there was a follow-up performance review undertaken by Mr Niehus with the applicant. These reviews were apparently done with sales representatives on an ongoing basis. In the applicant's meeting with Mr Niehus, Mr Niehus indicated to him that there were areas of his performance that were not up to the respondent's standard. The content of this meeting was confirmed in a memorandum to the applicant from Mr Niehus dated 25 June 1997 (exhibit A30). In this memorandum, Mr Niehus refers to the applicant's low call rate relative to other sales representatives. He expressed the opinion that this was because the applicant did not observe the Territory Call Priorities, which Mr Niehus had spent a considerable time preparing for the sales representatives. Mr Niehus also requested the applicant to focus more on time management. The memorandum concluded that Mr Niehus was looking to the applicant for a lift in his performance to achieve Mr Niehus' goals in relation to the overall state performance.

It was the applicant's evidence that during all of this time, he remained in contact with Mr Hutchins to discuss his concerns with him and to receive any support and assistance that the respondent could provide. On 16 July 1997, in a memorandum from Mr Hutchins to the applicant (exhibit A79), Mr Hutchins expressed the view that there were still some relationship issues between the applicant and Mr Niehus that needed to be worked upon. However, he also referred to a need for the applicant to also consider changing the way in which he dealt with others. The sentiment expressed in this memorandum being that if the applicant was prepared to exhibit some behaviour changes, then others would readily embrace it and respond accordingly.

A large number of performance appraisals relating to the applicant's employment with the respondent were in evidence. These covered the period from in or about April 1989 to in or about July 1998 (see exhibits A77 to A94 inclusive). It was common ground that the respondent had an ongoing system of performance management and review, which included an employee "coaching report" by which sales representatives' performance and feedback were offered and received on a regular basis. In relation to the performance assessment process, the applicant accepted that Mr Niehus, by personality, was somewhat blunt and would frankly tell the applicant when a job was well done and when it was not well done. A perusal of the performance appraisal and coaching reports clearly bears this out. Whilst the applicant in evidence said that he received no praise or encouragement from Mr Niehus, I pause to note that exhibit A91 is a coaching report from Mr Niehus that is highly complimentary of his performance. It is also relevant to note that this coaching report was completed approximately one year after the Letter was given to Mr Niehus by the applicant and the other sales representatives. Whilst I do not propose to highlight them separately, there were other performance appraisal and coaching reports that were tendered in evidence, also containing complimentary references in relation to aspects of the applicant's performance. I also note from a number of these documents, recognition from the applicant himself of a need to improve his performance in a number of areas as identified in the appraisals and reports.

In December 1997, a further work performance review was undertaken between the applicant and Mr Niehus. The results of this review were set out in a memorandum from Mr Niehus to Mr Furfaro dated 18 December 1997 (exhibit A39). In this note, Mr Niehus expresses the view that despite a lot of discussion about his work performance, relative to his colleagues, the applicant had room for improvement. The applicant said that he responded to this memorandum by a written note prepared by himself (see exhibit A40). Mr Niehus further responded to the applicant's response (exhibit A45) and expressed the view that he was concerned that the applicant's response missed the point that he was attempting to convey to the applicant regarding his performance. Mr Niehus' memorandum concludes with an invitation to the applicant that he is available to provide help and assistance to achieve the required performance levels.

Whilst the applicant in evidence said that he was being unfairly targeted by Mr Niehus, I note for example, exhibit A54, in which Mr Niehus expressed concern to all sales representatives in relation to priority calls. Specifically, and in my opinion importantly, the memorandum concluded that these calls would be monitored by Mr Niehus and "questions asked if you are not following these instructions."

In March 1998 Mr Connell again visited Western Australia. He inspected the applicant's territories with Mr Niehus and the applicant. Also at about this time, the applicant said that he spoke with Mr Hutchins who suggested that as the applicant still felt under stress, that he undergo some counselling. The applicant accepted this invitation and the respondent arranged for counselling with Ms Maynart.

Following Mr Connell's visit to Western Australia, Mr Connell sent an e-mail to Mr Niehus to be passed on to the applicant. This referred to a number of matters of concern that Mr Connell identified regarding his working in the field with the applicant during his visit. In particular, these matters related to the respondent's change of direction to focus on working major shopping centres and supermarkets, and focusing on priority calls. The note referred to a number of significant calls that had been missed and Mr Connell expressed the view that he was at a loss to understand how this could have occurred, given the applicant's assurances the day previous that all of these matters would be attended to. The applicant testified that he responded to Mr Connell's e-mail by memorandum dated 31 March 1998 (see exhibit A52). The applicant was unable to give Mr Connell any explanation for his failure to attend to small calls in shopping centres.

By way of reply, Mr Connell sent a memorandum dated 5 May 1998 to the applicant expressing his concern about the applicant's misinterpretation of his earlier e-mail and his inability to explain why required tasks were not achieved. In particular, Mr Connell expressed concern that the applicant was not putting into effect the respondent's policy direction in relation to servicing supermarkets. This memorandum was expressed as a first written warning in relation to the applicant's performance (see exhibit A53). I pause to note that in cross-examination, the applicant agreed that Mr Connell was a very experienced manager and former representative who knew his job very well. In this regard, I refer to the terms of exhibit A64, with attached daily merchandising activity report for the applicant. The applicant conceded that Mr Connell's comments as to his very low productivity for the period of the report were justified. I also observe that by September 1998, Mr Niehus was providing some information to Mr Dhu in relation to the applicant's performance, given Mr Dhu's position as the respondent's sales director.

By this stage, the applicant had taken legal advice in relation to his position and had instructed his solicitors to write to the respondent setting out his concerns in relation to Mr Niehus and historical events, and proposing a solution to what the applicant saw as the problem. That letter was dated 31 August 1998 and was exhibit R7. In it the applicant's solicitors set out a large number of allegations by the applicant in relation to his perception of his treatment by Mr Niehus following the events surrounding the Letter. The letter said that Mr Niehus was unfairly dealing with the applicant and that the applicant's forced resignation was foreshadowed. As a possible solution, the letter referred to the respondent dismissing Mr Niehus and replacing him with the applicant. An alternative proposal suggested was for the applicant to resign on being paid an appropriate termination package, and indicated that if either option were not acceptable, then litigation would ensue.

The applicant said that on 10 September 1998 he attended a meeting in Perth with Mr Dhu and the respondent's managing director Mr O'Donnell. The applicant said that he thought the meeting would be for the purposes of reaching a resolution of the matter in light of his solicitor's letter, but rather, he was told that as he had instructed solicitors to act on his behalf, the matter would then be placed in the hands of the respondent's solicitors to reply. I note that in cross-examination, the applicant testified that the letter from his solicitors was prepared on his instructions. He conceded that the proposal that Mr Niehus, with some 20 years service with the respondent be dismissed, was not a fair option.

The respondent's solicitors then replied to the applicant's solicitor's letter by letter dated 15 September 1998. The applicant received a copy of this letter (see exhibit R2). The terms of the respondent's reply is quite important and formal parts omitted the letter provided as follows—

> *"We are instructed to respond to the matters raised in your letter as follows—*
>
> 1. *Our client has in place performance management systems designed to ensure that its employees meet the required standards of performance. An important part of the performance management system is providing employees with feedback in relation to their performance and guidance as to how their performance may be improved.*
> 2. *Your client has, along with other employees of our client, received feedback, support and guidance in relation to his performance with a view to improving his performance to the standards required of a sales representative.*
> 3. *The actions taken by our client in respect of your client's performance are consistent with responsible management practices when dealing with employee performance.*

4. *Accordingly, our client denies that your client is being or has been dealt with in a manner which is harsh or unfair or that your client has been placed under undue, harsh or oppressive pressure.*
5. *In relation to your client's continuing employment, our client does not accept that if Mr Niehus remains as Regional Manager, Mr Furfaro will be "forced" to resign. Any decision in this regard will be entirely the responsibility of Mr Furfaro. Mr Furfaro's ultimatum requiring the removal of Mr Niehus as Regional Manager as a condition of his continuing employment is, in the circumstances, unreasonable.*

We are instructed therefore to advise that—

1. *Mr Niehus will remain as Regional Manager.*
2. *Our client is prepared to retain Mr Furfaro in employment on the basis that it continues to provide him with feedback, support and guidance to assist him to reach and maintain the required standards of performance.*
3. *If Mr Furfaro does not wish to continue in his employment with Wrigley, please advise us of the terms on which Mr Furfaro proposes to resign."*

Despite the views expressed by the respondent's solicitors, the applicant subsequently tendered his resignation on 1 October 1998 (see exhibit R1).

The applicant maintained in his evidence that it was Mr Niehus' conduct that forced him to tender his resignation. However, in cross-examination, the applicant conceded that there was nothing ever said either by Mr Niehus or Mr Connell to force his resignation. In particular, the applicant agreed that no one at the respondent requested his resignation or ever told him that his employment was at risk. It was the applicant's contention that it was the effect of the various memorandums that led him to do what he did. He said that he carefully read the terms of exhibit R2 and he agreed that as a result, he was required to consider his options. Furthermore and importantly, in my opinion, the applicant accepted that if he did not follow Mr Niehus' or Mr Connell's instructions regarding work performance issues, the respondent was properly entitled to raise these matters with him as a part of proper performance management process. The applicant also said that sometimes Mr Niehus was very positive with him and that he was well aware of the distinction between formal warnings and mere communications as to work matters.

Respondent's Evidence

Mr Dhu was the respondent's sales and marketing director. His evidence was that because he was based in Sydney, he had limited involvement in the issues with the applicant in the Perth office and in the main, relied upon assessments from regional managers in relation to staff matters.

Generally, Mr Dhu said that he took the view that the issues raised by Mr Niehus with the applicant related to legitimate performance matters. It was his opinion that it was these matters that were the source of tension between the applicant and Mr Niehus. Whilst he was aware of the personal tension between the applicant and Mr Niehus, as they were both based in the Perth office, he said they needed to work through these issues themselves as work colleagues. In relation to the specific issues that the applicant raised, he said that it was the company's concern to provide the applicant with appropriate support and assistance.

Mr Dhu visited Perth in August 1998 and spent one day working with the applicant in the field. Whilst he formed the view that on this occasion he considered the applicant's territory to be satisfactory, he observed that this was based upon working with the applicant for one day only. In relation to the letter from the applicant's solicitors, he referred to the meeting with the applicant and Mr O'Donnell in Perth in September 1998. His evidence was that as the matter had become a legal issue, the respondent's reply was left in the hands of its solicitors. In terms of the applicant's proposal for the respondent to dismiss Mr Niehus, Mr Dhu said that the respondent resolved not to terminate Mr Niehus' employment as he was a senior manager who had a long period of service and was regarded by the respondent as a good performer. Indeed, he said that in his view the whole Western Australian team was a good one. Mr Dhu also said that in his opinion, Mr Niehus had put in place appropriate performance management steps in relation to the applicant and indeed the other sales representatives.

Mr Connell was the respondent's national field manager. His major responsibility was to oversee the sales representative workforce throughout the respondent's Australian operations. He referred to the meeting in Perth on 10 March 1997 between himself, Mr Niehus and the applicant. He said that this was the first involvement he had in relation to the issues that had been raised by the applicant. In relation to the conduct of the meeting generally, Mr Connell denied that he in any way "sided" with Mr Niehus against the applicant. In his view, he considered that the meeting went well and formed the view that the parties would be able to work together in order to resolve the issues. However, he testified that he was of the opinion that the respondent had raised legitimate issues of concern with the applicant.

In relation to Geraldton, Mr Connell said that the issues surrounding problems found at Geraldton were not discussed at the meeting as Mr Niehus travelled to the Geraldton territory the day after the meeting. He included reference to Geraldton in his memorandum (see exhibit A24) to highlight some problem areas that he had also recognised.

Mr Connell also gave evidence in relation to the change of direction that the respondent undertook in relation to its sales strategy. He said that this occurred from late 1996 into 1997 and involved a movement away from sales to smaller corner stores or the working of defined territories into stores that would return greater sales volume. This entailed a change of focus in the work of sales representatives to target their efforts towards servicing larger retail chains and shopping centres in order to maximise sales volume. These changes were communicated to staff. In relation to this general issue, Mr Connell said that during the course of visits to Western Australia during 1997 and 1998, he had the opportunity to observe the applicant in the performance of his duties. It was Mr Connell's opinion, that whilst aspects of the applicant's work performance were satisfactory, the applicant did not properly grasp the change in the respondent's focus to place priority on calls to supermarkets and others in major shopping centres in which supermarkets were located.

In relation to the supermarket manual prepared by the applicant (see exhibit A14) Mr Connell said that it was "brilliant" and he was very impressed with it. He referred to his various communications in this regard. In particular, his praise directed to the applicant in relation to the manual.

However, Mr Connell gave an example of an area of concern in relation to the applicant as being an incident at the Armadale shopping centre in relation to which a visit was undertaken in March 1998. He said that both he and Mr Niehus had "walked" the shopping centre. The respondent's requirements in relation to this centre were the subject of discussion between he and the applicant on this occasion. According to Mr Connell, the applicant serviced the shopping centre the next day and missed a number of stores, directly contrary to what had been discussed the day previously. Mr Connell said he regarded this as quite a serious matter as in his view, it was an indication of the applicant not following the required procedure. This led to correspondence between Mr Connell and the applicant (see exhibits A52 and A53), the latter of which being the first written warning to the applicant.

Mr Connell also gave some evidence about his use of the daily merchandising activity reports, which were the subject of a considerable amount of evidence in this matter (see for example exhibit A64). He said that these reports were not used as a form of discipline for sales representatives, but were rather a means of communicating information and obtaining feedback from representatives. In particular, he referred to exhibit A68, being a memorandum from him to both Mr Niehus and the applicant attaching a daily merchandising activity report and raising a number of queries in it. He said that he copied this directly to the applicant for his response in order to take some pressure off Mr Niehus, in view of the tension that had developed between Mr Niehus and the applicant.

During the course of July and August 1998, Mr Connell continued to receive information by way of memoranda and notes from Mr Niehus and the applicant, regarding aspects of the applicant's performance. It was Mr Connell's evidence that through his independent assessment of the issues raised, there

were legitimate performance issues that needed to be addressed in his opinion. It was also his view that Mr Niehus' responses, in terms of his performance management of these matters with the applicant, was appropriate and was consistent with Mr Niehus' obligations as a regional manager to properly manage his staff and ensure those staff were meeting the respondent's performance objectives. Mr Connell added that his own visits to Western Australia and his working with the applicant in the field confirmed his assessment of these matters.

In relation to the applicant's resignation, it was Mr Connell's evidence that he did not contemplate dismissing the applicant at all. He emphasised that he had only given the applicant one written warning about his performance. He also said that at no stage did the applicant indicate to him that the applicant was considering his resignation. I note however, that this was referred to in Mr Connell's memorandum to the applicant following the meeting on 10 March 1997 (see exhibit A23). From the viewpoint of the respondent, it was Mr Connell's impression that the parties were still in the process of trying to resolve the issues raised by the applicant when he resigned. Indeed, it was Mr Connell's evidence that the applicant's resignation was a "huge waste".

Mr Niehus had been in the position of the regional manager for Western Australia since in or about February 1982. He had been employed by the respondent since in or about November 1979, when he commenced as a sales representative in Western Australia. Mr Niehus gave evidence about his duties which involved managing the day-to-day operations of the respondent in Western Australia; achieving sales targets; ensuring the distribution of the respondent's product and developing the respondent's sales force. He had a direct reporting relationship to Mr Connell.

Mr Niehus gave evidence generally in relation to the duties and responsibilities of the applicant and of sales representatives generally. He noted that it was his practice to accompany sales representatives on field calls to customers for training purposes and to also provide regular "coaching" reports. He provided the applicant, as a sales representative, with information including territory lists; product display diagrams and plans and work plans and instructions on a regular basis to assist him in the performance of his duties.

In relation to the respondent's change of strategic direction, Mr Niehus said that the respondent changed its focus to maximise sales from high product—volume markets instead of what may be regarded as corner store and family type business customers. He said that this involved the respondent, through its sales staff, targeting large national chain supermarkets; independent supermarkets; convenient stores; petrol stations and newsagents, generally in that order. It was his evidence that this significant change was communicated to all staff in or about October 1996 by Mr Connell and subsequently followed up by way of other communications since that time.

In terms of the effects on the sales representatives of these changes, Mr Niehus testified that changes in the system of work for sales representatives were required to implement this different focus. Specifically he said that sales representative activities were to be directed more towards supermarkets. Additionally, other changes included—

(a) each sales representative's daily routine was to be determined by an individualised "activity planner" detailing which stores and customers had to be visited;

(b) sales representatives spending more time dealing with grocery and supermarket managers to capture the best product locations;

(c) calls to customers became more demanding and more time-consuming;

(d) sales representatives being expected to ensure that the product was located in the optimum position in the store in accordance with the respondent's policies and instructions and that product was displayed in accordance with the respondent's product display diagrams and policies. This was because the volume of supermarket sales depended to a large extent on the location and display of the product in the stores; and

(e) the respondent's management recording and assessing the performance of sales representatives in terms of merchandising and product display and location.

A further consequence of this change was that the management of sales staff was more focused and "hands on." This led, in Mr Niehus' evidence, to him taking a far more active role in coaching and monitoring the performance of sales representatives. He said that this was a change to the way in which work had been done in the past, but said that it was necessary to ensure that the respondent's strategic marketing and sales imperatives were being met in the field operations.

Mr Niehus also gave evidence about the respondent's national performance management system for employees. In short, in addition to annual performance appraisals, the respondent had an ongoing review of targets and goals for employees and a process of confirming work performance issues in writing. It was Mr Niehus' evidence that as regional manager, he was at all material times required to comply with and implement the respondent's performance management policies and procedures.

In June 1995 Mr Niehus received the Letter, which was signed by four of the five sales representatives under his supervision, which included the applicant. He said that at the time that he received the Letter, he was both surprised and disappointed because none of the issues raised in it had been previously mentioned to him. He said that he had never before received a letter like this from his staff. He would ordinarily deal with these types of issues person to person. He testified that shortly after he received the Letter, he held a meeting with the sales representatives and said to them that he considered that the matters contained in the letter could be dealt with "in-house", but only on the basis that the Letter was withdrawn as if it was not, then because it was in essence a formal complaint about his management, he would be obliged to forward it to the respondent's head office in Sydney. The sales representatives did not agree this to and accordingly the matter was referred to Sydney.

It was Mr Niehus' evidence that whilst he did not necessarily agree or accept the matters raised in the Letter, he at least considered that there were issues in relation to communication that needed to be addressed. In view of this, he decided that in future he would reduce his communications to staff to writing in order that any misunderstandings could be avoided and that sales staff were properly aware of the respondent's requirements. Additionally, he said that he regularly held meetings with the sales representatives to discuss work issues.

Specifically in relation to the applicant, Mr Niehus said that during most of his employment, the applicant's performance was satisfactory and he often received complimentary performance appraisals. On the introduction of the change to the respondent's sales focus outlined above, the applicant experienced some difficulties. It was in particular in areas involving requirements to comply with the respondent's required procedures that caused the applicant some difficulty. Mr Niehus also expressed the view that it appeared to him that the applicant was not comfortable being more closely monitored and supervised as a result of the changes. In short, he said that in relation to these matters, he found the applicant difficult to deal with and less than co-operative. He then set out in his evidence a number of examples in relation to this, most of which have been dealt with in the outline of evidence of other witnesses above. Additionally, from in or about January to June 1998, Mr Niehus gave evidence about meetings he continued to have with the applicant to discuss matters concerning his work performance which included: planning and responsibilities (see exhibit A45); failure to follow instructions (see exhibit A46); poor car stock control and problems with fieldwork.

Further, Mr Niehus referred to the visit to Western Australia by Mr Connell during which Mr Connell worked with the applicant in the field to review his performance. In the meeting that took place between Mr Connell, Mr Niehus and the applicant, Mr Niehus said that he indicated during the course of this meeting that he was prepared to "put the past under the bridge" with the applicant, and for both of them to be regarded as equals. He also said that the decision to give the applicant the written warning (see exhibit A53) was Mr Connell's and not his. Mr Niehus gave evidence about further meetings between he and the applicant in July and August 1998 and various written communications concerning ongoing performance matters, in particular, the applicant failing to follow instructions; difficulties with service station work; store grading; merchandising activity and low productivity reports; customer complaints and some difficulties with route calls.

Mr Niehus strongly denied that he singled out the applicant for unfair treatment and in any way conducted a "vendetta" against him. He denied shouting at the applicant and constantly criticising his performance. However, he said that as the regional manager for the respondent, he was responsible for the Western Australian region's overall performance and this required him to properly manage and monitor his sales representatives and to raise legitimate areas of concern with them. He strongly denied that it was ever his intention to force the applicant to resign from the respondent. In terms of the effect of the required change in the way he managed staff with the change in the respondent's strategic direction, Mr Niehus said that to an extent he had to "step back" from being "one of the boys" in his dealings with the sales representatives. This necessarily changed the way he went about his responsibilities and he somewhat distanced himself from the sales representatives. In relation to the Letter, Mr Niehus said in cross-examination, that he did take the matters raised in the letter "on board" and put in place changes, for example in the area of country trips. It was his view however, that the matters raised in the Letter did not warrant being sent to Sydney, as he would have preferred dealing with the matters informally with the sales representatives.

In relation to Geraldton, he said that he visited the applicant's Geraldton territory, because he had formed the view that the applicant did not consider he had a problem with his own performance. In this regard, Mr Niehus referred to exhibit A48, that being the comparative summary of sales representative performances and noted that the applicant was one of the lowest performers on this assessment. Specifically, in Mr Niehus' opinion, the applicant had difficulties in relation to servicing small stores and generally following the respondent's desired directions.

As to the constant flow of memorandums, it was Mr Niehus' evidence that the purpose of this approach was consistent with what he viewed he had to do with under performance issues, and to coach and assist the applicant to recognise areas needing review and to obtain an improvement. In particular, Mr Niehus noted that at no time did the applicant formally request his assistance in overcoming issues identified, despite Mr Niehus offering it to him.

In terms of how he handled issues raised by the applicant with him, Mr Niehus gave evidence that he took deliberate steps to get other management involved, such as Mr Hutchins and Mr Connell, who were removed from direct day-to-day involvement with the applicant.

The respondent finally called Mr Hutchins. Mr Hutchins was responsible for all human resources matters at the respondent and had responsibility for its grievance policy, which was tendered as exhibit R12. In particular he drew attention to the suggestion in it to managers and supervisors, that if they had a potential issue with an employee, to not work with that issue in isolation from others.

Mr Hutchins referred to his involvement with the applicant when he first raised his concerns with him. He said that he tried to empathise with the position of the applicant and suggested that he should focus on face-to-face discussions with Mr Niehus in an endeavour to resolve their differences. Various notes, e-mails and memoranda were tendered to evidence Mr Hutchins' involvement with the applicant (see exhibit's A76, A77 and A81). Further, Mr Hutchins had discussions with Mr Niehus about the applicant and also wrote a memorandum to Mr Niehus passing on to him the applicant's perception of the issues and requesting Mr Niehus to give consideration to it (see exhibit A75).

Mr Hutchins also came to Western Australia in June 1997 and met with both the applicant and Mr Niehus in an endeavour to assist in resolving the matters. He said that at all times in dealing with the applicant, he took the applicant's concerns seriously and considered that the respondent did its best to deal with the matters. Additionally, he explained the respondent's grievance procedure to the applicant, however the applicant did not formally pursue it. It was Mr Hutchins' view that Mr Niehus was a firm but fair manager, and that the respondent was attempting to do all that it could to assist the applicant in resolving what he considered to be the issues affecting him.

Findings and Conclusions

Subject to what I say below about the former sales representatives called by the applicant, in terms of the evidence, this is not a case in which there are significant conflicts in the evidence. It is more a matter of characterisation of the events and the effect of facts as found, in terms of the applicant's claims. I consider that generally, the witnesses called by the parties gave their evidence honestly. In particular, I do not doubt the genuineness and honesty of the applicant, although I suspect from time to time his emotional state may have led him to unwittingly embellish some aspects of his relationship with Mr Niehus. In this regard I refer to some differences between the terms of exhibit A13, being the applicant's hand written transcription from his diary as to events, and his direct testimony. In some instances, the applicant somewhat exaggerated his description of incidents that occurred in his written narration. I emphasise however, that it his oral testimony that I have taken into account.

Undoubtedly, the genesis of events, at least from the applicant's point of view, was the Letter in 1995 and I find accordingly. It is somewhat surprising however, that the sales representatives, including the applicant, had cause to write the Letter in such a formal way, given the applicant's evidence that at least up until June 1995, he had a very good working relationship with Mr Niehus and could discuss matters with him openly. I am also satisfied that the terms of the Letter raised some concerns as to lines of communication and thereafter Mr Niehus adopted a more formal basis of communication by primarily confirming matters in writing. I also accept Mr Niehus' evidence that as a result of this and other changes in terms of the respondent's operations, that Mr Niehus adopted a more "one step removed" style of management with the respondent's sales representatives.

As to the evidence of the other sales representatives, I have treated their evidence with some caution. In the case of Mr Tedesco and Mr Mills, both employees left the respondent's employment in controversial circumstances. Additionally, in the case of Mr Mills, he was employed for a period of two years from 1991 to 1993, prior to the events alleged by the applicant arising from the Letter in June 1995. Moreover, Mr Mills described his relationship with Mr Niehus as being always difficult and demeaning, contrary to the evidence of the applicant and, to an extent, Mr Stone. I regarded all three of these witnesses as being somewhat partisan. I should also emphasise that it is the circumstances of the applicant's employment and its termination that the Commission is concerned with.

Having carefully considered all of the evidence, I accept that the applicant's performance did give rise to some legitimate concerns from the respondent, in particular as a consequence of the change in the respondent's strategic direction in late 1996 and in 1997, and the different requirements that this imposed on sales representatives. I also accept Mr Niehus' evidence, and that of Mr Connell, that these changes led to a different style of the management of sales representatives that requiring a more "hands-on" approach in terms of monitoring sales performance. I am also satisfied that in the main, the numerous memoranda and other documents tendered in evidence specifically raising performance matters with the applicant, properly reflected the respondent's concern regarding aspects of the applicant's performance. I should also observe however, that some of these matters were more minor in nature.

I also have no doubt on the evidence, that the changes that took place during this period were not well received by the applicant. I am sure he was resistant and probably on the evidence, somewhat resented the degree of closer supervision imposed by Mr Niehus and considered that this was some form of personal attack on him. Taken objectively however, the vast majority of the issues raised by the respondent, as I have noted, were legitimately raised and indeed, in terms of the respondent's performance management approach, arguably the respondent was obliged to raise these matters with the applicant as a responsible employer. This would be particularly the case, in the event that ultimately performance issues may have led to the respondent terminating either the applicant's employment or the employment of any other of its sales representatives. Also, it is the case that on the evidence, managers other than Mr Niehus independently formed the view

that the applicant had some performance issues that needed to be addressed.

I am also satisfied that the respondent did, in particular through Mr Hutchins, attempt to take all reasonable steps to assist the applicant in dealing with the issues that he raised concerning his employment relationship with Mr Niehus. This included the constantly available counsel of Mr Hutchins, the offer and acceptance of counselling sponsored by the respondent and the invitation by the respondent for the applicant to activate the respondent's grievance procedure. Furthermore, the evidence as to the visits to Western Australia by Mr Connell, Mr Dhu and earlier by a Mr MacPherson, in an endeavour to assist in the resolution of the issues with the applicant, are totally at odds with the respondent orchestrating the applicant's departure, as he perceived the situation.

Furthermore, despite the applicant's assertions to the contrary, I am satisfied and I find that the communications between the respondent and the applicant, in particular from Mr Niehus, were not always negative and critical as the applicant said. I have already referred to the evidence in the form of performance appraisals and coaching reports prepared by Mr Niehus, some of which over the material periods are very complimentary of the applicant. Additionally, there is the supermarket manual prepared by the applicant. Whilst the applicant was critical of Mr Niehus' lack of overt encouragement, the response from Mr Connell, a very senior manager of the respondent, which was publicised throughout the respondent's management generally, was quite glowing in terms of the applicant's efforts.

Having carefully observed all of the witnesses during the course of the lengthy hearing of this matter, I have no doubt that Mr Niehus was a person who put issues to his staff very directly. Perhaps, on some occasions, he may have communicated in a somewhat blunt fashion. In this regard, I note the applicant's view that Mr Niehus "called a spade a spade". Indeed, this can easily be gleaned from some of the communications between Mr Niehus and the applicant and other sales representatives. I am also prepared to accept on the evidence, that the applicant may have received a "dressing down" from Mr Niehus on occasions. However, the evidence also indicates that Mr Niehus was quite prepared to praise employees, including the applicant, in circumstances where he thought that was warranted.

There is no doubt in my mind, having heard all of the evidence, that Mr Niehus, in raising matters as he did with the applicant, created some resentment in the mind of the applicant and the applicant also was, and became, very sensitive to constructive criticism. At the same time, I also have no doubt that the circumstances in which the applicant found himself, as events transpired, were stressful upon him. The performance requirements of the respondent company also no doubt, placed considerable pressure on Mr Niehus, to achieve the respondent's performance objectives.

The letter from the applicant's solicitors to the respondent (exhibit R7) issued to the respondent effectively an ultimatum to dismiss Mr Niehus and replace him with the applicant. With all due respect, that proposition can only have polarised the parties in terms of the relationship between Mr Niehus and the applicant. In my opinion, it did very little to promote a conciliatory outcome between the parties. In this regard, I note the applicant's concession in his evidence that as set out in the respondent's solicitors reply (see exhibit R2), there was no real basis upon which to dismiss Mr Niehus and I find accordingly. In exhibit R2, the respondent put its options to the applicant to consider. In particular, I find that the applicant was advised that Mr Niehus would remain as the Western Australian regional manager and that the respondent would continue to employee the applicant as it had done, subject to its right to provide appropriate feedback, support and guidance in relation to the respondent's required standard of performance. In light of this letter, I find that some two weeks later, the applicant submitted his resignation in writing on 1 October 1998.

The threshold issue to determine in this matter was whether there was a dismissal in order to attract the jurisdiction of the Commission. Both counsel for the applicant and for the respondent referred to my decision in *Kenneth Green v The Kununurra Region Economic Aboriginal Corporation* (1999) 79 WAIG 582. In *Green*, I set out what I consider to be the relevant principles in determining whether, in matters such as the instant matter, there has been in law a dismissal for the purposes of the Act. I adopt and apply what I said in *Green* without further repeating it. Also, I accept counsel for the respondent's submission that, based upon the decision of the Industrial Relations Court of Australia in *Gunnedah Shire Council v Grout* (1995) 62 IR 150, merely because an employee is suffering stress at the time that he or she tenders a resignation, that does not, by this fact alone, render the resignation an involuntary act (see also *Mohazab v Dick Smith Electronics* (1995) 62 IR 200).

In considering the respondent's position in relation to this matter, I am satisfied that the respondent's actions in attempting to deal with the applicant's concerns were wholly inconsistent with any assertion that the respondent was deliberately embarking upon a course of conduct designed to force the applicant to resign or that the respondent otherwise engaged in a course of conduct so as to destroy or seriously damage the relationship of confidence and trust between the employer and the employee, to leave the applicant with no real option but to leave the employment. In my opinion, much of the evidence, objectively considered, admits of a contrary conclusion. In particular the steps taken through Mr Hutchins, and indeed actions undertaken by Mr Connell, as I have noted above, do not support any finding to the effect that the respondent was in some way surreptitiously attempting to force the applicant to leave. If that were the case, one would have thought that the respondent would not have taken any of the steps that it did take, in an endeavour to assist the applicant.

Moreover, the respondent's reply to the applicant's solicitors letter (exhibit R2) makes it plain that the respondent was more than prepared to continue to provide assistance and support to the applicant. It was the applicant who made a decision, on the applicant's own evidence, to tender his resignation without anyone from the respondent suggesting or requiring that he do so. Quite to the contrary, the respondent offered to maintain the status quo. The applicant, in light of these clear options open to him, decided to resign and not to continue to work for the respondent. This was also not done in haste it seems, as a period of about two weeks elapsed before the applicant resigned.

Whilst I have tremendous sympathy for the situation in which the applicant found himself, I am not able to conclude, having carefully considered all of the evidence and the submissions, that the applicant was dismissed by the respondent in order to found jurisdiction in this matter.

The application is therefore dismissed.

APPEARANCES: Mr C Primerano of counsel appeared on behalf of the applicant.

Mr S Woodbury of counsel appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Ray Furfaro

and

The Wrigley Company Pty Ltd.

No. 2098 of 1998.

COMMISSIONER S J KENNER.

10 December 1999.

Order.

HAVING heard Mr C Primerano of counsel on behalf of the applicant and Mr S Woodbury of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the application be and is hereby dismissed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Trevor Harper

and

Toms Tyres and Brakes Pty Ltd and Spintwin Pty Ltd.

No. 1946 of 1997.

19 January 2000.

Reasons for Decision.

COMMISSIONER C.B. PARKS: The application filed in the Commission alleges that Trevor Harper (the applicant) has been unfairly dismissed from employment with "TOMS TYRES + SPINTWIN PTY LTD". At a conference conducted pursuant to s.32 of the Industrial Relations Act 1979, the Commission granted an application by the applicant to cite Toms Tyres Pty Ltd, and Spintwin Pty Ltd, both as respondents to the action before the Commission. At the commencement of the hearing of the matter the agent for both respondents submitted that the lastnamed respondent operates a franchise under an arrangement with the firstnamed respondent, and in that capacity it was the lastnamed respondent that had been the former employer of the applicant. The applicant conceded that Spintwin Pty Ltd had been his employer and that the firstnamed respondent had been cited because management thereof had been involved with his dismissal. The Commission thereupon orally ordered that Toms Tyres Pty Ltd be struck out as a respondent to the matter.

Spintwin Pty Ltd trades as "Toms Tyres and Brakes" in the town of Fremantle where the applicant had been employed to perform mechanical repair work. The applicant alleges he was unfairly dismissed from that employment and seeks monetary compensation in remedy for his financial loss said to have resulted from the dismissal. The respondent concedes that the applicant was dismissed from employment, but asserts that such was effected to meet the request by the applicant that his employment be ended in that way, in order that he might qualify to receive social security benefits.

There is no dispute that the applicant had a number of absences from duty totalling several days, during the last two weeks of his employment, for reasons related to a medical problem suffered by his infant daughter. According to the respondent the overall level of absence by the applicant had exhausted his entitlement to the payment of his wages for such absences however payment had been continued by an arrangement. The actual terms of the arrangement were not disclosed to the Commission, however the applicant indicated during the course of his evidence that he had received some level of payment during the last two weeks which he was not due, and he expected such would be recovered by the respondent from subsequent wage payments.

The dismissal of the applicant was effected by Noel John Featherby, the National Marketing Manager for the franchisor, when acting to assist Robert James Marchese, a principal of the respondent and the newly appointed franchisee, who accepted his assistance because he had little experience dealing with the issues that were to be discussed with the applicant. Mr Marchese did not attend the discussion Mr Featherby had with Mr Harper however Wayne John Akers, the Group Manager for the franchisor, attended the discussion to witness what occurred and also as a training exercise for him. Hayley-Anne Harper, the wife of the applicant, asserts she was nearby to where the discussion occurred and overheard what passed between Mr Featherby and her husband. Messrs Featherby and Akers say that Ms Harper was not anywhere nearby and therefore could not have heard what passed between Mr Featherby and Mr Harper.

According to Mr Marchese, which the applicant denies, they had a conversation around three or four weeks prior to the dismissal and Mr Harper commented to the effect he would rather receive social security benefits than be employed by the respondent and that he could obtain such provided he were dismissed. Mr Marchese says he understood the applicant to be suggesting that he be dismissed and hence raised it with Mr Featherby to seek his counsel. Mr Marchese also sought the counsel of Mr Featherby regarding the difficulty the business was experiencing because the applicant was the only experienced mechanic employed and his absences caused disruptions and the rescheduling of work and that caused dissatisfied customers. It was following this latter discussion that it was arranged with Mr Featherby that he meet with the applicant to discuss the difficulties being experienced by the respondent with the view of finding a resolution thereto. Both Messrs Marchese and Featherby say that the principal difficulty for the business was the inability to replace the applicant with a temporary mechanic at the short periods of notice the business had of the absences occurring.

On a Thursday, the last day of expected absence in a three day period of absence, the applicant, accompanied by his wife, attended the workplace in the vicinity of 3.30 pm to 4.00 pm, at the telephone request of Mr Marchese, and it is then that Mr Marchese directed him to a meeting with Messrs Featherby and Akers.

Mr Featherby says he firstly explained to the applicant the difficulty his absences were causing and then asked him whether he wished to terminate as he had earlier made known, and suggested he consider the alternative of taking a defined period of absence rather than ad hoc absences until the medical problem of his daughter had been overcome. Mr Akers confirmed that at some stage Mr Featherby suggested the option of the applicant taking a fixed period of leave. Mr Harper, and his wife who asserts she overheard what was said, both deny that any offer of leave was made to him.

It is common ground that Mr Featherby put to the applicant that he had requested that his employment be terminated, and Messrs Featherby and Akers say he answered in the affirmative, whereas the applicant says he sarcastically answered, "yeah sure" or "oh yeah sure", but meaning "no".

It is also common ground that Mr Featherby made mention of Mr Harper working a further week as a period of notice or the alternative of him ceasing employment that day, and that if the applicant took the latter option he would owe money to the respondent. Messrs Featherby and Akers have indicated that the approach taken in relation to Mr Harper was that he was effectively seeking termination of the employment, and hence it was for him to decide the manner in which he would do so, however it was apposite to indicate that the respondent expected to have the benefit of one week of notice in which to replace him, and that during such notice period he would also gain a further week's wage, or alternatively, if he elected to cease immediately he would forfeit one week's wage to the respondent. Mr Harper explained that it was his understanding that the respondent acted to dismiss him, but offered him the opportunity to select the manner thereof, and that the reference to him not working the period of notice and owing money was in the context that he would not receive a further week's wage and served to remind him that he had an account with the respondent that was in debt. Plainly those acting for the respondent, and the applicant, wrongly assumed the other had the same understanding regarding the nature of the termination and what were the associated entitlements of each party.

Mr Harper informed Messrs Featherby and Akers he would work the one week period of notice, however he would not be available to work on the Friday as had been previously arranged, but he would return to work on the Saturday and the notice period would be worked from that day onward.

Mr and Mrs Harper departed after the meeting. Mrs Harper returned to the workplace some twenty minutes later when she requested, and was granted, a meeting with Mr Featherby. According to Mr Featherby, Mrs Harper was irate and in effect objected to the termination of the applicant's employment and he responded that Mr Harper had originally sought such and had confirmed that with him in their earlier conversation. Mrs Harper is said to have indicated he had been unreasonable given they have a sick child, and to that he responded that he understood their circumstance however the operation of the business also had to be considered, and he also said "I can assure you that if you wish to apply for compassionate leave, which can be one week, two weeks, one month or a year, I can assure you Trevor (Mr Harper) will have a job back with the company when he returns". Mrs Harper denies that Mr Featherby suggested a period of compassionate leave and asserts that he said, "Trevor can have his job back when he sorts out his problems, but he has been having problems for (some period) and until he sorts out his problems, he's not welcome", and in addition he indicated that her husband would not be allowed to return in the near future.

Mr Harper returned to the workplace on the following Saturday, he worked that day and decided not to complete the period of notice. The applicant did not work for the respondent again after that day.

Much of the material, and contentious, evidence led on behalf of each party was not properly put, or in many instances not put at all, to each witness who gave conflicting testimony and hence the different versions of what was allegedly said, and in what context, has not been adequately tested by either party. It is plain that Mr Featherby set out to resolve the difficulties, which I am satisfied existed and were substantial, the absences of Mr Harper were causing the respondent's business. Logically the only way in which the applicant could assist to reduce or remove the difficulties experienced by the respondent was, if further absences seemed likely, to cease absences at short notice, however no reasonable guarantee of that would be possible, or have a planned and defined period of absence during which the likelihood of further medical problems with his daughter could be assessed, or his employment be terminated. I have reservations as to whether the approach of Mr Featherby toward the applicant was as he described it. Although I do not accept that Mr Featherby bluntly dismissed the applicant as he and his wife described, I suspect Mr Featherby placed the greater emphasis upon a termination of the employment, however I am convinced that there had been comment by Mr Harper which led the respondent to believe that he was inclined toward termination, and that when the proposition of termination was raised with him the response he gave did not appear to be facetious and was reasonably taken to indicate his consent to that course. There is no evidence that Mr Harper said anything more which might have suggested his intentions had been different, or that termination of his employment was a surprise, or that he considered it unreasonable. The difficulties experienced by the business and the apparent preparedness of the applicant to end the employment I am satisfied provided valid reason for the act of dismissal and was not an unfair exercise of the right of the respondent.

Appearances: Mr T. Harper on his own behalf

Mr J.C. Beedham on behalf of the respondents

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Trevor Harper

and

Toms Tyres and Brakes Pty Ltd and Spintwin Pty Ltd.

No. 1946 of 1997.

19 January 2000.

Order.

HAVING heard Mr T. Harper on his own behalf and Mr J.C. Beedham on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT Toms Tyres Pty Ltd be struck out as a respondent.

THAT this application be and is hereby dismissed.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Maxwell Raymond Healy

and

The King and I Pty Ltd.

No. 2157 of 1998.

31 January 2000.

Reasons for Decision.

COMMISSIONER C.B. PARKS: The application before the Commission is one authorised by s29(1)(b)(ii) and claims that Max Healy (the "applicant") has not been allowed by his former employer, the King and I Pty Ltd, (the "respondent") a benefit to which he is entitled under his contract of service. The applicant seeks to recover the alleged benefit from the respondent by way of an order from the Commission.

The application filed in the Commission claims that the applicant, a real estate salesperson, is entitled to commissions arising from the listing for sale and/or the sale, of several named properties, which claims were amended by consent of the respondent. The amended claim asserts that there is a balance of commission due and payable to the applicant, which he has not received from the respondent in relation to the sale of three properties. Listed hereunder are the three properties and the balance of commission which is claimed to be due and payable—

- Spring Valley and Red Valley (the "Valleys property") $70593.74
- 280 Forrest Hills Parade Bindoon (the "Bindoon property") $1365.60
- 201 Greenhead Road Bullsbrook (the "Bullsbrook property") $1365.60

There is no dispute that Mr Healy acquired the listing for sale in relation to the three properties for which additional commissions are claimed. The applicant did not sell the Valleys property or the Bindoon property but did also sell the Bullsbrook property. Following upon the sale of each of the three properties the applicant was paid a commission of 25% of the commission received by the respondent from the vendors of these properties.

It is the claim of Mr Healy that it is a term of his contract of employment that upon the sale of a property listed by him through canvassing outside of the office to which he was attached, he became entitled to receive a commission of 50% of the commission paid to the respondent by the vendor of such a property. There not being any dispute that each of the three properties were so listed by the applicant, it is his claim that he is entitled to the payment of a further 25% commission from the commission received by the respondent. There is no dispute that the applicant is entitled to commission at the rate of 50% of the "gross office commission" received in relation to the Valleys property. However they have divergent views on what it is that constitutes the "gross office commission".

At the material time the respondent traded under the "LJ Hooker" banner from separately franchised offices located at Midland, Northam, Toodyay, and York. The respondent considers each office was a separate operation to each other office and therefore, when on the occasion two of the offices are involved in the sale of a property, that sale is considered to be a conjunctional sale. Mr Healy (attached to the Midland office) and Mr King (attached to the York office) were involved in the overall process of the listing and the sale of the Valleys property, and that the respondent considers to be a conjunctional sale between two offices because the Midland and the York offices were involved. Based on this premise the commission received by the respondent from the vendor was divided evenly and 50% apportioned to each of the two offices. The respondent contends that the Commission received by any one of the given offices in relation to a particular sale is the "gross office commission" received in respect of that sale and it is upon that commission that the percentage commission of a salesperson is calculated. Hence it is that in relation to the Valleys property sale 50% of the commission was apportioned to the Midland office and the applicant was in turn paid a commission of 50% of that, the net effect of which is that he received 25% of the commission paid to the respondent.

It is the contention of Mr Healy that the "gross office commission" is the full commission paid to the respondent at its head office, the Midland office, and that each other office operated by the respondent is not an office in its own right but a branch office. That he asserts is plain from the fact that the respondent is a single entity that operated each office which, in accordance with the "Real Estate and Business Agents Act 1978", held the necessary Triennial Certificate (exhibit 2) authorising the respondent to carry on the business of a real estate and business agent from the described Midland office, and by endorsement to carry on that business at the offices described in Northam, Toodyay and York. The evidence is that each of

the offices which had been operated by the respondent were the subject of a separate franchise agreement with "LJ Hooker", each operated independent of the other to the extent that each serviced an allocated area, and essentially salespersons from a given office had no involvement in the area of another office, except by arrangement ie a conjunctional sale, and each office operated as a separate profit centre. Submitted into evidence is what is described as the Office Procedures Manual (exhibit 3), the terms of which are said by the respondent to have applied to the employees at each office, including sales persons, and which prescribes the commission structure and levels payable to the sales person or sales persons and the office or offices, involved in the sale of a property. The respondent contends that the terms of the Office Procedures Manual applied to the applicant by reason of the written agreement with him titled "Workplace Agreement" (exhibit 1), and that the terms thereof have previously been applied to the applicant and accepted by him.

Mr Healy denies having been appraised of the terms of the Office Procedures Manual and that prior to the presently disputed matters he was paid, and accepted, commission calculated in accordance therewith.

The "Workplace Agreement" entered upon by the parties on 9 May 1996, specifies that remuneration will be paid on a commission only basis and in relation thereto prescribes—

"2.5.2 Percentage payable

(a) In office listing sales will be paid at the rate of 38% of gross office commission for sales made.

(b) Listings acquired by way of canvassing of specified areas will be paid at the rate of 50% of gross office commission for sales made.

2.5.3 Entitlement to commission—

(a) Only physical inspection of the property with the purchaser, completion of 'offer & acceptance document and settlement of the sale will be valid entitlement for commission of 'in office listings'.

(b) In accord with clause (a) above, conjunctional sales of 'in office listings' sold by another agent will not entitle the sales person to commission.

(c) Conjunctional sales of other agents listings in the 'in office listings area' will entitle the sales person to 38% of the total office commission received.

(d) Conjunctional sales of listings acquired by canvassing specified areas will entitle the sales person to commission at the rate of 50% of the gross office commission received."

The foregoing prescription is contained within subclause 2.5 Remuneration, of clause 2. Terms Expressly Agreed by the Parties, which also contains the following subclause—

"2.8 Office Procedures

All office procedures are to be adhered to"

Contained within the "Workplace Agreement" are clauses 3. Office Procedures, and 4. General Duties, which are formed of subclauses, titled according to their subject matter, which respective titles are set out hereunder—

"3.1 Rosters
3.2 Areas
3.3 Conjunctionals
3.4 Listings
3.5 Uniforms & Name Badges
3.6 Disputes
3.7 Teamwork & Loyalty
3.8 Phone calls
3.9 Handing out maps
3.10 Other sales staff's customers"

and

"4.1 Listings
4.2 Sales
4.3 Diary entries
4.4 Office tidiness
4.5 Letter drops & other listing campaigns
4.6 Maps & Handouts"

Jennifer Anne Stageman, and John Eugene Butler, attended a meeting at the Toodyay office where other employees of the respondent were also present. There Mrs King tabled the Office Procedures Manual and placed emphasis on some of its contents. The obligation was placed upon Mr Butler to have each employee sign a copy of the manual to signify their acceptance of its terms. The recollection of Ms Stageman is that Mr Healy arrived at the meeting late and after the address in relation to the manual had concluded, she did not see him read the manual but does recollect commenting to him upon the topic of hygiene contained therein. According to the applicant he has not previously seen the Office Procedures Manual entered into evidence but he does recollect that at the time he was attached to the Toodyay office a draft manual of a similar kind had been produced. Mr Butler recollects that following the meeting Mr Healy stated that he had no need to accept and sign the manual because he had a pre-existing arrangement with the respondent, and he, Mr Butler knew Mr Healy was party to a higher commission arrangement.

It is plain that the "Workplace Agreement" at clauses 1a), 2.1, 2.2, 2.3, 2.5, 2.6, 3.1.1, 3.3, 3.5 and 3.8 contain prescriptions regarding subject matter for which there are also prescriptions within the Office Procedures Manual. The Office Procedures Manual did not exist in May 1996 when the "Workplace Agreement" was entered upon and hence it appears plain that the "Workplace Agreement" expressed a range of office procedures which the parties to the agreement expressly agreed would be observed. That which the parties agreed upon may not be unilaterally altered by the action of one party and as between the parties requires that there be consent to the alteration either express or implied. On the evidence Mr Healy did not expressly consent to the terms of the Office Procedures Manual, on the contrary he expressly rejected it in relation to that which is covered by the "Workplace Agreement" and I am not satisfied there is evidence that he has, by his conduct acquiesced with the terms of the manual.

Do the words of clause 2.8 of the "Workplace Agreement", ie "all office procedures are to be adhered to" import into the agreement whatever office procedures may be established from time to time? In the opinion of the Commission it does not. It is well settled that when interpreting the provisions of an instrument the provision is to be considered in the context of the intention displayed by the instrument as a whole. As I have already observed the "Workplace Agreement" contains at clause 3. Office Procedures, and at Clause 4. General Duties, express provisions in relation to a number of subject matters and hence it is my view that the reference to office procedures in clause 2.8 and that to general duties in clause 2.12 are not for the purpose of importing into the agreement office procedures and general duties generally but are commands to observe that which is prescribed in clause 3 and clause 4 respectively.

A number of the provisions contained within the "Workplace Agreement" are drafted in the plural and refer to salespersons in the generality, whereas others are drafted in the singular, however, notwithstanding the aberration of the plurality, the agreement is made between two parties only, the applicant and the respondent, and hence the prescribed entitlements and obligations are theirs. The term "gross office commission", in addition to being contained in subclause 2.5.2 and subclause 2.5.3 of the agreement, is also contained in subclauses 2.1 and 2.6 reproduced hereunder—

"2.1 Targets

An office gross commission figure of $6,800-00 is expected for each calender month. Failure to reach this figure will result in discussion for review of employment."

and

"2.6 Advertising

Management will provide advertising at a maximum rate of 7% of Gross Office commission. Management is aiming for 0% advertising expenses, which will be attained by vendor paid advertising. (See below)."

Subclause 2.1 is of no assistance in determining the meaning of "office gross commission" however subclause 2.6 obligates management to afford the applicant the benefit of advertising to the maximum rate specified as a percentage of the "gross office commission" if the term of "gross office commission" has the meaning which Mr Healy contends subclause 2.6 obligates the respondent to provide advertising reckoned on a percentage of what be the gross commission, that is the aggregated commission from all offices. Plainly that is not the intention of the subclause. It is directed at the advertising. The respondent was obligated to provide for the purpose of attracting business to the office where Mr Healy was attached. At the time of entering upon the agreement he was attached to the Toodyay office, and at the time the words "gross office commission" meant the gross commission applicable to that office, and now means the gross commission applicable to the Midland office. It is to that level of gross commission which the respondent applied subclause 2.5.3.

It is the contention of Mr Healy that although, he had been attached to the Midland office, his workplace was not that office and did not have the same duties and obligations as the other salespersons who worked at that location. His role, as he described it, was that of an "outside representative" and that he generally worked away from the office, and he dealt with a geographical area allocated to him in which he canvassed for listings of properties for sale. According to Mr Healy it is for this reason that he and the respondent entered upon the "Workplace Agreement" which affords him a commission arrangement different to other sales persons who had been employed by the respondent. I am satisfied the applicant operated as he describes. Ms Stageman and Mr Butler perceived him to have operated in that manner. Plainly the commission structure the "Workplace Agreement" affords the applicant is different to that which applied to other salespersons as evidenced by the Office Procedure Manual, and it seems apparent, given the express reference to canvassing in a specified area, that the agreement was formulated to cover the manner in which he operated. That fact does not however assist in the determination of this matter.

The whole foundation of the argument by Mr Healy is upon what constitutes the "gross office commission". It being my finding that such is the gross commission received by the office to which he was attached, and therefore his claim fails The argument by the applicant did not bring into contention the conjunctional sale concept and the particular level of the "gross office commission" apportioned to the Midland office.

The terms of the "Workplace Agreement" do not entitle Mr Healy to the calculation of commission upon the basis he claims and his application will therefore be dismissed.

Appearances: Mr MR Healy on his own behalf

Mr D. Heldsinger, of Counsel on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Maxwell Raymond Healy

and

The King and I Pty Ltd.

No. 2157 of 1998.

31 January 2000.

Order.

HAVING heard Mr MR Healy on his own behalf and Mr D. Heldsinger, of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT this application be and is hereby dismissed.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Richard Clyde Heron

and

White Caps Fishing Company Pty Ltd.

No. 1649 of 1996.

25 January 2000.

Reasons for Decision.

COMMISSIONER C.B. PARKS: Before the Commission is an application by Richard Clyde Heron (the "applicant") wherein he alleges that he was unfairly dismissed from employment with the White Caps Fishing Company Pty Ltd (the "respondent"). The Notice of Application referring this matter to the Commission was, with the approval of the Deputy Registrar, lodged in the Commission by facsimile transmission on 6 November 1996 and alleges that the applicant was dismissed from his employment as the skipper of a rock lobster fishing vessel on 10 October 1996. In remedy the applicant seeks monetary compensation for his loss of remuneration in relation to the 1996/1997 fishing season.

The respondent denies that the applicant was dismissed from employment. It is asserted that the relationship which had existed between the parties was not that of employee and employer but that of contractor and principal. Alternatively, if it be held the parties had an employment relationship, that relationship, it is said, concluded on 30 June 1996 according to the terms of a written share fishing agreement, and that being so, the reference of the matter to the Commission has been made outside of the 28 days allowed by s.29 of the Industrial Relations Act 1979 (the "Act").

Having heard the parties the Commission held that the applicant had not been an employee of the respondent, and furthermore, the relationship which had existed between them had ended on 30 June 1996 and in any event the reference of the matter to the Commission was made more than 28 days after that date. The parties were informed that the reasons of the Commission for such declaration would be later delivered in writing. These are those reasons.

The engagement of Mr Heron by the respondent was subject to an agreement titled "Share Fishing Agreement", signed and dated 9 November 1995, wherein clauses 1 and 4 disclose that the applicant would participate as a share fisherman for the period 15 November 1995 to 30 June 1996. The applicant performed the role of skipper at the vessel Morning Rose for the 1995/1996 rock lobster fishing season, that being the period stipulated in the agreement, shortly following which the vessel was removed from the water and was placed on hard-standing.

Mr Heron had been engaged by the respondent under separate written agreements in relation to each of the rock lobster fishing seasons 1993/1994 and 1994/1995, the contents of which are similar to the 1995/1996 season agreement. The applicant claims there was tacit agreement that he would skipper the vessel each season and it is on that premise that he contends he had an ongoing employment relationship with the respondent entitling him to skipper the Morning Rose for the 1996/1997 season until he was informed to the contrary on 10 October 1996.

On their face each of the written agreements entered into by the parties have a finite life, ie each of the rock lobster seasons separately identified therein, and hence they plainly do not create any ongoing relationship of any kind between the parties. I note that the applicant is described as both "the skipper" and "the fisherman" in the 1994/1995 agreement, and simply as "the fisherman" in the 1993/1994 and 1995/1996 agreements. Hence the role of skipper performed by the applicant each in the 1993/1994 and 1995/1996 seasons was according to some unwritten understanding between the parties, the term "fisherman" being equally descriptive of any member of the vessel's crew. Whether as part of that understanding there had also been some tacit arrangement that the applicant would, in the ordinary course be the skipper from season to season, need not be decided by the Commission.

In late July 1996 Mr Heron had a conversation with a Mr Brett Heales, a person whom he described as a part owner in

the vessel, and who informed the applicant that it appeared he would not be the skipper of the vessel for the 1996/1997 fishing season. On 31 August 1996 an advertisement appeared in The West Australian newspaper stating that a "North end C zone skipper" was wanted by the advertiser who is not identified by name. On 2 September 1996 the applicant wrote to the advertiser and offered his services as a skipper. Shortly following this date Mr Heron became aware that the advertiser to whom he had applied was the respondent and that caused him to telephone a Mr Rick Francis, a representative for the respondent, and question if he would be the skipper of the Morning Rose for the 1996/1997 season. The reply given by Mr Francis was to the effect that the respondent was "looking at" skippers for the 1996/1997 season and the most suitable persons would be selected. If it had been that some ongoing relationship existed between the parties from season to season, such was placed in question by Mr Heales in July 1996, and, in the opinion of the Commission, the matter was settled by Mr Francis in early September 1996 when he told Mr Heron the respondent would select the most suitable person to skipper the Morning Rose, the plain indication being there was no chosen skipper at the time. Hence the applicant was not the skipper at that time.

The reference of this matter was made to the Commission somewhat in excess of one month after Mr Francis indicated the applicant was not the skipper, and hence his application has been made outside of the time allowed by s.29 of the Act and is not competent. On this basis alone the application fails.

The applicant, on his own evidence, demonstrated that as skipper it had been his responsibility to select, engage, and control crew of the vessel, and that included deciding their individual remuneration and expenses. Mr Heron determined the hours the vessel would operate and where fishing would be done. He provided no evidence that the respondent exercised any control over him or the crew, or that the respondent was entitled to exercise any such control, as term of their relationship. Plainly the terms of the final agreement do not provide any right of control of the kind peculiar to an employment relationship. For the most part the terms of the agreement are neutral. However, clause 8 thereof declares that the applicant is responsible "for his own Workers Compensation Cover and Taxation installments" and that discloses an intention that the relationship was not to be one of employer and employee. These are adequate indicia that the contract between the parties is not one of service, but one for service, and hence the complaint of the applicant does not fall within the jurisdiction of the Commission.

Counsel for the respondent made oral application for costs to be awarded against the applicant but made no submission in that regard. It is open to the Commission to award costs, excluding for the services of a legal practitioner or agent, however, given the nature and purpose of the Commission it has not been its practice to award costs unless satisfied that the circumstances of a particular case warrant such. The application has been misguided but in no way vexatious or mischievous, and absent any submission in support of the application for costs, I find there is nothing in relation to the matter which justifies any order for the payment of costs.

Appearances: Mr R Heron on his own behalf

Mr R. Richardson, of Counsel on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Richard Clyde Heron

and

White Caps Fishing Company Pty Ltd.

No. 1649 of 1996.

25 January 2000.

Order.

HAVING heard Mr R. Heron on his own behalf and Mr R. Richardson, of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT this application be and is hereby dismissed.

(Sgd.) C.B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Margaret Christine Hocking

and

Joseph Mathias

No. 2156 of 1998.

3 March 1999.

Reasons for Decision.

(Given extemporaneously at the conclusion of the submissions, as edited by the Commissioner.)

COMMISSIONER C.B. PARKS: The applicant in this matter, claims that the respondent employed her for a period of time, and that, on the two particular days, 16 and 17 March 1998, she worked for a period of 3 hours on each day for which she did not receive the payment of $90.00 due as an entitlement according to her contract of employment.

No appearance has been entered for the respondent however the Commission will hear and determine the matter in the absence of the respondent. A Declaration of Service sworn by the applicant declares that the Notice of Application in this matter was served upon the respondent at, "566 Beaufort Street, Perth". No answer to the application has been filed by the respondent within the time prescribed, or at all.

The Commission gave written notice to the respondent of a conference to be held in relation to this matter. On the day which the conference was to have been conducted the Commission received a facsimile transmission from the respondent advising he would not be attending on account of illness and that "The matter of $90 dollars which she alleges I owe her, can be disputed, I have been prepared to pay the amount to save the unnecessary proceedings".

By a letter dated 19 January 1999 the respondent was directed by the Commission to settle the matter in the terms he proposed.

Subsequent to this direction the Commission received a letter from the applicant which asserts that the respondent issued her a cheque in the sum of $90.00 in settlement of the claim which has not been honoured.

On 9 February 1999 the Commission forwarded a Notice of Hearing to the aforementioned address of the respondent, by pre paid post, giving three weeks' notice that the matter would be heard and determined. That notice has not been returned to the Commission by the postal authority. Hence I am satisfied that such has been received by the respondent, and that it is appropriate to proceed in his absence.

Ms Hocking testified before the Commission that she commenced work for the respondent on 9 March 1998, and worked a number of hours on two days, for which she was subsequently paid, and that following that time the parties negotiated an arrangement that any future work done would be paid at the rate of $15.00 per hour. Ms Hocking has told the Commission that on the two subsequent dates identified in her notice of application she worked 3 hours on each of those days, and consequently she is entitled to payment of those hours at the rate of $15.00 per hour, hence the claim for a sum of $90.00.

The applicant freely informed the Commission that, in discussions she has had with Mr Mathias at different times subsequent to 17 March 1998, he has disputed that he owes her the money claimed, and that is to her credit.

The Commission is faced with testimony under oath from Ms Hocking, that she was employed and did the work claimed, that she was to be paid for that work at the rate of $15.00 an hour, and that she has not received payment for such work. There is no evidence before the Commission to the contrary.

Accordingly, I am satisfied that Ms Hocking is due the sum of $90.00 under her contract of employment and accordingly the Commission will order that such be paid by the respondent.

Appearances: Ms MC Hocking on her own behalf

No appearance on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Margaret Christine Hocking

and

Joseph Mathias.

No. 2156 of 1998.

25 January 2000.

Order.

HAVING heard the applicant on her own behalf and there being no appearance on behalf of the respondent the Commission, pursuant to the power conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT Joseph Mathias pay to Ms. MC Hocking the sum of $90.00.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Jodi Ann Hoffmann

and

Western Australian Aboriginal Media Association.

No. 180 of 1999.

COMMISSIONER A R BEECH.

2 February 2000.

Reasons for Decision.

The remaining matter for determination by the Commission is the compensation to be ordered under s.23A of the Act in lieu of an order for re-instatement.

The Commission is required to assess the loss for which the applicant is to be compensated. In this case, and as Mr Woodward correctly observed, given that 12 months has passed since the dismissal of Ms Hoffmann, her loss arising from the dismissal is able to be quantified with some precision. She had been employed part time for 25 hours per week. Her weekly wage, gross, was $484.62. This rate included a shift allowance component. Her weekly wage, gross, without the shift allowance component, was $421.41.

It is not suggested that Ms Hoffmann would have remained in employment for only a short period of time had she not been dismissed. It is likely, therefore, that if Ms Hoffmann had not been dismissed then she would have remained in the respondent's employment. Her financial loss is, therefore, measured by the wages she would have earned had she not been dismissed. Given the likelihood that she would have remained in employment to the date of this hearing, her loss is the wages she would have earned over that period of time.

Mr Clohessy submitted that the Commission should not order compensation to Ms Hoffmann which includes consideration of the shift allowance component because she has not, in fact, worked and experienced the disability for which that allowance is paid. However, I am unable to agree. It would also be true to observe that Ms Hoffmann did not perform the work for which she was paid her wage yet it cannot be argued that the Commission should not order compensation to Ms Hoffmann for that reason. The likelihood is that the work which Ms Hoffmann would have been required to perform would have been work for which the shift allowance was payable. It follows that the wage that she has lost because of the dismissal is the weekly wage including the shift allowance component.

There is no evidence before the Commission of any loss arising from any injury associated with the dismissal.

Ms Hoffmann is obliged to mitigate her loss, as she acknowledges. She gave evidence that in the months following her dismissal she did look for work but was unsuccessful. She was not cross-examined in her evidence on that point and I have no reason not to accept it. Ms Hoffmann did find work in mid July 1999, some six months after her dismissal. That work has been as a casual with ABC radio. Her earnings between mid July and the middle of December 1999 were $8,015.00. She did not receive any other income in the period leading up to the resumption of the hearing of this matter.

On behalf of the respondent, Mr Clohessy argued that the Commission should take into account that on 11 January 1999 the respondent and Ms Hoffmann entered into an agreement in settlement of a negligence claim in the District Court. The Statement of Claim lodged by Ms Hoffmann in the District Court was against the defendant and alleged—

> negligence, breach of contract of employment and/or breach of statutory duty by the defendant which caused personal injury to the plaintiff during the course of her employment with the defendant on or about 14 April 1998, including all aggravations and/or exacerbations.

The agreement entered into between the parties was for—

> the sum of $35,000.00 damages (exclusive of all payments paid to Ms Hoffmann previously pursuant to the *Workers Compensation and Rehabilitation Act 1981*) plus costs of $2,500.00 in full and final settlement of all causes of action the plaintiff may have had for damages against the defendant arising out of the matters pleaded in the Statement of Claim.

Mr Clohessy argues that that sum of $35,000.00 should be viewed as income which should be taken into account in assessing Ms Hoffmann's loss. He points to her evidence that this sum of money rendered her ineligible for any social security payments. He also argues that the Commission has previously held that workers' compensation payments should be offset against the compensation to be assessed by the Commission under s.23A of the Act. I have considered the authority to which Mr Clohessy referred, that being the decision of the Full Bench in *Bogunovich v Bayside Holdings* (1999) 79 WAIG 8 and 10. As his Honour the President makes clear, workers' compensation payments received by an employee after the dismissal are to be taken into account by the Commission in assessing the employee's loss arising from the dismissal which occurred. In this case, the settlement obtained by Ms Hoffmann did not occur after the dismissal. It occurred before it. Further, and more significantly, it was not a workers' compensation payment. It was a payment in settlement of the claim of "negligence, breach of contract of employment and/or breach of statutory duty by the defendant which caused personal injury to the plaintiff during the course of her employment with the defendant on or about 14 April 1998, including all aggravations and/or exacerbations". It was not a sum of money paid in lieu of wages foregone. Furthermore, had Ms Hoffmann not been dismissed, she would have had the $35,000.00 settlement and also received remuneration from the respondent. What Ms Hoffmann has lost as a result of her dismissal is the remuneration she would otherwise have received. That is the loss and it is that loss which the Commission is obliged to assess. I therefore rule against Mr Clohessey's submission in relation to the $35,000.00 settlement.

On the evidence, therefore, Ms Hoffmann's loss to the date of the hearing is 48 weeks at $484.62 per week. That is $23,261.80. From that is to be deducted the amount of $8,015.00. That leaves $15,246.80 which represents Ms Hoffmann's loss to date. The limit on the compensation the Commission may order is six months of Ms Hoffmann's remuneration. "Remuneration" is a wide concept which can include superannuation contributions and also non-monetary benefits: *Capewell v Cadbury Schweppes* (1997) 78 WAIG 299 at 301. Ms Hoffmann was entitled to a superannuation payment of 7% of her base wage of $421.41 which is $29.50 per week. If six months equals 26 weeks, then the limit set by the legislation of six months of Ms Hoffmann's remuneration

equals 26 x ($484.62 + $29.50). This is a sum of $13,367.10. Although Ms Hoffmann's loss is greater than the limit imposed by the legislation, the Commission is obliged to limit the compensation to be ordered to $13,367.10. There is nothing in the evidence before me which would persuade me that it would not be in accordance with the equity, good conscience and the substantial merits of the case to order that sum as the compensation to Ms Hoffmann. Accordingly, I so order.

The final matter for consideration is that the respondent's letter of termination to Ms Hoffmann makes it clear that she was entitled to annual leave payments of $1,122.24 and four weeks' wages in lieu of notice being $1,938.48. Ms Hoffmann asks that these amounts be included in any order to issue by the Commission pursuant to s.23A(1)(a) of the Act. That provision is a power to the Commission to pay to a dismissed employee any entitlements due. I have little doubt that these two sums represent entitlements that are due. I note that the respondent did pay them at the time of the dismissal but its payment was returned to it by Ms Hoffmann. Notwithstanding, the payment is, nevertheless, due and payable. Mr Clohessy draws attention to the suggestion in the Notice of Answer and Counterproposal that Ms Hoffmann's employment was covered by a Federal award. As Mr Woodward correctly points out, this was not a matter established as a fact before the Commission. Indeed, it was never a matter canvassed in any of the evidence. I am not, therefore, of the opinion that, to issue an order that those entitlements be paid constitutes the Commission enforcing an award of the Federal Commission. On that basis, those entitlements will be included in the order to issue.

The Minute of a Proposed Order now issues.

Appearances: Mr P. Woodward on behalf of the applicant.

Mr R.W. 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.

4 February 2000.

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 orders—

THAT the Western Australian Aboriginal Media Association forthwith pay Jodi Ann Hoffmann—

(a) the sum of $13,367.10 as compensation for the loss caused by her dismissal;

(b) the sum of $3,060.70 by way of entitlements due to her by way of annual leave payments and payment in lieu of notice.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

James Carson Jamison

and

Cenva Pty Ltd t/a SMC Vending Operations.

No. 1293 of 1999.

CHIEF COMMISSIONER W.S. COLEMAN.

12 January 2000.

Reasons for Decision.

The applicant Mr Jamison took up the position of manager of the respondent's retail store, laundry and snack bar operations at Murrin Murrin on 24th June 1999. The appointment provided for a probationary period of 3 months. On 9th August 1999 his services were terminated.

Mr Jamison claims that he was unfairly dismissed. He does not seek reinstatement in employment but submits that his loss or injury arising from the dismissal amounts to the equivalent of 6 weeks pay. This is $3000 (net) based on his annual salary of $40,000 while in employment with the respondent. The amount has been calculated by Mr Jamison with reference to the balance of the probationary period of his appointment with the respondent. The applicant states that he has been unemployed for the period from 9th August until the end of November 1999.

Under the terms of employment Mr Jamison spent 2 weeks out of every three at Murrin Murrin. When he was at the airport preparing to return to work on 8th August he was advised by telephone by an employee on site not to return. Mr Jamison states that he was told that "there would be an explanation further down the track". He ignored this direction and boarded the aircraft. The person who contacted him with the advice was the daughter-in-law of a proprietor of the respondent company.

On his arrival at Murrin Murrin Mr Jamison telephoned Mr Hateley the financial controller of the enterprise and the person to whom he was responsible. Mr Hateley did not know why Mr Jamison had been directed not to return to site but undertook to find out. It transpired that one of the proprietors Mrs Sadie Canning was in Perth. She wished to meet with Mr Jamison to inform him that there was not any benefit in continuing the employment relationship. This view appears to have been based on the respondent's assessment that Mr Jamison had failed to develop the business. Another factor seems to have been conflict between Mr Jamison and Mrs Fleur Canning, Mrs Sadie Canning's daughter-in-law and the person who told him not to return to the site.

It is Mr Jamison's evidence that although he was the manager Mrs Fleur Canning refused to take orders from him. Likewise her brother Roger who was also employed in the business would only take directions from his sister. Roger's understanding and fluency with English was poor. He communicated with his sister in Spanish.

The problems dealing with the employees at Murrin Murrin appear to have been appreciated by Mr Hateley. He advised Mr Jamison "to tread softly softly". Indeed it was known to the respondent that although Mr Jamison was the manager, Mrs Fleur Canning had refused to hand over the accounts. She had been managing the business up until Mr Jamison's appointment.

The problems Mr Jamison confronted when he took over as manager included stock control, cleanliness, laundry standards and production. It is his evidence that he sought to address these matters in a 'hands on' way. He worked from 5.00am to 5.00pm each day. It is Mr Jamison's evidence that it was necessary for him to be at work at 5.00am as that was the busiest part of the day. He acknowledges that Mrs Sadie Canning requested that he work from 9.00am until 9.00pm. However he states that his reasons for the 5.00am to 5.00pm shift were explained and were accepted by her. The matter was not raised by her again although Mr Jamison met with her daily. He notes that Fleur Canning refused to participate in the shift roster.

When Mr Jamison took up the appointment as manager the priorities identified for the position were to "examine all aspects of trading and operations with a view to increasing profits, improving profile and presentation and involvement with Village Forum and Marketing". A key issue was 'business development' with goals and strategies to position the operation for the Stage 2 expansion with Annaconda.

On 4th August 1999 Mr Hateley gave him a priority list which specified stock control, staff rosters, business development and reporting (Ex 2). These matters reflected the issues that Mr Jamison had reported on previously (Ex 6) and initiatives being pursued with P & O for an expanded laundry service. There is no evidence of any aspects of dissatisfaction with his performance being raised with Mr Jamison.

When Mr Jamison returned to Murrin Murrin on 8th August the only comments which appear to have been made were expressions of regret that 'things had not worked out'. Mr Hateley subsequently confirmed the termination of employment. While

the proprietors may have harboured misgivings over his performance and his failure to realise their expectations for the business at no time were these conveyed to Mr Jamison. I accept the evidence presented by Mr Jamison of the difficulties he faced in trying to set the laundry, snack bar and retail shop on a firm basis. To expect that business development should have been pursued without that being done would be folly. However within the limits of what was being addressed by Mr Jamison to secure stock control, proper ordering procedures, work routines and laundry production I am satisfied that he was still able to pursue opportunities for the development of the business. It is insufficient to establish an appointment on a probationary basis and then fail to give the incumbent feed back or directions if expectations are not being met. The situation is even more difficult for an appointee if he or she is faced with intractable issues of staff management which are recognised to be beyond that person's control. That was the position of Mr Jamison's employment. Without proper support it is unlikely that anyone would have succeeded.

In all the circumstances I am satisfied that the applicant has discharged the onus of establishing that he was unfairly dismissed. While it appears that the relationship could have been amicably concluded at one stage, the comments that he should count himself lucky that the return air fare from Murrin Murrin was not deducted from his entitlements did nothing to assist the situation.

In coming to the conclusion that the applicant was unfairly dismissed I do not want to be seen as having impugned the integrity of Mr Hateley. He presented in an honest and forthright manner as indeed did the applicant. However Mr Hateley was not directly involved in the termination of Mr Jamison's employment. It is clear that he was not privy to any of the misgivings subsequently being expressed by the proprietors on site. Mr Hateley was unable to present evidence to refute that presented by the applicant on his performance and Mr Hateley had never expressed any dissatisfaction with Mr Jamison.

It is clear that the relationship between the parties has broken down. Reinstatement or re employment is impractical.

In the light of evidence put forward by the applicant on the extent of his loss arising from his unemployment since the termination of his appointment with the respondent, I am satisfied that the amount of $3000 (net) which equates to the balance of earnings Mr Jamison would have received during the remainder of the probationary period is equitable compensation. I so order.

Appearances: Mr J Jamison on his own behalf

Mr Hateley on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

James Carson Jamison

and

Cenva Pty Ltd t/a SMC Vending Operations.

No. 1293 of 1999.

CHIEF COMMISSIONER W.S. COLEMAN.

24 January 2000.

Order.

HAVING heard on Mr J. Jamison on his own behalf and Mr L. Hateley on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the Industrial Relations Act, 1979 do hereby order —

1. Declares that the applicant was unfairly dismissed from his employment with the respondent on 9th August 1999;
2. Declares that it is impracticable to reinstate the applicant to his former position.
3. Orders that the respondent pay the applicant the sum of $3,000.00 (net) by way of compensation; and
4. That the respondent pay to the applicant this amount within 28 days from the date of this Order.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

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.

15 December 1999.

Reasons for Decision.

THE COMMISSIONER: This interlocutory application brought by the applicants in these matters, seeks to join Lodi Holdings Pty Ltd and Torcello Holdings Pty Ltd (the Proposed Respondents) as respondents to the substantive applications. This application has arisen during the course of the hearing of the substantive matters.

The applicants have sought the joinder of the Proposed Respondents pursuant to the Commission's procedural powers contained in s 27(1) of the Industrial Relations Act 1979 ("the Act"). The Proposed Respondents were given due notice of the applicants' application and an opportunity to be heard in relation to it.

It was common ground that the sole purpose of the application is to obtain discovery and inspection of documents which the applicants consider that the Proposed Respondents may have in their possession, power or control, which relate directly to the matters in question in the substantive proceedings. In short, Mr Long, counsel for the applicants, submitted that the proposed orders were within the Commission's jurisdiction as they were an industrial matter, and did not involve an abuse of the Commission's process. Furthermore, he submitted that in terms of merit, that by reason of the relationship between the respondent and the Proposed Respondents, in terms of their respective shareholdings and common directorships (see exhibit A23), a reasonable inference is able to be drawn that either or both of the Proposed Respondents may have in their possession, power or control, documents that are relevant to the substantive applications. It was submitted that the applicants would be materially prejudiced in their ability to prosecute their claims, if they were deprived of access to such documents in the course of the proceedings.

The application has arisen primarily because the respondent said that it has no documents in its possession, power or control, that relate to the sale and subsequent closure of the abattoir at which the applicants were formerly employed.

It was submitted further by Mr Long, that the application was not an abuse of process because the production of documents issue was directly relevant to the substantive proceedings and was not unrelated to the inquiring into and dealing with the substantive matters pursuant to s 23 of the Act. In relation to the question of the corporate relationship between the respondent and the Proposed Respondents, Mr Long submitted that the Proposed Respondents had an interest in the substantive applications because of their relationship with the respondent.

It was also submitted that the evidence disclosed by exhibit A23, enabled an inference to be drawn that control and/or ownership of the respondent was to be found in either or both of the Proposed Respondents. In this regard, it was said by counsel that the orders sought against the Proposed Respondents were ancillary and necessary to determining whether relief should be granted by the Commission in the substantive proceedings. Mr Long therefore submitted that the Proposed Respondents had a sufficient interest to justify them been joined as parties to the applications.

Counsel for the Proposed Respondents Mr Fruetrill, objected to the application to join on two bases. The first submission was that there was no jurisdiction for the Commission to make the orders sought, as there was no industrial matter between the applicants and the Proposed Respondents. Reference was made to the relevant provisions of ss 7, 23(1) and 27 of the Act. The submission was that the procedural powers in s 27 of the Act must have, as their foundation, a live industrial matter. It was said that the applicants sought no relief or made any allegations against the Proposed Respondents of a substantive nature to be adjudicated by the Commission. In particular, counsel submitted that the mere provision of discovery by a person or persons said to be completely disinterested in the proceedings was not an industrial matter.

The second basis of objection put by the Proposed Respondents was that in any event, the stated purpose of the application being only to seek the discovery of relevant documents, it was an abuse of the Commission's process that the Proposed Respondents be joined solely for this purpose. In this regard, reference was made by Mr Fuetrill to *Christmas Island Resort Pty Ltd v Geraldton Building Co Pty Ltd* (1997) 18 WAR 334 at 343F to 345B and to *Flower and Hart v White Industries (Queensland) Pty Ltd* (1999) 163 ALR 744. It was submitted by counsel that neither of the Proposed Respondents had any interest in the proceedings between the applicants and the respondent. Furthermore, it was submitted that there were available to the applicants other processes in order to obtain relevant documents.

I turn now to consider the various submissions made in support of and opposing the application.

Industrial Matter

The first issue is whether the application is an industrial matter for the purposes of the Act. The definition of "industrial matter" contained in s 7 of the Act relevantly provides as follows—

> *" 'Industrial matter' means, subject to s 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...".*

It is well settled that the meaning of "industrial matter" contained in s 7 of the Act is very broad, and indeed is broader than for example, the corresponding provision of the Commonwealth legislation. In *The Minister for Police and Another v Western Australian Police Union of Workers* (1994) 75 WAIG 1504 at 1508 Franklin J, (with whom Kennedy and Rowland JJ agreed) described the approach to the definition of "industrial matter" in terms of a two step process. The first step being a consideration as to whether the matter in issue falls within the description of "work, privileges, rights or duties" of the employer or employee or employers or employees as the case may be. Once that is identified, the next step is to determine whether the matter in issue affects or is related to that identified "work, privilege, right or duty". There was no suggestion by counsel that the otherwise broad definition of "industrial matter" should, for any reason, be read down in the context of the present application.

In my opinion, the matter of the application to join the Proposed Respondents is an industrial matter. The matter to which the first step of the two step test relates clearly is the dismissal of the applicants by the respondent, and the allegation as to their unfairness and the contractual benefits claims. In a general sense, the matter of discovery and production of documents, in the context of the present claims, is clearly a matter that "affects or relates to the work, privileges, right or duties of employers and employees". Furthermore, I accept Mr Long's submission that the question of discovery and production of documents relates to the duty of an employer to notify its employees in relation to possible termination of employment and matters affecting that employment again, in the context of the present claims.

Therefore, I reject the Proposed Respondents' submissions that the matter is not an industrial matter.

Abuse of Process

For the following reasons in my view, there is more substance in this submission advanced by the Proposed Respondents. As identified above, there is no contest that the sole reason for joining the Proposed Respondents is in order to obtain discovery of documents. As a general proposition, an abuse of process in a court or tribunal will arise in circumstances where the court or tribunal's processes are sought to be used for a purpose other than that for which the proceedings are intended or that some ulterior purpose is the basis for the proceedings under challenge: *Christmas Island Resort Pty Ltd* (supra) at 343F to 345B. In *"Australian Civil Procedure"* by B Cairns (2nd Ed) the learned author observes at 350—

> *"It is an abuse of process to join a party simply to obtain discovery from him. As there is no substantive cause of action against such a party he would be dismissed from (sic) action on a summary application."*

The learned author then refers to the case of *Nicholls v McLeay* (1971) 1 SASR 442 in which Chamberlain J said at 445—

> *"There is, as is stated in an article in the Australian Law Journal, Vol 44 (1970) p 388 "much authority for the proposition that persons should not be made parties to an action solely for the purpose of obtaining discovery." Amongst the cases cited to me were Wilson v Church (1); Burstall v Beyfus (2); Burchard v MacFarlane; ex-parte Tindall (3); Gould v National Provincial Bank Ltd (4), but in all of these cases substantive relief was either not sought or not available against the party against whom discovery was claimed. I respectfully agree that it would be an abuse of process to join a party against whom no substantive relief could possibly be obtained simply for the purpose of obtaining discovery, although even this proposition does not appear to be universally accepted.*

His Honour then referred to *Penfold v Pearlberg* (5) (1965) 3 All ER 120.

I have carefully considered these authorities and the article referred to by Chamberlain J in *Nicholls*. In my opinion, it would be, based upon these authorities and materials to which I have referred, an abuse of process for the Proposed Respondents to be joined to the substantive applications solely for the purpose of obtaining discovery. In this connection, it also could be said that given that this is the sole purpose, the Proposed Respondents do not have a sufficient interest in the matter to be determined before the Commission: *State School Teachers Union of Western Australia (Incorporated) (*1990) 70 WAIG 2563. It appears to me that the appropriate course for the applicants to seek to obtain relevant documents is to utilise the relevant provisions of the Act and regulations in relation to the summonsing of witnesses, in the absence of any provision in the Act or regulations for a subpoena duces tecum or for the discovery and inspection of documents from a non-party. Whilst this may not be particularly efficacious from the point of view of the applicants, in view of the fact that any such documents are only made available at the hearing of a matter, this appears to be the only course available.

For these reasons the application to join the Proposed Respondents to the substantive applications is dismissed.

Appearances: Mr J Long of counsel appeared on behalf of the applicant.

Mr M Fuetrill of counsel appeared on behalf of Lodi Holdings Pty Ltd and Torcello Holdings Pty Ltd.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Kenneth Charles Landwehr &
Mark Leonard Peterson

and

Wynnes Pty Ltd & Another.

No. 366 & 367 of 1999.

COMMISSIONER S J KENNER.

16 November 1999.

Order.

HAVING heard Mr J Long of counsel on behalf of the applicants and Mr J Ley of counsel 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 Milne Feeds Pty Ltd be struck out as a respondent to the applications.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mark Leonard Peterson

and

Wynnes Pty Ltd.

No. APPL 367 of 1999.

COMMISSIONER S J KENNER.

14 January 2000.

Order.

Having heard J A Long of counsel on behalf of the applicant and Mr J Ley of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby discontinued by leave.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Irene May Lawson

and

Night Crest Pty Ltd as trustee for the King Kong Sales Unit trading as King Kong Sale.

No. 475 of 1999.

21 September 1999.

Reasons for Decision.

(Given extemporaneously at the conclusion of the submissions, as edited by the Commissioner.)

COMMISSIONER C.B. PARKS: The application before the Commission is one in which the applicant, Ms Lawson, alleges that she was unfairly dismissed from her employment with the respondent on 29 March 1999, and that as a consequence of the dismissal there are benefits under the contract of employment that she was entitled to but did not receive.

At a conference conducted pursuant to section 32 of the Act, on 3 June 1999, the Commission established that the two claims for the benefits of wages in lieu of notice, and pro rata annual leave claimed are grounded upon the provisions of the Shop and Warehouse (Wholesale and Retail Establishments) Award which applied to the employment. Hence they are not benefits which arise from the contract of employment but matters of enforcement that fall outside the jurisdiction of the Commission.

The complaint of unfair dismissal is accompanied by a plea for monetary compensation and other forms of relief which, for the reasons that follow, I need not address further.

At the request of the respondent the applicant attended the office of the respondent on a non-working day, where she met with Ms Dawes and another. In that meeting Ms Lawson was informed her services were terminated. The reason given for that termination, the applicant has described as a "cut-back in hours". Ms Dawes described it somewhat differently. However, the end result is the same. The advice given to Ms Lawson was to the effect that the business needed to reduce costs and sought to do that via a reduction of the number of hours people were employed which meant a reduction in wages costs.

Plainly the applicant does not accept the reason given is the true reason for the termination of her services. That conclusion Ms Lawson reached for two reasons. Approximately one week prior to the termination of her services the applicant had discussion with her manager in relation to the non-registration of an intended Workplace Agreement the parties had executed. At that time the manager is said to have wrongly attributed blame to Ms Lawson for the non-registration of the agreement.

The second matter which Ms Lawson says caused her to conclude as she did is that other persons had been engaged as employees shortly prior to the time of her dismissal, thus indicating that the respondent needed those additional persons to meet the work requirement. Hence there was no apparent need for the respondent to dispense with her services.

Ms Lawson also says that Ms Dawes, in the meeting at the time of her dismissal conceded that she had interviewed one of the persons who was engaged prior to the dismissal of Ms Lawson. One further indication that there was a need for employees to perform the duties is said to be the appearance of an advertisement approximately one week subsequent to the dismissal inviting 15 to 17 year old persons to seek employment with the respondent.

Ms Dawes did not address whether or not in fact she had interviewed and engaged an employee shortly prior to the dismissal of Ms Lawson. Ms Dawes did refer to three employees, whom I understand to be junior employees, engaged at or about that time whose employment is said to have ceased shortly thereafter. Furthermore, the Commission is told that following the date of dismissal several of the stores operated by the respondent ceased operation, and that there were also other reductions made to staffing levels. Ms Dawes concedes that following the staff reductions it became apparent that adjustments were required and some casual employees were sought.

The law in relation to claims for unfair dismissal is well settled. Both an employer and an employee are, according to the contract of employment that exists between them, entitled to bring their relationship to an end. However, it is well settled that an employer exercising the right to dismiss shall not do so unfairly. It is also well settled, that the onus of proof that there was unfairness in a dismissal lies with the applicant who alleges that to be the case.

The fact that three junior employees commenced prior to the dismissal of Ms Lawson and their services were not brought to an end before her services were terminated understandably caused the applicant to suspect the motive for her dismissal, particularly in view of the incident with her manager in relation to the non-registration of the workplace agreement. However, there is no evidence to show that the non-registration of the proposed Workplace Agreement is connected with the dismissal.

Notwithstanding the suspicions that Ms Lawson has, she has failed to discharge the onus of proof and show to the Commission that the reason given for her dismissal was not a true and valid reason for the employer to bring her services to an end. That being so the Commission is not satisfied that the dismissal was unfair on the grounds claimed and accordingly the application will be dismissed.

Appearances: Ms I.M. Lawson on her own behalf

Ms Dawes on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Irene May Lawson

and

Night Crest Pty Ltd as trustee for the King Kong Sales Unit trading as King Kong Sale.

No. 475 of 1999.

25 January 2000.

Order.

HAVING heard Ms IM Lawson on her own behalf and Ms Dawes 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.

Sean Martin

and

Timothy John Sampson

No. 399 of 1999

Lesley Warren Cooper

and

Timothy John Sampson.

No. 510 of 1999.

COMMISSIONER A.R. BEECH.

20 December 1999.

Reasons for Decision.

(Given extemporaneously at the conclusion of the hearing, as edited by the Commission)

The Commission has before it two claims, they being from Mr Martin and Mr Cooper. Although they have been dealt with separately, they have some common elements, and it is those common elements that I am able to deal with now.

It is quite clear that both Mr Martin and Mr Cooper were employed and they did work between the dates that they have mentioned, but the controversial point between them and Mr Sampson is whether or not it was a term of their employment that the rate of $1.50 per bale was payable subject to the bales achieving, on average, a weight of 585 kilos. They deny that it was. Mr Sampson has a contrary view because he saw it as an incentive such that if that weight was achieved then accommodation and meals would be provided.

The claim of Mr Martin really turns upon whether or not it was a term of his employment. In Mr Cooper's claim there is also the additional issue whether he is owed a further 3 days' remuneration for work that he performed.

In each case, with both Mr Martin and Mr Cooper, the contract of employment between them both was not in writing. Neither of them had any documents to show what the terms were when they first started employment. Mr Martin gave evidence about the terms of employment as did Mr Sampson.

In a matter such as this, the onus of proving on the balance of probabilities that the contract of employment was as Mr Martin says lies on Mr Martin. It is not up to Mr Sampson to prove to the contrary. It is up to Mr Martin to prove that his claim is correct.

Obviously I, as a Commissioner, was not there. I have to find a way of determining which of the two versions I am prepared to accept. If I look at the evidence overall, I accept that Mr Sampson's own remuneration is based upon the weight of the bales that are produced not on the number of bales. That was Mr Sampson's evidence and it was not in any sense challenged by Mr Martin under cross-examination. I have no reason to disbelieve it.

I therefore find that if Mr Sampson himself is remunerated by the weight of the bale, it is more likely than not that he would impose some kind of a weight restriction on his own employees. I therefore find that it is more likely than not that it is Mr Sampson's version of the contract of employment that is likely to have prevailed. I also found, when Mr Sampson was giving evidence, that none of Mr Martin's cross-examination, none of the questions that he asked, shook Mr Sampson in his evidence. He didn't say "Yes, you're right. I've made a mistake", nor did he retract or change is evidence.

Although I believe Mr Martin gave his evidence in good faith, he has not proven on the balance of probabilities to me that he has been underpaid in the way that he suggests. For example, even in relation to the issue of accommodation, it was Mr Martin's own evidence that Mr Sampson said in front of his wife that he, Mr Sampson, would take care of the accommodation. Mr Sampson denies that he said it. Mr Martin did not call evidence from his wife to substantiate his own evidence. It is his word against Mr Sampson's word, and for the reasons that I have given I tend to prefer the evidence of Mr Sampson that the rate of $1.50 per bale was payable subject to the bales achieving, on average, a weight of 585 kilos.

I also put to Mr Martin during his own cross-examination that his reference to his belief that it was impossible to get the bale weights that are talked about tends to make me think that there was a weight element in the bales. Therefore to the extent that Mr Martin's and Mr Cooper's claims rely upon that issue, I do not believe that Mr Martin has made out the claim.

In relation to Mr Cooper's claim of 3 days' wages for other work that was performed, again I am not satisfied on the evidence that I could make an order in Mr Cooper's favour. There is nothing in Mr Cooper's own claim that if he performed work other than baling he would be paid at a different rate. It is not evident from his paperwork, and Mr Sampson's evidence that work other than baling was all part of the one deal has not, in my view, been shaken.

I do not pass any views about the fairness or unfairness of what occurred. I merely have to establish as a matter of fact what were the terms of the contracts of employment and, as I have indicated, the onus is upon Mr Martin to prove his claim, and the claim of Mr Cooper. For the reasons that I have set out, I do not believe the claims have been made out. I therefore intend to issue an order that dismisses both of claims. The reasons that I have given now will be produced in writing and sent to you and you will have an opportunity to consider what I have said and see whether you want to take the matter further. But that concludes the matters and an order will now issue that dismisses both applications.

Appearances: Mr S. Martin on behalf of himself as the applicant and on behalf of Lesley Warren Cooper.

Mr T. Sampson on behalf of himself as the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Sean Martin

and

Timothy John Sampson.

No. 399 of 1999.

13 January 2000.

Order.

HAVING HEARD Mr S. Martin on behalf of himself as the applicant and Mr T. Sampson on behalf of himself as the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the application be dismissed.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Lesley Warren Cooper

and

Timothy John Sampson.

No. 510 of 1999.

13 January 2000.

Order.

HAVING HEARD Mr S. Martin on behalf of the applicant and Mr T. Sampson on behalf of himself as the respondent,

the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the application be dismissed.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Antoinette Mladineo

and

BRL Hardy Wine Company.

CRN 008 273 907.

No. 1954 of 1999.

3 February 2000.

Reasons for Decision.

(Given extemporaneously at the conclusion of the submissions, taken from the transcript as edited by the Senior Commissioner)

SENIOR COMMISSIONER: By these proceedings the Applicant alleges that she was unfairly dismissed from her employment with the Respondent and seeks compensation by way of relief. She was employed by the Respondent as a machine operator and by her Notice of Application says that she was dismissed by being forced to resign on 6 December last, or thereabouts. The Respondent for its part denies that she was dismissed and in particular denies that she was forced to resign. It says that she resigned of her own volition after being admonished for not apologising to a fellow employee, as it asserts, had been previously agreed would happen.

Furthermore, the Respondent says that the Commission does not have jurisdiction to entertain this claim because the Applicant was at all material times a party to a collective workplace agreement which does not contain a provision, it says, for the Commission to deal with an application of this nature. Moreover, the Respondent says that even if the Commission did have jurisdiction, the dismissal was not unfair because she simply was not dismissed.

The evidence before the Commission, supported by a letter from the Commissioner of Workplace Agreements, is that the Applicant is a party to the Respondent's collective workplace agreement numbered 99/357. The Applicant does not dispute that she, in fact, signed a workplace agreement and that workplace agreement has, ostensibly at least, been registered as the Commissioner of Workplace Agreements by his letter, suggests. However, the Applicant really challenges the veracity of the registration process and as I understand it, suggests amongst other things, that the Commissioner of Workplace Agreements could not have been satisfied that the Applicant understood what was in the workplace agreement. I understand the Applicant to say that (although there is no evidence of it) she did not speak to the Commissioner regarding the agreement. Secondly, as I understand it, the Applicant challenges the veracity of the registration of the agreement on the grounds that the workplace agreement does not strictly comply with the statutory requirements of the *Workplace Agreements Act 1993*. Thus, the argument is that the workplace agreement is not a workplace agreement and hence should not operate to outlaw the current proceedings.

Furthermore, the Applicant argues that even if the workplace agreement was taken to be regularly registered, it should be read as making provision for the Commission to deal with an application of this nature. In this respect the Applicant relies on clause 8 of the agreement, which purports to govern the resolution of disputes and grievances. Clause 8.1(3) provides that if the matter is not resolved it must be submitted to the Employee Relations Commission, which I take for the present purposes, to be the Industrial Relations Commission of this State, or submitted to an agreed mediator for the purposes of "conciliation and mediation". The agent for the Applicant argues that a broad interpretation should be put on that clause such that it compels the parties in the absence of agreement to come to the Employee Relations Commission for arbitration and includes as part of that process an application with respect to unfair dismissal.

In my view, there is no merit in either of the arguments. It is not disputed that the workplace agreement has been registered and it is not disputed that the Applicant has signed, or is a party to, the registered workplace agreement. It is thus a workplace agreement in force under the *Workplace Agreements Act 1993* and therefore a workplace agreement for the purposes of section 7G of the *Industrial Relations Act 1979*. I do not believe, and am certainly not satisfied, that the Commission has jurisdiction to go behind the action of the Commissioner of Workplace Agreements in registering the workplace agreement in question. The Industrial Relations Commission is not the supervisory tribunal for the activities of the Commissioner of Workplace Agreements. That, seemingly, is the task of the Supreme Court. There are a number of authorities which suggest that the Commission, as a statutory tribunal, has limited powers and has no jurisdiction to go behind the statutory actions of the kind envisaged by the *Workplace Agreements Act 1993* (see: *Australian Glass Manufacturing Co Pty Ltd & Ors v. Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch & Ors (1992) 72 WAIG 1499; The Registrar of the Western Australian Industrial Relations Commission v. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch (1999) 79 WAIG 2975, 2976*). In my view, the Commission does not have jurisdiction to undertake the task which the agent for Applicant invites it to undertake on this occasion. Certainly, I am not convinced that it has that authority, based on the modern decided cases.

Despite the valiant efforts by the agent for the Applicant to persuade me that the dispute settling procedure contained in the workplace agreement gives the Commission authority to deal with this matter, I am not convinced that it does. In my view, clause 8.1(3) deals exactly with what it says, that is, "conciliation and mediation". Arbitration is dealt with separately by clause 8.1(4) and provides that the parties may agree to submit the dispute to arbitration and if so agreed, the decision must be accepted by the parties subject to an appeal being available. In this instance it is patently obvious that there is no such agreement. In my view, the dispute settling procedure contains a number of steps, the third of which is conciliation and mediation and the fourth of which is arbitration. Each is dealt with separately in the agreement. Arbitration is the fourth step and thus I think it is simply reading too much into clause 8.1(3) to say that as well as "conciliation and mediation" it also includes arbitration. In any event, I am not convinced that even if it did include arbitration the sub-clause meets the requirements of section 7G of the *Industrial Relations Act 1979*. That section, as I read it, requires the workplace agreement to stipulate clearly that the Commission has authority to deal with a claim that an employee has been harshly, oppressively or unfairly dismissed from employment. Not by any manner or means can it be said that clause 8.1(3) contains such a provision. It may also be, in light of the authority referred to by the agent for the Respondent, namely *Milgate v. Heyder & Shears Exclusive Caterers (WAG 3 of 1999, 20 October 1999, unreported)*, that the employment having been terminated it is impermissible in any event for the Applicant to rely on the dispute settling procedure. In the circumstances, I do not find it necessary to deal with that matter.

For the reasons outlined, I am not convinced that the Commission has jurisdiction to deal with the matter. Indeed, in my view, the provisions of the workplace agreement operate in the circumstances to preclude the Commission from dealing with the matter. The application ought, therefore, to be dismissed. It may be that the Applicant finds herself in a difficult position because of the statutory time limits but the law can only be enforced as it is and not on the basis of what it should be.

Appearances: Mr G McCorry on behalf of the Applicant

Mr A N Mackey on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Antoinette Mladineo

and

BRL Hardy Wine Company.

CRN 008 273 907.

No. 1954 of 1999.

3 February 2000.

Order.

HAVING heard Mr G. McCorry as agent on behalf of the Applicant and Mr A.N. Mackey as agent on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the applicant be and is hereby dismissed for want of jurisdiction.

(Sgd.) G. L. FIELDING,
[L.S.] Senior Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Peter Morete

and

Unique Metal Works Pty Ltd.

No. 1855 of 1996.

18 January 2000.

Reasons for Decision.

COMMISSIONER C.B. PARKS: The application which refers the complaints of Mr Morete to the Commission alleges that he was unfairly dismissed from his employment by the respondent, and that the respondent failed to pay him monetary benefits he had been due according to his contract of employment. The application asks that the Commission order his reinstatement in employment, and the payment at the benefits said to be due, in remedy.

An answer filed in response to the application firstly asserts that the employment of Mr Morete was terminated because the need occurred to reduce the workforce by reason of redundancy, and he had been chosen for reasons therein specified, secondly it is denied that his dismissal was effected in an unfair manner, and thirdly it asserts that the benefits claimed do not arise under his contract of employment, but are benefits of the kind prescribed by the award applicable to the employment, and therefore such claims fall outside the jurisdiction of the Commission to hear and determine.

At the hearing of the matter it was submitted on behalf of the applicant that should the Commission find that there had been an unfair dismissal it ought remedy such either by reinstating the applicant in employment with the respondent, or alternatively, the respondent be ordered to pay him compensation equal to the wages he would ordinarily have received in a six month period. There was no attempt to prosecute the second head of complaint that the respondent had failed to pay Mr Morete benefits he had been due according to his contract of employment and hence there is no need to address that matter further.

The respondent fabricates products with sheetmetal, aluminium, and stainless steel, and so far as is presently relevant operated a section in which the applicant performed sheetmetal related work. There is no dispute that the applicant is not a tradesperson and that his duties were semi-skilled however the parties differ on the range of duties performed and the degree of skill he was, competent to, and was required to, exercise. In the early part of the employment Mr Morete worked away from the workshop for periods when he assisted a tradesperson with on-site work, and on a few occasions during the course of his employment he also drove a motor truck to carry goods for the respondent. At the date of the dismissal in December 1996, and for some time prior thereto, the applicant had been engaged in the workshop predominantly upon work involving the manufacture, inspection, and touch-up painting, of powder coated sheetmetal heater cassettes, including their packing for despatch.

It is common ground that on the day the employment of Mr Morete ended such was preceded by his attendance to an office where he met with Peter Figliomini, the Managing Director for the respondent, and Siegfried Norbert Niemann, the Works Manager for the respondent, and the termination of his employment was announced to him. The applicant thereafter held a telephone conversation with his female partner, he then collected his tools from his workplace and proceeded outside the workshop where he waited for his female partner to arrive with a motor vehicle and transport him away.

According to Mr Morete, Mr Niemann announced to the effect that his services were no longer required and that he was to gather his tools and leave, and that Mr Figliomini referred to his rate of work as having been too slow, he had been absent from work too often, and that there had been conflict between him and another employee named Michael, which he, the applicant, understood were given as the reasons for his dismissal. Mr Morete says that he collected his tools and was waiting outside the workshop when he was approached by Mr Niemann who then said he was giving him notice of one week to terminate the employment, a statement he says he viewed as having no effect because he had already been dismissed.

Both Mr Figliomini and Mr Niemann say that the applicant was told he was being given notice to terminate his employment, and Mr Figliomini asserts that he expressly mentioned six working days of notice. Mr Niemann described the notice given as one week. The applicant is said to have been told the reason for his dismissal was that the workload in the workshop had diminished, also his rate of work had been slow, and his level of absence from duty had been too great. It is their further evidence that at the time Mr Morete plainly comprehended he had not been dismissed with immediate effect and in that regard he is said to have been heard to ask his female partner in their telephone conversation whether he should remain, or leave immediately, and it thereafter followed that he did the latter. Mr Niemann denies that he told the applicant to "pack his tools" and that he spoke to Mr Morete regarding notice of dismissal where he waited outside the workshop. The recollection of Mr Figliomini is that the final decision to dismiss the applicant was made the day prior to him being informed, whereas Mr Niemann said he thought such had been made two days prior, and both say that such flowed from a management meeting approximately two weeks earlier when it was known that the heater cassette work upon which Mr Morete had been engaged was ending, and it appeared no alternative work was available that he was suited to perform. Paul Wayne Figliomini, the Quality Manager for the respondent, whom Messrs Peter Figliomini and Niemann say participated in the material management meeting, recollects attending such a meeting in the month prior to the dismissal and his evidence confirms that the available workload was a matter discussed. Mr Paul Figliomini expressed the opinion that the applicant was the obvious first choice to be made redundant at the time it was appropriate to reduce the workforce.

I am satisfied from the evidence of Messrs Peter Figliomini and Niemann that Mr Morete was given six working days of notice to terminate his employment, and that the applicant had been engaged upon repetitive semi-skilled work of the kind which the respondent no longer had need for, and that the overall workload did not increase until two or three months later. The applicant contends that the respondent could readily have continued his employment by allocating him the work of driving the respondent's motor truck to cart goods and materials, however the evidence is plain that the need did not exist to have one employee allocated to that duty alone as the vehicle was used infrequently and the driving duties, like on the occasions that Mr Morete performed them, were performed by different employees as an adjunct to their usual duties when the need arose. The Commission is also satisfied that management had not been satisfied with the performance of, and the absence from duty by, the applicant and although such was of some relevance in the decision to dismiss him, the principal reason was that he had become redundant to the respondent's reasonable needs. Hence there was valid reason to dismiss the applicant.

Counsel for the applicant correctly asserted that notwithstanding a valid reason for a dismissal may exist, a dismissal may however be effected in such a way that it is procedurally flawed to an extent that renders it unfair. Counsel contends that the respondent acted in breach of s.41 of the Minimum Conditions of Employment Act 1993 in that, management having decided to make Mr Morete redundant, did not discuss with him the likely effect upon him, or discuss measures that may have been taken to avoid or minimize the effect thereof, and that conduct renders the dismissal unfair. Plainly discussions of this kind were not entered into with the applicant, and that was wrong, however the testimony of Mr Peter Figliomini convinces me that the respondent had no alternative suitable employment it might provide the applicant and hence the required discussion would have brought no different result. In my view this procedural error by the respondent, given the circumstance of the case, is not such as to render the dismissal unfair. The application before the Commission will therefore be dismissed.

Appearances: Mr P. Ward, of Counsel on behalf of the applicant

Mr A. Randles on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Peter Morete

and

Unique Metal Works Pty Ltd.

No. 1855 of 1996.

18 January 2000.

Order.

HAVING heard Mr P. Ward, of Counsel on behalf of the applicant and Mr A. Randles 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.

Simon Paul Morseto

and

Mezzonine Pty Ltd t/a The Lunching Pad.

No. 1457 of 1999.

17 November 1999.

Order.

HAVING HEARD Mr S. Morseto on behalf of himself as the applicant the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

1. THAT to the extent that paragraph 20 of Application 1457 of 1999 is a claim by Simon Morseto that he was unfairly dismissed that part of the claim is withdrawn by leave; and
2. THAT Simon Morseto serve a copy of this Order together with a copy of Application 1457 of 1999 upon Mezzonine Pty Ltd within 7 days of the date of this Order.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Spiro Naumovski

and

Neil Temple Scott/IV Entertainment Pty Ltd.

No.1285 of 1998.

COMMISSIONER J F GREGOR.

24 December 1999.

Reasons for Decision.

THE COMMISSIONER: On 8 July 1998, Spiro Naumovski (the applicant) applied to the Commission for orders pursuant to section 29 of the Industrial Relations Act, 1979 (the Act). The applicant claimed that he was entitled to benefits not being an Order or Award of the Commission and that he had been unfairly dismissed. The applicant based his claim on his contract of employment between himself and Neil Temple Scott/IV Entertainment Pty Ltd (the respondent). The details of the claim for contractual benefits were not provided in the Application. However, they were set out in a Schedule of Further Particulars of Contractual Benefits, which became *Exhibit B1*. In total, the applicant claims payment for 1,276.06 hours of work conducted at 73 Rupert Street, Subiaco; 230 Marine Parade, Cottesloe; Yanagan Crescent; Boronia Street, City Beach and at the club premises at 78 James Street, Northbridge. In its final form, the Schedule sought payment of $16,125.00.

Additionally, the applicant claims that he was unfairly dismissed. On 11 June 1998, the respondent demanded the club keys after the applicant allegedly failed to correctly place a bar mat.

The matter was heard by the Commission over a period of six (6) days commencing on 6 May 1999 completing on 26 November 1999 at which time the matter was reserved for decision.

Most of hearing time dealt with evidence concerning the alleged contractual benefits claim. Evidence from both parties regarding the unfair dismissal was relatively short. My Reasons for Decision will disclose that the claim is not unusual. I do not intend to summarise the evidence, concerning the contractual benefits claim. My reasons for doing so will become clear later. Rather than summarising the evidence, an overview of the applicant and respondent's relationship sufficiently contextualises these Reasons for Decision.

The respondent has operated nightclubs in Perth from early 1980. The applicant met the respondent through a friend. He was introduced as a potential glass collector for the respondent's nightclub when he was approximately 18 years of age. The respondent contends that the applicant wished to become involved in the nightclub industry when they first met. The respondent asserted that this was the applicant's passion. Over succeeding years, the applicant worked for the respondent and they developed a social friendship. The respondent claims that they became good friends and he was interested in the applicant and his career aspirations. The respondent suggested that the applicant become involved in brick paving and taught him the trade, providing advice when required. Whilst involved in the brick paving business, the applicant did not work full-time at the respondent's club but their association continued.

The respondent's nightclub burnt down in September 1993. The applicant and respondent's relationship was renewed, on a social basis at this time. The respondent and friends decided to redevelop the nightclub. The respondent, in his evidence, contends that the club was redeveloped through a combination of voluntary and paid work conducted by employees and friends. The applicant, while working with an asphalt company, helped redeveloped the club using his building skills when required. According to the respondent, this changed when the applicant advised him that he had left the asphalt company and wanted to work for the respondent. The respondent claims against his better judgement, that he offered the applicant work at the club. The respondent assumed that the applicant believed he had, by leaving the asphalt company, committed himself to the respondent. The respondent asserted that the applicant was not asked and did not perform the skilled tradesman work

claimed in the Schedule of Further Particulars of Contractual Benefits. The respondent objects to the claims in the Schedule on numerous other grounds as well. In particular, although, the applicant did assist the respondent and others on some occasions he was not and was never asked to do the work of the nature that is described in the Schedule of Further Particulars of Contractual Benefits.

The respondent discovered that the applicant left the asphalt company's employ not because he wanted to work for the respondent. Rather he had lost his driver's licence and was unable to fulfil his contract of service. Prior to re-opening the club, the respondent asked the applicant to become an approved manager pursuant to the Licensing Act. Due to a series of criminal convictions the applicant was unsuitable. The respondent claims that the applicant became demoralised, began loafing around the club, did not receive stock properly and refused to learn cocktails and general bar etiquette causing workers to complain about the applicant's conduct. The applicant contends that he threw himself into his work at the club involving long hours in responsible positions. The applicant denied that he had problems with other workers and denied that he had, without authorisation, removed money from the tills and was unable to balance tills.

During cross-examination, the applicant admitted to having taken drugs socially and with the respondent. The respondent contended that he advised the applicant to stop consuming illegal substances.

In June 1998, the respondent discovered that the applicant had incorrectly placed some bar mats and asked him why he had done it. The applicant replied that he was under too much pressure. The respondent gave the applicant a few weeks break and asked him to return the keys which he did without complaint. When the applicant visited the club to collect some of his possessions, they had an altercation. The respondent believed that was the end of the matter and expected the applicant to come back to work in a few weeks. If the applicant apologised, the respondent considered all would be well.

The applicant contends that he had worked for almost 24 hours straight and required sleep. However, the respondent telephoned, from another part of the club, asking the applicant to collect the bar mats and put them in the bar. He admits that he put them upside down. The applicant left the club, slept and returned to the club. During this time, the respondent had been sleeping upstairs. While the applicant was on a private phone call the respondent started to abuse him. He came downstairs, told the applicant to take his shoes off and walk on the mat. The applicant identified that the mat was upside down. He turned it over the right way. The respondent demanded that the applicant surrender his keys and directed him to go upstairs and collect his belongings. The respondent continued to abuse him. The respondent rang him later that day advising that he had forgotten his toolbox and other pieces of equipment. The applicant thought that the respondent was playing with his emotions considering his years of hard work.

The applicant believed that he had been dismissed and was thrown out on the street. The applicant saw the respondent next when he attended a function at the club for the tradesmen. The applicant asked the respondent "was the relationship really over" and his response was "you could be back in three months time".

This is a sufficient summary of the relevant events in this matter. The Commission heard evidence on behalf of the applicant from Mr Cyril Bourseau. Mr Bourseau worked at the club, with the applicant who was his manager. The applicant organised rosters, times and engaged in carpentry, painting and cleaning activities. He thought the applicant worked long hours. He was unable to state what money was paid to the applicant. Mr Bourseau was aware that, on occasions, the tills did not balance. However, he did not hear the respondent complaining that the money had been stolen. Similarly, Mr Bourseau did not hear the respondent complain about the use and dealing of amphetamines in the club.

Mr Dimice Petrovski, who had worked in the club part-time, gave evidence to the Commission. Mr Petrovski, originally resigned from the respondent's employ, whilst working at the Hyperdrome club which burnt down in 1993 because he was not paid correctly. He was involved in rebuilding the club and saw the applicant working in the club carting bricks, sand and steel. He was aware that the applicant and respondent agreed that the applicant would continue working in the club after it opened. He had seen the respondent using drugs regularly.

Mr Ian Alexander gave evidence for the respondent. He was a registered plumber and gas fitter while he worked in the club and had been properly paid. He asserted that work mentioned in the Schedule of Further Particulars of Contractual Benefits was in fact done by him. Mr Alexander asserted that if he were to carry out the work claimed by the applicant, it would take less time.

The respondent called the applicant's mother, Ms Vera Naumovska, to give evidence. Ms Naumovska's evidence does not need to be summarised. The respondent called his mother, Ms Justine Ellen Scott to give evidence. Ms Scott and her late husband assisted the respondent in the nightclub. They engaged in stocktaking, the collection delivery of stock, attended the bar safe and accounting requirements. Mrs Scott claimed that the applicant tried to do so but he was incapable.

I need to deal with my findings concerning witness credibility. Most of the applicant's evidence related to his contractual benefits claim. The Schedule set out in *Exhibit B1* is extensive and is created years after the work was completed. There is no contemporaneous record of the work done or the hours. The applicant had difficulty relying on his memory. Many of his responses during cross-examination were flippant. He was prepared to reduce his claim by up to half or three-quarters of the original claim. His evidence did not appear reliable and I so find. I do not discount all of his evidence. He clearly remembers the events surrounding the termination. The respondent himself supports the applicant's contention. However, their emphasis is different. I will deal my conclusions about those dealings later in my Reasons for Decision.

I treat the evidence of Mr Bourseu and Mr Petrovski with some caution because of the inconsistency between examination in chief and cross-examination.

I have similar doubts about the respondent's evidence. The respondent appears to have selective memory. I am influenced by the respondent's action resulting in delaying the proceedings. The respondent's explanations are dubious and his evidence contradictory.

The usefulness of the applicant and respondent's evidence is questionable because it is potentially unreliable. Similarly, the credibility of the information provided by them is low. I will rely on evidence given by others and analyse the circumstances and decide on the balance of probabilities what occurred. Mr Alexander's evidence is the only evidence that I have complete confidence in. He clearly articulated his memory of the events and was not disturbed in cross-examination. He was not intimidated by the circumstances or by giving his evidence. Importantly, this assists me in determining which version of events, on the balance of probabilities, is correct. Initially, I will deal with the contractual benefits head of claim. This application is instituted pursuant to sub-section 29(b) of the Act.

Senior Commissioner Fielding observed in *Glen Robert Bartlett v. Indian Pacific Limited No. 319 of 1998-98 68 WAIG 2509 at 2519* that the Commission's relevant jurisdiction, pursuant to the Industrial Relations Act, is to enforce benefits owed under a contract of employment. Therefore, the Commission must ascertain what benefits are specified in the contract in question. Being a legal document, a contract's meaning and scope is determined by legal principles and contract law requirements. In the Full Bench decision in *Reginald Simons v Business Computers International Pty Ltd 1985 (65 WAIG 2039)* the learned Acting President observed that—

> *"The jurisdiction which is founded by proceedings brought under section 29(b)(ii) of the Act is judicial. It is not arbitral or legislative. The Act limits the jurisdiction to ascertaining existing rights by determination of whether or not the employee has been denied a benefit which is not a benefit under an award or order to which the employee is entitled under a contract of service."*

In a situation where there are contracts which are not made under an Award or Order of the Commission in most cases, negotiations which led to their formation in the first place are not exhaustive of remedies which are to apply for resolution of every conceivable incident. Although the Commission's jurisdiction is judicial, it may grant relief where an aggrieved party's rights and obligations can be fairly implied. It is not

necessary to rely widely upon an expressed or written term where another term may be implied, see *Bryne v. Australian Airlines 131 ALR 422* and by the Privy Counsel in *BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council 1978 52ALJR 20 (BP Westernport Case)* and the High Court in *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales (1982) 56 ALJR 459*.

The applicant's contention, that terms ought to be implied in the contract is weak. The applicant's argument that he worked for the respondent at 73 Rupert Street, Subiaco; 230 Marine Parade, Cottesloe; Yanagan Crescent and Boronia Street, City Beach and at the club premises at 78 James Street, Northbridge has the hallmarks of being the product of his imagination not a validly created contract. The applicant's assertion does not detail offer, acceptance or consideration. No contemporaneous record of work completed was presented to the Commission. Similarly, the applicant did not detail when this work took place. The original application does not even identify the claim. It appears to have been constructed post filing the application. It is unclear whether the applicant asserts that he had a contract with the respondent to work on the properties or alternatively he had individual contracts with the respondent relating to each property. There is no evidence when the arrangements were made, the rate of payment, length of time taken to complete the task, the provision of tools or the completion of pre-construction preparations.

I am unable to determine that any identifiable contract was formed between the parties. Mr Hooker's concessions concerning the applicant's difficulty in pursuing his claim are indicative of this. The same can be said for the overtime claim that has been made. In the absence of documentation, evidence of the oral arrangement is required to prove that a contract has been formed requiring the respondent to pay the applicant for work done.

Even if I am wrong, I accept Mr Alexander's evidence that the applicant did not do the work claimed at least that work on which Mr Alexander worked. This casts doubt upon the whole of his claim. The Commission may give effect to a contract that is not an award or order of the Commission, if the terms can be established. As the Commission is preforming a judicial act it is not permissible to determine new rights between the parties. That is not the function under s. 29(b)(ii) of the Act.

In cases of unfair dismissal, the Act enables employees to seek relief when they have been harshly, oppressively or unfairly dismissed. When determining this, the Commission is to apply *Undercliff Nursing Home v. Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385.* The issue is whether an employer has acted harshly, unfairly or oppressively in a dismissal amounting to an abuse of the employee's rights. In determining whether an abuse occurred, Denning MR comments in *British Leyland UK Ltd v. Swift (1981) 10 IRLR 91* are relevant.

In discussing how a reasonable employer would have acted, Denning MR said—

> *"It must be remembered that in all circumstances there is a band of reasonableness which one employer might take one view and one quite reasonably take another view"*.

Additionally, Kennedy J in the *Shire of Esperance v. Mouritz (1991) 71 WAIG 891* stated that while procedure is important, resolution of an alleged unfair dismissal claim is not determined solely by legal entitlements. This highlighted, albeit slightly different terms in the same dish, the decision and the reasons of Nicholson J—

> *"a fair hearing…is an element in determining whether the dismissal was harsh or unjust…The mere fact that the employee did not have proper opportunity to explain or it had not been warn of the possibility of termination does not automatically entitle the applicant to a remedy. No injustice will result, if the employer could be justifiably dismissed"*.

The President and Rowland J—

> *"The issue of dishonesty as a basis for dismissal remains undetermined. The unfairness of the dismissal cannot therefore be determined by procedural unfairness alone"*.

Most likely the set of events, which led to the applicant's services being terminated, are as follows.

The respondent asked the applicant, who had been working for an extended period, to move some bar mats. The applicant did so. However, he placed the mats upside down. When the respondent discovered the upside down mats, he was angry. The respondent believed that the applicant was under pressure and was not paying attention to small matters in the club.

The respondent demanded that the applicant take off his shoes and stand on the mats. Whilst unnecessary, if indicates the respondent's state of mind. He was agitated and had been swearing at the applicant. The respondent demanded the applicant's keys and told him to leave the club. If he genuinely believed the applicant needed a few weeks off, the applicant would not need to take his belongings. In the respondent's final submission, he clearly indicates that he believed the job was finished. He said "*I felt that he should have apologised to me for confronting me in such a way and he did not apologise. And when he asked me if he could have his job back I said. well maybe and you have to show me that you really want it and that you really like it"*. He required the applicant to demonstrate commitment to his employment. I accept, that two weeks later, the respondent told the applicant that he might get a job in three months. The respondent clearly dismissed the applicant. The fundamental issue concerning the bar mats was trivial. The evidence does not suggest that it was one of many incidents which the respondent took issue with the applicant.

The respondent contends that his relationship with the applicant was avuncular in nature. They were workmates and social friends. They spent a lot of time together and used drugs recreationally. The respondent says that the dismissal ought to be judged contextually. However, the Commission is required to decide whether the dismissal has been harsh, unjust or unreasonable, in accordance with fair go all round test established in *Loty and Holloway v. Australian Workers Union (1971) AR 95 at 99*. Regardless of prior events, a fair go all round can not be established. The applicant was dismissed in heat of the moment in circumstances that the respondent could not justify. For all those reasons, I find that the applicant was unfairly dismissed

For the reasons that I have set out before concerning the parties relationship it is patently clear that the Commission could not order reinstatement. There has been a complete breakdown in the relationship and any attempt to restore it would be futile. The Commission now considers the question of compensation. The applicant has a legal entitlement to *"loss or injury caused by his dismissal pursuant to s. 23(a)(ii)(ba) of the Act"* as described by the Full Bench in *Bogunovich v. Bayside Western Australia Pty Ltd (99 79 WAIG 8 and 10)*. Loss or injury may include hurt, distress, loss of dignity and anxiety, Pursuant to section 23A(1)(a) of the Act payment of adequate notice needs to be considered.

Through his Counsel, the applicant claimed the sum of $5,000.00 for humiliation, anxiety and distress. This is similar to an Award made by the Full Bench in *Bogunovich v. Bayside Western Australia Pty Ltd.* Although no medical evidence was called to support the applicant's contention that he was humiliated and distressed, he did suffer anxiety and distress as a result of his dismissal. The amount of compensation claimed under the head of injury is not reasonable given the Full Bench's determination in *Rogers v. Leighton Contractors Pty Ltd (Full Bench: 1 November 1999—unreported)* where his Honour after consideration of fact of a similar nature to those here awarded $2,000. The same is appropriate in this case and I award $2,000.00. The applicant ought to have been given notice of dismissal and applying the test detailed *Antonio Carlo Tarozzi v The WA Italian Club (1991) 71 WAIG 2499,* two weeks pay should have been paid, and he will be awarded $1,500.00 for notice. I reject the balance of the claims concerning outstanding overtime and contractual benefits. I note that no evidence was led as to any other loss. As observed in *Rogers v. Leighton Contractors Pty Ltd (ibid);* 'the entitlement of loss is a matter of proof and in the absence of such proof no compensation can be awarded.

This matter will be concluded by the Commission issuing orders that the applicant was unfairly dismissed by the respondent on 11 June 1998. It is not tenable to order reinstatement. Compensation should be fixed and $4,500.00 will be awarded.

The Counsel for the applicant made submissions concerning costs. I have carefully considered those submissions and

have concluded that the tests contained in *Brailey v. Mendex (1993) 73 WAIG 27* have not been met. The circumstances are not extreme and it is inappropriate that costs be awarded.

Appearances: Ms Buckley of Counsel and later Mr R Hooker of Counsel appeared for the applicant

The respondent appeared on his own behalf save for appearance concerning procedure by Mr Ayres of Counsel and later Mr Edwards of Counsel.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Spiro Naumovski

and

Neil temple Scott/IV Entertainment Pty Ltd.

No. 1285 of 1998.

COMMISSIONER J F GREGOR.

24 December 1999.

Order.

HAVING heard Ms Buckley of Counsel and later Mr R. Hooker of Counsel of behalf on the applicant and the respondent on his own behalf save for Mr Ayres, of Counsel, and Mr Edwards of Counsel who appeared on procedural issues, the Commission pursuant to the powers conferred under the Industrial relations Act, 1979, hereby orders—

1. THAT the applicant was unfairly dismissed.
2. IT is not tenable to order reinstatement.
3. The respondent pay the applicant $4,500.00 compensation.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Vanessa Kym Parker

and

PFK Pty Ltd t/a Limestone Replicas.

No. 347 of 1997.

COMMISSIONER C.B. PARKS.

31 December 1999.

(EXTEMPORE REASONS FOR DECISION AS EDITED BY THE COMMISSIONER).

Ms Parker, a former employee of the respondent, claims that the respondent failed to pay her her usual weekly wage of $241.00 for the last week at her employment, plus one week's wage of $241.00 in lieu of her receiving one week's notice that her employment was to be terminated, and finally four weeks "holiday pay" in the sum of $723.00.

When this matter first came on for hearing no appearance was entered for the respondent and therefore proceedings were adjourned to a date to be fixed. The applicant was however informed by the Commission that a facsimile transmission had been received from the respondent wherein it is alleged that she was "— paid 'award' wages —", that the claim "— is actually an award claim —", that it is also stated that the Commission "— cannot enforce award entitlements —", and the award referred to is titled the Plaster, Plasterglass and Cement Workers' Award (the "Award"). The Commission further informed the applicant that the matter raised by the respondent brought into question whether the Commission had jurisdiction to hear and determine her claims and therefore such would require address by the parties before the Commission would deal with the merits of the claims.

When the matter later proceeded before the Commission it was plain that the respondent alleged the Commission lacked jurisdiction, for the reason earlier stated, upon the advice of a third party and Ms P Boucher, the Manager and a Director for the respondent, was not competent to show why that is so. Equally, the agent for the applicant also lacked the necessary competency to address the issue.

It is the uncontested statement of Ms Boucher that the respondent had manufactured limestone ornaments, garden ornaments, birdbaths, gnomes, plaques, planter boxes, pillars, and other like objects by casting a cement, limestone rubble, and limestone sand slurry into latex rubber moulds made by the respondent. Ms Parker, a person of less than 21 years of age, had been employed upon the work of repairing and preparing the models of the objects prior to their use to make the latex rubber moulds.

Clause 3.—Scope and the Award states that it applies "— to employees (excluding a described group of employees not presently relevant) engaged in the industries carried out by the respondents and employed in the classifications referred to in Clause 13. Wages hereof'. The representatives of the parties were not able to enlighten the Commission regarding the nature of the industries carried out by the several respondents named within the Award however there is assistance in Clause 6. Definitions thereof where the following definitions appear –

"(1) 'Operative Fibrous Employee', 'Operative Plasterglass Employee' or 'Manufactured Cement Goods Employee' means an employee engaged in—

(a) architectural modelling;

(b) the manufacture of architectural ornaments of fibrous plaster, plasterglass plaster or cement;

(c) the manufacture of fibrous plasterglass goods or portable articles of reinforced cement or concrete, cement pressed work, baths, wash tubs, troughs, sinks, pillars, ornaments, and other miscellaneous goods, including floor beams, partition blocks, linters and acoustic tiles (but excluding cement roofing tiles);

(d) any phase or phases of items (a) to (c) inclusive.

(2) A 'Modeller' is defined as an employee who prepares the ground work or who may make models and/or moulds, whether of gelatine, plaster, wax, plasterglass cement or fibreglass, or other suitable materials."

and

"(6) Junior employees shall not be employed on labourers' duties in any factory in which labourers are employed on the work set out in subclause (4) hereof, except such juniors as may be agreed upon between the union and the employer from time to time."

The plain words of clause 6 (1)(c) and (d) disclose that the industry in which the employees described are engaged, so far as is material, is the manufacture of portable cement based articles ie pillars, ornaments and other miscellaneous goods. And further, any employee engaged in the associated preparation of the ground work or who may make models or moulds of suitable materials is also engaged within the industry. Plainly the industry here described is that conducted by one or more of the respondents that are listed within the Award in order to assist with defining the scope thereof.

Schedule 2—Respondents of the Award cites "H B Brady Co Pty Ltd" which the Commission, from its own experience, knows is the manufacturer of cast ornamental ceiling objects. Hence the Commission is satisfied that the scope of the Award includes the manufacturing process in which the respondent engaged within this state, the whole of which is covered by the Award according to clause 4.—Area thereof. It therefore remains to determine whether the actual work performed by Ms Parker, that is, the repair and preparation of models for mould making, falls within the industry described and within a classification prescribed.

A junior employee, according to the classifications contained in clause 13.—Wages, is an employee who has not attained 21 years of age and who plainly may be employed upon the type of work covered by the Award [other than the prohibited work of a labourer described in clause 6 (4) which is not presently relevant]. Reference to the preparation of groundwork in clause 6 (2) is followed by the words "or who makes models and/or

moulds" and the structure of the subclause leads me to conclude that the word "or" has been used by the draftsperson to refer to the alternative of "preparing groundwork" and that of "making", and both in relation to "models and/or moulds". If it were otherwise the reference to preparation of the groundwork, absent any qualifying words to identify the preparation of what, or the ground work for what, leaves an unidentifiable subject matter and therefore a nonsense which would not have been intended. Preparation of the groundwork referred to in association with the making of a mould I am satisfied encompasses the repair and preparation of the model from which the mould is to be made. In the parlance of the industry "making" of a model may also be inclusive of the repair and preparation function. Hence I find that the work done by Ms Parker was that of a junior employee covered by the Award. The weekly wage usually paid to her, and upon which each of her claims is based, is that prescribed by clause 13 of the Award for a junior employee "Under 21 years of age". Each of the applicant's other claims are also benefits of the kind and quantum prescribed by the Award.

It is well settled that the Commission does not have the jurisdiction to enforce the provisions of an award. The application will therefore be dismissed.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Vanessa Kym Parker

and

PFK Pty Ltd t/a Limestone Replicas.

No 347 of 1997.

31 December 1999.

Order.

HAVING heard Mr C Parker on behalf of the applicant and Ms P Boucher on behalf of the respondent the commission, pursuant to the power conferred on it under the industrial Relations Act, 1979, hereby orders—

THAT this application be and is hereby dismissed for the want of jurisdiction.

(Sgd.) C. B. PARKS,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

David Charles Rath

and

Avtec Security Services Pty Ltd.

No. 1215 of 1999.

COMMISSIONER P E SCOTT.

28 January 2000.

Reasons for Decision.

THE COMMISSIONER: This is an application made pursuant to Section 29 of the Industrial Relations Act, 1979. The Applicant claims that he has been unfairly dismissed from his employment with the Respondent and that he has been denied benefits not being benefits arising from an award or order but which arise from his contract of employment with the Respondent. The Respondent is a company which is not registered in Western Australia. However, I am satisfied that the Applicant has served the application in the appropriate manner and accordingly there is no impediment on that ground to the application proceeding.

I have noted previously, in particular on the 11th of January this year, that there were indications from the Respondent that the company may be in liquidation or in the process of being wound up. The Respondent has had an opportunity to present any information of that nature to the Commission and none has been forthcoming. On the contrary, the Commission has before it Exhibit 1 which would tend to indicate that there is no impediment to this matter proceeding on the basis of the status of the Respondent.

I have heard evidence from the Applicant, David Charles Rath. I have observed the Applicant as he gave his evidence and have no doubt as to his honesty and that his evidence is credible, and I accept that evidence.

The Applicant signed a contract of employment with the Respondent on the 1st of November 1998. Although the contract, which is document A of Exhibit 2, indicates at Clause 5 that the employment was to start on the 1st of November 1998, according to the Applicant his commencement date was in fact the 10th of December 1998. The contract provides that the Applicant was to receive a starting salary of $26,000 per annum and Clause 14.3, following reference to the annual salary, notes that this is $1,000 per fortnight.

The Applicant was provided with a vehicle in accordance with Clause 15 of the contract of employment and was provided with a petrol card. The Applicant has also given evidence that he was to be provided with $100 per month as a mobile telephone allowance. He was also at some point in the employment to be provided with a $50 per week allowance on account of his providing home office facilities to the Respondent. This was in accordance with a verbal agreement with Mr Anthony Vitali, the Respondent's Managing Director.

The Applicant has given evidence of the difficulties he encountered in receiving his pay on time and I am satisfied from his evidence and from the supporting documentation contained within Exhibit 2, being his Commonwealth Bank Account Statements, that this is so. On the 31st of July 1999, the Applicant met with the Victorian State Manager, whose first name was Derek, who had come to Perth to deal with a number of issues on behalf of the Respondent. He raised with Derek that this late payment was a difficulty and the Applicant said that he would no longer work for the company without undertakings as to payment being made on time. I accept that up to this point the Respondent had breached the contract on a number of occasions and that the Applicant was within his rights to expect that the Respondent would pay in accordance with the contract.

If there is any doubt that the Respondent brought about the termination of the contract it is overcome on the evening of the 31st of July 1999, by Derek advising the Applicant that he had spoken with Mr Vitali who said that it was no longer necessary for the Applicant to work for the company. I see this then as the termination by the company, if the Applicant had not previously been entitled to treat the breaches of the contract by the Respondent as bringing the contract to an end. The Applicant, in accordance with his obligations, returned to the Respondent the company's property which he held.

There is no evidence that the Applicant's employment was properly terminated in accordance with any of the grounds set out in Clause 25 of the employment contract. None of those matters appear to be the basis of termination. The termination appears to have been on the grounds that the Applicant was no longer prepared to tolerate the late receipt of wages. This is not a reasonable basis on which to terminate employment. Accordingly, I am satisfied that the Applicant's employment has been unfairly terminated by the Respondent.

The Commission then is to consider the appropriate remedy in those circumstances. I note the records of the Commission in respect of attempts to communicate with the Respondent and I note the evidence of the Applicant in regards his employment. I have no doubt that re-employment or reinstatement is impracticable. Accordingly, compensation is the appropriate remedy.

I have heard the Applicant give evidence as to his loss and that loss is for some three and a half weeks during which he was without work. He has also lost the use of a company vehicle and the fuel account. I note in accordance with the contract of employment that the company vehicle was available to the Applicant for reasonable private use beyond the employer's business. Accordingly, I am satisfied that the Applicant's actual financial loss has been three and a half weeks wages plus $320 in respect of the motor vehicle. I calculate the three and a half weeks wages at the rate of $500 per week. Therefore,

the lost wages equals $1,750 and the loss of the motor vehicle equates to $320.

I have heard evidence from the Applicant as to his non-economic loss, the loss to his reputation and dignity, and of the stresses and difficulties this has brought upon him and his family. This Commission does not readily provide compensation for such non-economic loss but in the circumstances I am satisfied that an amount of one week's pay is an appropriate compensation for those matters.

The Applicant has clearly sought to mitigate his loss and has done so to the extent that he obtained alternate employment some three and a half weeks after his termination. I take account of all of the circumstances of the Applicant's employment, including the position he held and his length of service, and conclude that an amount of $2,570 is an appropriate amount of compensation for all of his loss.

As to the Applicant's contractual entitlements, the Applicant says that he is owed wages by being underpaid $200 net for the period 9th to the 23rd of July; and for the 26th to the 30th of July 1999, a net figure of $395. I am unable to calculate what those amounts would be in gross terms, however the order of the Commission shall be that the Applicant is entitled to an amount, after tax of, $595 on account of unpaid wages.

Further, I'm satisfied that the Applicant is entitled to an amount of $15 per day for the month of June for a car allowance and this totals $300. The Applicant is entitled to a telephone allowance of $80 for June and $50 for July. I am satisfied that the Applicant is entitled to these amounts in accordance with his evidence that he was to be paid for those amounts in excess of his standard telephone account. The Applicant is also owed $600 on account of his provision of a home office space in accordance with the terms of a verbal agreement with his employer.

The Applicant referred the Commission to Clauses 19, 23 and 24 of his contract of employment which import certain provisions from an Award. Clause 19 of the contract provides his entitlements in respect of leave and it says "The employee is entitled to annual leave, sick leave and long service leave in accordance with the Security Officers Award (South Australia) or the equivalent state award where the employment is not in South Australia". I take note of the Security Officers Award No. A25 of 1981, an Award of this Commission. Clause 9.—Annual Leave, sub-clause l(a) provides for—

> "… a period of four consecutive weeks leave with payment of ordinary hours as prescribed prior to preceding on annual leave, to be allowed annually to an officer by his employer after 12 months continuous service with such employer".

Sub-clause 4(a) provides—

> "If after one month's continuous service in any qualifying 12 monthly period an officer lawfully terminates his service or his employment is terminated by the employer through no fault of the officer, the officer shall be paid 2.92 hour's pay in respect of each completed week of continuous service in that qualifying period".

The Applicant is therefore entitled to 2.92 hours pay for each week for 33 week's service. I calculate that the Applicant is entitled to $1,267.90 on account of annual leave in accordance with his contract of employment, an amount which has not been paid. In accordance with Clause 23, he is also owed one week's pay in lieu of notice at $500 per week.

Order issued accordingly.

Appearances: Mr D C Rath appeared on his own behalf

There was no appearance for the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

David Charles Rath

and

Avtec Security Services Pty Ltd.

No. 1215 of 1999.

COMMISSIONER P E SCOTT.

3 February 2000.

Order.

HAVING heard Mr D C Rath on his own behalf and there being no appearance for the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) DECLARES that David Charles Rath has been unfairly dismissed from his employment by the Respondent;

(2) DECLARES that reinstatement is not practicable;

(3) ORDERS that the Respondent shall pay to the Applicant the amount of $2,570 as compensation for unfair dismissal;

(4) ORDERS that the Respondent shall pay to the Applicant the amounts of—

  (a) $595 being the net amount of underpaid wages; and

  (b) $500 being pay in lieu of notice; and

  (c) $1,268 being accrued annual leave; and

  (d) $1,030 being motor vehicle, telephone and home office space allowances.

(5) The amounts specified in Orders (3) & (4) hereof shall be paid no later than 7 days from the date of this Order.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gary David Saunders

and

Woodroffe Industries Pty Ltd.

No. 572 of 1999.

COMMISSIONER A.R. BEECH.

18 January 2000.

Reasons for Decision.

The relevant facts are that it was a term of Mr Saunders' contract of employment that he would receive—

> *"Immediate membership of the Company Superannuation Defined Benefit scheme with 8.5% employer contributions on annual superannuation salary and salary sacrifice."*

Mr Saunders commenced employment on 3 June 1997 and resigned on 20 October 1998. He then received the resignation benefit which is prescribed under the Trust Deed of the respondent's superannuation scheme. That resignation benefit resulted in a payment to him which did not reflect the respondent's contribution which is set out in the contract of employment between Mr Saunders and the respondent. The respondent admits that it did not contribute that percentage of Mr Saunders' salary into the respondent's superannuation scheme. It says that the nature of a defined benefit superannuation scheme is that the respondent in fact only needs to contribute the funds which are necessary to meet the fund's outgoing commitments. It states that the wording in the contract of employment should have had the word "deemed" inserted before the words "8.5%". However, it also acknowledges that the Commission is not

able to rewrite the contract of employment that existed between the parties. It can decide the claim on the basis of the contract to which the parties themselves had agreed.

The difficulty which Mr Saunders faces in bringing his claim to this Commission is that his superannuation entitlement upon resignation is defined by the Trust Deed and not by the level of the respondent's contribution to the superannuation scheme. If his defined benefit on resignation is less than he would have received had he actually retired then he will only be entitled to that lesser amount. That is the case here.

And the critical point upon which I think this case turns is that even if the respondent had, as it initially promised to do, contributed 8.5% of Mr Saunders' salary into this particular superannuation scheme it would make no difference to his resignation benefit. Indeed I would take it one step further. If I were now to grant Mr Saunders' claim and order the respondent to pay into the superannuation scheme an amount of 8.5% of his salary, and the respondent complied with that order, Mr Saunders would not receive any greater payment either now or in the future than he has already received. The only practical consequence of such an order is that, as Mr Johns advised, the respondent would pay that amount less at the end of the year. Thus, even if Mr Saunders had been successful and persuaded me that his claim is valid and I issued an order in his favour enforcing that benefit under his contract of employment, in fact, it would have no benefit to him whatsoever. I have reached the conclusion that even if I was persuaded by Mr Saunders' claim, I would exercise my discretion and not issue such an order because the point really is moot.

This then brings me to what is essentially Mr Saunders later claim, or particularised claim, and that is that he says that the Commission ought now require the respondent to pay to him directly the difference between what he received from the superannuation fund upon his resignation and what he estimates in dollar terms would have been the contribution of the respondent into the fund. According to his documents that is an amount of approximately $2,300.00.

However, the difficulty he then faces is that even reading the contract of employment at its most favourable, the obligation in the contract of employment was on the respondent to pay the money into the scheme. It does not provide that if the respondent did not do so the residual, or the consequential, cash equivalent would then be paid to him. It just is not open to the Commission to order the respondent to pay that difference to Mr Saunders as he requests essentially because his entitltment depends upon the Trust Deed of the scheme of which he was a member, not upon the respondent's contribution to that scheme.

It may be appropriate to observe that when parties enter into a contract of employment, particularly in these days of individual employment contracts which, of course, this was, that employees need to be aware of the precise terms of an offer that is made regarding superannuation and it may well be appropriate for an employer to fully explain the terms of such an offer. But having said that, the Commission is nevertheless only able to deal with the facts of the matter. There is no jurisdiction within this Commission that would say, for example, that the contract was unfair for any reason and it is, I suspect, along those lines that Mr Saunders is currently heading.

An order will issue that dismisses Mr Saunders' claim.

The respondent has claimed that Mr Saunders should pay the respondent's costs. It regards Mr Saunders' pursuing of this claim as mischievous. Even if it is mischievous, it is not an extreme circumstance and that is the test to be applied by the Commission when a party seeks an order of costs against the other party. The application for an order for costs will also be dismissed.

Appearances: The applicant on his own behalf by way of written submissions.

Mr P. Johns on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gary David Saunders

and

Woodroffe Industries Pty Ltd.

No. 572 of 1999.

18 January 2000.

Order.

HAVING HEARD Mr G.D. Saunders on his own behalf as the applicant by way of written submissions and Mr P. Johns 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 application be dismissed.
2. THAT the respondent's claim for costs be dismissed

(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Dr Louise Anne Smyth

and

St John of God Health Care Inc.

No. 1973 of 1998.

COMMISSIONER J F GREGOR.

24 December 1999.

Reasons for Decision.

THE COMMISSIONER: On 4 November 1998, Dr Louise Anne Smyth (the applicant) applied to the Commission for an order pursuant to section 29 of the Industrial Relations Act (the Act). The applicant alleged that St John of God Health Care Inc (the respondent) terminated her employment agreement on 12 October 1998, in a harsh, oppressive and unfair manner. The applicant seeks compensation in the sum of $70,916.40 capped at the equivalent of six (6) months salary at the sum of $54,000.00 in accordance with s. 23A of the Act. The total amount of compensation is constructed from three (3) heads of claim: loss of past earnings; future loss of earnings; and compensation for injury and loss of reputation. The applicant's claim is crystallised in Annexure A to the application, where the applicant alleges that as a highly specialised immuno-pathologist her employment opportunities in Western Australia are limited to large organisations such as the respondent.

Pursuant to an employment agreement dated 18 August 1997, the respondent employed the applicant for 6.35 sessions per week on a salary of $108,000.00 per annum. The employment could be terminated by either party on 3 months notice notwithstanding the express intention that the applicant's period of employment would be long term. During the course of the employment, the respondent requested the applicant to reduce the sessions for reduced salary pursuant to the respondent's operational requirements. If she did not agree, the employment agreement would be terminated. The applicant was prepared to agree to work fewer hours for a restricted period, subject to certain terms and conditions. Agreement could not be reached, resulting in the respondent terminating the agreement on 12 October 1998.

Relevantly, the applicant is a medical practitioner who worked in general practice for 4 years. She held various teaching positions including lecturer in a Department of Pathology and later qualified in the super speciality of immuno-pathology.

The respondent in this matter operates a number of health care facilities and is a charitable organisation. It provides a variety of health care services including pathology.

In July 1997, the respondent purchased the applicant's previous employer, Perth Pathology Services. Not all Perth Pathology Services employees joined the respondent. When the respondent purchased the business, it did not know how many employees it required or the appropriate number of sessions for a pathologist consultant. Nevertheless, it entered into a written agreement with the applicant on 18 August 1997.

The applicant's salary was calculated on 6/10th pro-rata portion of salary payable to a full time pathologist of $180,000.00 per annum. Therefore, the applicant's salary was $108,000.00 per annum. The same method of salary calculation was used by Perth Pathology Services. The contract does not entitle the respondent to unilaterally vary the number of sessions worked by the applicant.

The applicant's work requirements did not change when the respondent took over Perth Pathology Services. She worked 6 sessions per week each of 3.5 hours duration. The respondent's immuno-pathological work was shared between the applicant and another immuno-pathologist.

The respondent reviewed Perth Pathology Services practices, six months after it took it over. Savings were required in a number of areas including employee's salaries. Alterations were made to the purchasing policy and through staff attrition. Across the respondent's total operation, 20 full-time equivalent positions were terminated. As part of the process, the respondent requested three (3) pathologists reduce their number of sessions. The applicant was one of those approached. The other two pathologists agreed to the reduction in hours and pay. There was sufficient work to support four immuno-pathological sessions of which another doctor worked two sessions. Dr Kyle, on behalf of the respondent approached the applicant, requesting she reduce her hours. He suggested her six (6) sessions be reduced to three (3) sessions, which she was unhappy about. Dr Kyle consulted the respondent's management. As a result, they requested the applicant reduce her workload to four (4) sessions per week. Mark Taylor, the respondent's administrative head, met with the applicant in April to discuss the reduction in hours. The applicant requested that the proposal be put in writing which was done (*Exhibit W6*). The letter states that the arrangements would commence in July 1998 unless the applicant advised otherwise.

The applicant's solicitor responded to the letter, (*Exhibit W7)*. Dr Kyle and Mr Taylor met the applicant on 3 July 1998. The parties notes of this meeting differ (*Exhibit W10, W 11, and E1*). The negotiating process continued via various forms of correspondence (*Exhibits W14, 15, W16 and W17)*. A letter dated 12 August 1998, raised the issue of underpayment and contained the respondent's proposal to increase the applicant's sessions to 4 hours each session. In a letter dated 25 September 1998, the respondent terminated the applicant's services giving her 3 months notice *(Exhibit W17).* The termination did not eventuate. However, on 9 October 1998, the applicant was given three (3) months notice of termination effective from 12 October 1998. The applicant was not required to work during the notice and was offered the option of a lump sum payment which was eventually paid. On 19 October 1998, the applicant commenced practice as a general practitioner. Two days later the respondent paid her $26,270.00 being 13 weeks pay. The applicant was on notice until 12 January 1999. Since January 1999, the applicant worked with General Pathology Services. However, she does not provide purely specialist immuno-pathology services. The applicant's income from general pathology is equivalent to the amount that she received when employed by the respondent.

The applicant argues that there is a notion of redundancy in this dismissal. That is not the case. The applicant incorrectly contends that the onus of proof to establish her dismissal is on the employer. The applicant is to establish that the dismissal was harsh, unfair or unreasonable.

The questions to be addressed are not complicated. The applicant and respondent freely entered into a contract (*Exhibit W3*) on 18 August 1997. The contract details the employment relationship, specifying the applicant's hours of work and salary. Pursuant to the restrictive covenant contained in the contract of employment, the applicant was not to work for any other private pathology practice. Additionally, she was to declare to her supervisor any activity which may cause a conflict of interest. The conflict of interest clause specifically provides—

> "*It is hoped that your association with St John God Pathology will be a long one"*.

The contract of employment included a confidentiality clause and a provision prohibiting the applicant, for 12 months after the contracts conclusion, from approaching or soliciting referral work from any doctor who has referred work to the respondent or Perth Pathology Service.

The contract's terms attempt to bind the applicant, a person of particular skills, into a relationship which extended into the foreseeable future. This is notwithstanding either party's ability to terminate on three (3) months notice. The applicant was required to sign an employment agreement that met the Health Insurance Commission requirements. She could not work in any other private pathology service and was bound to declare potential conflict of interest. She was to maintain confidentiality, an approved pathology provider certificate; and was accredited to hospitals to which the respondent provides services. Further, she was unable to solicit referral work from any doctor who referred work to either the respondent or Perth Pathology Service at anytime during the proceeding two years.

The contract's provisions are quite onerous. However, the applicant was prepared to enter into it because of the high salary. Therefore, at law the applicant was entitled to the contractual benefits. The contract does not anticipate any variation of its terms, as the parties obligations are clear.

For an employer to unilaterally vary the contract sufficient reasons, which justify terminating if agreement could not be reached, must exist.

The respondent took steps to improve efficiency which included use of consumables, reducing staff numbers and pathologist sessions. Agreements with other pathologists to reduce their sessions and pay according were reached. The respondent asserts that it had to reduce the applicant's sessions because there was insufficient immuno- pathology work. It was not in the respondent's best interest to reduce all Dr Stuckley's, the other immuno-pathologist, sessions. The respondent's other business arrangements with Dr Stuckley made it financially viable to retain his services.

Ultimately, the respondent decided that it could not maintain the applicant's earning rate. Any suggestion that did not meet the respondent's budget was unsatisfactory. Dr Kyle and Mr Taylor told the Commission that the applicant's suggestions effected other staff, making it unable to honour the arrangements with other pathologists. Additionally, the respondent may have been in breach of taxation salary packaging rules if it accepted the applicant's suggestions.

The respondent's need to reduce its operating cost must be taken in context of its total operations. Exhibit W25 *Statement of Income and Expenditure* demonstrates that the impact of reducing the applicant's salary was incalculably small. Continuing the applicant's employment at the contracted rate of pay would not effect the respondent's capacity to trade. It was not close to insolvency. The respondent was in a viable financial position. Rather, the respondent was attempting to maintain its expenditure being less that its income. The respondent's income had reduced considerably since 1997, and was attempting to reduce its expenditure accordingly. As the respondent contends this action was financially prudent. However, the financial savings were not necessary to keep the business operational.

Ultimately, the respondent could not convince the applicant to agree with it. The applicant was not prepared to alter her position any further. Increasing the number of sessions and altering the conflict of interest and restrictive covenants did not alter the applicant's position. The parties reached an impasse which was broken by the respondent terminating the contract of service. During cross-examination the respondent's two primary witnesses admitted that there was a degree of unfairness about the applicant's dismissal. It was argued that they meant the termination of a professional colleague's contract was unfair in an ordinary persons opinion.

Having seen and observed the witnesses myself, I form a different view about their admissions. Both Mr Taylor and Dr Kyle presented as honest and sincere witnesses. They handled a difficult situation in the best way they could. However, they both believed that terminating the contract was unfair. It is reasonable to conclude that they believed the termination was unfair because in the medical profession restrictive contracts attempt to retain valuable professionals long term. The applicant has been deprived of her contractual benefits. Each party

accused the other of being inflexible in their negotiation. If any criticism is levelled it should be bourn mutually. The applicant was prepared to move from her position, albeit not in a way that was suitable to the respondent. The respondent was entitled to weigh the impact of the applicant's suggestions on its general operations. In my view, the potential detriment to the respondent did not entitle it to unilaterally vary the contract. It decided to terminate the contract. After carefully considering the context of the relationship and contract, I conclude that dismissing the applicant was unfair and deprived her of her fundamental rights agreed to between the parties.

The question to be addressed is whether the respondent's action contravenes the authorities this Commission has to apply the test detailed in *Miles v. Federated Miscellaneous Workers' Union of Australia, Hospital Service and Miscellaneous, WA Branch (Undercliffe Case) (1985) 65 WAIG 385.* The question to be answered is whether the employer's right to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as to an amount to an abuse of the right.

The Counsel raised the question of valid termination. The *Undercliffe Case* states that a dismissal for a valid reason, within the meaning of the Act, may still be unfair. For example, if it is executed in a procedurally unfair manner see *Shire of Esperance v. Mouritz (1991) 71 WAIG 891* and *Byrne v. Australian Airlines (1995) 65 IR 32*). The *Undercliffe Case* considers, as established in *Loty and Holloway v. Australian Workers Union (1971) AR 95 at 99* whether there was a "fair go all round", requiring fairness to the employee and employer. The applicant, in this case, had a contract designed to last a long time. Her freedom to practice professionally was restricted by the contract. Those concessions were valuable to her. She was prepared to forego them to achieve the contract's general benefit. Fairness entitles her to the contract's general benefits without alteration or it being taken away from her without good reason.

Fairness to the employer, requires that the continuation of the contract would not interfere significantly with its operations. The respondent was not prepared to consider the applicant's suggestions which altered or effected its arrangements with other employees. There may have been a range of alternatives which the respondent chose not to consider or implement. Paying the applicant what she suggested would not have caused the respondents business to be detrimentally effected. The difference between what the applicant wanted and the total amount of money involved is so small it can not be measured. Therefore the balance of fairness clearly rests with the applicant and I so find.

The Commission declares that the applicant has been unfairly dismissed. Reinstatement is not available and the Commission would ordinarily fix compensation. Before the Commission is a Schedule of the applicant's loss and damage. No supporting evidence was called to support the figures. There must be because as His Honour the President observed in *Rogers v. Leighton Contractors Pty Ltd (Full Bench 1 November 1999, unreported—(at page T2) 'the establishment of loss is a matter of proof'.* On what is before me, I can not assess the amount of loss. The amount of injury can be assessed but I have decided not to do so until I have all of the information relating to both loss and injury before me. For this purpose, the matter will be listed to give the applicant the opportunity to provide the Commission evidence of her loss in order that of compensation can be calculated.

The matter will be listed in due course.

Appearances: Mr D Vilensky of Counsel appeared for the applicant.

Mr S Ellis of Counsel and Mr C Toohey of Counsel appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Bryan Francis Stokes

and

The Typing Centre of Perth Pty Ltd
t/a Australian International College of Commerce.

No. 779 of 1999.

COMMISSIONER A.R. BEECH.

23 December 1999.

Reasons for Decision.

Bryan Francis Stokes was employed by the respondent as a lecturer from 12 April 1999 until 4 June 1999. He claims to have been dismissed and that his dismissal was harsh, oppressive and unfair. He also claims certain contractual entitlements. The respondent objects to the claim. It argues that Mr Stokes was employed on a casual basis and that it was entitled to vary Mr Stokes' days and times of work or provide no work. The respondent denies that it terminated Mr Stokes' employment at all. Alternatively, if it did terminate Mr Stokes' employment then it did so by accepting his repudiation of the contract and in any event Mr Stokes could be dismissed on 1 hour's notice.

The issue for determination as a preliminary point is whether or not Mr Stokes was employed as a casual. He argues that he was not employed as a casual.

I find the facts to be as follows. The respondent placed an advertisement in the local newspaper on 27 March 1999 for a legal trainer. The position referred to in the advertisement was "a casual trainer". The advertisement was noted by Mr Stokes' wife. She relayed the advertisement to Mr Stokes. Mr Stokes himself did not read the advertisement but made contact with the respondent. Mr Stokes then attended an interview with Mr MacDonald who is the Manager of the college.

The evidence of Mr MacDonald and of Mr Stokes differs in relation to whether Mr MacDonald stated during the course of the interview that the position was "casual". Mr MacDonald maintains that he did. Mr Stokes maintains that the word "casual" was not used at all. I will return to this point later.

I find as fact, however, that Mr MacDonald showed Mr Stokes a curriculum (Exhibit 2) which contained module details for a Certificate in Para-Legal Studies. It contained details of 8 modules—

- Advanced Legal Office Procedures
- Advanced Legal Theory
- Legal Documents and Litigation Procedures
- Conveyancing / Land Law
- Business and Consumer Law
- Search Procedures
- Court Procedures
- Legal Research Procedures.

The course was a 36-week course and had an accompanying timetable to December 1999. Mr Stokes was informed that the hours would be 9.00am to 1.00pm five days per week. The remuneration would be $30.00 per hour. Mr MacDonald asked Mr Stokes what parts of the curriculum he would be comfortable in teaching and Mr Stokes indicated that with some preparation he would be comfortable in doing all of it. I accept the evidence of Mr MacDonald that it was understood between him and Mr Stokes that if everything went well, and if the respondent was satisfied with Mr Stokes' work, and Mr Stokes was happy with doing that work, Mr Stokes would do the course to the end of the year (transcript pages 50, 51).

Mr Stokes commenced employment on 12 April, 3 weeks before lecturing commenced. There was no written contract of employment between the parties. Although a written contract proposal was received by Mr Stokes on approximately 10 May, it was never signed and plays no part in these proceedings. Mr Stokes worked until 4 June 1999. During the period of his employment 1 public holiday occurred on 26 April. He was not paid for that holiday.

Although further matters were covered in the evidence, they are not relevant to my finding in this matter.

Conclusion

It is as well to state that the terms of the contract of employment between Mr Stokes and the respondent will be found from the discussion between them and the facts of what occurred during the course of Mr Stokes' employment. Mr MacDonald's intentions in offering the position to Mr Stokes, or Mr Stokes' intentions in accepting the position, are not relevant to the determination of the actual terms and conditions of employment if the intention was not made part of the contract during the negotiations or in practice. Thus, although Mr MacDonald's evidence is that in accordance with company policy it was his intention to offer the position as a casual position, if he did not in fact do so, his intention is irrelevant. However, on the facts of this matter, it is somewhat misleading to concentrate on whether or not Mr Stokes was a "casual" employee as that term is understood. The label given by the parties to an employment relationship may be of little assistance in reality (*Metals and Engineering Workers Union v Centurion Industries Ltd* (1996) 76 WAIG 1287 at 1288). There is a long line of cases where courts and industrial tribunals have held that the true character of an employee's employment is to be determined by reference to all of the circumstances and not just the label given to it at the time by the employer or the employee (*ibid.*). Having regard to all of the circumstances I find that Mr Stokes was offered, and accepted, employment as a lecturer to lecture on the modules set out in the curriculum provided everything went well, that the respondent was satisfied with his work and that Mr Stokes himself was happy with doing that job. He would work 9.00am to 1.00pm Monday to Friday at the rate of $30.00 per hour. He would not be paid for public holidays.

Crucially, however it was not a term of Mr Stokes' contract of employment with the respondent that he could be offered no work at all after he had completed teaching only one module. It was a term of his employment that his continuation would be subject to everything going well and the respondent being satisfied with his work. But it was not the understanding between the parties, and therefore not a term of the contract of employment, that the employer could unilaterally take the work away from Mr Stokes in the absence of everything going well and the respondent being satisfied with his work. I am reinforced in this conclusion by reference to Exhibit 4, being a memorandum from Mr Stokes to the Managing Director, Mr Tooley, of 28 April 1999. That memorandum concerned a timetable for all of the modules set out in the curriculum, not merely one module and reflects Mr Stokes' understanding at the time.

The conclusion regarding the terms of Mr Stokes' contract of employment are the same whether or not Mr MacDonald mentioned the word "casual" when he interviewed Mr Stokes. Even if Mr MacDonald used the word "casual", its use would not override the express terms which he otherwise agreed with Mr Stokes. The word is an expression with no fixed meaning (*Reed v Blue Line Cruises* (1996) 73 IR 420 at 424). In the absence of Mr Macdonald specifying what he meant by the use of that term its use has no practical effect upon the terms of employment he had discussed and agreed. The same conclusion applies even if Mr Stokes' contract of employment might be deemed "casual" for the purposes of regulation 30B(1)(d) of the *Workplace Relations Regulations* as referred to by the respondent (*Graham v Bluesuits P/L t/a Toongabbie Hotel*, 3/11/99, Print S0282).

Thus even if Mr Stokes' contract of employment was—

> … a separate and distinct contract of employment entered into for a fixed period to meet the exigencies of particular work requirements of an employer, rather than under a single and on-going contract of indefinite duration (*Centurion Industries, op. cit.*)

Mr Stokes was employed to teach the modules set out in the curriculum subject to everything going well and the respondent being satisfied with his work. That is why the mere use of the word "casual" does not assist the respondent.

I find that for the purposes of s.29(1)(b) of the Act, Mr Stokes was not a casual employee whose contract of employment merely came to end in accordance with its terms. On the evidence, Mr Stokes' employment came to an end because of the decision of Ms Jenkins, the General Manager, that Mr Stokes would cease teaching and the respondent would employ another person for the purposes of becoming a backup lecturer for the course. During that period, Mr Stokes would not lecture and would not be paid. I accept that Mr Stokes became irate and even aggressive in his response. Nevertheless, for the purposes of this preliminary hearing I am quite satisfied that Mr Stokes' employment was brought to an end by the actions of the respondent in removing his lecturing work after he had lectured in one module. There is no evidence, nor suggestion of any evidence, that things were not going well or that the respondent was not satisfied with his work. Accordingly, the Commission concludes that Mr Stokes was indeed dismissed and that the dismissal which occurred was not contemplated by the terms of the contract of employment agreed between him and the respondent. The Minute of a proposed order to that effect, and to re-list the matter for further hearing, now issues.

Appearances: Mr B. F. Stokes on behalf of himself.

Mr C. Toohey (of counsel) on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Bryan Francis Stokes

and

The Typing Centre of Perth Pty Ltd
t/a Australian International College of Commerce.

No. 779 of 1999.

COMMISSIONER A.R. BEECH.

21 January 2000.

Supplementary
Reasons for Decision.

Mr Toohey was quite correct to point out that the scope of the preliminary hearing was to determine the status of the employment relationship. Therefore, the order to issue in this matter should declare the nature of that relationship, that is that Mr Stokes was not a casual employee.

It is part of the respondent's argument against Mr Stokes that the contract of employment between them came to an end due to an alleged repudiation of the contract by Mr Stokes. That is an issue which has not been canvassed thus far in the proceedings. Although there has been some evidence which goes to the circumstances of the termination (to use a neutral term) of the contract of employment, if this matter eventually is re-listed and proceeds before me, I would not consider the content of the final paragraph of the Reasons for Decision to be the last word on the subject. It is an issue which will be able to be re-visited by way of both evidence and submissions by both parties.

The order to issue, therefore, will declare that Mr Stokes was not a casual employee and order that the application be re-listed for further hearing and determination.

The issuing of the order will not prevent the parties from initiating, or continuing, any discussions between themselves in an endeavour to resolve the matter between them.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Bryan Francis Stokes

and

The Typing Centre of Perth Pty Ltd
t/a Australian International College of Commerce.

No. 779 of 1999.

21 January 2000.

Order.

HAVING HEARD Mr B. Stokes on behalf of himself as the applicant and Mr C. Toohey (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 Bryan Francis Stokes was not a casual employee.

(2) ORDERS THAT the application be re-listed for further hearing and determination.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gek Lian Tan

and

'Gabriels' Cafe.

No. 1842 of 1998.

COMMISSIONER S J KENNER.

15 December 1999.

Reasons for Decision.

(Given extemporaneously at the conclusion of the proceedings, taken from the transcript as edited by the Commission)

THE COMMISSIONER: This matter has been remitted to the Commission as presently constituted as a result of a decision of the Full Bench of the Commission dated 10 September 1999, to consider the question of relief, in view of the Full Bench's finding that the applicant's dismissal was harsh, oppressive and unfair.

Notice of these proceedings to determine relief was sent to both the applicant and the respondent on 27 October 1999 at their respective addresses on the Commission's record.

The applicant has appeared in support of her claim. Mr Kafetzis also appeared on behalf of the respondent, but elected after a short period, to no longer maintain his appearance before the Commission. This was after having been advised that it was the Commission's opinion that the respondent was duly notified of the proceedings and would proceed to hear and determine the matter of relief in his absence, if he choose not to remain in the proceedings.

I should also add that during the course of his brief appearance before the Commission, Mr Kafetzis complained that the notice of hearing of these proceedings mistakenly had his initial as "G" and not "P" Kafetzis. In raising these matters, I must record that Mr Kafetzis conducted himself generally in a most offensive manner. In this regard, the Commission notes its inability to have dealt with Mr Kafetzis' conduct, in view of the repeal of the former s 101 of the Act in 1984, regarding contempt in the face of the Commission.

The Commission heard evidence and submissions from the applicant. She did not seek reinstatement with the respondent because of her former work environment but rather sought compensation for her unfair dismissal and told the Commission that she sought two weeks' pay in that regard. Her hourly rate of pay was $11.00 per hour, based on a 30-hour week, leading to a total amount $330.00 per week gross.

The applicant did not earn other income in this two-week period. Having heard her evidence, the Commission is satisfied that the applicant has established at least a loss of two weeks' pay, which she claims that being an amount of $660.00 and I find accordingly. The onus is on the applicant to establish loss and injury in support of a claim for compensation. I also find that as the applicant does not seek it, reinstatement would be impracticable.

In view of the evidence, it is the Commission's view that the applicant, as a matter of equity and good conscience, should be awarded a sum of compensation in respect of the unfairness of her dismissal, that sum being two weeks wages in the amount of $660.00. An order will issue to this effect, requiring the respondent to pay this sum to the applicant within 21 days.

APPEARANCES: The applicant appeared in person.

Mr P Kafetzis appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gek Lian Tan

and

'Gabriels' Cafe.

No. 1842 of 1998.

COMMISSIONER S J KENNER.

17 December 1999.

Order.

HAVING heard Ms G L Tan on her own behalf and Mr P Kafetzis on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

ORDERS that the respondent pay to the applicant the sum of $660.00 within 21 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.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

David W White

and

Satelite Investments Pty Ltd.

No. 320 of 1997.

31 January 2000.

Reasons for Decision.

COMMISSIONER C.B. PARKS: It is the complaint of David White (the "applicant") that he has been unfairly dismissed from his employment with the respondent in the roles of player ie pitcher, pitching coach, and development co-ordinator with the Perth Heat baseball team. The Notice of Application pleads for the remedies of compensation and the recovery of benefits allegedly due according to a fixed term contract. However the case put to the Commission was for the sole remedy of monetary compensation in the sum of $9967.15, in consequence of his unfair dismissal, on the ground that his contract of employment would ordinarily have expired on or about 27 May 1997, and hence he could have reasonably expected to receive a further $9000.00 in salary and to have accrued a right to further pro-rata annual leave in the sum of $967.15. There is no dispute that the respondent dismissed the applicant however the respondent denies that it did so unfairly and asserts that his conduct had been such as to warrant the dismissal.

The dismissal of the applicant was executed by Douglas Mateljan, the General Manager, who handed the applicant a letter confirming the dismissal, and who stated the reasons for that decision. The applicant was presented with a cheque in payment of the entitlements purportedly due in consequence of the termination of employment. According to Mr White the payment received covered some expenses he had claimed, salary for the part of the week he had worked prior to the dismissal, pro-rata annual leave and the sum of $500.00 which he understood to be a payment in lieu of notice.

The terms and conditions of employment, so far as they are evidenced in writing, are contained in four documents, an agreement titled Standard Player Contract executed 28 May 1996 (exhibit C1), a letter addressed to the applicant dated 14 May 1996 (exhibit C2), a memorandum addressed to the applicant dated 24 May 1996 (exhibit C3), and the Code of Conduct and the Player Handbook (exhibit S2). An annual salary of $26000.00 is prescribed and shown to be formed of two equal amounts, one attributed to the position Development Co-ordinator and the other attributed to the position Player/Pitching Coach, and in addition different bonus payments are prescribed

in relation to the described positions. In relation to the position Development Co-ordinator there appears the statement "(the) main responsibilities are co-ordination of schools, camps and clinic programs, along with other development areas that may arise from time to time", and in relation to the position Player/Pitching Coach it is stated that the position "requires you to fulfil the obligations set out in the Players Agreement, along with the responsibilities associated with such a position".

The reasons given to the applicant for his dismissal were that he had conducted private tuition in baseball for a fee in contravention of a direction to the contrary and in breach of his duty to the employer, and that he played baseball with a club in the local league, in contravention of a general direction, and that on a team trip to Sydney he having requested and being refused permission to reside away from the hotel at which team members were accommodated, did not reside at the hotel and used other accommodation, that on the same trip to Sydney he failed to comply with policy and pitched to a member of the opposing team so as to provide batting practice for that person, and that after having been informed he was not to continue playing games of golf during the usual working hours without first obtaining the approval of the General Manager, continued to play golf without reference to the General Manager.

Mr White readily concedes that during his employment he conducted private tuition in baseball under the business name DW Strike Zone, and that he received payment for the tuition, but he denies any wrong doing. According to the applicant at the time he entered into the employment arrangement in May 1996 he made known to Mr Mateljan the existence of DW Strike Zone and he gave no direction to cease private tuition but did say to him to "keep it under your hat because the owner of the team may wish the business to engage in private tuition at some future time". The applicant says that later in the year he sought to place an advert for DW Strike Zone in the year-book produced by the respondent but was prevented from doing so by Mr Mateljan who commented that the owner would "hit the ceiling" if he saw the advertisement because he may feel that business is being taken away and he also said that advertising "wasn't exactly keeping it under your hat".

The private tuition conducted by the applicant had, on all occasions, been by way of providing tuition to an individual child at each session. There is no dispute that throughout the time the applicant was employed the respondent had provided tuition in baseball by way of what are described as "camps" and "clinics" which dealt with groups of children and had not conducted a tuition session for an individual child. It is the contention of the applicant that the respondent was in the business of providing group tuition, and not individual tuition, which would not have been profitable to the respondent, and hence the conduct of his business was not in competition with the respondent and did not conflict with his duty to the respondent.

Mr Mateljan became General Manager with the respondent in or about August or September 1996. Mr Mateljan joined management of the respondent in 1993 and in March of 1996 was appointed to the position of Baseball Operations Manager. It is in this lastmentioned capacity he approached Mr White with the proposition he become a contracted player, Mr White having been an uncontracted pitcher for the respondent the previous year. According to Mr Mateljan from that meeting and subsequent conversations with the applicant it emerged that Mr White had in mind conducting private clinics and tuitions and that on or about 22 May 1996, when a written employment proposal put to the applicant was discussed, he became aware that the applicant was offering tuition through the business of DW Strike Zone. Mr Mateljan says he then told the applicant that the conduct of private tuition was against the policy of the respondent and that such would also be a direct conflict with his role of Development Co-ordinator. Mr White is said to have indicated that he had commenced some tuition sessions and from that Mr Mateljan says he assumed from his experience the tuition would not extend for many weeks and therefore he stated to the applicant that he would allow him to finish those sessions but he was to keep that situation "under his hat" because were the owner to became aware of it both their jobs would be on the line.

Mr Mateljan says that on or about 24 May 1996 there was a further discussion with Mr White regarding the proposed role of the Development Co-ordinator and that it involved the co-ordination of camps and clinics and the development of other programs designed to produce income for the respondent. Mr Mateljan says he again reinforced that if the applicant accepted the proposal he was not to conduct private clinics.

Mr Mateljan says he next heard of DW Strike Zone at the time the respondent's year-book was being compiled and when a list of the advertisers was provided to him by one of his staff and he found it to contain the name DW Strike Zone. According to Mr Mateljan he did not sight the proposed advertisement, but he did know that Mr White sold baseball gear and it was possible that was the purpose of the advertisement, hence he enquired as to the nature of the proposed advertisement and was informed by the applicant that it referred to private tuition. He did not allow the advertisement to be published. There was no evidence from Mr Mateljan regarding what he said to the applicant except that he directed him to arrange for an advertisement to be placed regarding the tuition offered by the respondent.

A report to the managing Board of the respondent, on 30 October 1996, was prepared by Mr White in response to a request from Mr Mateljan that he prepare a business plan. That report addresses income generating programs eg camps, clinics and others. Mr Mateljan claims that prior to the report being presented to the Board he raised with Mr White the topic of clinics for individuals who stated there was no market for them and they were not profitable, and consequently he did not pursue it further at the time. Mr White does not recollect having such a conversation with Mr Mateljan. It is however plain from the testimony of the applicant that it is his opinion that there is a limited market for individual tuition and that it would not be profitable for the respondent to conduct such tuition.

Around November 1996 a Mrs van Kempen telephoned the respondent inquiring about individual baseball tuition for her child. The particulars thereof were relayed from Mr Mateljan to Mr White for him to deal with it. It flowed from this that the applicant arranged with Mrs van Kempen to provide private individual tuition through DW Strike Zone, and at least one such session was conducted and payment received.

It is the evidence of the applicant that when Mr Mateljan passed him the information regarding Mrs Van Kempen he believed it to be for the purpose of him arranging private tuition because the respondent had not been involved in the provision of individual tuition.

Shortly prior to Christmas 1996 Mr Mateljan says a player on the team mentioned that Mr White had conducted an individual tuition at the WACA ground, and that he says caused him to suspect it may have been a private tuition. In view of this suspicion an enquiry was made to Mrs van Kempen in early January 1997 regarding the tuition she had sought for her child and the response was that Mr White had provided individual tuition on one occasion and that payment had been made to him for that. A review of the respondent's records was undertaken which revealed that no payment for an individual tuition had been remitted to the respondent by the applicant. Mr Mateljan says that he did not wish to act upon the matter without first referring it to the management Board of the respondent later in the month.

On 9 January 1997 the respondent's team arrived in Sydney to play baseball commencing on the next day. The day prior to the date of departure from Perth Mr White sought permission from Mr Mateljan to reside away from the hotel in which the team would be accommodated. That permission was refused. On the day of 9 January 1997 the applicant travelled to Sydney in company with his female partner, and separate from the remainder of the team, and that night Mr White did not join the team and reside at the hotel with them. On the following day 10 January 1997 the Assistant Coach, Mr Adamson who is also a director of the respondent, gave permission to the applicant to reside away from the hotel for the remaining nights that the team was in Sydney.

Mr Mateljan told the Commission that the respondent considers it important that team spirit be fostered and it is the requirement that the team, and the coaching staff who may be required to deal with matters, reside at the same hotel when away and hence because Mr White is both a player and a pitching coach he refused him permission to reside away from the

hotel. The applicant does not dispute that he sought and was refused permission to reside away from the hotel. However in his view his action was justifiable, because the place at which he resided was closer to the ground where they were to play baseball, and because he was able to achieve greater rest than he would have done had he resided at the hotel with the remainder of the team who he knew would not arrive until very late that night.

While in Sydney the applicant, who apparently arrived at the baseball ground prior to the remainder of the team on one day during their visit to Sydney, was, upon the arrival of the remainder of his team, seen to be pitching to a person in the uniform of the opposing team in order to provide him with what appeared to be batting practice.

As I understand the evidence of Mr Mateljan it is that providing practice and therefore assistance to an opposing team is not to be done and adversely affects morale. Mr White does not deny that he pitched to a person in the uniform of the opposing team, however he denies that he was providing batting practice as such because the other person involved held a coaching position with the opposition team, he had retired and was not a player, and it was simply a case of that person wishing to test his level of retained skill. Mr White says that he pitched no more than 6 balls and implied that number could not be seen as constituting practice.

On 24 December 1996 members of the team, including the applicant, were addressed by Mr Ferguson, the Principal Coach, and also by Mr Mateljan, regarding them playing baseball with local league clubs. The address was prompted by one of the respondent's team players being injured in a local league club game and was therefore unable to play for the Perth Heat. Mr Ferguson was plainly angry that a team player had become incapacitated and issued a direction, that players within one particular category were prohibited from playing club baseball, but that players in a second category could do so provided they obtained prior permission from him, or other nominated persons, including Mr White.

In mid January 1997 the applicant played baseball and pitched for a local club and when questioned about that by Mr Mateljan because of the direction given by Mr Ferguson, he replied that he was one of the persons authorised to approve the playing of club baseball and had taken the decision he could play.

According to Mr White, he being a pitcher, he fell within the category of players who may play club baseball, and he did not fall within the category that were prohibited from playing such baseball. The absolute prohibition, he says, applied to "positional" players which description does not include a pitcher.

The direction given by Mr Ferguson, according to Mr Mateljan, was plainly no "regular" player was to play club baseball and that meant the 20 rostered players out of the squad of 30. Hence Mr White who has been a rostered player since 1995 was a regular player and therefore prohibited from playing club baseball.

There was evidence from John Edward Tourville, an Assistant Coach for the respondent, and from Shane Tonkin, a pitcher for the respondent, regarding the direction given by Mr Ferguson at the meeting on 24 December 1996. Messrs Tourville and Tonkin both say that a pitcher is not a "positional" player and although on the "roster" may be required to do limited pitching, and hence it may be appropriate that a pitcher throw more pitches and that is achieved through the avenue of club baseball. Their understanding is that Mr Ferguson did not prohibit pitchers from playing club baseball but that permission was required before that was done.

Robert Matthew Wells, a pitcher with the respondent, has the recollection that what Mr Ferguson conveyed to the players was that "regular" or "full time" players were not to play club baseball. He understood that to include pitchers, however there was the exception that players who did not play for the respondent each weekend could seek permission to play club baseball in order "to keep their innings up". From the general gist of the evidence the usually accepted practice is for players to maintain a level of participation and achievement in competitive baseball, and if that was not achieved with the Perth Heat, they would play for a local club. In the case of a pitcher the level of participation in baseball is apparently measured by the "pitch count" ie the number of balls pitched within some time parameter.

The last of the reasons given for the dismissal of the applicant is that he played golf during working hours without the approval of Mr Mateljan. There is no dispute that it was appropriate for the applicant to play golf on occasions during usual working hours, in games organised by sponsors or for public relations reasons. It is the complaint of Mr Mateljan that the applicant had begun to regularly play golf and had not been available to assist in the office when difficulties were being experienced. That situation, Mr Mateljan says, caused him to speak with Mr White about the playing of golf, around November 1996 when he made known to Mr White that difficulties had occurred in the office, and therefore, although it may be appropriate to participate in a golf game with a sponsor or for public relations reasons, he was to seek the approval of Mr Mateljan before playing golf during usual working hours. The assertion of Mr Mateljan is that subsequent to giving this directive to the applicant in or about November 1996 the applicant played further games of golf during working hours without first seeking his approval. This allegation was not put to the applicant and therefore he has neither conceded nor denied the truth of it.

The argument of the applicant is essentially that he did not engage in conduct which contravened the requirements of the respondent and that the respondent failed to afford him natural justice in that he was not given an opportunity to defend his conduct before the decision was taken to dismiss him.

The respondent contends that the conduct of the applicant described in the reasons given him for his dismissal, save for his continued playing of golf, was in each case an act of misconduct and each act warranted instant dismissal. It is argued for the respondent that it had been unnecessary to give the applicant an opportunity to defend his conduct because the respondent possessed plain evidence that Mr White, had conducted private tuition, played local club baseball, not resided at the Sydney hotel as directed, and pitched to give batting practice to a person on the opposing team in Sydney.

I am not satisfied from the evidence that the direction given by Mr Ferguson on 24 December 1996 was expressed in terms that made it absolutely clear to those in attendance which category of players it was that were absolutely prohibited from playing local club baseball. Mr Tourville, an Assistant Coach with the respondent travelled with the applicant to the amateur club game in which he played in January 1997 and it is plain from his evidence that he questioned Mr White about his intention to play in that game, however when informed by Mr White that he was permitted to play he obviously was satisfied with that answer because he did not view Mr White to be subject to the absolute prohibition. For these reasons I am not convinced that the applicant intentionally contravened a direction of Mr Ferguson. There is the assertion that the applicant played golf during working hours without authorisation, however I am not satisfied that it has been established he did in fact play golf during working hours subsequent to the requirement being placed upon him to seek prior authorisation. Plainly the applicant did pitch a number of balls to a person wearing the uniform of the opposition team in Sydney. However, beyond the view of Mr Mateljan that such is not acceptable conduct, there is no evidence to show that it is notorious that such is either not tolerated in baseball generally, or by the Perth Heat team in particular, and hence I am not satisfied that such conduct by the applicant may be construed misconduct on his part.

On 9 January 1997 the applicant, in the full knowledge he had been refused permission to reside away from the hotel in Sydney where the team were to be accommodated, resided at a different place on that night. The fact that Mr Adamson authorised his residing at another place on the following nights the team was in Sydney does not have the effect of sanctioning his earlier conduct. Hence I find that the applicant did misconduct himself when he deliberately disobeyed the direction given him by Mr Mateljan.

Pamela Rosemary Richards, the former office manager for the respondent, was called by the applicant to give evidence and told the Commission that throughout the employment of the applicant she had been aware he had been conducting private tuition. It is her belief that Mr Mateljan would also have known. However, she was unable to provide any direct evidence to substantiate that belief and conceded it was assumption on her part. Ms Richards recollects that Mr Mateljan did say

to her that he had told Mr White not to conduct private tuition, and that he questioned her whether payment had been received in relation to tuition arranged by Mrs van Kempen, however she was equivocal as to whether or not these matters were raised with her prior to, or after, the dismissal. Hence I do not find the evidence given by Ms Richards to be of any assistance.

Although the alleged playing of golf during working hours was said to be a matter of concern it is plain that the catalyst for the dismissal of the applicant was his other conduct during January 1997, and his earlier conduct which became apparent in January 1997.

There is no evidence to suggest, as I understand has been implied by the applicant, that Mr Mateljan had been aware of the private tuition and acted upon it in order to add weight to the other allegations of misconduct. I am satisfied that Mr Mateljan made his enquiry to Mrs van Kempen prior to the team travelling to Sydney on 9 January 1997, and hence he commenced an enquiry into the possible conduct of private tuition prior to when the other conduct also relied upon had occurred. The only evident reason to commence the enquiry is the suspicion generated from the comment of the player weeks prior.

Mr Mateljan has told the Commission that there were several occasions on which a Mr Fogarty, whom both parties referred to as the "owner" of the team, had stated to him that players contracted to the team were not to conduct private tuition and it was plain that his job would be in jeopardy if he allowed that to occur. Mr Mateljan says the attitude of Mr Fogarty was conveyed to the applicant however he did permit him to conclude tuition he may have previously arranged. To the extent there is a difference between the evidence of Mr White and Mr Mateljan I prefer the evidence of Mr Mateljan who I am satisfied told the applicant that he was not allowed to conduct private tuition in the future, and that he was unaware the applicant had continued to do so until his suspicion was raised in December 1996. Hence I find that the applicant acted wrongfully and that conduct, together with his misconduct in disobeying Mr Mateljan and not residing at the hotel in Sydney, was valid and justifiable reason for the respondent to terminate his employment.

It has not been argued before the Commission that the form of dismissal was either summary or unlawful. From that I assume there is acceptance that the payment made to Mr White, purportedly in lieu of notice, reflected the lawful manner in which the contract of employment might be terminated. The dismissal has not been shown to be unfair and therefore this application will be dismissed.

Appearances: Mr TC Crossley on behalf of the applicant
Mr A Smetana on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

David W White

and

Satelite Investments Pty Ltd.

No. 320 of 1997.

31 January 2000.

Order.

HAVING heard Mr TC Crossley on behalf of the applicant and Mr A Smetana 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.

SECTION 29 (1)(b)—Notation of—

Applicant	Respondent	Number	Commissioner	Result
Amato M	QPSX Communications Pty Ltd	2429/1997	Gregor C	Discontinued
Bain R	Allight Pty Ltd	1602/1999	Gregor C	Order Issued
Bartsch AA	Hamersley Iron Pty Ltd	1840/1999	Beech C	Discontinued
Bell M	QPSX Communications Pty Ltd	2428/1997	Gregor C	Discontinued
Bergmann	Workpac (WA) Pty Ltd	1607/1999	Fielding SC	Dismissed for want of prosecution
Bottcher W	Robinswood Pty Ltd	945/1999	Beech C	Discontinued
Bradford JS	Timber focus International Pty Ltd	1179/1999	Wood C	Discontinued by leave
Brogan S	Boral Building Services Pty Ltd	1542/1999	Beech C	Discontinued
Brown D	QPSX Communications Pty Ltd	2434/1997	Gregor C	Discontinued
Butler BA	Calder Design Pty Ltd	1520/1999	Gregor	Dismised
Cameron CL	BP Cataby Road House	1185/1999	Beech C	Struck out for want of prosecution
Carroll DR	QPSX Communications Pty Ltd	2440/1997	Gregor C	Discontinued
Chidgey M	LCL Cargo Services Pty Ltd	1423/1999	Scott C	Dismissed
Claybrook GJ	Hampton Transport Service	1510/1999	Scott C	Dismissed
Combs PJ	Goldeast Corporation Pty Ltd T/A Metro Motors	999/1999	Scott C	Dismissed
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union	Artfocus Holdings t/a Kea Group/Kea Digital Media	CR 224/1999	Kenner C	Discontinued by leave
Coombs DP	Cineac Pty Ltd	1468/1999	Beech C	Discontinued
Dawkins SJ	Leeuwin Realty, The Professionals Pty Ltd	720/1999	Gregor C	Discontinued for want of prosecurtion
Dichiera J	Dial-A-Basket	1307/1999	Beech C	Discontinued

Applicant	Respondent	Number	Commissioner	Result
Ebert EE	Health Solutions (WA) Pty Ltd	1472/1999	Beech C	Discontinued
Ellery AJ	Elliott's Small Engines	1604/1999	Beech C	Discontinued
Engles DG	Outokumpu Mining Australia Pty Ltd	433/1999	Beech C	Discontinued
Farris D	D Nabbs & B Duffied F/T t/a Fresh & Crusty	1374/1999	Gregor C	Discontinued
Ferguson	Barminco Pty Ltd	1566/1999	Beech C	Discontinued
Garrett D	Pioneer Concrete (WA) Pty Ltd	1424/1999	Beech C	Discontinued
Gartrell LA	Opal Lake Holdings Pty Ltd t/a Mundaring Hotel	486/1999	Gregor C	Dismissed for want of prosecurtion
Glossop DB	Artfocus Holdings T/A Kea Group/Kea Digital Media	979/1999	Kenner C	Discontinued
Grace C	Finishing Touch Pty Ltd	1612/1999	Beech C	Discontinued
Greenmount A	Bunning Building Supplies Pty Ltd	1194/1999	Gregor C	Discontinued
Guinan BL	Tangent Nominees Pty Ltd t/a Advantage Homes	1396/1999	Beech C	Discontinued
Hailwood JL	Price Savers	1579/1999	Gregor C	Discontinued
Hargraves RC	Bristile Ltd (Metro Brick Division)	1318/1999	Kenner C	Discontinued
Hartridge A	Half Price Pine Furniture	1281/1999	Gregor C	Discontinued
Herbort S	QPSX Communications Pty Ltd	2421/1997	Gregor C	Discontinued
Hill RA	Buonissimo	1255/1999	Beech C	Discontinued
Hillis BN	City West Fitness Centre	1855/1999	Kenner C	Discontinued
Householder JE	QPSX Communications Pty Ltd	2430/1997	Gregor C	Discontinued
Hudson KT	QPSX Communications Pty Ltd	2420/1997	Gregor C	Discontinued
Hurkala SM	Novacoat Pty Ltd	399/1998	Scott C	Dismissed
Kaldor MJ	QPSX Communications Pty Ltd	2438/1997	Gregor C	Discontinued
Keenan GJ	Federated Liquor and Allied Industries Employees' Union	1704/1999	Scott C	Dismissed
Kirkham EJ	Goldbrook Holdings Pty Ltd t/a Summit Realty	1524/1999	Beech C	Struck out for want of prosecution
Korechi L	QPSX Communications Pty Ltd	2426/1997	Gregor C	Discontinued
Laing SC	Aldo Roberto Bertogna, Bernadette Bertogna & Lisa Fahed Jahashan t/a Dual Image Technology	1288/1999	Scott C	Dismissed
Lancaster GF	Impex Power Corporation Pty Ltd	1021/1999	Beech C	Discontinued
Landymore-Lim L	Arismac Sales	1009/1999	Scott C	Dismissed
Lawrence AJ	Specialised Lifting Service	1283/1999	Gregor C	Discontinued
Lemin G	QPSX Communications Pty Ltd	2423/1997	Gregor C	Discontinued
Linahan A	QPSX Communications Pty Ltd	2425/1997	Gregor C	Discontinued
Macri G	Geers and Pusey, Certified Practising Accountants	1666/1999	Wood C	Discontinued by leave
Madalena KM	Network Video Home Entertainment Centre (Greenfields)	1340/1999	Scott C	Dismissed
Mall M	QPSX Communications Pty Ltd	2422/1997	Gregor C	Discontinued
May MA	Greg Hawkins T/A Video City	1418/1999	Gregor C	Order Issued
McBride S	Deckside Pty Ltd t/a Ranger Heavy Duty Products	1142/1998	Gregor C	Discontinued for want of prosecurtion
McIntyre R	QPSX Communications Pty Ltd	2433/1997	Gregor C	Discontinued
McMahon V	Family and Children's Services	1517/1999	Gregor C	Discontinued
Millington SJ	Ampac Technologies Pty Ltd	1360/1999	Gregor C	Discontinued
Monterosso PA	QPSX Communications Pty Ltd	2432/1997	Gregor C	Discontinued
Moore SN	Phoenix Steel Sales Pty Ltd t/a Phoenix Metalform	1019/1999	Kenner C	Discontinued
Morley RW	National Workforce Pty Ltd	1225/1999	Gregor C	Discontinued
Morse CB	Australian Red Cross WA Division	1507/1999	Fielding SC	Discontinued
Morseto SP	Mezzonine Pty Ltd t/a The Lunching Pad	1457/1999	Beech C	Struck out for want of prosecution
Mudd L	QPSX Communications Pty Ltd	2419/1997	Gregor C	Discontinued
Muir DP	Toms Tyres & Brakes Pty Ltd	1509/1999	Beech C	Discontinued
Musial B	Doric constructions Pty Ltd	1906/1999	Scott C	Withdrawn by leave
Ness S	Prok Group Limited	1486/1999	Gregor C	Discontinued
Osborne WT	QPSX Communications Pty Ltd	2437/1997	Gregor C	Discontinued
Owen L	Tony Critchley t/a Critchley's Landscaping & Wholesale Nursery	1895/1999	Beech C	Withdrawn by leave
Perram EM	Gillang Pty Ltd	1152/1999	Wood C	Discontinued by leave
Petherick B	OST Pty Ltd t/a Sunlite Australia	1323/1999	Gregor C	Discontinued
Petriconi R	Greenport Nominees Pty Ltd t/a Indiana Tea House	1251/1999	Beech C	Discontinued
Plewright AG	Toms Tyres & Brakes	1402/1999	Scott C	Dismissed
Quigley RK	QPSX Communications Pty Ltd	2441/1997	Gregor C	Discontinued
Quinns Baptist College Inc	Kevin Wayne Clarke	1370/1999	Scott C	Withdrawn by leave
Radcliffe R	Kondinin Shire Council	1546/1999	Gregor C	Order Issued
Rapkin K	The Perth Diocesan Trustees and Others	1553/1999	Scott C	Withdrawn by leave
Sain NL	Honor Promotions	1534/1999	Beech C	Withdrawn by leave
Sheen AL	Natcomp Technology Australia Pty Ltd	1327/1999	Gregor C	Discontinued
Sicuso Domenico	Swanview Corporation Pty Ltd	449/1999	Beech C	Discontinued
Simon B	QPSX Communications Pty Ltd	2424/1997	Gregor C	Discontinued
Smith MI	QPSX Communications Pty Ltd	2435/1997	Gregor C	Discontinued
Smythe M	E'Co Australia Pty Ltd	26/1999	Scott C	Dismissed

Applicant	Respondent	Number	Commissioner	Result
Tate RL	Homestake Gold of Australia	1161/1999	Gregor C	Discontinued
Taylor LM	Denmark Holdings Pty Ltd t/a "Denmark Unit Hotel"	25/2000	Scott C	Withdrawn by leave
Taylor RE	Robyn Lundbech and Roger Lundbech t/a Bobby-Sue's	618/1999	Beech C	Discontinued
Taylor RM	QPSX Communications Pty Ltd	2436/1997	Gregor C	Discontinued
Templeman TP	QPSX Communications Pty Ltd	2439/1997	Gregor C	Discontinued
Timms WE	Wesfarmers Transport Ltd	1018/1999	Beech C	Discontinued
Verdonk C	Van Leeuwen Pipe & Tube Australia Pty Ltd	1227/1999	Beech C	Struck out for want of prosecution
Wainwright	June Sinclaire	1010/1999	Scott C	Dismissed
Walker SW	QPSX Communications Pty Ltd	2431/1997	Gregor C	Discontinued
Wall CM	Princess Road Tavern	1333/1999	Scott C	Dismissed
Ward D	QPSX Communications Pty Ltd	2427/1997	Gregor C	Discontinued
Watts MW	Expressway Civic Pty Ltd	1242/1999	Gregor C	Dismissed
Willey F	Autopaints Pty Ltd	1455/1999	Beech C	Discontinued

CONFERENCES—
Matters referred—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian, Liquor Hospitality and Miscellaneous Workers Division, WA Branch

and

Bilby's Place Child Care Centre.

No. C304 of 1999.

18 January 2000.

Order.

WHEREAS the parties to this matter were parties to application C157 of 1999;

AND WHEREAS following a conference held between the parties in that matter on 9 August 1999 an agreement was reached between the parties which settled the matter;

AND WHEREAS in application C304 of 1999 the applicant union has advised the Commission that the respondent has failed to implement the terms of the agreement reached between them in C157 of 1999;

AND WHEREAS the Commission listed this matter for mention only on 22 December 1999;

AND WHEREAS the Commission is of the view that an order should issue reflecting the terms of the agreement reached between the parties in this matter;

AND HAVING HEARD Mr J. Rosales-Castaneda on behalf of the applicant union and there being no appearance on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the Industrial Relations Act 1979, hereby order—

THAT Bilby's Place Child Care Centre—

1. Pay all superannuation entitlements due to its former employee Shavvaughn Waite by 31 January 2000;
2. Provide a 1998/1999 Group Certificate to Shavvaughn Waite by 31 January 2000;
3. Pay Shavvaughn Waite 29 hours' wages as annual leave entitlement by 31 January 2000;
4. Pay Shavvaughn Waite $462.82 by 31 January 2000 by way of wages underpaid;
5. Give Shavvaughn Waite an Employment Separation Certificate by 31 January 2000;
6. Provide Shavvaughn Waite with copies of all relevant pay slips by 31 January 2000; and
7. Provide a Certificate of Service to Shavvaughn Waite by 31 January 2000.

(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

UNIONS—
Application for alteration of rules—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

In the matter of an application by
The Civil Service Association of Western Australia Incorporated.

1896 of 1999.

ROBIN COLBERT LOVEGROVE
DEPUTY REGISTRAR.

18 January 2000.

Decision.

HAVING read the application, there being less than five per cent of the membership of the organisation having objected to the application or to the proposed amendments, after consulting with the President, and upon being satisfied that the requirements made there under have been complied with, I have this day registered an alteration to Rules 3, 12, 19, 22, 23, 24, 26, 27 and 29 of the registered rules of the applicant organisation, in terms of the application as filed on 17 December 1999.

(Sgd.) R.C. LOVEGROVE,
Deputy Registrar.

CONFERENCES—Notation of—

PARTIES		NUMBER COMMISSIONER	DATE	MATTER	RESULT
Australian Workers' Union	Buckeridge Group of Companies	Kenner C C 21 of 1999	n/a	Alleged Unfair Dismissal	Withdrawn
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Goldfields Contractors Pty Ltd	Kenner C C 211 of 1999	19/11/99	Termination	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Goldfields Contractors Pty Ltd	Kenner C C 289 of 1999	19/11/99	Acceptance of Employment Form	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Shire of Murray	Kenner C C 323 of 1999	10/12/99	Impending Termination	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Melville Motors Pty Ltd	Kenner C C 324 of 1999	13/12/99	Alleged Unfair Dismissal	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Brown & Root AOC	Fielding SC C 353 of 1999	14/01/00	Termination of Employment	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Simplot Pty Ltd & Other	Kenner C C 267 of 1999	8/11/99	Redundancy	Discontinued
Builders' Labourers, Painters and Plasterers Union	A-MAC Painting Services	Kenner C C 251 of 1999	4/11/99	Access to Time & Wages	Discontinued
Builders' Labourers, Painters and Plasterers Union	Rowethorpe (Uniting Church Homes)	Kenner C C 262 of 1999	4/11/99	Access to Time & Wages	Discontinued
Builders' Labourers, Painters and Plasterers Union	Royal Perth Hospital C 255 of 1999	Kenner C	n/a	Alleged Contractual Entitlements	Discontinued
Builders' Labourers, Painters and Plasterers Union	Boral Building Services	Kenner C C 258 of 1999	4/11/99	Non Payment of Productivity Allowance	Discontinued
Builders' Labourers, Painters and Plasterers Union	TD Nelson & Son	Kenner C C 265 of 1999	20/1/00	Outstanding Wages & Superannuation	Discontinued
Builders' Labourers, Painters and Plasterers Union & Other	Designrite Constructions	Kenner C C 340 of 1999	n/a	Lack of Amenities on Site	Discontinued
Civil Service Association	Speaker of Legislative Assembly & Others	Fielding SC PSAC 45 of 1999	29/10/99 and 18/11/99	Negotiations re EBA	Discontinued
Cockburn Cement Limited	Australian Workers' Union	Kenner C C 343 of 1999	11/1/00	Ban over sampling and testing duties	Discontinued
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union	Millennium Inorganic Chemicals Ltd	Kenner C C 238 of 1999	30/9/99	Denied Productivity Bonus	Referred
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union	Supreme Australia Pty Ltd	Kenner C C 10 of 2000	n/a	Return to Work Order	Discontinued
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	Peter Radford	Kenner C C 261 of 1999	20/1/00	Access to Time & Wages	Discontinued

PARTIES		NUMBER COMMISSIONER	DATE	MATTER	RESULT
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	Iluka Resources Limited (Westralian Sands Limited)	Kenner C C 193 of 1999	9/9/99	Reclassification of Employee	Discontinued
Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA	Mardo Australia Pty Ltd	Kenner C C 325 of 1999	13/12/99	Alleged Unfair Dismissal	Referred
Liquor, Hospitality and Miscellaneous Workers' Union	Burswood Resort (Management) Ltd	Fielding SC CR 125 of 1999	7/7/99	Disciplinary Interviews without representation	Discontinued
Liquor, Hospitality and Miscellaneous Workers' Union	Solid Concepts	Beech C C 250 of 1999	n/a	Alleged Unfair Dismissal	Closed
Liquor, Hospitality and Miscellaneous Workers' Union	Tip Top Bakeries	Beech C C 292 of 1999	21/12/99	Dismissal	Referred
Liquor, Hospitality and Miscellaneous Workers' Union	Bilby's Place Child Care Centre	Beech C C 244/1999	16/9/99	Entitlements	Referred
Liquor, Hospitality and Miscellaneous Workers' Union	Burswood Resort (Management) Limited	Parks C C 100/1999	14/4/99, 20/4/99, 20/5/99	Dismissal	Referred
Liquor, Hospitality and Miscellaneous Workers' Union	Crest Group Pty Ltd t/a Gateway Child Care	Beech C C 235/1999	7/2/99	Entitlements	Referred
Media, Entertainment & Arts Alliance of Western Australia Union	ALW Pty Ltd	Fielding SC C 291 of 1999	19/11/99	Payment as per agreement	Discontinued
Media, Entertainment & Arts Alliance of Western Australia Union	The Western Australian Sports Centre Trust	Beech C PSAC 46 of 1999	n/a	Shift Penalties	Referred
Media, Entertainment & Arts Alliance of Western Australia Union	CEO, WA Sports Centre Trust	Scott C C 328 of 1999	10/1/00	Termination	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Miriam Anne Angus

and

Child Support Agency.

No. 1045 of 1999.

COMMISSIONER S J KENNER.

20 January 2000.

Direction.

HAVING heard Mr G Droppert of counsel for the applicant and Ms S Nash of counsel for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

(1) THAT 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 parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 7 days prior to the date of hearing.

(3) THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than 3 days prior to the date of hearing.

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

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

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Paul Leslie McCarthy

and

Ryan Mining Pty Ltd.

No. 1055 of 1999.

COMMISSIONER S J KENNER.

17 January 2000.

Direction.

Having heard Ms J Whitcombe of counsel for the applicant and Ms K Broux of counsel for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

(1) THAT 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 parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 14 days prior to the date of hearing.

(3) THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than 7 days prior to the date of hearing.

(4) THAT the applicant and respondent file an agreed statement of facts (if any) no later than 7 days prior to the date of hearing.

(5) THAT the matter be listed for hearing for 2 day(s).

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

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Alexander Joseph Bellotti

and

Minister for Police Western Australia & Other.

No. APPL 1893 of 1999.

COMMISSIONER S J KENNER.

2 February 2000.

Direction.

Having heard Mr J O'Conner of counsel for the applicant and Mr D Matthews of counsel for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

(1) THAT 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 parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 14 days prior to the date of hearing.

(3) THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than 3 days prior to the date of hearing.

(4) THAT the respondent file and serve an outline of submissions upon the applicant and any list of authorities upon which it intends to rely no later than 10 days prior to the date of hearing.

(5) THAT the applicant file and serve an outline of submissions upon the respondent and any list of authorities upon which it intends to rely no later than 4 days prior to the date of hearing

(6) THAT the applicant and respondent file an agreed statement of facts (if any) no later than 3 days prior to the date of hearing.

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

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

NOTICES—
Appointments—

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Senior Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of sections 16(3) and 80D of the Industrial Relations Act 1979, hereby appoint, subject to the provisions of that Act, Commissioner P.E. Scott to be an additional Public Service Arbitrator for a period of six months from the 29th day of January 2000.

Dated 28th day of January, 2000

(Sgd.) G. L. FIELDING,
Senior Commissioner.

SITE ALLOWANCES—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Hanssen Pty Ltd & Others.

No's. CR 259 & CR 299 of 1999.

COMMISSIONER S J KENNER.

17 December 1999.

Reasons for Decision.

THE COMMISSIONER: These claims for site allowances were referred under s 44 (9) of the Industrial Relations Act 1979 ("the Act"). Both applications were the subject of s 44 conferences in an attempt to settle the claims by the applicants for site allowances by conciliation. The claims relate to employees of the respondents covered by the terms of the Building Trades (Construction) Award No 14 of 1978 ("the Award"), employed on two construction sites. One site is located in Wellington Street, East Perth ("Wellington Street") and the other in Labouchere Road, South Perth ("South Perth"). Both sites are multi-story residential projects. As both applications involved the same principal employer, for convenience, the parties consented to the applications being heard and determined together.

The Commission has had the benefit of site inspections in determining these matters. Submissions and evidence from the parties followed immediately thereafter.

Mr G Giffard represented the applicants and Mr G Hanssen represented the respondents. There was one witness called by the applicants, Mr D Smith, who is a union organiser. He gave evidence about the conditions on both sites. Mr Smith was not cross-examined and the respondents did not call evidence.

Principles

The Award provides in clause 8(16) that the unions party to the Award may request an employer to consider a site allowance to compensate for all special factors and/or disabilities on a project. Where the parties are unable to reach agreement, the Commission is to determine an appropriate rate. Such determination is to be based on the criteria set out in the decision of the Full Bench of the then Conciliation and Arbitration Commission in *Sapri Construction Company Pty Ltd v The Amalgamated Society of Carpenters and Joiners of Australia and Ors* (Print F1957) *("Sapri")*. Those criteria are—

"(i) In relation to a claim for a new site allowance the first issue to be decided is whether the site is one for which an allowance is appropriate. As the unions acknowledged, not all projects attract an allowance. The test is whether at 23 December 1982 the site would have attracted such an allowance. It would be quite contrary to the intention of the wage pause to grant a site allowance for areas or circumstances where one would not have customarily applied or in any other way to create a precedent for the extension of site allowances beyond the areas or circumstances to which they have previously applied.

(ii) As to the quantum of any allowance, this should be assessed on the same basis as immediately prior to 23 December 1982 and therefore the level should not exceed what would have been appropriate at that date for the circumstances on the site.

(iii) Fixation of a new site allowance should have no regard to other site allowances, even in the immediate area, which have not been assessed by the Commission or where the Commission is not satisfied that the amount agreed between the parties is appropriate.

(iv) The foregoing applies to all claims for site allowances made before 23 December 1982 and not determined at that date as well as new claims after that date."

Additionally, it is also the case that compliance with the terms of *Sapri* constitutes compliance with the Commission's wage fixing principles and that site allowances are to be seen as set apart from the wage fixing principles: *Master Builders' Association of Western Australia v Building Trades Association of Unions of Western Australia* (1987) 67 WAIG 1731; *Confederation of Western Australian Industry (Inc) and Or v Building Trades Association of Unions of Western Australia* (1992) 72 WAIG 1500.

As has been noted in previous decisions of this Commission in matters such as these, the onus is on the applicants to demonstrate that—

(a) The site is one that warrants consideration of an allowance;

(b) There are disabilities experienced on site;

(c) That those disabilities are beyond those comprehended by the Award; and

(d) That the amount claimed is appropriate to compensate for those disabilities.

I turn now to consider the sites in question.

Wellington Street

The first project was the construction of a multi-storey residential building on Wellington Street, West Perth. The project involves the construction of some 68 apartments and has a value of $8.1 million. The works commenced in June 1999 and are due to be completed in April 2000. The site has one entrance on Bishop's Row that can be accessed from Hill Street. The access to the site via these streets is somewhat congested due to a narrow road and cars parked either side of it.

The application for Wellington Street claimed a site allowance of $1.55 per hour because of the following conditions—

1. soft sand;
2. lack of parking facilities;
3. lack of set down areas;
4. distance to amenities;
5. use of second hand timber;
6. overlapping trades; and
7. adjacent to busy traffic.

As to the site itself, the buildings under construction at the time of the inspection occupied most of the area of the site with limited access to and from the site. Wellington Street, a busy city thoroughfare on one side and Bishops Row on the other bound the project. Limited parking is available on the street frontage however a City of Perth parking station is close by. The applicants claim that employees are required to carry their personal hand tools across the road from the parking facilities and this necessitates some compensation.

Specifically, the site has a courtyard in the centre of the complex. This area is somewhat congested and a crane and concrete trucks occupy this area. Materials, including precast panels used in the main construction, are transported into position by crane. This entails these materials being craned overhead of employees on site into position. From the Commission's observations, there are limited set down areas on the site. Also, from the nature of the site, a degree of double handling of materials is apparent. Employees were, by the layout of the site, required to work in close proximity to one another, and some overlapping of trades was evident.

There was also evidence of soft sand on the site, particularly in an area set aside for tools and materials storage. I note however, the respondent's submissions that a bobcat is available to assist in the handling of materials from this area. In this regard, it is to be noted that some larger building materials are stored on soft sand and it appeared to the Commission that this might require difficult manoeuvring across the sand to the apartments being constructed.

The Commission viewed some of the amenities on the site. The site had three lunchrooms catering for up to 20 employees each. The project compliment at the time of the hearing was at its peak of 60-70 employees. There is some distance to the amenities from parts of the site, however this in itself is not necessarily unusual.

There appeared to be little second hand timber used on this site, as conceded by the parties.

Whilst I acknowledge Mr Hanssen's submissions that the method of construction used by his company attempts to minimise adverse conditions on site, I am satisfied on the evidence and materials before me, that the conditions on this site warrant some consideration for disabilities encountered not otherwise encompassed by the Award. Having regard to previous decisions of the Commission in relation to contested site allowance claims, and those subject of agreements ratified by this Commission, I consider an appropriate allowance to be $1.20 per hour for each hour worked. This allowance will be payable in lieu of those allowances otherwise applicable pursuant to clause 9- Special Rates and Provisions of the Award.

South Perth

This project commenced in August 1999 and is due for completion in May 2000. It is also a multi-storey residential construction comprising some 17 apartments with a project value of $5.4m. It is located at Labouchere Road, South Perth.

The union claimed that the following disabilities on the site warranted the payment of a $2.05 site allowance—

1. distance to amenities;
2. use of second hand timber;
3. adjacent to busy traffic;
4. exposure to wind and dust;
5. height allowance; and
6. overlapping trades.

This site had amenities located at the street frontage. There was one crib room and ablutions. As with Wellington Street, the lift available on this site is for the use of materials only. The union claimed that this was a disadvantage to employees, who were required to walk down stairs in order to use the amenities.

There appeared to be minimal use of second hand timber on this site, due to the use of prefabricated panels in the construction.

The South Perth site is located parallel to the Mitchell Freeway and Labouchere Road. There is ample on-site parking for employees and the site is quite spacious, compared to Wellington Street. There is a considerable distance from the freeway to the site.

It was said that this site is exposed to wind and dust. It is the case that the site surrounds are open with sandy areas. No doubt a sea breeze may create some dust on site. However, it was not apparent that there would be very much preparation or transportation of materials over large distances on site. This would not be beyond the norm contemplated by the terms of the Award and I am not satisfied it would cause excessive difficulties for employees on this site. Furthermore, there was no direct evidence before the Commission that there were particular problems created by wind blown dust.

At inspection the construction was six storeys high and it is expected to reach nine storeys at completion. Whilst the applicants claimed consideration for height in their application, the Award, by clause 10- Multi-Storey Allowance, compensates for this factor and does not warrant any further consideration in my opinion.

There were approximately 30 employees on the site on the day of the inspection. Whilst it appeared that they were working in some areas of close proximity, this was not other than what could be reasonably expected, considering the stage of the development and the size of the site. There was not the same degree of congestion as apparent at Wellington Street.

Having regard to the evidence and what as observed by the Commission on the inspection, I do not consider that this site has a level of disabilities associated with it to warrant the payment of a site allowance.

Operative Date

The final matter for consideration is the operative date of the allowance. The applicants sought an operative date from the date of the applications in each matter, they being 13 September 1999 for Wellington Street and 27 October 1999 for South Perth. By the terms of s 39(3)(b) of the Act, the Commission is able to give retrospective effect to a decision in the event that it is satisfied that there are special circumstances that make it fair and right to do so, but no earlier than the date of the application. In the case of site allowance orders, it is often the case that the operative date of the order will be the date of application, subject to the Commission being satisfied that the relevant employees have been experiencing the adverse conditions the subject of the order from that time. I am so satisfied on this occasion.

Accordingly, an order and minutes of proposed order now issue giving effect to these reasons for decision.

APPEARANCES: Mr G Giffard on behalf of the applicants.

Mr G Hanssen 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 and Other

and

Hanssen Pty Ltd & Others.

No. CR 299 of 1999.

COMMISSIONER S J KENNER.

17 December 1999.

Order.

HAVING heard Mr G Giffard on behalf of the applicants and Mr G Hanssen on behalf of the respondents the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australian Builders Labourers, Painters and Plasters Union of Workers and Other

and

Hanssen Pty Ltd and Others.

No. CR 259 of 1999.

COMMISSIONER S J KENNER.

21 December 1999.

Order.

HAVING heard Mr G Giffard on behalf of the applicants and Mr G Hanssen on behalf of the respondents the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

(1) THAT notwithstanding the provisions of the Building Trades (Construction) Award 1987 No R14 of 1978, employees employed by or on behalf of the respondents to carry out construction work on the multi story residential unit development site in Wellington Street East Perth ("the Project") shall be paid $1.20 per hour worked in lieu of and in substitution for all special rates and conditions prescribed in clause 9(1) of the Building Trades (Construction) Award 1987 No R 14 of 1978.

(2) THAT this order shall apply from the first pay period commencing on or after 13 September 1999 until practical completion of the Project.

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

RECLASSIFICATION APPEALS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Nicholas Peter Dragicevich

and

Department of Resources Development.

No. PSA 2 of 1999.

17 January 2000.

Reasons for Decision.

PUBLIC SERVICE ARBITRATOR/SENIOR COMMISSIONER: The Appellant is and was, at all material times, a member of the State Public Service and as such is a public service officer within the meaning of the *Public Service Management Act 1994*. At all material times he occupied an office in the public service designated as Senior Project Officer within the Department of Resources Development.

The 'official' Job Description Form for that office indicates that at all material times it carried a classification, for salary purposes, of Level 6 under the *Public Service Salaries Agreement 1985*. That Agreement has since been replaced by the *Public Service Award 1992*, which by Clause 10 and Schedule A contains a similar salary classification structure.

In January 1999 the Appellant lodged the instant Notice of Appeal seeking that the office occupied by him be reclassified as Level 7 and be re-titled "Manager (Technical)". In addition, the Appellant seeks payment for higher duties at the rate prescribed for Level 7 from the 5th March 1996. The grounds on which the appeal is made are that the "present salary" payable to the Appellant is not commensurate with the increased level of duties and responsibilities of the office; that the current title is not appropriate for the position; and that higher duties have been carried out by him since the 5th March 1996 at the level of Level 7.

The appeal was ostensibly instigated pursuant to section 80E of the *Industrial Relations Act 1979* which authorizes the Commission, constituted by a Public Service Arbitrator, to enquire

into and deal with any industrial matter relating to a "Government officer". The Appellant is, by definition, a "Government officer". More particularly, section 80E(2) authorizes the Commission, constituted by an Arbitrator, to enquire into and deal with any industrial matter including—

> "a claim in respect of the salary, range of salary or title allocated to the office occupied by a Government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him."

It is common ground that at all material times, certainly at the time the Notice of Appeal was lodged, the Appellant was a party to a workplace agreement with the Chief Executive Officer of the Department. Section 26A of the *Industrial Relations Act 1979* seemingly precludes the Commission from receiving in evidence or otherwise informing itself of the terms and conditions of that agreement. However, it is common ground between the parties to these proceedings that the workplace agreement in question regulates the level of remuneration paid to the Appellant.

The Respondent submits that because of the existence of the workplace agreement the Commission is without authority to entertain the current appeal. It argues that by reason of section 7B of the *Industrial Relations Act 1979* the Appellant is not an employee for the purposes of the Act, nor by reason of section 7C of the Act can the matter, the subject of the appeal now in question, be an "industrial matter". Furthermore, the Respondent argues that by reason of provisions of sections 45 and 46 of the *Workplace Agreements Act 1993* the provisions of the *Industrial Relations Act 1979*, which confer a right of appeal against the decision or recommendation of an official performing any function in public sector management, have no application in the case of the Appellant. In support of its argument the Respondent refers to and relies upon the decision of the Public Service Appeal Board in *Oliver v. CEO Goldfields Esperance Development Commission (1997) 77 WAIG 2819.*

The Appellant for his part suggests that until recently the Department had fostered a belief that the Commission had jurisdiction to entertain an application of the kind now in question. Moreover, the Appellant argues that the jurisdiction given to the Public Service Arbitrator under the *Industrial Relations Act 1979* is special. This is reinforced by the fact that the Arbitrator is established as a constituent authority of the Commission. For these purposes the Act contains special provisions in section 80C of the Act dedicated to dealing with the interpretation of that part of the Act dealing with the jurisdiction of the Public Service Arbitrator. In particular, the section contains a definition of "employer" different from that which applies generally and contains a definition of "Government officer" rather than defining an "employee". In the circumstances, the provisions of sections 7B and 7C, as they apply to the jurisdiction of the Commission generally, should be read as having no application to the jurisdiction of the Public Service Arbitrator.

In my opinion, the provisions of the *Industrial Relations Act 1979* of themselves, deny the Commission jurisdiction to enquire into and deal with the appeal now in question. By force of the Act the matters the subject of the appeal are, so far as they concern the Appellant, no longer an industrial matter and thus not within the scope of the jurisdiction of the Commission, however constituted. The concept of an "industrial matter" for these purposes is defined by section 7 of the Act to be "subject to section 7C" of the Act. Section 7C expressly provides that 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" is not an industrial matter as defined under the Act. In my view, the Appellant is an employee for these purposes and the Respondent or its Chief Executive Officer is his employer. Section 7B of the Act defines an employee inter alia to include a person whose usual status is that of an employee. The preponderance of modern judicial authority has established that, at least for industrial relations purposes, public servants are not simply officers of the Crown but also employees (see: *Oceanic Crest Shipping Company v. Pilbara Harbour Services Proprietary Limited (1986) 160 CLR 626*). Indeed, consistent with this idea the *Public Sector Management Act 1994* contains extensive provisions to identify the employer of persons, including public service officers, "employed" in departments of State (cf: ss. 5 & 64). Although section 80C, which relevantly is dedicated to the jurisdiction of the Public Service Arbitrator, contains only a definition of "Government officer" and no mention of an "employee", there is no reason why a person cannot be both a Government officer and employee for the purposes of the Act. The definition of a "Government officer" in this context is simply a means of identifying a special class of employee. Likewise, the definition of "employee" in section 80C of the Act is not inconsistent with the definition of "employee" in section 7(1) of the Act which has general application throughout the Act. An "employee" in section 7 is defined to mean any person whose usual status is that of an employee. Thus, it does not exclude the arrangement whereby persons elsewhere described in the Act as "Government officers", is the Chief Executive Officer of the Department rather than the Department itself.

The fact that the Act, by section 80G(1), expressly provides in respect of the exercise of the jurisdiction vested in the Public Service Arbitrator, that the provisions of Division 2 of Part 2 of the Act apply, cannot be taken as a warrant to conclude that the other provisions, most notably the provisions of Parts 1 and 1A of the Act, have no application to the exercise of that jurisdiction. Such a conclusion is contrary to the express provisions of, for example, the opening provisions of section 7 of the Act. Moreover, it would logically follow that the provisions of Division 1 of Part 2 would likewise have no application and hence one might question the veracity of the establishment of the constituent authorities in general. The reality is that the provisions of section 80G(1) are simply declaratory and not exclusive. They are designed to put beyond doubt that in exercising the special jurisdiction vested in him, the Arbitrator has the powers normally vested in the Commission.

It is beyond question that the subject matter of the instant appeal concerns "part of the relationship" governing the Appellant and his employer. Accordingly, in my opinion, notwithstanding that by virtue of section 80E(2) the matter is one which ordinarily falls within the scope of the concept of an "industrial matter" for the purposes of the *Industrial Relations Act 1979* by force of section 7C, in this instance it is not an industrial matter. Hence it is not a matter within the jurisdiction of the Commission.

Any reason to doubt the application of sections 7B and 7C of the *Industrial Relations Act 1979* to the jurisdiction of the Public Service Arbitrator is, in my view, put to rest by the provisions of sections 45 and 46 of the *Workplace Agreements Act 1993*. Section 45 of that Act makes provision for the *Public Sector Management Act 1994* to exclude matters from the operation of a workplace agreement. Section 46 provides that subject to that limitation, and other provisions of the *Workplace Agreements Act 1993* relating to the Public Sector which has no relevance on this occasion, any workplace agreement is to "have effect despite any relevant enactment that would otherwise apply". For these purposes section 46(2) provides that a "relevant enactment" means an enactment that—

> "(a) makes provision for or in relation to the way in which human resources are to be managed or administered in any part of the public sector;
>
> (b) confers a right of appeal against a decision or recommendation of an official performing any function of public sector management;
>
> (c) empowers a person or body to determine the remuneration or other terms and conditions of employment of officers or employees;
>
> (d) requires any determination of the kind referred to in paragraph (c) to be made subject to any order, award or industrial agreement under the *Industrial Relations Act 1979*,

but does not include any provision of the *Equal Opportunity Act 1984*."

It was not argued, and nor do I consider it open to argument, that by reason of the provisions of Section 45 of the *Workplace Agreements Act 1993* enabling the *Public Sector Management Act 1994* to exclude certain matters from workplace agreements, that proceedings of the present kind are excluded. Section 99 of the *Public Sector Management Act 1994* deals with matters which cannot be the subject of workplace agreements. There is nothing in the provisions of that section, nor

under the regulations made under that Act, which enable public service officers and thus Government officers, whose employment is regulated by a workplace agreement, to make application to the Commission under section 80E of the *Industrial Relations Act 1979*. Section 99(b)(ii) of the *Public Sector Management Act 1994* expressly excludes from the operations of the *Workplace Agreements Act 1993* any matters dealt with by a provision of the *Public Sector Management Act 1994* relating to "approved classification systems or procedures in the Public Sector". There is no evidence that the classification system prescribed in Schedule A of the *Public Service Award 1992* was "approved" for the purposes of the *Public Sector Management Act 1994*. In any event, what is at issue is not so much the classification system prescribed under the Award but the appropriate level within that system payable in a particular case, in this instance, to the Appellant. Notably, section 99 of the *Public Sector Management Act 1994* permits amongst other things, "rates of remuneration" to be included in a workplace agreement.

The Agent for the Appellant concedes, and in my view, quite properly, that the instant appeal, in reality, concerns the level of remuneration to be paid to the Appellant, as the occupant of the office in question. Reclassification of that office is merely a means of determining the appropriate level of remuneration. The provisions of section 46(2)(c) make it quite clear that a workplace agreement has effect despite any statutory provision which "empowers a person or body to determine the remuneration or other terms and conditions of employment of officers or employees". Subsection 80E, upon which the Appellant relies, clearly falls within that category. Furthermore, the provisions of section 46(2)(d), provide that workplace agreements operate despite any enactment which requires such a determination "to be made subject to any order, award or industrial agreement under the *Industrial Relations Act 1979*". These provisions make it clear that the Commission, however constituted, cannot make an award or order which effectively varies the remuneration payable to a person in the public sector covered by a workplace agreement. In my view, it is clear that the provisions of section 46 and in particular, subsections (2)(c) and (2)(d), if not also subsections (2)(a) and (2)(b), put beyond doubt any suggestion that the Commission has jurisdiction to entertain a reclassification appeal for a public service office covered by a workplace agreement.

Such a conclusion is consistent with the scheme established by the *Workplace Agreements Act 1993*. Section 6(1) of that Act provides that no industrial award applies to persons covered by a workplace agreement. The reclassification which the Appellant, by these proceedings seeks, is based on the classification system created by an industrial award, namely the *Public Service Award 1992*. Schedule A to that Award, which sets out the classification structure and attendant salary levels, expressly provides that those "salaries are applicable to officers covered by this Award." The Appellant is not covered by the Award and cannot, therefore, consistently seek to claim what is essentially a benefit under that Award.

It follows that the appeal should be dismissed. In the circumstances it is not necessary to consider whether, because the office once occupied by the Appellant has now been abolished, the Commission as presently constituted has any jurisdiction to deal with the matter. I observe only that the Notice of Appeal was lodged in the Commission before the office was abolished. The accepted practice in the past has been to deal with appeals of this nature on the basis of the state of affairs at the time the appeal was commenced. Neither is it necessary to pass judgment on the Appellant's claim for retrospective payment of a higher duty allowance other than to observe that such a claim appears to be contrary to the provisions of section 39 of the *Industrial Relations Act 1979*.

Appearances: Mr E.P. Rea on behalf of the Appellant.

Ms L.P. Roche on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Nicholas Peter Dragicevich

and

Department of Resources Development.

No. PSA 2 of 1999.

17 January 2000.

Order.

HAVING heard Mr E. P. Rea as agent for the Appellant and Ms L.P. Roche as counsel 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 for want of jurisdiction.

(Sgd.) G. L. FIELDING,
[L.S.] Public Service Arbitrator/
Senior Commissioner Fielding.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Leah Robartson

and

Commissioner of Police.

No.PSA 91 of 1998.

28 January 2000.

Order.

WHEREAS this appeal is outstanding and no action to proceed on it has been initiated; and

WHEREAS notice was given by way of a letter dated 6 August 1999 that it was intended to dismiss this appeal for want of prosecution; and

WHEREAS on 7 September 1999 the agent for the respondent advised the Commission that the intentions of the applicant would be communicated to the Commission by 24 September 1999; and

WHEREAS by the 27 January 2000 nothing had been heard from either the applicant or agent and the Commission decided to dismiss the matter for want of prosecution.

NOW THEREFORE, pursuant to the powers conferred under the *Industrial Relations Act, 1979* do hereby order—

THAT this appeal shall be and is hereby dismissed for want of prosecution.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner,
Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Sandro Valentino

and

Commissioner of Police.

No.PSA 92 of 1998.

28 January 2000.

Order.

WHEREAS this appeal is outstanding and no action to proceed on it has been initiated; and

WHEREAS notice was given by way of a letter dated 6 August 1999 that it was intended to dismiss this appeal for want of prosecution; and

WHEREAS on 7 September 1999 the agent for the respondent advised the Commission that the intentions of the applicant would be communicated to the Commission by 24 September 1999; and

WHEREAS by the 27 January 2000 nothing had been heard from either the applicant or agent and the Commission decided to dismiss the matter for want of prosecution.

NOW THEREFORE, pursuant to the powers conferred under the *Industrial Relations Act, 1979* do hereby order—

THAT this appeal shall be and is hereby dismissed for want of prosecution.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner,
Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Lorraine Stevens

and

Commissioner of Police.

No.PSA 93 of 1998.

28 January 2000.

Order.

WHEREAS this appeal is outstanding and no action to proceed on it has been initiated; and

WHEREAS notice was given by way of a letter dated 6 August 1999 that it was intended to dismiss this appeal for want of prosecution; and

WHEREAS on 7 September 1999 the agent for the respondent advised the Commission that the intentions of the applicant would be communicated to the Commission by 24 September 1999; and

WHEREAS by the 27 January 2000 nothing had been heard from either the applicant or agent and the Commission decided to dismiss the matter for want of prosecution.

NOW THEREFORE, pursuant to the powers conferred under the *Industrial Relations Act, 1979* do hereby order—

THAT this appeal shall be and is hereby dismissed for want of prosecution.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner,
Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Marion Satie

and

Commissioner of Police.

No.PSA 94 of 1998.

28 January 2000.

Order.

WHEREAS this appeal is outstanding and no action to proceed on it has been initiated; and

WHEREAS notice was given by way of a letter dated 6 August 1999 that it was intended to dismiss this appeal for want of prosecution; and

WHEREAS on 7 September 1999 the agent for the respondent advised the Commission that the intentions of the applicant would be communicated to the Commission by 24 September 1999; and

WHEREAS by the 27 January 2000 nothing had been heard from either the applicant or agent and the Commission decided to dismiss the matter for want of prosecution.

NOW THEREFORE, pursuant to the powers conferred under the *Industrial Relations Act, 1979* do hereby order—

THAT this appeal shall be and is hereby dismissed for want of prosecution.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner,
Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Anna Marianne Wolters

and

Commissioner of Police.

No. PSA 95 of 1998.

28 January 2000.

Order.

WHEREAS this appeal is outstanding and no action to proceed on it has been initiated; and

WHEREAS notice was given by way of a letter dated 6 August 1999 that it was intended to dismiss this appeal for want of prosecution; and

WHEREAS on 7 September 1999 the agent for the respondent advised the Commission that the intentions of the applicant would be communicated to the Commission by 24 September 1999; and

WHEREAS by the 27 January 2000 nothing had been heard from either the applicant or agent and the Commission decided to dismiss the matter for want of prosecution.

NOW THEREFORE, pursuant to the powers conferred under the *Industrial Relations Act, 1979* do hereby order—

THAT this appeal shall be and is hereby dismissed for want of prosecution.

(Sgd.) J.F. GREGOR,
[L.S.] Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Keryn Anne Foley

and

Commissioner of Police.

No. PSA 96 of 1998.

28 January 2000.

Order.

WHEREAS this appeal is outstanding and no action to proceed on it has been initiated; and

WHEREAS notice was given by way of a letter dated 6 August 1999 that it was intended to dismiss this appeal for want of prosecution; and

WHEREAS on 7 September 1999 the agent for the respondent advised the Commission that the intentions of the applicant would be communicated to the Commission by 24 September 1999; and

WHEREAS by the 27 January 2000 nothing had been heard from either the applicant or agent and the Commission decided to dismiss the matter for want of prosecution.

NOW THEREFORE, pursuant to the powers conferred under the *Industrial Relations Act, 1979* do hereby order—

THAT this appeal shall be and is hereby dismissed for want of prosecution.

(Sgd.) J.F. GREGOR,
[L.S.] Public Service Arbitrator.