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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH— Appeals against decision of Commission—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Lesley Ann Cala

(Appellant)

and

Metropolitan Health Service Board and Craig Bennett.

(Respondent)

No FBA 28 of 2000.

BEFORE THE FULL BENCH.

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

9 June 2000.

Order.

THE Notice of Appeal herein, having been filed in the Registry of the Commission on the 8th day of May 2000, and the same not having been served, and the solicitors for the abovenamed appellant, on the 19th day of May 2000, having filed a Notice of Discontinuance in the Registry of the Commission, and the Full Bench having decided that the filing of the Notice of 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 9th day of June 2000, ordered, as follows—

- (1) THAT there be leave granted and leave is hereby granted for appeal No FBA 28 of 2000 to be discontinued.
- (2) THAT the Full Bench refrain from hearing the said appeal further.

By the Full Bench.

(Sgd.) P. J. SHARKEY,

[L.S.]

President.

2000 WAIRC 00007

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES: CHIEF EXECUTIVE OFFICER,
DEPARTMENT OF EDUCATION SERVICES V CIVIL
SERVICE ASSOCIATION OF WESTERN AUSTRALIA
INCORPORATED

HEARD: FULL BENCH

HON PRESIDENT PJ SHARKEY
COMMISSIONER WS COLEMAN
SENIOR COMMISSIONER GL FIELDING

DELIVERED: THURSDAY, 6 JULY 2000

FILE NO/S: APPL 716/1999

Decision:

Appeal upheld and remitted to the Public Service Arbitrator

Representation:

Applicant/Appellant: Mr M G Lundberg (of Counsel) by
leave

Respondent: Mr D L Newman

THE PRESIDENT:

1 On 30 April 1999, the Public Service Arbitrator (hereinafter referred to as "the Arbitrator") made a decision which was deposited in the office of the Registrar on 3 May 1999.

2 That decision was in the form of an order which, formal parts omitted, was—

"THAT the Chief Executive Officer, Department of Education Services forthwith pay the following employees the sum of money adjacent to their name—

Ms Iaschi	\$660.45
Ms Coppard	\$488.35"

3 The appeal is brought against that decision under s.49 of the *Industrial Relations Act 1979* (as amended) (hereinafter referred to as "the Act"). The decision was made in the course of a s.44 hearing resulting from an application by the respondent to this appeal, The Civil Service Association of Western Australia Incorporated (hereinafter referred to as "the CSA").

FOUNDATIONS OF APPEAL

4 The grounds of appeal are as follows, but Grounds 4 and 5 were abandoned—

- "1. The Public Service Arbitrator erred in law and acted in excess of jurisdiction in making an order that the Appellant pay sums of money to Ms Iaschi and Ms Coppard ("the Order") in that such Order purports to vary an industrial agreement otherwise than as

permitted under the provisions of the *Industrial Relations Act 1979* ("the Act").

2. Further and alternatively to paragraph 1, if the effect of the Order is not to vary an industrial agreement, then the Public Service Arbitrator erred in law and acted in excess of jurisdiction in making an order which gives retrospective effect to an industrial agreement, in that such Order is not authorised or permitted by the provisions of the Act.

PARTICULARS

- (a) The terms of the Order directly effect the operation of the *Department of Education Services of Western Australia Enterprise Bargaining Agreement 1997* ("the EBA"). The EBA was registered on 24 December 1997.
 - (b) The Order requires the Appellant to pay to Ms Iaschi and Ms Coppard the wage increases payable under the EBA for the period of time between July/August 1997 and 24 December 1997.
 - (c) The terms of the Order operate to give retrospective effect to the EBA.
 - (d) There is no power in the Act which authorises or permits the Commission to order that an industrial agreement have effect from a date prior to its registration.
3. Further and alternatively to paragraphs 1 and 2, if the effect of the Order is not to vary an industrial agreement, then the Public Service Arbitrator erred in law and acted in excess of jurisdiction in making an order which gives retrospective effect to an industrial agreement prior to 27 March 1998, in that the such Order is not authorised or permitted by the provisions of the Act.

PARTICULARS

- (a) The Appellant repeats the particulars at paragraphs 2(a) to 2(c) above.
 - (b) The application leading to the making of the Order was lodged in the Commission on 27 March
 - (c) There is no power in the Act which authorises or permits the Commission to order that an industrial agreement have effect from a date prior to the date on which the application leading to the making of the order was lodged in the Commission.
4. The Public Service Arbitrator erred in law and acted in excess of jurisdiction in issuing an Order pursuant to section 44(6) of the Act when such Order was not, and was not capable of being, made in accordance with that sub-section.
 5. The Public Service Arbitrator erred in law and acted in excess of jurisdiction in issuing an Order in circumstances which amounted to an exercise of judicial power otherwise than as permitted under the provisions of the Act.
 6. The Public Service Arbitrator erred in law and acted in excess of jurisdiction in that—
 - (a) he received in evidence or informed himself of a workplace agreement, or the provisions of a workplace agreement, contrary to section 26A(a) of the Act;
 - (b) further and alternatively to paragraph 6(b), he awarded particular conditions of employment to employees who were not parties to a workplace agreement merely because those conditions applied to other employees who were parties to a workplace agreement, contrary to section 26A(b) of the Act."

BACKGROUND

5 The appellant is the Chief Executive Officer of a Department of Government, and the respondent is an organisation of employees, as "organisation" is defined in s.7 of the Act.

6 The Department of Education Services (hereinafter referred to as "the Department") had, at the material time,

approximately 20 employees. The Chief Executive Officer (hereinafter referred to as "the CEO") of the Department concluded a workplace agreement, according to the evidence before the Commission, with 15 of those employees which was registered on 30 May 1997. However, three other "employees" had indicated their willingness to sign a workplace agreement, pursuant to the *Workplace Agreements Act 1993* (hereinafter referred to as "the WA Act"). They were, at that time, not employees of the Department but were working in the Department on secondment. The three "employees" (hereinafter referred to as "the secondees") were, therefore, not able to sign the Department's workplace agreement because the CEO of the Department was not their employer. (Assuming that a CEO can be an employer. That remains for me an open question.)

7 The secondees were only able to be party to a workplace agreement between each of them and their own respective employer or employers.

8 The remaining two employees (hereinafter referred to as "the two employees") who chose not to accept the Department's workplace agreement were later covered by an enterprise bargaining agreement (hereinafter referred to as the "EBA") registered in the Commission on 24 December 1997.

9 The secondees eventually did enter into workplace agreements with their respective employer/employers and these were registered on 28 October 1997 and 5 November 1997. (There is no evidence as to when they became employees of the Department.) Upon registration of their workplace agreements, the CEO of the Department paid them an administrative payment equivalent to the wage which would have been paid to them if their workplace agreements had, in fact, been registered on 30 May 1997.

10 However, no such payment was made to the two employees whose conditions of employment were later covered by the EBA when it was registered.

11 On the evidence of the then Manager, Corporate Services of the Secondary Education Authority, Mr Daniel Michael McEvoy (the only witness who gave evidence in the proceedings at first instance), the CEO of the Department had not realised that the secondees would not be able to sign its workplace agreement offer.

12 At the time of the offer, various departments were amalgamating to form the current department and the secondees had been regarded as part of the Department's own workforce. His realisation that the secondees would not be able to sign the Department's workplace agreement only occurred after the secondees did not receive the wage increases which were received for the Department's own employees who had signed the workplace agreement.

13 The CSA claimed that the CEO of the Department had acted unfairly by paying "an administrative payment" to the secondees but not to the two employees (named in the order at first instance) whose conditions of employment were covered by the EBA.

14 The claim before the Arbitrator, as he characterised it, was that, in all fairness, the CEO, having made an administrative payment to the secondees upon the registration of the agreements containing their conditions of employment, should make a similar administrative payment to the two employees upon registration of the industrial agreement containing their conditions of employment.

15 The CSA pointed to the small size of the Department's workforce and said that all of the workforce was treated as one unit by the Department and the contribution the employees all made to the productivity of the Department. Thus, the CSA claimed that the payment by the Department of an administrative payment to the secondees on the basis that they had been prepared to sign a workplace agreement as at 30 May 1997 but could not do so, was discriminatory.

FINDINGS OF THE ARBITRATOR

(a) Although there were obvious legal differences between a workplace agreement and an EBA, all "employees" contributed the same to the productivity of the Department.

(b) It is quite likely that a workplace agreement and an EBA in the same workplace will come into effect in accordance with the WA Act and the Act respectively from different dates.

(c) It is a matter of government policy that wage increases payable to employees which result from the registration of a workplace agreement to which they are party, also on the registration of an EBA under which they are to be employed, are payable upon registration and not from an earlier date. If the respective dates of registration of a workplace agreement and an EBA are different, then the wage increases will apply to the respective employees from those different dates.

(d) In this case, the Department decided to pay the secondees an additional payment administratively.

(e) (i) In effect, the Department paid the secondees as though their workplace agreements had been registered retrospectively and there was no obligation on the Department so to do.

(ii) The Department was not obliged to do so by the terms of the secondees' workplace agreements.

(f) Although the secondees were not parties to the Department's workplace agreement, which was registered on 30 May 1997, the CEO elected to treat them as though they had been. He did so because the secondees had been willing to sign the workplace agreement but were not able to do so because they were not employees of the Department.

(g) On the material before the Arbitrator, that reasoning is equally applicable to the two employees whose conditions of employment are covered by the EBA. They were also quite willing to have the EBA signed as at a date in July or August 1997 when an agreement "in principle" on the EBA had been reached between the Department and the CSA.

(h) In the context of this Department's operations, it cannot be fair to make an administrative payment to three "employees" because they had been willing to sign a workplace agreement earlier than it was registered, but not to make a similar payment to two employees who had agreed to an EBA earlier than it was registered.

(i) In *AFMEPKIU v Western Australian Mint* (1996) 76 WAIG 1700, the payment by the Western Australian Mint of a bonus to all employees other than those whose employment conditions were prescribed in an award was held to be unfair (and the Arbitrator relied upon that case).

(j) The different treatment by an employer of similar employees, doing the same work in the same workplace, is the natural cause of industrial unhappiness.

(k) In this case, the different treatment was not sanctioned by force of any Act of Parliament or any set of terms and conditions by way of workplace agreement or otherwise.

(l) The application of the principle behind the administrative payment made to the secondees means that the payment ordered will be calculated by reference to wage increase payable under the EBA for the period of time between July/August 1997 and 24 December 1997. Thus, the payment will have the result of treating the two employees in the same manner as the secondees were treated and is the fair resolution of the issue.

ISSUES AND CONCLUSIONS

16 This was a discretionary decision, as that is defined in *Norbis v Norbis* (1986) 65 ALR 12 (HC). Thus, the Full Bench is not permitted to interfere and substitute the exercise of its discretion for that of the Commission at first instance unless the appellant establishes that the exercise of the discretion miscarried according to the ratio in *House v The King* [1936] 55 CLR 499 (see also *Gromark Packaging v FMWU* 73 WAIG 220 (IAC)).

The Arbitrator's Decision

17 If the evidence of workplace agreements being signed by fifteen of the twenty employees on 30 May 1997 and by the secondees later was admissible, then I make the following observations.

18 It was common ground that fifteen employees signed workplace agreements (and that they were in force) and benefited from whatever those agreements offered as and from 30 May 1997. (The supplementary submissions for the CSA contained assertions to that effect from the bar table which were not invited and were not made at first instance.) It was common ground that the secondees were unable to enter into such agreements, although willing to do so, because they were not employees of the Department. It is also not in dispute

that, in October and November 1997, they entered into workplace agreements and, by an administrative act of the CEO, were paid an amount equal to what they would have received between 30 May and October and November 1997 respectively had they been able to enter workplace agreements.

19 The other two employees, who eventually were the subject of an EBA registered on 24 December 1997, were denied such a payment, although, to his credit, the CEO attempted to seek the consent of DOPLR to what was apprehended to be a retroactive payment.

20 After the EBA registered, the respondents to that agreement made application under s.44 of the Act and that application eventually resulted in the matter being heard and determined and the orders appealed against being made.

21 Further, the application sought a retroactive payment of the amount of increased salary from 30 May to 24 December 1997. However, it was submitted that that was infelicitous drafting rather than an indication of the true nature of the application.

22 This was a matter where all staff were treated by the employer as part of the one team for the purposes of productivity. All staff entered the change process at the same time. All were responsible for organisational results and deserved credit. The administrative salary increase was not related to the workplace agreement. It was not contended that it was contractually based and, indeed, it was a payment to persons in relation to a period when, for all or part of the time, they were not employees.

23 The payment was, in fact, in the nature of an *ex gratia* payment to compensate three persons who were not employees, but whom the CEO sought, as a matter of fairness, to reward. Against that, he did not reward two actual employees who might have expected such a reward. There was no suggestion that the administrative payment was paid to discharge a contractual obligation.

24 It was not challenged upon appeal that all the employees concerned had contributed the same to the productivity of the Department, as the Arbitrator found. Further, the secondees, who were not employees of the Department and were not able to enter an agreement, were paid an administrative payment, that is, it would seem a gratuitous payment, so that they would be put on an equal basis with the majority of their co-employees.

25 It was not a technicality that they could not enter into workplace agreements. They were not employees of the Department. That is a very substantial matter, not a technicality. Their agreement could only be with their employer. It was not the case that they were "workplace agreement employees", as Mr Lundberg, for the appellant, submitted. They were paid a gratuitous payment because they, at the time, could not enter into workplace agreements.

26 On the other hand, no gratuitous payment was not made to actual employees who were entitled to be treated well by their employer and who were willing, through the CSA, to seek the benefit of an EBA in July/August 1997.

27 It was therefore, in the correct exercise of his discretion, open to the Arbitrator to find that it was unfair to make an administrative payment to three persons who were willing but not able, as a matter of law, to enter into a workplace agreement with the Department, but not to make a similar gratuitous payment to two of its own employees who were willing, through their organisation, to enter into and receive the benefits of an EBA in July/August but who, through no fault of their own, could reap no benefits until 24 December 1997, when registration occurred. The two employees who did not benefit were actual employees.

28 As the Arbitrator observed, too, the different treatment of similar employees doing the same work in the same place can be a cause of industrial unhappiness.

29 In this case, that might be likely to be exacerbated by the fact that the beneficiaries of this administrative payment had not been employees and not entitled to enter a workplace agreement until, it would seem, late in 1997.

30 I also agree that, in this case, it was quite clear that the different treatment was not sanctioned or forbidden by any Act of Parliament or by the conditions of any agreement. I do not understand it to have been so asserted.

31 Further, government policy, whilst a matter of importance for the Department, is not a necessary factor at all in considering the fairness of what occurred. I want to make it clear that I do not criticise the Department for attempting to correct what it saw as a detriment to the secondees.

32 In summary, for those reasons, failure to treat, by a similar administrative payment, the Department's own employees on equal terms with persons who had not been employees, was unfair. It was also unfair because the workplace performance was the same. (See the Arbitrator's findings 1, 7, 8 and 9 above.)

S.26A of the Act

33 I refer to s.26A of the Act, which I reproduce hereunder—

- “Workplace agreements not to be taken into account
In the exercise of its jurisdiction the Commission shall not —
- (a) receive in evidence or inform itself of any workplace agreement or any provision of a workplace agreement; or
 - (b) award particular conditions of employment to employees who are not parties to a workplace agreement merely because those conditions apply to any other employees who are parties to a workplace agreement.”

34 A workplace agreement is defined in s.7 of the Act to mean—

“a workplace agreement that is in force under the Workplace Agreements Act 1993”.

35 In the WA Act, a “workplace agreement” is defined in s.3 as meaning—

“an agreement of the kind described in section 5 and where the context so requires means an agreement of that kind that is in force.”

36 In Ground 6 of the Grounds of Appeal, there are two grounds of complaint.

37 The first is that the Arbitrator erred in receiving evidence of a workplace agreement or the provisions of workplace agreement. The second is that the Arbitrator awarded particular conditions of employment to employees who were not parties to a workplace agreement merely because those conditions applied to other employees who were parties to a workplace agreement.

38 It is necessary to consider the interpretation of s.26A of the Act. I propose to interpret s.26A, giving to its words their ordinary and natural meaning, provided that to do so does not lead to absurdity, ambiguity or bring the section into unnecessary conflict with the tenor of the Act and its provisions. It is also necessary that I interpret and construe s.26A in the context of the Act as a whole and I do.

39 First, the principal objects of the Act include the carrying out of and the provision of means for conciliation with a view to amicable agreement, the promotion of goodwill in industry and the provision of means for preventing and settling industrial disputes not resolved by amicable agreement (see s.6(a),(b) and (c) of the Act).

40 The Commission has jurisdiction conferred, subject to the Act, cognisance of and authority to enquire into and deal with any industrial matter, as defined (see s.7 of the Act).

41 Part IA of the Act provides, inter alia, that the Act has effect subject to the WA Act and that, where any employer and employee are parties to a workplace agreement, they are not in relation to one another within the definition of “employer and employee” in s.7(1) (see s.7B of the Act).

42 Further, where any employer and any employee are parties to a workplace agreement, a matter that is part of the relationship between that employer and that employee is not an industrial matter, nor is it capable of being agreed to be an industrial matter (see s.7C of the Act).

43 Further, s.44 powers do not apply where a workplace agreement is in force (see s.7D of the Act).

44 In other words, those provisions exclude (except for s.7F and s.7G of the Act) the jurisdiction of the Commission in relation to workplace agreements and matters arising out of them.

45 It is not necessary to outline the full range of that exclusion.

46 It is necessary, however, to understand s.26A of the Act and its effect and to do, in the context of the whole of the Act and, in particular, the relevant parts of s.7 and Part IA.

47 S.26A extends that range of exclusion because—

- (a) (i) S.26A of the Act prohibits the Commission from receiving any evidence of any workplace agreement, that is, as defined in s.7 of the Act, a workplace agreement which is in force under the WA Act.
- (ii) A workplace agreement is in force once it has been registered if it is a collective agreement or, in the case of an individual, from the date of signature, provided the same is lodged for signature within 21 days or has been refused for registration or cancelled.
- (b) (i) Not only is the Commission prohibited from receiving in evidence any workplace agreement, it cannot inform itself of an agreement, which means, in my opinion, that the evidence of the existence of such an agreement whilst in force is forbidden.
- (ii) S.26A adds to a wide jurisdictional exclusion the exclusion of evidence of a workplace agreement or its provisions.

(c) Further, the Commission is prohibited from receiving in evidence or informing itself of any provision of a workplace agreement. That there is specific reference to an agreement on the one hand and to the provisions of the agreement on the other makes it clear that the fact of a workplace agreement and its provisions also, its contents are excluded from the ken of the Commission.

(d) Next, the Commission is prohibited from awarding particular conditions to employees merely because those conditions apply to any other employees who are parties to a workplace agreement.

(e) Unless and until a workplace agreement is in force, the jurisdiction of the Commission is not excluded, nor does s.26A(a) and (b) apply (see the discussion in *RGC Mineral Sands Limited and Another v CMETSWU* [2000] WASCA 162 (unreported) (IAC)).

48 To construe s.26A of the Act thus accords with the approach to interpretation and construction as I have expressed it above. To read those provisions, as I have read them, is to read the ordinary meaning of the words and to construe them with Part IA of the Act, as the Parliament intended, ensuring an unmistakable and emphatic intention to exclude workplace agreements almost entirely from the jurisdiction and ken of the evidentiary Commission.

49 In this case, evidence was given that some employees had signed workplace agreements, but that five employees did not. Three had not because they were not employees of the CEO, having been seconded to Department. (The interesting question whether the CEO is an employer under the *Public Sector Management Act 1994* did not arise.)

50 There was evidence that two other employees who did not sign workplace agreements were subject to the replacement EBA.

51 If one examines those provisions in the context of the whole of the Act, with special reference to Part IA, Parliament has evinced a clear and unambiguous intention not to permit the Commission to receive in evidence the existence of a workplace agreement, as defined.

52 It is noteworthy, too, that, by virtue of s.6(3) of the WA Act, that Act also has the effects described in s.7B, s.7C, s.7D and s.7E of the Act.

53 The clear intention of both Acts that the existence of a workplace agreement should not be the subject of evidence in the Commission, or any provision in it, is confirmed, if that were necessary, by the extract from Hansard cited by Mr Lundberg (see Hansard page 1459, 8 July 1993), which was as follows—

“The definition of “industrial matter” will principally be altered to provide that should an employer choose to cease collecting union dues on behalf of the union, the issue of the restoration of that practice will no longer be within the commission's jurisdiction. It is intended that parties to a workplace agreement should resolve disputed

matters directly or by the procedures outlined in the Workplace Agreements Bill and not have recourse to the powers of the Industrial Relations Commission – such as those available under section 44. (my underlining)

Those powers may not be exercised by the Industrial Relations Commission in regard to persons who are parties to a registered workplace agreement. Also, the commission will be denied jurisdictional authority to flow-on conditions contained in a workplace agreement to other employees or other employers, or to other employees of the same employer who are not parties to that agreement. This critical reform is designed to release employers and employees from the fetters of what has come to be known as “CWJ” – comparative wage justice – or “flow-on”, and to allow parties to address their own specific needs.

.....

The Government has been at pains in this reform process to provide an alternative system which will allow the parties to directly negotiate and resolve disputes with an absolute minimum of external involvement by third parties. Clearly, on the basis of that principle, it is our intention that the Industrial Relations Commission should not be able to exercise its general powers in respect of workplace agreements. That is the purpose of the amendments to the Industrial Relations Act that I have outlined.”

54 So emphatic is that expression of intent that Parliament must have been presumed to have taken account of the fact that such an approach might, from time to time, give rise to absurd exclusions of evidence. What I have just said is, of course, highlighted, in legislative policy terms, by s.4 of the WA Act which provides—

“This Act has effect despite any provision of the Industrial Relations Act 1979”

55 Thus, the fact that any workplace agreement, as defined, was entered into was not admissible at first instance.

56 The question here is not whether workplace agreements (as defined in s.7 of the Act) are part of an industrial matter (they could not be), but what evidentially could be admitted in the hearing and determination of the industrial matter before the Commission. The matter before the Commission was clearly an industrial matter and that was not in issue.

57 Accordingly, no evidence was admissible of the existence of workplace agreements to which the secondees became parties. There could be no evidence as to when any such agreements were registered or that they existed. Accordingly, all which could be before the Commission in that context was evidence that the secondees could not enter workplace agreements and that they were paid an amount because they could not, on 30 May 1997, enter into a workplace agreement, as defined. Further, evidence of the existence of workplace agreements to which any other employees were parties was not admissible.

58 It was then open to the Arbitrator to find that the secondees, who were not qualified to enter into a workplace agreement, were paid an amount which they might be paid, but the two employees elected to seek cover under an EBA and were not paid.

59 That, on the authority of *AFMEPKIU v Western Australian Mint* (op cit), was self evidently unfair.

60 Fundamentally, the same considerations as to merit which I have outlined above apply as if there were admissible evidence of the workplace agreements. However, if what I have said is correct, the Arbitrator was not entitled to have before him in evidence the fact that fifteen employees signed workplace agreements on 30 May 1997, or that the secondees who were paid a gratuity were later to enter workplace agreements.

61 Effectively, therefore, the evidence before him which was quite cogent was that persons who could not enter into a workplace agreement because they were not employees were paid a gratuity which actual employees who became subject to an EBA were not paid.

62 As to the question of the operation of s.26A(b) of the Act, since the existence of any workplace agreement or any provisions thereof was not a matter which could properly be before the Commission, constituted by the Arbitrator in this case, then he could not award anything by reference to the agreement.

63 Further and in any event, the gratuities paid to the secondees were not paid pursuant to conditions in any workplace agreement and it was not, at any time, properly suggested that they were.

64 I would also add that the Arbitrator did not, contrary to s.26A of the Act, award, for those reasons, any condition to employees merely because conditions applied to parties to a workplace agreement. As I understand it, monies were paid to the three “secondees” because they could not be parties to a workplace agreement in May 1998.

Variation and Retroactivity

65 The question of retroactivity was dealt with by the Arbitrator, who decided that the amount claimed was not claimed as a retroactive payment. The order was, however, expressed as if it were.

66 The crux of the Department’s case was that the order, as a matter of substance, purported to vary the EBA in that it modified the salary increases payable to the two employees whose employment was subject to the EBA. The principles relating to those submissions were laid down by the Industrial Appeal Court in *Director General of the Ministry for Culture and the Arts v CSA & Others* 80 WAIG 453 (IAC) (see also *The Chief Executive of the Western Australian Tourism Commission v CSA* 80 WAIG 1370 (FB)).

67 An order made independently of and by a process separate from the proceedings by which an industrial agreement is registered may, nonetheless, constitute a variation of that agreement.

68 Further, there is no power to make an order which purports to give an industrial agreement any operative effect prior to its coming into existence.

69 It was submitted that the Arbitrator’s order was plainly retrospective in effect (and was retrospective on its face). That was because the EBA was not registered until 24 December 1997 and the period to which the order related preceded that registration. (The Full Bench was referred to page 12 B to D of the appeal book.)

70 The claim was not connectable to the EBA, even though it was somewhat incomprehensibly expressed to be.

71 An amount which was paid was paid because it could not form part of the workplace agreement because it was paid to persons who had been, in fact, secondees and not employees. More appropriately, the monies were paid because persons could not enter a workplace agreement in May 1998, which was a reason bearing no relation to any workplace agreement, as defined.

72 Similarly, there was no relationship between the EBA and the payment sought by those employees who were subject to the EBA. The amount was paid to achieve equity amongst employees. It was not, in fact, an order rendering an agreement retrospective at all, nor was it a payment which varied the EBA.

73 To achieve more “exact” fairness, the Arbitrator could have, and perhaps should have, ordered the same amount which the three secondees were paid to be paid to the two EBA employees.

FINALLY

74 Although the point was not raised upon this appeal, or at first instance, and I therefore reach no conclusion on the matter, it was arguable that the appellant was in breach of the implied term that the employer be good and considerate to her/his employees.

75 Put another way, there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence or trust between an employer and employee (see *Woods v W M Car Services (Peterborough) Ltd* [1982] ICR 693, *Blaikie v SA Superannuation Board* (1995) 65 SASR 85 at 105 per Olsen J, *Gilmore and Another v Cecil Bros and Others* 76 WAIG 4434 at 4444 (FB) and the cases cited therein).

76 Whilst this term is generally referred to in the context of constructive dismissal, I see no reason, on the face of it, to confine the obligations prescribed by such an implied term to those situations.

77 For those reasons, I am not of opinion that the exercise of discretion miscarried or, if it did, on the basis that evidence contrary to the prohibition in s.26A of the Act was admitted, then, for the reasons which I have enunciated, I would not substitute my own discretion for the exercise at first instance. It is clear that the reasons for decision of the Arbitrator recognised and reflected at law the equity, good conscience and the substantial merits of the case. No ground of appeal was made out.

88 For those reasons, I would dismiss the appeal.

CHIEF COMMISSIONER W S COLEMAN—

89 I have read the draft form of the reasons for decision of the Hon. President and with respect regret that I am unable to concur with the conclusion reached.

90 The background to this matter, the terms of the order against which the appeal is argued and amended grounds of appeal are set out fully in the Hon. President's reasons for decision.

91 I consider that the decision of the Public Service Arbitrator needs to be addressed in the first instance on the ground that goes to the question of whether or not the order gives retrospective effect to an industrial agreement.

92 Payment under the order was calculated by reference to the wage increase payable under the enterprise bargaining agreement for the period of time between July – August 1997 and 24th December 1997. This was determined to be a fair resolution to the issue with these two employees being treated in a manner similar to the three employees who were given a payment administratively which had the effect of “back dating” their workplace agreements. It was not a “flow on” of the payment under the workplace agreements as the amount ordered for the two employees was determined by reference to the enterprise bargaining agreement that covered them from 24th December.

93 On its face, it is difficult to see how the effect of the order was not that of back dating the enterprise bargaining agreement. To escape this conclusion it would need to be shown that the order stood as a discrete source of rights and obligations separate and distinct from and not arising out of the industrial agreement (see *Minister for Cultural Affairs and the Arts v Civil Service Association and others* (2000) 80 WAIG 1370: Anderson J).

94 In my view the issue before the Public Service Arbitrator for arbitration when the dispute between the parties could not be resolved through conciliation proceedings under section 44 of the Act was incorrectly characterised by the Public Service Arbitrator as concerning “the fairness of what has happened.” No doubt the treatment being accorded the three members of staff who subsequently signed workplace agreements highlighted what was seen as an inequity by the respondent union. Indeed that was recognised by the Chief Executive Officer. He recommended that special consideration be given to the two employees “notwithstanding Government policy on retrospectivity”. Importantly the proposed one-off payment was based on initiatives including work arrangements for “bankable hours” to meet the demands for processing the Low Interest Scheme and Grant and Subsidy payments administered in the Office of Non-Government Education. This was stated by the Chief Executive Officer to have contributed to savings and productivity improvements for the whole of the organisation. The initiatives had been in place from May 1997 (Appeal Book p.91).

95 The substance of the matter that remained outstanding at the conclusion of conciliation proceedings was a claim for payment for two members of the respondent union who had performed duties for a period immediately prior to the registration of their enterprise bargaining agreement but for whom it was considered the award rate did not adequately reflect the worth of their work. This necessarily attracted consideration of the Wage Fixing Principles [(1999) 79 WAIG 1847]. As a matter of law the Public Service Arbitrator was obliged to address the issue on this basis (see *CCIWA v FMWU* (1989) 69 WAIG 3219 at 3226; *re WAIRC; Ex parte Confederation of Western Australian Industry (Inc)* 1992 6 WAR 555; *RRIA v AMWSU* (1993) 73 WAIG 1993 at 1998-9; *Ngala Family Resource Centre v ALHWWU* (1997) 77 WAIG 2551 at 2553; *PSC v CSA* (1998) 78 WAIG 3629 at 3633).

96 Although the Public Service Arbitrator observed that the order did not offend the State Wage Principles there is nothing to indicate that the payments which were determined had regard to the fact that claim was ostensibly for an increase above the award safety net. In this respect it would appear that particular consideration should have been given to the Work Value Changes Principle [(1999) 79 WAIG 1847 at 1851]. This is necessary having regard to the situation where productivity and savings initiatives had been implemented in the workplace since May 1997. While it is impermissible for the Public Service Arbitrator to deal with the matter as if it had been part of the enterprise agreement, it would have been permissible to consider whether an allowance was warranted by reason of work value changes. If justified then this would stand as a distinct and discrete basis for the payment not related as such to the enterprise agreement.

97 The Public Service Arbitrator observed that the three members of staff who subsequently entered into workplace agreements had been paid as though their workplace agreements had been registered retrospectively, that is, from 30 May 1997. Application of this principle to the two members of the respondent union meant that the order determined by the Public Service Arbitrator was calculated by reference to the wage increase payable under the enterprise bargaining agreement for the period of time between when the employees were quite willing to have that agreement “in principle” signed and when it was registered. From this it appears what was ordered tied the payment to those which arose out of the rights and obligations under the industrial agreement by at least giving part of that agreement retrospective effect.

98 I would uphold Ground 2 of the appeal, suspend the order and remit the matter to the Public Service Arbitrator to be dealt with in accordance with the Wage Fixing Principles as required as a matter of law. The Principles allow consideration of the payment of an allowance where significant changes in work value have occurred.

SENIOR COMMISSIONER G L FIELDING—

99 In my opinion the appeal should be upheld.

100 The circumstances giving rise to this Appeal have been set out in the draft reasons of the President which I have had the benefit of reading. I gratefully adopt his account of these circumstances.

101 In my view the order in question did have the effect of amending the *Department of Education Services of Western Australia Enterprise Bargaining Agreement* 1997, as the Appellant contends. The order, though providing for a lump sum payment, was made on the basis “that the payment ordered will be calculated by reference to the wage increase payable under the enterprise bargaining agreement for the period of time between July/August 1997 and 24 December 1997”. The 24 December 1997 was the date on which the Agreement became effective.

102 The order effectively requires the Respondent to pay the only two employees covered by the Agreement the rates of pay stipulated in that Agreement from a date different from that stipulated in the Agreement. As counsel for the Appellant submitted, notwithstanding that the Respondent had struck a bargain with the Appellant regarding rates of pay, which bargain is reflected in the Agreement, a short time after it came into force the Respondent sought and was granted an entitlement to those rates of pay on terms different to those stipulated in the agreement. Although the reason for the order was unrelated to the process which led to the registration of the Agreement, the order nonetheless had the effect of contradicting the Agreement by requiring the Respondent to pay the increased rates of pay earlier than the Agreement stipulates. On the basis of the decided authorities an order of that kind is impermissible. Indeed, there is little to distinguish the circumstances of this case from those considered in *The Chief Executive Officer of the Western Australian Tourism Commission v. The Civil Service Association of Western Australia Incorporated* (2000) 80 WAIG 1370 (see also: *Director-General of the Ministry for Culture and the Arts v. The Civil Service Association of Western Australia Incorporated* (2000) 80 WAIG 453; and see too: *Robe River Iron Associates v. Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others* (1987) 67 WAIG 731). It follows that in my opinion the Appeal should be allowed.

103 In the circumstances I do not find it necessary to consider the other grounds of appeal, particularly that based on the provisions of section 26A of the Act. I would, however, observe that although the section forbids the Commission from receiving in evidence or informing itself of any workplace agreement I doubt that extends to information indicating only that a workplace agreement existed in a particular workplace. It would otherwise be impossible for the Commission to decide whether or not a particular matter in issue was an industrial matter, as section 24 of the *Industrial Relations Act 1979* permits, where the challenge was based on the existence of such an agreement. In this context there may be a distinction between information of any workplace agreement and information of the existence of an agreement of that kind. Further, in this case there can be no suggestion that the Commission received evidence or information regarding "any provision of a workplace agreement". It is acknowledged that what was in issue was an administrative payment made outside of the terms of the workplace agreement. Similarly, it cannot be said that the Commission awarded conditions of employment to the two employees in question because those conditions applied to employees covered by a workplace agreement. Even if the administrative payment made to the employees covered by a workplace agreement could be said to be "conditions of employment" applying to those employees, the conditions awarded to the employees under the instant order are not the same. There is nothing to suggest that the rate of pay was the same and all the indications are that the retrospective payment for those other employees was made from a different operative date.

104 There is no substance in the Respondent's contention that the appeal is incompetent on the grounds that the decision of the Arbitrator arose out of a claim of the kind mentioned in section 80E(2) of the *Industrial Relations Act 1979*. Clearly, by virtue of section 80G(2) of the Act there is no right of appeal from determinations made in respect of claims of that kind. The claim which led to the order now in question was not a claim of that kind. Section 80E(2), so far as is relevant, refers to "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". Not by any scope of imagination could it be said that the claim related to the salary allocated to an office. Rather, what was in issue was a special or occasional payment which did not affect and was not intended to affect, the salary allocated to the office occupied by the aggrieved employees. Likewise, there was no question of which one of a range of salaries should apply to the employees in question. Moreover, the application was not made in accordance with Regulation 44 of the Industrial Relations Commission Regulations as is required for a claim under section 80E(2) of the Act. Rather, the application was made, in accordance with Regulation 8, initially for a compulsory conference, seemingly in exercise of the general authority given to the Commission constituted by a Public Service Arbitrator under section 80E. The provisions of section 44 of the Act which by reason of section 80G(1) have application to jurisdiction of the Commission constituted by a Public Service Arbitrator do not oblige the Public Service Arbitrator to refer an industrial matter for hearing and determination following a compulsory conference. Whether or not that occurs is discretionary. Thus it cannot be said, even disregarding the form of the application, that the application for the conference could be taken as an application under section 80E(2) of the Act. The plain fact of the matter is, as the schedule to the Notice of Application reveals, that the application was for "equitable treatment, with regard to over-agreement payments" on the same basis as that which applied to employees covered by workplace agreements. That is not a matter which falls within the scope of the matters referred to in section 80E(2) of the Act.

105 Although in my view the appeal should be upheld I would be surprised if anyone could conclude objectively that the Respondent's complaint of unfairness was not well founded in the circumstances. Indeed, information put before the Public Service Arbitrator indicates that the Appellant himself appears to have recognised as much. Furthermore, and not surprisingly, counsel for the Appellant conceded that as the

events transpired the two employees in question had been treated unfairly. In the circumstances, it is perhaps a case where technical objections could best be put aside in the interests of good industrial relations.

106 I agree with the order proposed by the Chief Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.
Industrial Relations Act 1979.

Chief Executive Officer, Department of Education Services
(Appellant)

and

The Civil Service Association of Western Australia
Incorporated.

(Respondent)

No 716 of 1999.

BEFORE THE FULL BENCH

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

31 August 1999.

Order.

THIS matter having been due to come on for hearing before the Full Bench on the 31st day of August 1999, and the abovenamed appellant by its Counsel having by letter dated that 5th day of August 1999 applied to adjourn the hearing and determination of the appeal herein sine die pending the hearing and determination of matter IAC No 6 of 1999 before the Western Australian Industrial Appeal Court, and the said letter having been filed herein on the 6th day of August 1999, and the respondent having consented to the adjournment by letter dated the 10th day of August 1999, and the said letter having been filed herein on the 16th day of August 1999, and the parties herein having consented to waive the requirements of s.35 of the Industrial Relations Act 1979 (as amended), it is this day the 31st day of August 1999 ordered, by consent, that the hearing and determination of appeal No 716 of 1999 be and is hereby adjourned sine die.

By the Full Bench.

(Sgd.) P. J. SHARKEY,

[L.S.]

President.

2000 WAIRC 00012

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES: CHIEF EXECUTIVE OFFICER,
DEPARTMENT OF EDUCATION SERVICES V CIVIL
SERVICE ASSOCIATION OF WESTERN AUSTRALIA
INCORPORATED

CORAM: FULL BENCH

HON PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
SENIOR COMMISSIONER G L FIELDING

DELIVERED: THURSDAY, 6 JULY 2000

FILE NO/S: APPL 716/1999

Decision:

Appeal upheld and remitted to the Public Service Arbitrator
Representation:

Appellant: Mr M G Lundberg (of Counsel) by leave

Respondent: Mr D L Newman

Order.

THIS matter having come on for hearing before the Full Bench on the 23rd day of May 2000, and having heard Mr M G Lundberg, (of Counsel), by leave, on behalf of the appellant and Mr D L Newman, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 6th day of July

2000 wherein it was found that the appeal should be upheld, it is this day, the 6th day of July 2000, ordered and directed as follows—

- (1) THAT the appellant be and is hereby granted leave to withdraw grounds 4 and 5 of the grounds of appeal from the Notice of Appeal filed herein.
- (2) THAT application No 716 of 1999 be and is hereby upheld.
- (3) THAT the decision of the Public Service Arbitrator in matter No. PSACR 22 of 1998 given on the 30th day of April 1999 be and is hereby suspended and the application is hereby remitted to the Public Service Arbitrator to hear and determine according to law and in accordance with the reasons for decision.

By the Full Bench.

(Sgd.) P. J. SHARKEY,

[L.S.]

President.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Robert Holland
Appellant

and

Carony Pty Ltd
Respondent.

No FBA 14 of 2000.

BEFORE THE FULL BENCH.

19 June 2000.

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

Reasons for Decision.

INTRODUCTION

THE PRESIDENT: This is an appeal against the whole of the decision of the Commission, constituted by a single Commissioner, in matter No 86 of 1999, given on 17 March 2000, whereby the Commissioner dismissed an application by the appellant made pursuant to s.29(1)(b)(ii) of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act"). The appellant alleged in his application that he had not been paid \$15,600.00 being contractual benefits to which he claimed to be entitled.

GROUND OF APPEAL

It is against that decision that the appellant appeals on the following grounds (see page 17 and 18 of the appeal book (hereinafter referred to as "AB"))—

* Commissioner Parks erred in law by failing to accept a decision made by the Administrative Appeals Tribunal.

(case # w98/72)

* Linda Joan Parks by her own admission has told us the secretarial duties she was contracted to perform for Dewsons of Bunbury were sub-standard and against the provisions of the Australian Taxation Department.

One needs to ask does Linda Parks offers(sic) her professional services for this kind of fraud or was she coerced by the principal of the company Peter Rogers?

This above mentioned information is testimony to the fact that this person was not a credible witness, considering her statements could not be cross examined in the courts.

* Miss Jodie Dawn Rogers testified under oath that "exhibit 13" was a true computer record of coinage analysis to balance the books, despite the fact that

an entrance had been manufactured by hand on the computer print out. However Miss Rogers also testified that there was one other employee receiving cash payments, this persons name and amount paid failed to show in handwriting or computer print on the coinage analysis sheets. I fail to see the validity of such an important office record. On no part of "exhibit 13" is there any record of Robert James Holland even receiving a wage cash or otherwise.

* Ms Joanna Hendrika Hurley testified in the same court that the number of employees paid cash were "approximately six", again no entries were made on the coin analysis sheets. One must certainly question the integrity of these pay clerks as they worked together in the same office and neither was aware of how many people were receiving cash payments with any clarity.

Ms Hurley spoke at great lengths about what her job description in the company was, however looking over the offending coin analysis sheet (exhibit # 13) and assuming that the last name to appear on the first page was "Joanne", no surname given, earned a meager \$21.05 for her weekly wage.

* Phyllis Doreen Ridley testified in the same court that she had on two occasions put cash in my payslip, although when asked the exact amount, was unsure and guessed at \$200 "or" \$300. Furthermore when asked how many people she paid cash to Mrs Ridley replied, "three or four".

Mrs Ridley issued me with a written testimonial on the 21st March 1995, this document was bought(sic) before the court and suddenly Mrs Ridley had no memory of ever writing or signing her name to this document, but admitted the signature was indeed hers.

* Mr Peter Rogers the owner/director of Dewson's Bunbury, failed to take the stand on the day, something I find extraordinary for a man who runs a legitimate business supposedly.

It is with these above mentioned inconsistencies in mind that I appeal to you to overturn the decision of Comm. C.B.Parks."

BACKGROUND

Mr Robert James Holland, the appellant, was employed by Carony Pty Ltd, the respondent, as a butcher. The respondent, at all material times, conducted a supermarket known as "Dewsons" at Bunbury in the State of Western Australia. The appellant's claim is for the payment of a contractual benefit alleged to relate to the period from 6 February 1995 to 28 June 1997, a period of 73 weeks, during which he alleged that he was not paid the benefit of \$300.00 per week to which he was entitled under his contract of employment.

The claim was amended by leave of the Commission and further amended by leave of the Commission upon the hearing of this matter.

The appellant's claim was then for a monetary benefit due to him in each week of the year ending 30 June 1996, being \$300.00 per week and totalling, for the period, \$15,600.00.

The respondent, who opposed the claim, alleged that the contract of employment entitled the appellant to the payment of a set weekly wage and that, throughout his employment, he was paid that wage in full. The respondent company denied that it failed to pay the appellant the \$300.00 portion of that wage each week.

It was common ground that the appellant had been employed by the respondent to perform the work of a butcher and to supervise others performing such duties in a section of the supermarket business of the respondent.

The Commissioner found that the parties entered into an arrangement whereby the agreed weekly wage was to be divided and that a \$300.00 component thereof was payable in cash and not to be recorded as income. Thus, it would not attract the deduction from the total wage of an amount for income tax. The appellant denied that he was paid such a cash component and seeks recovery of the amount which he alleges was not paid.

The agent for the appellant at first instance, Mr Oliver Moon, submitted that the doctrine of issue estoppel was applicable and that the respondent ought not to be permitted to mount the defence that it had paid the cash by each component to the appellant. That submission arose in the following manner.

After the employment relationship ended on or about 28 June 1997, the Australian Taxation Office (hereinafter referred to as "the ATO") assessed the income of the appellant for the financial year 1995/96 to be \$15,600.00 greater than that declared by him, and for the financial year 1996/97 to be also greater than he had declared.

That decision was taken on review to the Administrative Appeals Tribunal, General Administrative Division (hereinafter referred to as "the AAT") in matters No WT98/72 and 73—Robert J Holland v Commissioner of Taxation. The AAT set aside the decision of the Commissioner of Taxation in relation to the year 1995/96 and found that the taxable income of the appellant "should be reduced by \$15300". The AAT affirmed the decision of the Commissioner of Taxation in relation to the year 1996/97, thus.

The appellant gave evidence that the assessment of the ATO which he had received, alleging that he had undeclared income of \$15,600.00 for the year of 1995/96 was based on his having received that sum by way of weekly cash payments from the respondent.

In setting aside the 1995/96 assessment of the ATO, the AAT, notwithstanding the difference in the assessment figure quoted, it was submitted by the agent for the appellant, was a finding that the appellant did not receive the material cash payments. Accordingly and consequently, the submission was that the respondent did not make the material cash payments and the respondent was estopped from asserting otherwise.

The Commissioner referred to "Cross on Evidence", 5th Australian Edition, and held that neither the respondent nor somebody privy thereto had been a party to the matter before the AAT, and, therefore, the respondent was not precluded from its defence that the appellant had been paid all of the monies which he had claimed in this matter by issue estoppel.

In addition, he added that the reasons for decision of the AAT were not before the Commission and that it was not evident whether the matter before the AAT was decided on its merits and hence the facts, or for lack of some procedure. There was no attempt to put those reasons for decision before the Commission at first instance.

The Commissioner found as a fact a number of uncontested matters, which I reproduce from pages 11 and 12(AB)—

- From March 1991 to November 1995 Lynda Joan Parks, under a contract for service with the respondent, performed as part of her service the processing of the weekly payroll for employees of the respondent.
- From in or about May 1995 until February 1996, Joanna Hendrika Hurley was employed by the respondent and was trained by Lynda Joan Parks in the process of preparing and paying wages to the employees after which she assumed that role from Ms Parks.
- Jodie Dawn Rogers was employed by the respondent from 1993 to 1999 and for the calendar years 1995 and 1996 it was part of her role to assist Joanna Hendrika Hurley with the process of paying wages to employees of the respondent.
- Wages were paid to employees, including Mr Holland, by means of cash contained in a sealed envelope to which was attached a "payslip" bearing explanatory information regarding the wages contained therein.
- Phyllis Doreen Ridley, an employee of the respondent for in excess of 9 years, assisted with the processing of wages on a few occasions during that time by inserting into individual envelopes the cash to be received by employees as wages.
- Mesdames Parks, Hurley, Rogers and Ridley have each dealt with the wages paid to Mr Holland and have placed the cash to be received by him as wages into an envelope which was then sealed and the "payslip" attached.

- Throughout the calendar years 1995 and 1996 Mr Holland collected the sealed envelopes containing his wages and the attached "payslips", together with those of the butchers whom he supervised, from the office where they were prepared and thereafter distributed the wages envelopes to those under his supervision.
- The "payslip" which Mr Holland received each week, attached to the envelope containing his wages, recorded that he was paid a wage which did not include the \$300.00 component."

Before the Commission was the oral evidence of the appellant on his own behalf. For the respondent, there was affidavit evidence from Ms Lynda Joan Parks and oral evidence from Mrs Phyllis Doreen Ridley, Ms Jodie Dawn Rogers, Ms Joanna Hendrika Hurley and Ms Bridget Green. Ms Green was an industrial inspector stationed at Bunbury. The other three witnesses were employees of the respondent.

The appellant gave evidence that he received each week an amount recorded on an attached "payslip" which aligned with the award prescribed level and did not include the \$300.00 additional wage component, payable, he said, by agreement with the respondent.

The appellant said, in evidence, that the initial agreement had been for a payment of \$250.00 per week, but that, shortly following the commencement of his employment with the respondent in February 1995, the sum was increased to \$300.00 per week.

He asserted that throughout his employment he was not paid the additional weekly wage component, notwithstanding a complaint to Mr Peter Rogers, described as principal of the respondent, but presumably the Managing Director or a Director.

The Commission was told by the appellant that the respondent paid for the purchase of a refrigerator for the appellant and also provided financial assistance in relation to his travel to Bali. Both of these were said to be acts by the respondent to appease the appellant for not paying him the additional \$300.00 per week component. The appellant also told the Commission that he had complained to Peter Rogers on a number of occasions because he had not honoured the arrangement to pay him the benefits claimed, namely \$300.00 in cash as well as the award rate for a butcher.

There was an affidavit sworn by Ms Lynda Joan Parks at Coffs Harbour in New South Wales (and admitted without objection) (exhibit 11), saying that, in February 1995, when she was performing office duties on a contract for service, she was instructed by Peter Rogers, acting on behalf of the respondent, that the appellant was to be paid \$250.00 per week in addition to the net wage stating in his computer based payslip and that, at a short time later, she was instructed to increase the additional cash payment to \$300.00.

By her affidavit, she also deposed that from February 1995 to November 1995, she personally placed such additional cash payments in the pay packets for the appellant each week during that period. She also gave evidence that she instructed Ms Hurley, who was to assume her role, that the additional cash payment was to be made weekly to the appellant. Ms Parks was not cross-examined, nor sought to be cross-examined.

There was evidence from Ms Joanna Hendrika Hurley that, throughout the period, she was involved with the processing of wages for the appellant from around May 1995 to February 1996 and that a sum of \$300.00 was placed in the envelope prepared in relation to the appellant and that amount was in addition to the other monies contained therein and which were recorded on the attached "payslip".

Ms Jodie Dawn Rogers gave evidence that, during the calendar years 1995 to 1996, she had both assisted Ms Hurley, and acting in the absence of Ms Hurley, had personally placed in an envelope the amount of wage stated for the appellant in the payroll sheets, and then placed a further \$300.00 in the same envelope, sealed the envelope and attached the "payslip" relating to the appellant.

Similar evidence was given by Mrs Phyllis Doreen Ridley.

There was an amount of documentary evidence tendered, including alleged records of payments said to have been made to the appellant in January, April and June 1997 and notes saying "Bob \$300".

FINDINGS OF THE COMMISSION

The Commissioner found as follows—

1. He did not believe the evidence that the appellant had given to be credible.
2. That Ms Parks now resides in New South Wales, Ms Hurley is no longer an employee of the respondent, Ms Rogers is no longer an employee of the respondent, but is a daughter of Mr Peter Rogers.
3. There was no reason why any of these persons would give false evidence for the respondent.
4. Mrs Ridley remains employed by the respondent, but there was not the slightest indication that her evidence was somehow tainted by that.
5. He found that the direct evidence given that the claimed \$300.00 per week was paid to the appellant throughout the year ended 30 June 1996 was overwhelming.
6. He found that the veracity of the oral evidence of Ms Rogers was supported by the contemporaneous records of payments made to the appellant in 1997 in excess of that, which was declared as income paid to him.
7. The evidence given by the witnesses called by the respondent, the Commissioner was satisfied, had shown that the \$300.00 per week which the appellant claimed that he did not receive from the respondent in the year ending 30 June 1996 was, in each such week, included as part of the wages placed in an envelope, sealed and the “payslip” relating to the appellant was then attached thereto.
8. The Commissioner was equally satisfied that no person was able to or did tamper with that sealed envelope before the appellant took possession of it each week.
9. The appellant told the Commission that he had complained to Peter Rogers on a number of occasions because he had not honoured the arrangement to pay him the benefits claimed. However, the Commissioner found it incredible that a person who had been promised, in effect, \$15,600.00 per year of employment and who was otherwise paid \$24,024.00 in the year ending 30 June 1996, would not have pursued a failure by the employer to pay around 39% of the promised remuneration.

ISSUES AND CONCLUSIONS

The decision at first instance was a discretionary decision, as that is defined in Norbis v Norbis (1986) 65 ALR 12. It is for the appellant to establish that the exercise of discretion at first instance miscarried in accordance with the principles in House v The King [1936] 55 CLR 499 (HC) (see also Gromark Packaging v FMWU 73 WAIG 220 (IAC)).

The grounds of appeal contained attacks on the finding of the Commissioner as to some facts and the credibility of some witnesses. Of course, in relation to those grounds, the Full Bench is bound by the well known ratio in Devries and Another v Australian National Railways Commission and Another [1992-1993] 177 CLR 472 (HC) (as explained in State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq) (1999) 160 ALR 588)—

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

At the commencement of proceedings, the appellant (who appeared in person) sought to tender the reasons for decision of the AAT in the proceedings between himself and the Commissioner of Taxation referred to above. That was objected to by Mr Darcy, who appeared for the respondent upon the appeal.

There was discussion at first instance of a prohibition upon the revelation of what occurred in those proceedings pursuant to s.35(2) of Administrative Appeals Tribunal Act 1975 (as amended). Evidence was given by the appellant that the issue before the AAT was that he was paid monies which were not declared by the respondent. He was cross-examined on the decision.

There was no suggestion that the respondent was a party to proceedings before the AAT, although it had some participation, whether as a witness or not is not clear.

In any event, the reasons for decision were not before the Commission at first instance. The appellant blamed his advocate at first instance, Mr Moon, for not tendering the document, but there was a question of confidentiality. In any event, it was never suggested to the Commissioner that the respondent was involved in the proceedings in the AAT as a party or the privy of a party.

As a result, no issue estoppel can arise. Accordingly, the reasons for decision are and were irrelevant and were not before the Commission at first instance. S.49(4) of the Act therefore precluded the Full Bench seeing the document too.

No issue estoppel can arise or be applied against parties who were not on controversy when the issue was first determined, either in their favour or adversely to them. If a party was not involved in the litigation of that issue, either because it was not an issue between him and the other party to the proceedings, or because he was not a party at all to the proceedings at the time of the resolution, then he is not affected by, nor can he raise an estoppel. Likewise, his presence initially or subsequently cannot affect the right of other parties to raise or rely on an estoppel, as between themselves (see Jackson v Goldsmith (1950) 81 CLR 446 and Carl Zeiss Stiftung v Rayner & Keeler Ltd [No 2] [1967] 2 All ER 536) (see, too, Volume 16 “The Laws of Australia” Part E, page 56 et seq and Secretary, Department of Aviation v Ansett Transport Industries Ltd and Another (1987) 72 ALR 188 (FCFC)).

There was no basis on which to find an issue estoppel in the appellant’s favour.

Next, the appellant purported to complain, albeit not by any direct submissions as to bias, that the Commissioner had erred in accepting Ms Parks’ evidence because she was his nephew’s separated wife. This had been a matter specifically raised at first instance by the Commissioner (see page 19(AB)). No objection was taken by or on behalf of either party and any right to object on the ground of bias was raised (see Vakauta v Kelly 87 ALR 633 (HC)).

In any event, this matter was not raised as a ground of appeal, nor was an allegation that a Mr Wayne Eric Parks, referred to at page 46(AB) was the Commissioner’s nephew’s son. Further, no objection was raised on that score at first instance and Mr Wayne Parks gave no evidence, nor was he called to. Indeed, it appears that this issue was only raised subsequent to the case before the Commission when it became apparent, on the face of an exhibit, that Mr Wayne Parks was employed by the respondent.

The main complaint in the appeal was that the Commissioner accepted the evidence of the respondent’s witnesses in preference to that of the appellant on the crucial point that the appellant had been paid that \$300.00 component of his pay which he received in his pay packet as a separate component of his total wages.

I have already adverted to the affidavit evidence of Ms Lynda Joan Parks who, at the time of the hearing at first instance, lived in Coffs Harbour in New South Wales, which was tendered without objection.

However, Mr Moon made it clear, at page 73 of the transcript at first instance (hereinafter referred to as “TFI”), that the weight to be attached to the evidence was in issue. He said—

“I would say though that it must be taken on the value as it normally is in these proceedings that the document cannot be subjected to cross-examination and therefore the veracity of the evidence in the document cannot be tested.”

Essentially, the appellant’s evidence was that Mr Rogers, the Manager of Dewsons, agreed to pay him the award wage for a butcher to run the meat unit at the Dewsons supermarket. However, the award wage was to be paid in the normal

manner and on top of that, he was to be paid \$300.00 per week in cash. He gave evidence that that agreement was not honoured. He also gave evidence that he earned what he called "sweeteners" in the form of the gift of a refrigerator and a trip to Bali. These, he said, were to stop him from actually going for the money, which had originally been promised to him.

The failure to pay these monies led to Mr Rogers and the appellant being at loggerheads and they did not speak to each other. After he was dismissed, the appellant went to the Department of Productivity and Labour Relations to make a complaint and saw an Industrial Inspector, Ms Bridget Green.

He claimed that he had not received the cash when he received an assessment from the Commissioner of Taxation, and that he received no cash at any time during the two and a half years of his employment.

Ms Joanna Hendrika Hurley worked for the respondent in 1995 and 1996. Amongst her duties were the paying of wages. She knew the appellant and was involved in doing his wages basically the whole time that he was there. She worked his wages out on the award level, and they were then made up with a cash supplement which was above the award wage and not recorded. The cash payment was put in his pay packet with his pay slip and his award wages. The appellant was a department head, since he was in charge of the butchers' shop.

Whilst she was there, Ms Hurley did "pays" and Ms Parks taught Ms Hurley in the beginning. Ms Rogers also assisted in putting cash of \$300.00 in the appellant's pay packet. Ms Hurley described the appellant as a very loud man who would make a noise if he was not getting something. He never complained about being short paid. She said that, to her knowledge, it was not true that he was not paid. She was able to say, in cross-examination, that approximately six other employees received cash payments. She was not shaken in cross-examination.

Ms Jodie Dawn Rogers, who gave evidence, is the daughter of Mr Peter Rogers and was employed in Dewsons from 1993 to 1999, including 1995 and 1996 in the office. She put money into the pay packets, but if Joanna was away sick, she actually did them as well. She knew the appellant who worked in the meat department. Every week she did his pay up including the years 1995 and 1996.

She put the money into the pay envelopes with the payroll sheets, then entered in the extra money which the appellant got and took \$300.00 out of the tills to put into his pay envelope. That amount, she said, was \$300.00 over and above what was recorded on his wage advice slip. The envelopes were sealed up and given to department heads. The pay envelopes, in 1995 and 1996, were distributed down in the meat area by the appellant.

The coin balance (exhibit 13)(see page 45(AB)) shows staff payments for a period and notes "+ Bob \$300.00", and exhibit 15, pages 2 and 3 are a handwritten document titled "Daily Cash Balance" and shows a \$300.00 payment to "Bob—meat room". Ms Rogers said that the appellant received the money because she put it in the envelopes herself. She was convinced that he received the monies for every week of his employment. She said that one other employee was paid a cash payment, although she did not deny that there could have been six employees who received cash payments.

She was, however, certain that, at the time when she, herself, was "doing the pays", there was the appellant and one other employee receiving cash payments. She was not shaken in cross-examination.

Mrs Phyllis Dawn Ridley worked in Dewsons for nine and a half years. She remembered the appellant as the butcher at the shop. Sometimes she worked at putting money in employees' pay packets. The appellant's pay was different because "it had cash" (see page 39(AB)). The "written out pay" was put in the envelope, then cash of \$200.00 or \$300.00 was put in over and above the normal pay.

Mrs Ridley said that three or four employees were paid the extra cash amounts (see page 40(AB)). She could not recall who these were, but she did recall that the appellant was one. The others only got \$50.00 or something like that. She said that she could not name them. That matter was not pressed in cross-examination (see page 41(AB)). She was not shaken in cross-examination.

Ms Parks' affidavit, sworn on 12 May 1999, contained evidence that she contracted her services to the respondent from March 1991 to November 1995 and provided general office services. She met the appellant in the butchers' department at the respondent's premises in February 1995. She also gave evidence that payments of \$250.00 a week cash and then \$300.00 were included by her in the appellant's pay packet after Mr Rogers' instructions to her in 1995; personally included by her, in fact, from February 1995 to November 1995 when her contract ceased. Her evidence was, too, that that additional amount of \$300.00 per week was required for the appellant.

It was submitted that Ms Parks admitted that her secretarial practices were sub-standard and "against the provisions of the ATO". Her affidavit contains no admission that her "secretarial duties" were performed sub-standard or that she acted "against the provisions of the ATO".

Further, I do not understand why it is alleged that she was engaged in fraud on the ATO merely because, on instructions, she placed the pay, including an extra cash payment, in the appellant's pay packet. There was no evidence that this was done with intent to defraud anyone.

It was submitted that Ms Rogers testified under oath that exhibit 13 was a true computer record of coinage analysis to balance the books, despite the fact that an entry had been manufactured by hand on the computer printout. However, it was submitted that she also gave evidence that there was one other employee receiving cash payments and this person's name and the amount paid to her/him was not recorded in hand writing or computer print on the coinage analysis sheets.

It was submitted on no part of exhibit 13 is there any record of the appellant even receiving a cash payment or otherwise. In fact, the words "+ Bob \$300.00" are written on exhibit 13. Ms Rogers said that she would not tell a lie in evidence. Exhibit 14 bore on the back of it the note "\$300, wage C/out". The latter must mean cash out, being \$300.00 cash for the appellant's pay packet. Exhibits 15 and 16, on the evidence, further evidenced that payment.

Ms Rogers did give evidence that, on exhibit 13, she did note "\$300 for Bob" (i.e. "+ Bob \$300.00") (see page 105(TFI)) for the extra cash amount which the appellant was paid. She did not write this on every week (see cross-examination pages 105-106(TFI)).

She also said in cross-examination that, besides the payment to the appellant, there was one other employee who was paid a cash payment and that was not written on the document (exhibit 13) because he had received it for a long time and, as I understand her evidence, she did not therefore need to write his name down to remind herself. (The lack of permanent records of the cash payment records was corroborated by Mrs Ridley (see pages 6-7(TFI)22.7.99). It is quite clear that no person being paid cash payments was formally recorded as receiving the same in the records exhibited, and for very obvious reasons.

The handwritten notes were written out, Ms Rogers said in re-examination, when the wages were "done". In short, her evidence was unshaken. There were records of the appellant receiving cash, corroborative of the oral evidence of Ms Rogers, particularly quite contrary to the submission on exhibit 13. She gave an adequate, feasible and unshaken explanation for not including the name of the other person receiving a cash payment. That ground is not made out.

It was both alleged and submitted that Ms Hurley gave evidence, at first instance, that the number of employees paid cash was approximately six. Again, no estimates, it was submitted, were placed on the coin analysis sheets. It does not follow that there is any significant discrepancy because Ms Hurley said six employees received cash payments, and Ms Rogers said two did. Again, it is quite understandable (given the nature of the payments and the reason for them) that no proper records were directed to be kept of the payments.

Ms Rogers did not deny, as I have said, that Ms Hurley was paying cash payments to six employees, but was clear that she was paying only two (see page 100(TFI)).

Ms Hurley was not cross-examined as to her evidence that additional cash payments were made to approximately six employees of the respondent when she was there. First, that evidence was not cross-examined and, second, it is not at all

clear that that means the payments were simultaneous. The question suggests that the answer required was to relate to the total time of Ms Hurley's employment by the respondent, which period was from May 1995 to February 1996 (see page 94(TFI)). Further, she corroborated, in part, the evidence of Ms Parks and Ms Rogers (see pages 95-96(TFI)). There is nothing in that ground, for those reasons.

Next, it was submitted and alleged that Mrs Ridley gave evidence that she had, on two occasions, put cash in the appellant's pay packet, but was unsure and guessed at \$200.00 or \$300.00. Further, it was submitted that Mrs Ridley, when asked how many people she paid cash to, replied "three or four". Her explanation in evidence was that the others were paid only \$50.00 cash payments (after some uncertainty), unlike the appellant who was paid a great deal more cash (see pages 3-5(TFI) 22.7.99).

It was also submitted that Mrs Ridley issued the appellant with a written testimonial about which Mrs Ridley had no memory, even though she admitted that the signature was hers (that is, exhibit 12 (see page 44(AB))). She did say in evidence that she did not sign the letter or such a reference (see page 4(TFI) 22.7.99). There was some vagueness and contradiction about her answers, including the question of her signature, it is true, but the substance of what she said as to the extra cash payments to the appellant were corroborated by other witnesses, two of whom were in the witness box and were not shaken.

Mrs Ridley's explanation that she could not remember the names of employees paid only \$50.00 or so in cash, whilst the appellant, the butcher, was paid \$200.00 or \$300.00 is credible. That appeal ground is not made out.

It was also submitted and stated that Mr Rogers did not give evidence and, implicitly, that he should have. There was, for the reasons given by the Commissioner, adequate evidence to establish the respondent's case, although the overall onus remained on the appellant. The Commissioner was right in finding that the appellant had not established his case on the evidence.

The appellant submitted that something should be made of discrepancies in the evidence of three of these witnesses, concerning the number of persons other than himself who received weekly cash payments, but all of them had a clear recollection of the payments to him. The discrepancies were explicable by differences in time and were not serious, even if they were not explicable by references to time. Indeed, one cogent factor was that the appellant was paid a significant sum and was a department head.

Further, all of the respondent's evidence as to the payments to the appellant was unshaken.

The Commissioner was entitled to make findings as to the uncontested facts as he made them at pages 11 and 12(AB).

The Commissioner saw the witnesses and found, having done so, that he did not accept the appellant's evidence as credible.

Further, he did believe the evidence of all of the witnesses for the respondent, which was, on my reading of the transcript, given in a straightforward way, not shaken and corroborated, to some extent in the case of Ms Rogers, by records of payments made in cash in 1997. Further, Ms Parks' affidavit was, to some extent, corroborated by the evidence of Ms Hurley.

The Commissioner was entitled to find as he did that the appellant was paid the \$300.00 per week which he claimed, in each week of the relevant period, and that no person was able to tamper with the pays before the appellant took possession of them.

Further, the Commissioner was entitled to find that the appellant (who was described in evidence as a loud man who would complain if he thought matters were wrong) would not have ignored a failure by his employer to pay 39% of his pay, inferentially (having seen the appellant in the witness box). Further, upon this appeal, the appellant, from the bar table, conceded that he had received some weekly payments of \$300.00, something not conceded at first instance.

In any event, it was not for the respondent to prove, on the balance of probabilities, that the monies had been paid, but for the appellant to prove that they had not been.

The Commissioner made findings based on credibility, which cannot be interfered with by the Full Bench because there is nothing, on the evidence or in the submissions put to us, which demonstrates any misuse of the Commissioner's advantage in seeing the witnesses. Indeed, it is fair to say, upon a close scrutiny of the evidence at first instance, that the contrary is the case.

I would add that the findings which the Commissioner made were clearly open to him on the evidence and that the appellant did not establish that the exercise of discretion at first instance had miscarried.

For those reasons, in my opinion, no ground of appeal is made out and I would dismiss the appeal.

CHIEF COMMISSIONER W S COLEMAN: I have read the reasons for decision of His Honour the President. I agree with those reasons and have nothing to add.

COMMISSIONER J F GREGOR: I have read the reasons for decision of His Honour the President. I agree with those reasons and have nothing to add.

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

Order accordingly

APPEARANCES: Mr R Holland on his own behalf as appellant

Mr M Darcy, as agent, on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Robert Holland
Appellant

and

Carony Pty Ltd
Respondent.

No FBA 14 of 2000.

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

19 June 2000.

Order:

This matter having come on for hearing before the Full Bench on the 1st day of June 2000, and having heard Mr R Holland on his own behalf as appellant, and

Mr M Darcy, as agent, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 19th day of June 2000 wherein it was found that the appeal should be dismissed, it is this day, the 19th day of June 2000, ordered as follows:—

- (1) THAT the oral application made by the appellant to adduce fresh evidence be and is hereby dismissed.
- (2) THAT appeal No FBA 14 of 2000 be and is hereby dismissed.

By the Full Bench

[L.S.]

(Sgd.) P. J. SHARKEY,
President.

2000 WAIRC 00002

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.
PARTIES: ST MICHAEL'S SCHOOL V THE
INDEPENDENT SCHOOLS SALARIED OFFICERS'
ASSOCIATION OF WESTERN AUSTRALIA,
INDUSTRIAL UNION OF WORKERS

HEARD: FULL BENCH

HON PRESIDENT PJ SHARKEY
COMMISSIONER WS COLEMAN
COMMISSIONER SJ KENNER

DELIVERED: TUESDAY, 4 JULY 2000

FILE NO/S: FBA 22/2000

Result:

Appeal dismissed.

Representation:

Appellant: Ms D L Peters (of Counsel), by leave

Respondent: Mr A D Gill (of Counsel), by leave

Reasons for Decision.

THE PRESIDENT:

1 These are the unanimous reasons for decision of the Full Bench. This is an appeal against, it would seem, the whole of the "decision" of the Commission, constituted by a single Commissioner, given on 15 March 2000 in matter No CR177 of 1999 and is brought pursuant to s.49 of the *Industrial Relations Act 1979* (as amended) (hereinafter referred to as "the Act").

2 The Commission issued reasons for decision on 15 March 2000 on a preliminary point of jurisdiction.

GROUNDINGS OF APPEAL

3 The grounds of appeal are expressed as follows—

- "1 The Commission erred in law in finding that it had jurisdiction to hear the claim as the claim seeks, in effect, enforcement of the *Independent Schools Administrative and Technical Officers Award 1993* ("the Award") in a manner within the exclusive jurisdiction of the Industrial Magistrate pursuant to section 83 of the *Industrial Relations Act 1979* ("the Act").
- 2 The Commission erred in law in finding that it had jurisdiction to hear the claim as the claim seeks, in effect, a bare declaration of the true interpretation of the Award, which may only be made upon an application under section 46 of the Act.

PUBLIC INTEREST

The reasons that this appeal raises matters of such importance that in the public interest an appeal should lie, include—

- (a) the appeal raises issues relating to the Commission's jurisdiction to determine the appropriate level of classification of employees under awards, an issue which has not been settled by the Commission; and
- (b) the issues relating to the Commission's jurisdiction to determine matters of this nature have general application, extending beyond the affairs of the parties and the teaching industry."

Is there a Decision?

4 A very real question arises as to whether there is a decision to be appealed against within the meaning of s.7 and s.49(1) of the Act, and having regard to s.34, s.35 and s.36 of the Act. The Full Bench invited submissions on this point and received helpful submissions from Ms Peters and Mr Gill.

5 The reasons for decision at first instance were not signed as they normally are not, nor do we suggest should be. This appeal purports to be against the "finding" expressed in those reasons, namely that the Commissioner has and had jurisdiction to hear and determine the matter.

6 The appeal is expressed to be against a "decision" of the Commission. There is, in the Appeal Book, nothing in the shape of an award, order or declaration; in particular, as referred to in s.34 of the Act. There is nothing in the shape of a decision perfected as required by s.36 of the Act (see *Registrar v MEWU* 73 WAIG 1227).

7 What occurred was that the Commissioner made a "finding" that he had jurisdiction to hear the matter and returned the matter to the list for hearing and determination. It is against that "decision" that the appellant now appeals.

BACKGROUND AND ISSUES

8 Further and alternatively, we turn to the merits of the appeal.

9 At first instance, the applicant organisation of employees, which is respondent to this appeal, filed an application in this Commission on 23 June 1999. The respondent to that application (the appellant in these proceedings) was, at the material time, the employer of Mrs Deline Murray. The appellant (although it is not certain as to what sort of entity it is) conducts an independent school. It is accepted by the parties that they are bound by the *Independent Schools Administrative and Technical Officers Award* (hereinafter referred to as "the award").

10 The matter was referred to the Commission for hearing and determination pursuant to s.44(9) of the Act in the following terms—

"The parties are in dispute over the classification level within the *Independent Schools Administrative and Technical Officers Award 1993* assigned to Mrs Deline Murray since 2 November 1995 given the nature of the duties undertaken in the performance of Mrs Murray's employment at St Michael's School. The union seeks an order that the appropriate level of classification for Mrs Murray under the *Independent Schools Administrative and Technical Officers Award 1993* since 2 November 1995 is at Level 4 of the award.

The respondent objects to and opposes the claim and seeks an order that the application be dismissed for want of jurisdiction."

11 The question is whether there is a decision capable of being appealed against within the meaning of s.49 of the Act.

12 There is no right to appeal to the Full Bench under s.49 of the Act unless the appeal is "in the manner prescribed by any decision (our underlining) of the Commission" (see s.49(2) of the Act).

13 A "decision" of the Commission is defined in s.7 of the Act as follows—

"includes award, order, declaration or finding"

14 A "finding" is defined as a decision and itself is defined in s.7 of the Act as follows—

"means a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate"

15 It is trite to observe that an appeal lies to the Full Bench from a finding of the Commission, constituted by a single Commissioner, which is a "decision", as defined in s.7 of the Act.

16 The Commissioner's determination was a "finding", as defined in s.7 of the Act, and therefore, ipso facto, a "decision" of the Commission, as defined in s.7 of the Act. It was so, in any event, because it was, as defined, a decision, determination or ruling made in the course of the proceedings which did not finally decide, determine or dispose of the matter.

17 It is quite clear that the decision was not a "decision", produced in the form of an award, order or declaration, as is mandatorily required by s.34 of the Act (see *CMEWU v UFTIU* 70 WAIG 3913 (IAC) particularly per Rowland J). Nor was the decision signed and delivered by the Commissioner constituting the Commission, as is the mandatory requirement of s.34 of the Act.

18 Next, this decision, not being an order, direction or declaration under s.32 of the Act or an order for dismissal as was mandatorily required by s.35, before it was delivered to be drawn up in the form of minutes and given to the parties concerned. After that, the parties concerned were entitled to speak to matters contained in the minutes. The parties concerned did not consent to a waiver of those mandatory requirements of s.35 of the Act (see *RRIA v AMWSU* (1989) 69 WAIG 991 at 996-999 (IAC) per Nicholson J).

19 A finding, of course, as defined in s.7 of the Act, is distinguishable from reasons for decision or findings which

constitute merely one part of the reasons for decision or which are evidentiary or procedural rulings made in the course of hearing a matter (see *Western Mining Corporation Ltd v CMEWU* (1989) AILR 399, see also *CEEEIPPU v BHP Iron Ore Pty Ltd* (unreported) (No FBA 11 of 2000) delivered 2 June 2000 per Sharkey P at pages 10-11).

20 The determination of whether the Commission has jurisdiction or not is clearly a finding, as defined.

21 Next, there is no decision, as required, bearing the Commission's seal and recorded as having been deposited in the office of the Registrar (see s.36 of the Act).

22 We now turn to the effect of those omissions.

23 However, first it is necessary to consider the law.

24 In *CMEWU v UFTIU* (IAC)(op cit), the Industrial Appeal Court considered whether a "finding" by the Full Bench amounted to a decision against which an appeal lay under s.90 of the Act, when no formal order had been extracted. That is the question which arises here. In that case, Rowland J held, at page 3914, that s.34(1) of the Act makes it mandatory that the decision shall be in the form of an award, order or declaration and shall be signed and delivered by the Commissioner constituting the Commission. He also held that, by s.36 of the Act, every decision shall be sealed, deposited in the office of the Registrar and open to inspection.

25 Cogently, His Honour observed that, until there is a decision which is in the form and has been processed in accordance with s.36 of the Act, there is no decision upon which s.90 can operate. (Equally, such an observation is applicable to s.49 of the Act.) His Honour observed that that was consistent with the reasons of the majority (Brinsden and Kennedy JJ) in *McCorry v Como Investments Pty Ltd* 69 WAIG 1000 (IAC). In that case, His Honour held that, since the finding was not "processed" in the way provided in s.34 and s.36 of the Act, it was not a "decision" which can be the subject of an appeal under s.90 of the Act. The appeal was, therefore, incompetent. Walsh J reached the same conclusion at page 3917, as did Kennedy J at page 3918.

26 In *Registrar v MEWU and Others* 74 WAIG 1487 (IAC), the question was whether an interim order, dated 19 June 1992, had or had no effect until 23 September 1992, the date of its depositing in the Registrar's office. In that case, Kennedy J said that the decision of the Commission is a document to be signed and delivered. Rowland J agreed with Kennedy J, but also indicated that he took the view which he took because *McCorry v Como Investments Pty Ltd* (IAC)(op cit) and *CMEWU v UFTIU* (IAC)(op cit) had not been distinguished on the facts. Franklyn J dissented.

27 We were also referred to *Fisher Catering Services Pty Ltd v ALHMWU* 77 WAIG 611 (IAC). In that case, reasons for decision had issued, but no formal award, order or declaration had issued, nor had s.34(1), s.35 and s.36(a) of the Act been complied with. Significantly, Their Honours were not taken to *Registrar v MEWU and Others* (IAC)(op cit) and *CMEWU v UFTIU* (IAC)(op cit) or, if they were, there is certainly no mention of those cases in the authorities referred to. Anderson J was of opinion that *McCorry v Como Investments Pty Ltd* (IAC)(op cit) did not stand for the proposition that a decision is not a "decision" unless it is a decision in respect of which all of the requirements of s.34, s.35 and s.36 of the Act have been complied with.

28 Scott J held that the decisions made were decisions of a preliminary nature, and that appeals against findings could not lie under s.90 of the Act to the Industrial Appeal Court.

29 In our opinion and with respect, nothing has been said sufficiently to the contrary in *Fisher Catering Services Pty Ltd v ALHMWU* (IAC)(op cit) to overrule the ratio decidendi expressed by the reasons for decision of all judges in *CMEWU v UFTIU* (IAC)(op cit) that failure to comply with s.34, s.35 and s.36 of the Act meant that there was no decision, as defined, and that the appeal in that case for that reason was incompetent. Further, the reasons for decision in *Fisher Catering Services Pty Ltd v ALHMWU* (IAC)(op cit) do not detract from the "minimal" view of Kennedy J in *Registrar v MEWU and Others* (IAC)(op cit) that a decision is a document to be signed and delivered.

30 That was a view repeated by Rowland J in *Registrar v MEWU and Others* (IAC)(op cit) and, in part, dealt with by

Kennedy J, who held that a decision for the purposes of s.90 of the Act should be written, signed and delivered.

31 In this case, no decision was written, signed or delivered, nor was it in the form of an award, order or declaration. The reasons for decision cannot constitute, for those reasons, an award, order or declaration. There must be a separate document written, signed and delivered.

32 Nor could such a decision escape on the basis that it was a finding which could or should be expected to be dealt with in reasons for decision (see *Fisher Catering Services Pty Ltd v ALHMWU* (IAC)(op cit) per Scott J at page 614).

33 Next, this was the sort of finding as to jurisdiction which was within the definition of "finding" and "decision" in s.7 of the Act (see *CEEEIPPU v BHP Iron Ore Pty Ltd* (FB)(op cit)).

34 There was no competent appeal because there was no "decision" against which an appeal could lie pursuant to s.49(1) of the Act. There was no decision because s.34 and s.36 of the Act were not complied with. There was no statutory valid decision because s.35 of the Act was not complied with. Thus, there was no decision because—

- (a) This was a "finding" which was a "decision", as defined.
- (b) No decision was committed to writing.
- (c) No decision was committed to the form of an award, order or declaration.
- (d) No decision was signed or delivered.
- (e) No decision was sealed or deposited in the office of the Registrar.

35 Even if that were wrong, we are not persuaded that the Full Bench should give leave to appeal pursuant to s.49(2a) of the Act because the decision sought to be appealed against was of "such importance that, in the public interest, an appeal should lie" (see *RRIA v AMWSU* 69 WAIG 1873 (FB)). We say that because, whilst a question of jurisdiction will generally come within the meaning of that phrase, this question was one of the type plainly and clearly considered in and subject to the ratio in *Crewe and Sons v AMWSU* (1989) 69 WAIG 2623 (FB) as explained in *J-Corp Pty Ltd v ABLF* (1993) 73 WAIG 1185 at 1188 (FB). We say that for the reasons which we express hereinafter.

36 It was also, with respect, a case which, in our opinion, was readily answerable by recourse to those decisions and the cases referred to therein.

37 The appellant's argument was that the order sought was an order to interpret or enforce an award, in which case the proceedings should have been brought under s.46 of the Act or s.83 of the Act, respectively.

S.46 and s.83 of the Act

38 The appeal turns upon the nature of the order sought by the applicant organisation at first instance. That application is for—

"An order that Mrs Murray be classified at Level 4."

39 The facts, as found by the Commissioner, were that the respondent's member was employed by the appellant and classified at Level 3 of the award. Levels 3 and 4 are both defined in Clause 13—Classifications of the award.

40 The Commissioner held that the order sought by the appellant could not be said to be an enforcement of the award in the manner cited in *Crewe and Sons v AMWSU* (FB)(op cit) and explained in *J-Corp Pty Ltd v ABLF* (FB)(op cit). We would observe, too, that the Commissioner correctly found that the order sought would not require the appellant to comply with its obligations under the award; nor was such an order sought.

41 The respondent made it clear that the dispute concerned what classification should apply to the duties performed by Mrs Murray. The order would not, of itself, require the employer to pay her at that rate. The order would require that she be classified for the purposes of her employment under the award as a Level 4 employee. The dispute was as to whether that is her classification.

42 Its resolution required a finding of fact as to her duties and the application of the terms of the award (perhaps involving its interpretation) to those duties, to determine whether her classification should be as a Level 4, not a Level 3, employee, and whether the order sought should therefore issue.

43 There was clearly no attempt to enforce an order to pay the monies or indeed to enforce the award. The matter involved a determination of what classification under the award applied to an employee. The order, as the Commissioner correctly observed, did not seek to compel the employer to do anything. Clearly, if the respondent was successful in obtaining the order and Mrs Murray was not paid what a Level 4 employee should be paid under the award, then the award would be enforceable in the Industrial Magistrate's Court, pursuant to s.83 of the Act.

44 Quite plainly, therefore, the order sought was not an order for enforcement because it does not seek the enforcement of existing rights, it did not allege a breach of an award, it was not a claim for a liquidated amount said to be due under the award and to be determined according to existing legal rights. The nature of the order sought was a decision as to the future rights, conduct and obligations of the parties and of an employee and that is the essence of arbitration. Further, which is the essence of industrial arbitration, the question ultimately was what was right and fair, particularly to the employee (see *Crewe and Sons v AMWSU* (FB)(op cit) at page 2627 and *Re Cram and Others; Ex parte Newcastle Wallsend Coal Co Pty Ltd* 163 CLR 140, see also *Health Services Union of Australia v Dorevitch Pathology* (unreported) (No C32827 of 1999) delivered 8 February 2000 (AIRC)).

45 The nature of the application and the order sought, for those reasons, is not one of enforcement but arbitral.

46 Further, for the reasons correctly expressed by the Commissioner at first instance, in any event, the matter is one which should unequivocally be dealt with under s.44 of the Act. (In any event, the award itself reflects the statutory requirement that a dispute resolution provision be included in awards. In the case of the subject award (see the appendix to the award) the requisite procedure requires that, with respect to any question, dispute or matter under the award, it shall be addressed in terms of that procedure, and may in turn be referred to this Commission.)

47 We now turn to s.46 of the Act. The Commissioner observed that the order did not, of itself, interpret a provision of the award (see page 19 of the appeal book). What was involved was a finding of fact as to the duties of Mrs Murray, followed by a finding that those duties entitled the respondent organisation to an order that she be henceforth classified at Level 4 in accordance with those duties.

48 Of course, if the facts do not warrant it, then the respondent is not entitled to an order.

49 The Full Bench has already observed that there is no substance in the suggestion that an industrial tribunal cannot interpret laws, awards and other legal instruments. A tribunal could not discharge its arbitral functions if it were unable to form an opinion on a matter of interpretation. The formation of views and opinions on matters of interpretation in arbitral proceedings does not, of itself, amount to a usurpation of judicial power (see *Crewe and Sons v AMWSU* (FB)(op cit) at page 2627).

50 We would observe that the making of a binding declaration of rights is an instance of the exercise of judicial power and is expressly conferred by s.46 of the Act. What was asked to be done here was that the Commission form an opinion as to the terms of the award on the way to determining whether it should make an order as to what was right and fair to regulate the future conduct of the parties, particularly that of the appellant vis à vis Mrs Murray.

51 That is why the decision in *Sisters of Mercy Perth (Amalgamated) and Another* (1999) 79 WAIG 3458 is distinguishable.

52 This matter was quite clearly a matter where the order sought was an arbitral order. The true nature of the order sought is an order within jurisdiction and power under s.44 of the Act.

53 We would add that the distinction between judicial and arbitral powers has not the same significance under the Act as it does in Federal matters, save and except that s.44 requires the Commission to exercise arbitral power. S.46 of the Act confers a separate judicial function and s.83 confers a separate judicial function on a member or members of the Commission and jurisdiction on the Industrial Courts which is not conferred on the Commission.

54 S.46 and s.83 of the Act did not and could not apply for those reasons.

CONCLUSION

55 The application made and the order sought were clearly and unequivocally within jurisdiction and power. We do not find the appeal competent or otherwise made out, for those reasons, and would dismiss it.

Order accordingly.

2000 WAIRC 00002

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES: ST MICHAEL'S SCHOOL V THE
INDEPENDENT SCHOOLS SALARIED OFFICERS'
ASSOCIATION OF WESTERN AUSTRALIA,
INDUSTRIAL UNION OF WORKERS

HEARD: FULL BENCH

HON PRESIDENT PJ SHARKEY
COMMISSIONER WS COLEMAN
COMMISSIONER SJ KENNER

DELIVERED: TUESDAY, 4 JULY 2000

FILE NO/S: FBA 22/2000

Result: Appeal dismissed.

Representation:

Appellant: Ms D L Peters (of Counsel), by leave

Respondent: Mr A D Gill (of Counsel), by leave

Order.

This matter having come on for hearing before the Full Bench on the 19th day of June 2000, and having heard Ms D L Peters, (of Counsel), by leave, on behalf of the appellant and Mr A D Gill (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 4th day of July 2000 wherein it was found that the appeal should be dismissed, it is this day, the 4th day of July 2000, ordered that appeal No FBA 22 of 2000 be and is hereby dismissed.

By the Full Bench

(Sgd.) P. J. SHARKEY,
President.

[L.S.]

FULL BENCH— Appeals against decision of Industrial Magistrate—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Shenton Enterprises Pty Ltd trading as John Shenton Pumps

(Appellant)

and

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

(Respondent)

No FBA 3 of 2000.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P.J. SHARKEY.
CHIEF COMMISSIONER W.S. COLEMAN.
COMMISSIONER J.H. SMITH.

17 April 2000.

Reasons for Decision.

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

This appeal was listed, as is the custom of the Full Bench, after a Deputy Registrar had ascertained the available dates of the two advocates concerned. The matter was listed on a date, namely 11 May 2000, being a date which both Mr G McCorry, the advocate for the appellant, and Mr C Young, the advocate for the respondent, had notified the Deputy Registrar as being a date on which they were available to appear.

On 3 April 2000, the Full Bench forwarded a Notice of Hearing to the advocates that the appeal would be heard on 11 May 2000.

On 5 April 2000, by a facsimile communication, Mr McCorry advised that the hearing date clashed with a commitment he had, namely the provision of an "industrial relations service" to the Commonwealth Government for the Indian Ocean Territories of Christmas and Cocos Islands, requiring him to visit Christmas Island to deal with a number of matters in the week commencing 6 May 2000. He advised further that, if the trip were not made, the matters could not be dealt with until the end of June 2000.

Mr McCorry advised that these arrangements were only confirmed on 4 April 2000, which was, of course, subsequent to the date of the Notice of Hearing.

There was no advice, prior to the forwarding of the Notice of Hearing, that the availability of Mr McCorry on 11 May 2000 had changed.

Mr Young forwarded a facsimile communication to the Associate to the President on 6 April 2000 consenting to the hearing being vacated.

In response to a communication from the Associate to the President of 12 April 2000, Mr McCorry advised in writing on 13 April 2000 that he was happy to have the Full Bench deal with his application to vacate 11 May 2000 as the date of hearing on the papers. Mr Young did not communicate to the Full Bench any objection to that being done. Accordingly, the matter has been determined on the papers.

Notwithstanding the consent of Mr Young and notwithstanding Mr McCorry's other commitment, it was a commitment which arose after this matter was listed before the Full Bench. The listing before the Full Bench took into account the availability of both advocates. The Full Bench had no notification that Mr McCorry was not available on 11 May 2000, he having advised in fact that he was available.

The listing of matters before a Full Bench is not an easy process and involves the co-ordination of the commitment of three members of the Commission. The reasons advanced, that Mr McCorry has other commitments of which he was notified after the Notice of Hearing issued are not grounds for the vacation of the date.

Whilst the Commission in these matters endeavours and has endeavoured to ensure that the appellant is represented by the agent whom it has engaged, it is not always possible to do so and the proper allocation of scarce Commission time is an important factor. There should be required a cogent reason for the vacation of a date when a hearing date has been fixed after consultation with the agents for the parties, or at all. The vacation of a date fixed some weeks in advance should not be lightly permitted. The existence of circumstances providing a fresh call on the time of the agent for the appellant after the event is not such a cogent reason. Further, there is nothing before us to suggest that his own client benefits from the granting of the application.

Therefore, for those reasons, we would dismiss the application for a vacation of the hearing date of the appeal.

Order accordingly.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Shenton Enterprises Pty Ltd trading as John Shenton Pumps
(Appellant)

and

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

No FBA 3 of 2000.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P.J. SHARKEY.
CHIEF COMMISSIONER W.S. COLEMAN.
COMMISSIONER J.H. SMITH.

17 April 2000.

Order.

The Notice of Hearing of the appeal herein, having been forwarded to the parties on the 3rd day of April 2000, giving notice of hearing of the appeal on the 11th day of May 2000, and the agent for the abovenamed appellant, on the 5th day of April 2000, having forwarded, in writing, an application to vacate the hearing date of the appeal, and the advocate for the abovenamed respondent, on the 6th day of April 2000, having advised, in writing, that the respondent consented to the hearing date being vacated, and the Full Bench having dealt with such application on the papers with the consent of Mr G McCorry, advocate for the applicant and without objection by Mr C Young, advocate for the respondent, and reasons for decision being delivered on the 17th day of April 2000, it is this day, the 17th day of April 2000, ordered that the application to vacate the hearing date of the appeal be and is hereby dismissed.

By the Full Bench,

[L.S.]

(Sgd.) P.J. SHARKEY,
President.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Shenton Enterprises Pty Ltd trading as John Shenton Pumps
(Appellant)

and

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

No FBA 3 of 2000.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P.J. SHARKEY
CHIEF COMMISSIONER W.S. COLEMAN
COMMISSIONER J.H. SMITH

21 June 2000.

Reasons for Decision.

THE PRESIDENT: This is an appeal against the decision of the Industrial Magistrate, sitting in the Industrial Court at Perth, given on 23 February 2000 in matter No 31 of 1999 and brought under s.84 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act").

Before the Industrial Magistrate, there was a complaint of breaches of the Electrical Contracting Industry Award, No R22 of 1978 (hereinafter referred to as "the award"). These were allegations of a failure to pay to Jonathan Michel, an employee of the appellant, monies to which it was alleged he was entitled pursuant to several clauses of the award.

The respondent organisation of employees is a party to the award.

It was, of course, alleged that the employer was bound by the award.

The Industrial Court, at Perth, having heard and determined the matter, reached the following decision—

- (a) That there was a breach of the award in each instance, as alleged.
- (b) That there was an underpayment of \$4,500.00 which should be paid by the appellant (the respondent at first instance) within 21 days.
- (c) That on each breach, a caution should be applied.
- (d) That costs of \$44.20 be paid by the appellant.

GROUND OF APPEAL

It is against that decision that the appellant appeals on the following grounds, which appear at page 2 of the appeal book (hereinafter referred to as "AB")—

"The learned industrial magistrate erred in fact and in law in finding that the Appellant (Defendant) was bound by the Electrical Contracting Industry Award No R22 of 178 (the award) in that he—

- (a) Wrongly found that the industry to which the award applies is clearly identified by the scope clause of the award and the Respondent (Complainant) was not required to adduce evidence of the activities of the named Respondents to the award and their employees in order to establish the scope of the award;
- (b) Wrongly found, in the absence of evidence as to what were the activities of the named respondents and their employees, that the evidence of Mr Kevin Harris did or was capable of establishing the scope of the award;
- (c) Wrongly found, in the absence of evidence as to what were the activities of the named respondents and their employees, that the Appellant (Defendant) at the material time carried out work within the electrical contracting industry.
- (d) Erred in not finding that clause 1 of the award constituted an express term within the meaning of section 37(1) of the *Industrial Relations Act 1979*, having the effect of saving the application of the Metal Trades General Award No 13 of 1965 to employees who were engaged in a classification in that award, but not employed in the electrical contracting industry as carried on by the names respondents to the award; and
- (e) Failed to find that the nature of the major and substantial work done by the employee was not capable of establishing which award applied to the employee, when the nature of the work done was identical under both awards."

BACKGROUND

The respondent organisation is an organisation registered under the Act, and the appellant is a company incorporated under the Corporations Law.

The respondent is a named party to the award, but the appellant employer is not a named party to the award.

The respondent alleged that the appellant was bound by the award and this contention was disputed by the appellant.

It was not in issue that the appellant employed Mr Jonathan Michel as an electrical installer from mid-November 1995 until 30 April 1997 in the calling of "Electrical Installer", as defined in Clause 5 of the award.

The respondent alleged that, from 24 October 1995, until 4 April 1997, the appellant failed to pay its employee, Mr Michel, various entitlements pursuant to Clauses 12(1)(a) and 27(3)(a) of the award and wages sub-clauses (9) and 2(a)(iii)(aa) of the First Schedule to the award.

The appellant denied that the award bound it, and asserted that its principal business activity was not that of electrical contracting, but rather that of pump service and repairs; accordingly it alleged that it was bound by the Metal Trades (General) Award 1966 No 13 of 1965.

EVIDENCE, ISSUES AND FINDINGS

The Scope Clause

The relevant clause, Clause 3 – Area and Scope of the Award, reads as follows (see page 8(AB))—

"3—Area and Scope

This award relates to the Electrical Contracting Industry within the State of Western Australia and to all work done by employees employed in the classification shown in the First Schedule—Wages and employed by the respondents in connection with the wiring, contracting, maintenance and the installation and maintenance of electrical light and power plants, and the installation of all classes of wiring, repair and maintenance of electric and electronic installations and equipment including switchboards and appliances carried out by the respondents as electrical contractors. Provided that the award shall not apply to the manufacturing section of the business of any of the respondents."

The existence of the award, that Mr Michel was employed in a classification contained in the award, and that he was an employee within the meaning of s.7 of the Act, were not matters in issue.

The respondent was required to prove, on the balance of probabilities, that the award bound the employer; it was said, by establishing that the employer was operating a business or undertaking in the relevant industry at the time of the alleged breaches. (I will deal with that and the effect of s.37 of the Act later in these reasons.)

The award does have effect, "according to its terms" and is to be interpreted as a legal document in accordance with *Norwest Beef Industries Ltd and Derby Meat Processing Co Ltd v AMIEU 64 WAIG 2124 (IAC)*. In construing the area and scope clause, the ordinary meaning of the words of the award must be construed, and, unless it leads to ambiguity or absurdity or, the interpreted construction renders the clause inconsistent with other clauses of the award, unjustifiably (see also *AEFEU v Minister for Health 71 WAIG 2253 (IAC)* per Anderson J).

By reference to Clause 3 of the award, the learned Industrial Magistrate held that the clause contained a particularisation of what the industry consisted of and did not, in any way, derogate from the identification of the industry. Since the industry to which the award applied was clearly identified and particularised, His Worship held that it was not necessary to embark upon the process suggested by the appellant of fact finding in order to identify the industry. In other words, the learned Industrial Magistrate held expressly that what the industry involved to which the award applied was ascertained solely by a construction of the scope clause of the particular award. However, His Worship did embark on a process of fact finding as well.

That follows what was laid down in the now classic dictum *WACJBSI v Terry Glover Pty Ltd 50 WAIG 704 (IAC)* per Burt J at 705—

"Each and every award must relate to an industry and what the industry is, is in every case primarily a question of construction of the particular award. It may be that the question is not only primarily but finally a question of construction, and it may be that the award as a matter of construction fails to give the final answer and requires for that purpose that findings of fact be made.

An award if made in terms "to relate to the ship building industry" would be of the first-mentioned kind. An award expressed to relate, as the one under construction here is expressed to relate, to "the industries carried on by the respondents set out in the schedule attached(sic) to this award" is of the other kind. In such a case the industry to which the award relates cannot be made known without definition of the industries carried on by the respondents. And this is necessarily a question of fact."

The Industrial Magistrate then went on to make a finding as to whether the appellant, at the material time, carried out work within the electrical contracting industry.

I should observe that one division of the appellant's business is the Electrical Motor Rewinds and Pump Repair Division, which carries out the repair and service of pumps. These are done in a workshop and two servicemen do repairs

on site or pull the pumps out and take them back to the workshop.

His Worship found that the appellant did not carry out electrical contracting in its Electrical Motor Rewinds and Pump Repair Division, nor did it carry out such work within its Fibreglass Manufacturing Division. Those findings were not challenged.

The question then was whether the appellant carried out electrical contracting in its Pool and Spa Service and Sales Division, and/or in its Bore Service and Repair Division.

Evidence

There was evidence from the employee, Mr Jonathan Hughes Michel, who was, at all material times and at the time of hearing, a qualified and licensed electrical fitter and installer (although at the time of the hearing he was unemployed). He did not and does not hold an electrical contractor's licence. He gave evidence that he has to work under an electrical contractor. He reiterated in cross-examination that he worked in the bores and pumps division on bores and pumps. The electrical side of repairs of pumps is the major part of the work in that division (see pages 33-34 (AB)).

Through Mr Michel, there was produced the "Yellow Pages" of the telephone directory, where the appellant advertises itself as "John Shenton Pumps" and "John Shenton Electrical Contractor". When Mr Michel was interviewed for the position, Mr Anthony Senagra explained that the company was looking for someone to install, remove, repair and maintain pumps and loaders.

He said that there is work on the pump involving such things as replumbing the suctioning and repacking the pump (see page 40(AB)). That sort of work is not electrical work. He did do other work, such as hooking up a welding machine, which was a smaller job.

Also called to give evidence for the respondent was Mr Kevin James Harris, a duly qualified electrician who had worked from 1961 until the present, in the main as an electrician, having obtained his electrical contractor's license in 1976. He had, however, been a contractor, owning and operating his own business since 1980. He was a licensed trainer and conducts assessments for apprenticeship schemes. In addition, he is a past President and a member of the Federation of Electrical Contractors, a trade association. He held an electrical contractor's licence. He was also a government appointed member of an enquiry into the Electrical Licensing legislation and changes thereto.

Mr Harris gave evidence that an electrical fitter does everything that a mechanic would do with an "electrical bit added on top".

His evidence was that the electrical contracting industry involved the installation, removal, renewal, design, connection and commissioning of electrical equipment or equipment with an electrical component to it. He gave evidence that his company is in the electrical contracting industry (see page 52(AB)).

The electrical contracting industry covers a wide range of sections, domestic, commercial and industrial, he said (see page 54(AB)). Further, he gave evidence that an organisation can only engage an electrician to do electrical work if they hold an electrical contractor's licence (see page 55(AB)).

Mr Harris contended that an electrical fitter or installer was employed in the electrical contracting industry.

The appellant called its General Manager, Mr Anthony Senagra, who had been employed by the appellant for 22 years, starting off as a junior and working his way up to become the appellant's General Manager. His Worship found that, although he did not have trade qualifications, he had an intricate knowledge of the operations of the appellant. The work which was done, according to his evidence, was the repair of bore pumps and equipment, service on pools generally and pumps (see page 72(AB)). Some repairs and service, he said, had nothing to do with electric faults or function (see page 74(AB)).

There was evidence from Mr Senagra that, although the appellant employed Mr Michel to wire up electric pumps, fault find and, where necessary, to replace cables, that, of itself, did not put the appellant into the electrical contracting industry.

Findings at First Instance

His Worship decided that that assessment did not determine the ultimate issue. The ultimate issue was to be decided by His Worship.

On Mr Michel's evidence, the learned Industrial Magistrate found that that gentleman carried out the wiring, repair and maintenance of electrical pumps and that electrical pumps are appliances.

His Worship found that there was specific reference to appliances within the award and Mr Michel carried out such work in the field both in domestic and commercial situations. He was sent out to do what, in the main, consisted of electrical work.

His Worship, therefore, found, agreeing with Mr Young in his submissions, that conceptually, there was simply no difference in Mr Michel being sent out to replace or repair an electric fan on the one hand and to do the same on an electric pump on the other.

His Worship also found that Mr Harris was a most impressive witness who gave evidence of the breadth of the electrical contracting industry. As part of his electrical contracting business, he carried out work of an identical nature to that carried out by Mr Michel and, therefore, the appellant, in wiring, repairing and maintaining electrical pumps.

The work carried out by the appellant in its Bore Service and Repair Division is the same work as is carried out by the electrical contracting industry, His Worship found.

Accordingly, His Worship concluded that the award had (and has) application to Mr Michel and to the appellant. He also found that the preponderance of the appellant's business in its Bore Service and Repair Division was clearly within the electrical contracting industry, and that the substantial part of work carried out by Mr Michel for the appellant was within that industry, namely the electrical contracting industry. Pump repairs which related to the operating system of the pump, as duties for the electrical operation, were not the major part of the work carried out by Mr Michel or his employer.

ISSUES AND CONCLUSIONS

I have already referred to the classic rule laid down in *WACJBSI v Terry Glover Pty Ltd (IAC)*(op cit).

We were referred by Mr Young, the advocate for the respondent, to *ETU v Signlite Pty Ltd 69 WAIG 2658 (FB)* (hereinafter referred to as "the Signlite Case"), where this clause was dealt with by the Full Bench. It is something of a pity that that case was not drawn to the attention of His Worship at first instance.

This was a decision of the Full Bench in which all three members agreed as to the orders to be made. I say that because the effect of a Full Bench decision is clear.

A Full Bench will not lightly depart from one of its previous decisions, more particularly when that decision has been applied by another Full Bench. It should only do so in circumstances in which it is convinced that an earlier decision was wrong or when there is some compelling reason why the earlier decision should no longer be followed (see *Re Warden Calder: Ex parte Cable Sands (WA) Pty Ltd (1998) 20 WAR 343 at 354-355 (WASC FC)*, see also *Craig v Troy (1997) 16 WAR 96 at 162*, *Traegar and Others v Pires De Albuquerque and Others (1997) 18 WAR 432 at 434, 447* and *Nguyen v Nguyen (1990) 169 CLR 245 at 263-270*, all applied in *Re Warden Calder; Ex parte Cable Sands (WA) Pty Ltd (op cit)*).

There was no submission that the Signlite Case decision was wrong, or that it should not be followed. However, as a matter of fact, it is distinguishable because, in the Signlite Case, where the common object to be achieved by the combined efforts of the employee and the employer was the manufacture and installation of electrical signs, in this case the common object to be achieved was that of installing and repairing electric pumps, insofar as the pumps and bores division of the appellant was concerned.

The appellant employer was not an employer named in the schedule and, therefore, the question for decision was whether it employed the employee named in the complaint in a calling mentioned in the award, in the industry to which the award applied. The scope clause is, as Fielding C, as he then was, observed in the Signlite Case, a Donovan clause (see *R J Donovan & Associates Pty Ltd v FCU 57 WAIG 1317 (IAC)*).

I apply the ratio in the Signlite Case and make the following observations—

- (a) A fact finding exercise is necessary to determine what the electrical contracting industry is.
- (b) The industry is defined as the electrical contracting industry.
- (c) The “industry” is not defined in the award by the enterprises carried on by the named respondents.
- (d) The award does not apply to the manufacturing section of the business of any respondents. That is an express exclusion.
- (e) The award applies to the classifications and the work done by the employees employed in those classifications, Mr Michel being so employed.
- (f) Since it is not evident, from the ordinary, natural meaning of the language of the award, what the electrical contracting industry is, then evidence is required and findings of fact are to be made.
- (g) Whilst the award applies to persons who do certain work for the respondents as their employees, that part of the scope clause designates the employees as persons employed in connection with certain activities carried out by the respondents to the award, provided however that they are activities carried out by the respondents as electrical contractors.
- (h) Thus, if those activities were not carried out by the respondents as electrical contractors, then the fact that they were performed by employees referred to in the classifications in the First Schedule would not mean that the award applied to the employees.
- (i) The industry is clearly ascertainable only by the terms of the scope clause without reference to the activities of the named respondents to the award.
- (j) Whether Mr Michel and the respondent are engaged in the same industry is to be determined by the common object which they seek to advance by their combined efforts (see *Parker and Son v Amalgamated Society of Engineers* [1926] 29 WAR 90).

I also refer to *Freshwest Corporation Pty Ltd v TWU 71 WAIG 1746 (IAC)* (hereinafter referred to as “the Freshwest Case”), particularly whether evidence as to the industry at the time when the award issued was required. That was a case where the industry could only be identified by ascertaining what were the industries carried on by the respondents.

At page 1748, His Honour, Franklyn J, said—

“The clause speaks specifically of what might be called “the respondents’ industries” and not generally of an industry or industries. (my underlining) Thus, for example, it is the industry or industries of a general carrier as carried on by the individually named respondents to which the award was directed and not a broad industry of general carrier which might include a business so different from those of the named respondents as not to be a relevant industry.

....

For the industries to which is applies to be determined with certainty – an essential to any award – it is necessary, in the absence of clear intention to the contrary, to define them by what they were at the date of the award.”

The Freshwest Case was concerned with a clause which was entirely different and bears no relation to the scope clause in this case.

The scope clause in the Freshwest Case required the industry concerned to be ascertained in accordance with the industries carried on by named respondents.

That was not the case here. The industry concerned was the electrical contracting industry. Thus, there was no bar to the receipt of Mr Harris’ evidence, even though he was not giving evidence of the industry at the time the award was made.

To find that the appellant was bound by the award, His Worship had to be satisfied that, at the time of its employment of Mr Michel, it was engaged in an industry carried on by any one or more of the respondents to the award and, further, that Mr Michel, as an employee, was employed to perform the work prescribed in Clause 3 and in an award classification.

The Electricity Act 1945 (as amended) and The Electricity (Licensing) Regulations 1991

There was no direct reference in either the Signlite Case or in this case, at first instance, to the Electricity Act 1945 (as amended) (hereinafter referred to as “the Electricity Act”) or the Electricity (Licensing) Regulations 1991 (hereinafter referred to as “the Electricity Regulations”). Accordingly, the Full Bench may not refer to those provisions, except, for the most part, by way of obiter dicta.

S.33A of the Electricity Act contains a definition of “electrical appliance” which is as follows—

“**electrical appliance**” means an appliance fitting, wire, or other apparatus or material intended suggested or designed for use in or for purposes of or for connection to any electrical installation;

and “electrical installation” which is as follows—

“**electrical installation**” means any appliances, wires, fittings or other apparatus placed in or on or over any land or premises and used for or for purposes incidental to the conveyance, control, supply or use of electricity and includes additions, alterations and repairs to an electrical installation.”

Clause 3 of the Electricity Regulations is significant. As a matter of law, an “electrical contractor” is defined as—

“...a person who carries on business as an electrical mechanic but does not include an electrical mechanic when acting in the capacity of an employee”

An “electrical mechanic” is defined as—

“an electrical worker who is authorized under these regulations to carry out electrical installing work”

“Electrical installing work” is defined as—

“the work of assembling and fixing in place, altering or adding to any electrical installation or maintaining, enhancing, repairing, removing, or, connecting to fixed wiring, any electrical equipment”

“Electrical equipment” is defined to include—

“any component or part of an electrical installation”

“Electrical installation” is defined to include—

“all wiring, wiring enclosures, switch gear, control and protective gear, appliances and any other components permanently connected to or associated with the wiring and that is on premises to which electricity is or is intended to be supplied through distribution works and where electricity is supplied from a private generating plant includes that plant”

“Electrical appliance” is defined as—

“a device in which electrical energy is consumed or substantially changed in character by conversion into heat, sound, motion, light or otherwise”

It will be clear from those relevant definitions that the work done by Mr Michel was work, as defined in the scope clause, Clause 3, and further that the electrical contracting industry, as defined within the Electricity Act and the Electricity Regulations, was done in relation to electrical appliances, as defined within the meaning of Clause 3 of the Electricity Regulations.

Conclusion

If one applies the Signlite Case, as one is required to do, it is quite clear that the electrical contracting industry, on the evidence, does include the installation of electric pumps and their repair.

The common object, applying *Parker and Son v Amalgamated Society of Engineers* (op cit), to be advanced by the combined efforts of the appellant and the employee is the installation and repair of electrical appliances, as defined, namely pumps, whereas in the Signlite Case, it was the manufacture, supply and installation of electric signs. Here, the pumps were not manufactured but were serviced and repaired. The pumps serviced here are clearly “electrical appliances”, as defined. That was not really in dispute.

It was also quite clear that Mr Michel was employed in a classification prescribed by the award, namely as an “electrical installer” and that he was employed in the installation and maintenance of electrical appliances, as defined in the Electricity Regulations. Thus, he was doing work within the meaning of the scope clause.

The industry involved here was the electrical contracting industry, not the pump service and repair industry, as the appellant claimed.

Accordingly, the Industrial Magistrate did not err in finding that Mr Michel was employed in the electrical contracting industry.

The Metal Trades General Award and the Award – which applies?

If two awards are inconsistent, then that question is to be determined in accordance with the principles laid down by the Industrial Appeal Court in *Hungry Jacks Pty Ltd and Others v Wilkins and Others* 71 WAIG 1751 (IAC).

Further, the Full Bench in *AWU v Sumich* 76 WAIG 942 at 943-944 considered the significance of the title to an award and concluded that the short title to an award is of little assistance without the evidence of what an industry is.

In the case of two inconsistent awards, the test of whether both of two competing provisions can be obeyed is not the “standard measuring rod of consistency”.

The general, in the case of inconsistent awards, should yield to the particular (see *Hungry Jacks Pty Ltd and Others v Wilkins and Others* (IAC)(op cit) per Anderson J (with whom Rowland J agreed at pages 1756-1757)).

It is quite plain that the award is an award directed specifically to the electrical contracting industry and that it does not, in its scope, relate to employees in manufacturing. Indeed, they are specifically excluded by the Scope Clause. Further, the Metal Trades General Award is undoubtedly a general award.

Nothing can be derived from its short title (72 WAIG 2348). Clause 1 of that award, which is its long title and reads as follows, does not take the matter any further—

“This award shall be known as the “Metal Trades (General) Award 1966” as amended and consolidated and to the extent shown in the First Schedule to this award replaces the several awards and industrial agreements set forth in that schedule and, with respect to construction work, replaces the several orders set out in the said schedule.”

Clause 3, the Area and Scope Clause, reads as follows—

“This award relates to each industry mentioned in the Second Schedule to this award and applies to all employees employed in each such industry in any calling mentioned in Clause 31.—Wages and Supplementary Payments (including the appendix thereto) of Part I—General or Clause 10.—Wages of Part II—Construction Work of this award but does not apply within the area occupied and controlled by the United States Navy at and in the vicinity of North-West Cape in relation to Increment 1 of the construction of the Communications Centre.”

The award includes Electrical Contractors but there is nothing to indicate that that award covers persons in the electrical contracting industry, as defined in Clause 3 – Scope of the Award. It is not clear that the award does not apply to the employees of an employer engaged in the industry of electrical contracting who is not a respondent to the award. Having regard to the fact that the award is specifically restricted to the electrical contracting industry and the employees of the named respondents to the award who carry on business in that industry, it is more likely that it could be the case.

There is no substance in the ground that the Metal Trades Industry General Award applies. This view is borne out by the genesis of the award in a wish to break the nexus with the Metal Trades Award and establish an award for the Electrical Contracting Industry (*ETU and Amalgamated Electrical Services and Others* 54 WAIG 603 (see also page 604)).

It does not seem to me, on an examination of the papers, that the question of whether the award was a common rule award was raised on appeal. In any event, that question was decided in the Signlite Case.

FINALLY

For those reasons, His Worship did not fall into error as alleged in the grounds of appeal. I would, for all of those reasons, dismiss the appeal.

CHIEF COMMISSIONER W S COLEMAN: I have had the advantage of reading the draft reasons for decision of the Hon. President. I agree that the appeal should be dismissed.

In a matter involving the prosecution of a claim for unpaid wages, the Industrial Magistrate determined, as a threshold issue, that the dependent company, (the appellant in these proceedings) although not a named respondent, was bound by the Electrical Contracting Industry Award No. R22 of 1978 (“the Award”). In those proceedings the company submitted that as the principal business activity was pump service and repairs it was covered by the Metal Trades General Award 1966 No. 13 of 1965.

The learned Industrial Magistrate found that the ordinary meaning of the area and scope clause of the Award “is a particularisation of what the industry consists of and does and does not in any way derogate from the identification of the industry.” On the basis of this it was unnecessary to embark on an enquiry into the activities of named respondents to the award and the employment of persons in classifications set out therein. In the learned Industrial Magistrate’s view, having concluded the issue of the identification of the industry, all that was required was to find out whether the appellant company carried out work within the electrical contracting industry particularised in the area and scope clause of the Award and whether it was performed at the material time by the employee to whom the claim related.

On the evidence before him the learned Industrial Magistrate found in favour of the claimant on the basis that the work undertaken by the company was the same as that carried out in the electrical contracting industry and that indeed the nature of the major and substantial part of employee’s work was also within that industry. In this respect the Metal Trades (General) Award 1968 No. 13 of 1965 had no application.

The appeal against the learned Industrial Magistrate’s decision attacks the approach taken in identifying the industry to which the Award applies in failing to adduce evidence of the activities of named respondents and their employees. It is submitted that the evidence presented is incapable of establishing the scope of the Award and that it was wrongly found to have shown that the activities of the appellant company at the relevant time came within the electrical contracting industry. Furthermore that the learned Industrial Magistrate erred in not finding that Clause 1 – Title of the Award constituted an express term within the meaning of section 37 (1) of the Industrial Relations Act, 1979, having the effect of saving the application of the Metal Trades General Award No. 13 of 1965 to employees who were engaged in a classification in that award, but not employed in the electrical contracting industry as carried on by named respondents to the Award. Finally that the learned Industrial Magistrate had failed to find that the nature of the major and substantial work done by the employee was not capable of establishing which award applied when the work was identical to that covered by the Metal Trades (General) Award.

The scope clause in the Award has a particularisation which limits its application to electrical contractors engaged in the electrical contracting industry within the State of Western Australia and to their employees employed in specific classifications set out in the Award who perform the kind of work identified in the clause; but it does not extend to work of that kind which is undertaken in connection with manufacturing.

As the Full Bench (*Sharkey P and Negus C*) in the *Electrical Trades Union of Workers of Australia (Western Australian Branch) Perth v Signlite Pty Ltd* 69 WAIG 2658 at 2659 (“the Signlite Case”) noted the “classic rule of determining the industry under an award was laid down by Burt J in *WA Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty Ltd* 50 WAIG 704 at 705 (“Glover’s case”)—

“Each and every award must relate to an industry and what the industry is, is in every case primarily a question of construction of a particular award. It may be that the question is not only primarily but finally a question of construction and it may be that the award as a matter of construction fails to give the final answer and requires for that purpose that findings of fact be made.”

Where is it necessary to make findings of fact, the particular course to be followed will be determined by the construction

of the scope clause. In the circumstances of this Award the approach has already been considered by the Full Bench in the Signlite case. The electrical contracting industry means in plain words the industry involving those employers who contracted to do electrical work (op cit at 2660). As noted by Fielding C as he then was, it is solely identifiable by the terms of the scope clause without reference to the activities of the named respondents to the Award (op cit at 2661). Nothing determined by the Industrial Appeal Court in *Freshwater Corporation Pty Ltd v Transport Workers' Union, Industrial Union of Workers, Western Australian Branch 71 WAIG 1746* ("the Freshwater Case") detracts from the approach taken by the Full Bench in the Signlite case. Indeed the distinction identified by the Industrial Appeal Court in the Freshwater Case (op cit at 1747) between ascertaining industries by reference to the "industries carried on by the respondents", "industries carried on by the respondents set out in the schedule" and those in which reference is made to "all workers employed ... by those employers named and engaged in the industry set out in Schedule A thereto" was recognised by the Full Bench in the Signlite case. The scope clause in the Electrical Contracting Industry Award was considered to be of the kind mentioned in the last category above and that type was reviewed in *R.J. Donovan and Associates Pty Ltd v Federated Clerks Union of Australia, Industrial Union of Workers Western Australian Branch 57 WAIG 1317* ("Donovan's Case"). That was also the approach identified by the learned Industrial Magistrate in the first instance (Appeal Book p.10).

Although the employee on whose account the union pursued the claim for unpaid wages was described as a technician by the appellant company, the learned Industrial Magistrate found on evidence presented that amongst other things he was involved in wiring, electrically fixing, maintaining, servicing, replacing, removing and installing motors and associated pumps powered by either 240 or 440 volts. Furthermore he was required to install and reinstall motors and carry out electrical fault finding. The mainstay of his work consisted of electrical work. It was found that at the outset of his employment the employee had established that the appellant held the necessary Electrical Contractors license. It was found that in reality he was an Electrical Fitter/Installer and performed his duties in the field, both in domestic and commercial situations. Importantly from the learned Industrial Magistrate's viewpoint he received evidence from an electrical contractor. Part of that contractor's work in the electrical contracting industry involves servicing and repairing pump and motors used in sewerage, stormwater and bore systems. This the learned Industrial Magistrate found to be identical to the work carried out by the employee whilst working for the appellant. There was no doubt that the work undertaken by the appellant in its Bore Service and Repair Division is the same as that carried out in the electrical contracting industry. These findings were open to the learned Industrial Magistrate and cannot be impugned on the ground that evidence was not forthcoming from named respondents to the Award. The tests which were applied to the construction of the award to identify the industry and to ascertain whether the work performed was the same as that carried out in the electrical contracting industry were properly applied, that is *Parker and Son v Amalgamated Society of Engineers 29 WAIG 90*, Glover's Case and Donovan's case. The grounds of appeal going to the identification of the industry under the Electrical Contracting Industry Award and the determination of work performed by the employee carried out in the industry under a classification in the award should be dismissed.

As to the ground of appeal going to the application of the Metal Trades (General) Award to displace the operation of the Electrical Contracting Industry Award, there is nothing in Clause 1 – Title which by virtue of section 37 of the Act, impacts on the scope of the Award to the extent claimed. The title of an award is only a label (*AWU v Sumich 76 WAIG 942 at 944*). The Award has application under common rule (Signlite case) and the only limitation with respect to electrical work is set out in the scope clause itself. The Award does not apply to the manufacturing section of the business. The circumstances under which there can be contemporaneous operation of this Award with the Metal Trades (General) Award is where manufacturing is undertaken by electrical contractors also undertaking electrical work. That was not the case here in the Bore Service and Repair Division. The appeal should be dismissed.

COMMISSIONER J H SMITH: The grounds of appeal, background, evidence and the findings at first instance are set out in the reasons for decision of the President.

Clause 3 – Area & Scope of the Electrical Contracting Industry Award No. R 22 of 1978 ("the Award") provides—

"This award relates to the Electrical Contracting Industry within the State of Western Australia and to all work done by employees employed in the classification shown in the First Schedule – Wages and employed by the respondents in connection with the wiring, contracting, maintenance and the installation and maintenance of electrical light and power plants, and the installation of all classes of wiring, repair and maintenance of electric and electronic installations and equipment including switchboards and appliances carried out by the respondents as electrical contractors. Provided that the award shall not apply to the manufacturing section of the business of any of the respondents."

The scope of the coverage of the Award was considered by the Full Bench in *Electrical Trades Union of Workers of Australia (Western Australian Branch) Perth v. Signlite Pty Ltd 69 WAIG 2658* ("Signlite"). In the Signlite case the Full Bench at 2659-2660 and at 2661 held that the industry to which the Award relates is solely identifiable by the terms of the scope clause without reference to the activities of the named Respondents to the Award. The Full Bench also held—

- (a) It is not clear from the Award what is the exact nature of the electrical contracting industry. That is largely a question of fact.
- (b) It is not the status of the employer which is determination of the industry, but rather the common object of the employer and employee.

Fielding C pointed out in Signlite that the scope clause is of the kind reviewed in *RJ Donovan & Associates Pty Ltd v Federated Clerks' Union of Australia, Industrial Union of Workers WA Branch 57 WAIG 1317* ("Donovan's case").

In the Donovan case the scope clause was in the following terms—

"This award shall apply to all workers employed in the clerical callings mentioned herein.....by those employers named and engaged in the industry set out in Schedule 'A' hereto."

An appellate body should only depart from its earlier decisions in circumstances in which it is convinced that an earlier decision is wrong or when there is some compelling reason why the earlier decision should not be followed (*Craig v Troy* (1997) 16 WAR 96 at 162 and *Traeger v Pires De Albuquerque* (1997) 18 WAR 432 at 447).

The Appellant's advocate argued that the Signlite should not be followed by the Full Bench in this matter. Further she argued that the decision of the Industrial Appeal Court in *Freshwest Corporation Pty Ltd v. Transport Workers' Union, Industrial Union of Workers WA Branch 71 WAIG 1746* ("Freshwest") should be applied. Alternatively it was argued that the factual circumstances of this case are distinguishable from the facts raised in Signlite.

There is nothing in the reasons for decision of the Industrial Appeal Court in Freshwest in relation to which it could be concluded that Signlite was wrongly decided. It is notable that Signlite was considered by the Court in Freshwest in that the decision is cited in the headnote, although the Court did not refer to Signlite in its reasons for decision.

The Industrial Appeal Court in the Freshwest case distinguished a scope clause of the kind identified in Donovan's case from a scope clause of the kind considered by the Industrial Appeal Court in *Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers' Industrial Union of Workers v. Terry Glover Pty Ltd 50 WAIG 704* ("Glover's case"). The scope clause in Glover's case identified Respondents by reference to "the industries carried on by the Respondents". In Freshwest the scope clause provided—

"This award shall apply to all workers following the vocations referred to in the wages schedule.....and are employed in the industries carried on by the respondent's to this award in connection with the transportation of goods and materials."

At page 1747 of *Freshwest*, Franklyn J observed that it was common ground that the task of the Industrial Magistrate when determining whether the employment of a worker to which the award applies involved—

“(1) identification of the industries carried on by the named respondents to the award (the named respondents); (2) identification of the industry in which Drage was employed by the appellant, and (3) identification of the industry in which he was so employed as one of the industries carried on by the named respondents.”

In this matter the task of the learned Industrial Magistrate was different, as the scope clause in the Award is a Donovan clause. Consequently, in this matter the Industrial Magistrate was required to determine whether the evidence before him established that the Appellant (Defendant) at the material time was engaged in the electrical contracting industry by carrying out electrical contracting in its Pool and Spa Service and Sales Division and/or in its Bore Service and Repair Division and employed Mr Michael in those divisions to perform work prescribed in an award classification.

The learned Industrial Magistrate in holding that the Respondent was engaged in the electrical contracting industry was entitled to have regard to the evidence of Mr Harris as he is clearly an experienced licensed electrical contractor who has extensive knowledge of the industry.

In view of the foregoing and for the reasons set out by the President in relation to grounds (a) to (c) of the Appeal, the Appellant is unable to make out those grounds. In addition, I agree with His Honour's reasons for decision in relation to ground (e) of the Appeal.

As to ground (d) of the Appeal, the Appellant argues that Clause 1 of the Award constitutes an express term within the meaning of s.37(1) of the Industrial Relations Act 1979 (“the Act”). Section 37(1) of the Act provides—

“(1) An award has effect according to its terms, but less and to the extent that those terms expressly provide otherwise it shall, subject to this section—

- (a) extend to and bind—
 - (i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and
 - (ii) all employers employing those employees;

and

- (b) operate throughout the State, other than in the areas to which section 3 (1) applies.”

The principles that apply in interpreting awards are the same principles that are applied in Courts of law for the construction of deeds, instruments statutes (*Norwest Beef Industries Limited v. Western Australian Branch Australian Meat Industries Employees Union* 64 WAIG 2124 at 2127).

Clause 1 of the Award provides—

“This award shall be known as the “Electrical Contracting Industry” Award R22 of 1978 as amended and consolidated and replaces Award No. 28 of 1973 as amended and Award No. 13 of 1965 as amended, consolidated and amended in so far as that award applies to employees employed in the classifications appearing in the First Schedule to this award by employers engaged in the electrical contracting industry as carried on by the respondents to this award.”

Clause 1 is the long title to the Award. It is established that a long title may be referred to as an aid to the construction of an Act (Pearce and Geddes *Statutory Interpretation in Australia* (4th Ed Butterworths, 1996) at [4.31]). In *Northern Territory of Australia v. GPAO* [1999] HCA 8 (1999) 196 CLR 533 Gleeson C J & Gummow J at [83] and 588 referred to Issacs J in *James v. Cowan* (1930) 43 CLR 386 at 408 in which Issacs J warned that the words of a long title cannot be construed separate from their context and the erect into a “purpose” of the statute with the meaning of a specific provision thereof and held—

“The title is the label which the Legislature thinks most suitable to identify the contents of the depository of its will on the given subject. It is no part of its enactment as

to the ‘purposes’ of the Act, except as to its authoritative selection as a label. The title is no more part of the remedy designed to cope with the evil dealt with than is the label on a druggist's bottle part of the remedy for the malady intended to be cured.”

The provisions of the Award must be interpreted as a whole. It follows therefore, that although Clause 1 of the Award can be considered as an aid to the construction of any operative provision of the Award, regard cannot be had to the terms of clause 1 alone without consideration of the terms of clause 3.

In my view ground (d) of the appeal is not made out.

For these reasons I am of the view that the Appeal should be dismissed.

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

Order accordingly,

APPEARANCES: Ms M M in de Braekt, as agent, on behalf of the appellant.

Mr C Y Young and with him Mr C Boyle on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Shenton Enterprises Pty Ltd trading as John Shenton Pumps
(Appellant)

and

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

No FBA 3 of 2000.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P.J. SHARKEY.
CHIEF COMMISSIONER W.S. COLEMAN.
COMMISSIONER J.H. SMITH.

21 June 2000.

Order:

This matter having come on for hearing before the Full Bench on the 11th day of May 2000, and having heard Ms M M in de Braekt, as agent, on behalf of the appellant and Mr C Y Young and with him Mr C Boyle on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 21st day of June 2000 wherein it was found that the appeal should be dismissed, it is this day, the 21st day of June 2000, ordered that the applications filed herein to extend time to file the appeal book in appeal No FBA 3 of 2000 out of time be and are hereby granted.

By the Full Bench,

[L.S.]

(Sgd.) P.J. SHARKEY,
President.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Shenton Enterprises Pty Ltd trading as John Shenton Pumps
(Appellant)

and

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

(Respondent)

No FBA 3 of 2000.

BEFORE THE FULL BENCH

HIS HONOUR THE PRESIDENT P.J. SHARKEY.
CHIEF COMMISSIONER W.S. COLEMAN.
COMMISSIONER J.H. SMITH.

21 June 2000.

Order.

This matter having come on for hearing before the Full Bench on the 11th day of May 2000, and having heard Ms M M in de Braekt, as agent, on behalf of the appellant and Mr C Y Young and with him Mr C Boyle on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 21st day of June 2000 wherein it was found that the appeal should be dismissed, it is this day, the 21st day of June 2000, ordered that appeal No FBA 3 of 2000 be and is hereby dismissed.

By the Full Bench,

[L.S.]

(Sgd.) P.J. SHARKEY,
President.

**FULL BENCH—
Matters referred under
Section 27—**

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Paul Stewart Hudson
Applicant

and

Barunn Pty Ltd t/as Thor Construction
Respondent.

No 1543 of 1999.

BEFORE THE FULL BENCH

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

16 June 2000.

Order.

WHEREAS in this matter the following question of law was referred to the Full Bench with the consent of the President pursuant to s.27(1)(u) of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act") by Commissioner A R Beech—

"Is application 1543 of 1999 validly before the Commission as a matter of law"

AND WHEREAS the matter having come on for hearing and determination before the Full Bench on the 16th day of June 2000, and having heard Mr R H Carthew (of Counsel), by leave, on behalf of the applicant and Mr A J Randles (of Counsel), by leave, and with him Mr D Sproule, on behalf of the respondent, and the parties herein having advised that the matter in dispute before the Commission at first instance was

settled, and the parties having consented to waive the requirements of s.35 of the Act, it is this day, the 16th day of June 2000, ordered and declared, by consent, as follows—

- (1) THAT it is unnecessary for the Full Bench to answer the question of law referred to the Full Bench pursuant to s.27(1)(u) of the Act, the matter in issue now being moot.
- (2) THAT application No. 1543 of 1999 be remitted back to Commissioner A R Beech.

By the Full Bench,

[L.S.]

(Sgd.) P. J. SHARKEY,
President.

**FULL BENCH—
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.

FBM 2 of 2000.

ROBIN COLBERT LOVEGROVE
DEPUTY REGISTRAR.

19 June 2000.

Decision.

HAVING been directed by the Full Bench, I have this day registered an alteration to rule 6—Membership, of the registered rules of the applicant organisation, in terms of the order as given on the 29th day May 2000.

[L.S.]

(Sgd.) R.C. LOVEGROVE,
Deputy Registrar.

**FULL BENCH—
Unions—Application for Orders
under Section 72A—**

Industrial Relations Act 1979.

PUBLICATION OF APPLICATION PURSUANT TO
SECTION 72A

Application Number FBM 3 of 2000 has been lodged pursuant to Section 72A of the Industrial Relations Act 1979 by the 'The Merchant Service Guild of Australia, Western Australian Branch, Union of Workers' and is published hereunder.

The application has been listed before the Full Bench at 10.30am on the 5th, 6th and 7th of September 2000.

Any person who wishes to be heard shall file a Notice of Application to be heard in accordance with Form 1, setting out the grounds upon which the person claims sufficient interest to be heard in relation to the application and serve it on the applicant at least 7 days before the above first mentioned date of hearing in accordance with Regulation 101A of the Industrial Relations Commission Regulations 1985.

J. A. SPURLING,
Registrar.

28 June 2000.

Form 1

Industrial Relations Act 1979

In the Western Australian Industrial Relations Commission

No. of FBM 3 of 2000

NOTICE OF APPLICATION

TO—

Not Applicable

TAKE NOTICE THAT—

The Merchant Service Guild of Australia, Western Australian Branch, Union of Workers

28 Mouat Street

Fremantle WA 6160

has this day applied to the Full Bench of the Commission for—

Orders pursuant to Section 72A of the Industrial Relations Act 1979.

The grounds on which the application is made are—

Attached to the Schedule hereto

(Affix Stamp of Commission)

Applicant's signature

THE APPROPRIATE FEE IS TO BE PAID UPON
LODGEMENT OF THIS APPLICATION

This notice must be completed by the applicant, signed and, where necessary, sealed by him, and a written statement of claim or other adequate description of the subject matter of the application must be attached.

For endorsements see back hereof.

SCHEDULE

APPLICATION PURSUANT TO SECTION 72A

Application is made by the Merchant Service Guild of Western Australia (Inc.) ("MSG") for the following orders under section 72A of the Industrial Relations Act 1979 (WA) ("the Act")—

1. That the MSG has the right to represent under the Act, to the exclusion of the Civil Service Association of Western Australia Incorporated ("CSA"), the industrial interests of all Fisheries Officers employed in the Fisheries Department of Western Australia by the Executive Director Fisheries who are eligible for membership of the MSG.
2. To the extent that the MSG does not have the right under the Act to represent the industrial interests of Fisheries Officers employed in the Fisheries Department of Western Australia by the Executive Director Fisheries, the MSG shall have that right.
3. That the CSA does not have the right under the Act to represent the industrial interests of any Fisheries Officers employed in the Fisheries Department of Western Australia by the Executive Director Fisheries who are eligible for membership of the CSA.

The grounds on which the application is made are—

1. The orders sought are ones to which it is open to the Full Bench to make under s. 72A of the Act.
2. The applicant is best placed to represent the industrial interests of the Fisheries Officers because—
 - (a) In the context of the enterprise, the applicant is the recognised principle union in relation to maritime employees and can commit greater resources and overall industry experience to protect the industrial interests of those employees engaged in the maritime industry;
 - (b) The applicant will be better placed to promote and facilitate successful enterprise bargaining in relation to Fisheries Officers within the Fisheries Department of Western Australia.
3. The orders sought will best facilitate the industrial representation of the employees.
4. The vast majority of Fisheries Officers employed by the Executive Director Fisheries would prefer to have their industrial interests represented by the applicant and not the CSA.

5. The Fisheries Officers have a predominant marine-related employment function and community of interest with the MSG.
6. There exists a preponderance of employee membership with the MSG, both historically and current. The vast majority of Fisheries Officers resigned from the CSA *en masse* in protest at the inadequacy of representation.
6. The orders sought are consistent with the objectives of the Western Australian Industrial Relations Commission's wage fixing principles.
7. The orders sought are consistent with the objects of the Act.

Definitions—

"Fisheries Officers" means all classifications of Fisheries Officers as defined in section 4 of the Fish Resource Management Act 1994 including but not limited to—

Temporary Fisheries Officers
 Trainee Fisheries Officers
 Fisheries Officers
 Senior Fisheries Officers
 Supervising Fisheries Officers
 Senior Fisheries Officers Master Patrol Vessel
 Fisheries Officers Mate Patrol Vessel
 Supervising Fisheries Officers Training
 Supervising Fisheries Officers Prosecution

PRESIDENT— Matters dealt with—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Thomas Richard Helm
Applicant

and

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

No PRES 8 of 2000.

BEFORE HIS HONOUR THE PRESIDENT
P J SHARKEY.

26 June 2000.

Reasons for Decision.

INTRODUCTION

THE PRESIDENT: This is an application by Mr Thomas Richard Helm, the abovenamed applicant, pursuant to s.66 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act"), against the abovementioned respondent organisation of employees, as "organisation" is defined in s.7 of the Act.

Since the respondent organisation is an organisation as defined in s.7 the Act, the applicant is a former member of such organisation and the orders sought were orders relating to the rules of the respondent organisation, their observance or non-observance, or the manner of their observance, within the meaning of s.66(2) of the Act, there was jurisdiction in the Commission, constituted by the President, to hear and determine the application.

The application seeks, formal parts omitted, the following directions and orders (as amended at the hearing) pursuant to s.66(2) of the Act—

- (a) That the decision of the Administrative Committee not to support or endorse the nomination of the applicant as a candidate for a seat in the Legislative Council representing the Mining and Pastoral Region be quashed;

- (b) That the decision of the State Council Political Sub-Committee not to support or endorse the nomination of the applicant as a candidate for a seat in the Legislative Council representing the Mining and Pastoral Region be quashed;
- (c) That the respondent not treat the decisions of the Administrative Committee and State Council Political Sub-Committee to afford preference to Jon Ford and Tom Stephens as candidates for the Legislative Council over the applicant as decisions of the respondent; and
- (d) That the respondent provide its members with procedural fairness in relation to its support for nominations for ALP pre-selection for seats in the Legislative Council."

The application was opposed by the respondent.

BACKGROUND

There was documentary evidence, but the only evidence given by a witness was that given by Mr Helm, the applicant, upon affidavit on which he was cross-examined.

There was little in issue on the facts. The applicant is presently a Member of the Legislative Council of Western Australia for the Mining and Pastoral Region of Western Australia.

The applicant was a member of the respondent organisation from 1980 until December 1999 and held the position of Vice President of the Wickham/Karratha Branch of the respondent from 1983 to 1986.

The applicant was then approached by the then member for the Pilbara in the Legislative Assembly to nominate for a recently vacated seat in the Legislative Council. He discussed this approach with members of the respondent's Administrative Committee and the Administrative Committee made a decision in accordance with its rules that the applicant be nominated for pre-selection for a seat in the Legislative Council, to which seat he was subsequently elected as a Member of the Legislative Council of the Western Australian Parliament representing the North Province.

That seat was changed to the "Mining and Pastoral Region" in 1989, and the applicant was "re-elected" for that seat in the Legislative Council at elections in 1989, 1993 and 1996. That evidence was not in dispute and I so find.

Before such re-election, the respondent's Administrative Committee, in consultation with and with the agreement of the applicant, approved and supported his nomination for the seat representing the Mining and Pastoral Region. For his nomination to succeed, the candidate required the approval and support of the respondent. If that were not forthcoming, then there was no point in nominating. That was the evidence and I accept it.

The State Administrative Committee consists of the State President, the State Secretary, the three Assistant State Secretaries and an equal number of rank and file State Conference delegates including the State Vice President. All other officials may attend meetings without voting rights.

The Administrative Committee is constituted and elected pursuant to Rule 10.6 of the respondent's rules and administers affairs of the respondent in accordance with the policies of the State Conference and State Council.

On or about 14 October 1999, at a meeting of the respondent's Administrative Committee, a decision was made by that committee, without consulting the applicant, not to support his nomination for another term. He was not made aware of this decision and no criticism of him was communicated to him nor, before November 1999, was his nomination for the seat contested or opposed. There was, in particular, no criticism of his performance or loyalty communicated to him.

It is alleged that the respondent did not afford the applicant procedural fairness or natural justice because—

- (a) The respondent's Administrative Committee made a decision not to support the applicant's nomination for the position of Member for the Mining and Pastoral Region.
- (b) The respondent's Administrative Committee decided to call for nominations for the position.
- (c) The respondent's Administrative Committee put a motion to the political caucus of the respondent seeking that the applicant withdraw his nomination for

the position of Member for the Mining and Pastoral Region.

- (d) Contrary to its rules, the respondent, through its Administrative Committee, exercised power over its political caucus in order to remove the applicant from his current position as a pre-selected candidate for the position of Member for the Mining and Pastoral Region without giving the applicant an opportunity to be heard and without giving the members of the political caucus a reasonable and fair opportunity to consider the issue of nomination for the position on its merits.
- (e) It is alleged that the respondent has acted contrary to the laws of natural justice, acted in a manner that was tyrannical and oppressive, imposed unreasonable conditions upon the membership of the respondent and was inconsistent with the democratic control of the respondent and its members.

Particulars of the claim have been lodged in accordance with directions, claiming contravention of Rules 10.3 and 10.6, that the Administrative Committee and Mr John Sharp-Collett, the Secretary of the respondent, acted beyond power, that there was a breach of the rules of procedural fairness and reasonableness and that various implied rules were breached.

Rule 10.3 of the respondent's rules reads as follows—

"3. STATE SECRETARY

The State Secretary shall be entrusted and authorised to act on all matters concerning the activities of the union in the State, subject to these Rules. He shall be responsible for the co-ordination of work of the State Organisers and shall for all purposes be the main Executive and Administrative Officer of the Union in the State.

He/she shall be entitled to attend and speak at any meeting of members in the State, but shall have the power to move and second motions and cast a vote only, at the State Conference and at meetings of the State Council.

He/she shall be responsible, in consultation with the State Council, for the engagement and supervision of the work of the staff at the State Office, for the maintenance of all necessary records of the Union, for the maintenance of complete record of the names, addresses and financial standing of all members in the State, and he/she shall forward an account to each member at least quarterly.

He/she shall report to each meeting of the State Council and State Conference on the affairs of the Union in the State and on all matters of which he/she has information concerning the welfare of the Union and its members.

He/she shall carry out such other duties as are allocated to him/her by State Conference or State Council.

He/she shall deposit all money received for use by the Council to the credit of the Union in a Bank account.

He/she shall maintain a strict and accurate record of all moneys received and expended by the State Council and shall account for these to the State Council.

He/she shall arrange for an audit of the books and records of the State Council annually and at such other times as directed.

He/she shall submit to the State Conference an audited statement of the financial transactions of the State Council and shall publish this to members.

He/she shall edit and arrange for the distribution of any publication to be issued by the State Council or State Conference.

He/she shall purge the register of members by striking off those members who are in arrears of dues for 12 months."

In late November 1999, the applicant had two discussions with Mr Jock Ferguson, who is the State Secretary of the respondent's Metal Division. Mr Ferguson told the applicant that he was under pressure to tap him on the shoulder, by

which the applicant took him to mean that the respondent did not want to nominate him for a further term.

Mr Ferguson refused to tell the applicant who was putting the pressure on. The applicant said that he made it clear that he was intending to nominate for a further term as member.

Having made some enquiries, the applicant, three days later, had a further discussion with Mr Ferguson.

At the conclusion of the discussion, Mr Ferguson said "Okay mate", and the applicant took that to mean that the problems had been sorted out.

There is, within the respondent, a body called the respondent's "Political Caucus" (hereinafter referred to as "the Caucus"), which has no status under the rules except as, perhaps, a sub-committee of the Administrative Committee. (It is not at all clear that the Caucus is constituted entirely by members of the Administrative Committee or by some persons who are not members of the Administrative Committee. I would have doubts that a sub-committee, consisting of persons not members of the Administrative Committee would have a valid existence.)

A meeting of the Caucus was due to be held on 13 December 1999. The applicant understood that the Caucus was going to receive nominations for various offices including for the ticket for the Mining and Pastoral seat.

On 9 December 1999, the applicant was on Christmas Island where he contacted Mr Fran Logan, an organiser of the respondent and the convenor of the Caucus, by telephone. The applicant sought, in that conversation, to ensure that his nomination was put before the Caucus meeting of 13 December 1999. This, he said, was important because the members would then know that the respondent supported the nomination. Mr Logan told him that he should speak to Mr Sharp-Collett.

The applicant was put through to Mr Sharp-Collett. During this discussion, Mr Sharp-Collett told him that his nomination would not be supported because he did not have the numbers of the "Left". The applicant told Mr Sharp-Collett that he did not need the numbers of the Left because he only needed the numbers on the respondent's Caucus.

Mr Sharp-Collett told him that he, the applicant, did not have the support of the respondent's Caucus either and suggested that it was time for him to retire and make way for change and renewal. There was further discussion in the course of which Mr Sharp-Collett advised the applicant that the Caucus would be asking the applicant to withdraw his nomination.

The applicant requested an opportunity to be able to argue his case in front of the Caucus and lobby them to gain support. Mr Sharp-Collett agreed that he could. The applicant asked for the names and addresses of the people in the Caucus. Mr Sharp-Collett said that he could come into the office to pick up a list. That list was obtained and it contained 23 names of persons whom he understood would constitute the Caucus.

Having returned from Christmas Island on 11 December 1999, the applicant lobbied as many people on the list as he could. However, some other names and contact details on the list were not correct or there were no contact details, so I assume that he was unable to contact them.

On the evening of Monday, 13 December 1999, the respondent's Caucus meeting was held at 5.00 pm at the respondent's offices. The applicant attended. There were 29 other people there, at least half of whom were not named on the list provided by the respondent to the applicant. The applicant named them in evidence.

During the meeting, nominations for the Mining and Pastoral Region seat were discussed. A motion was put by Mr Logan on behalf of Mr Sharp-Collett that the applicant be asked to withdraw his nomination. The applicant asserts that such a course was not in accordance with what Mr Sharp-Collett had told him, namely that he would have a chance to put his own arguments to the Caucus. However, the minutes reveal that he spoke before any motion was passed and I accept that that is the case.

The motion was supported by 3 to 4 people who argued that the Caucus was obliged to comply with Executive decisions. A vote was taken on the motion which was passed, 19 to 10. The applicant was then asked to withdraw his nomination.

The applicant, in evidence, expressed himself as being deeply distressed, stunned and shocked at the manner in which the respondent had terminated "his Parliamentary career" and his nomination to represent the respondent of which he had been a member for 19 years.

He then went later that night to the Trades Hall where the "Broad Left" members of the State Executive were meeting. The respondent had told the State Executive Broad Left that they had told the applicant to withdraw his nomination.

At the last minute, the applicant withdrew his nomination in accordance with the resolution of the respondent's Caucus. In evidence, the applicant said that he knew that he would not win the ballot because the Broad Left would follow the respondent's recommendation.

The next day, 14 December 1999, the applicant sent a letter to Mr Sharp-Collett resigning as a member of the respondent. He described himself as being shocked and in a daze at that time.

On 11 January 2000, the applicant wrote to Mr Sharp-Collett seeking details of the pre-selection process. On 17 January 2000, Mr Sharp-Collett wrote back, saying that the applicant's letter would be referred to the State Administration Committee at its next meeting on 25 January 2000. The applicant then decided to await a response from that Committee.

After a month had passed, and having received no response, the applicant sought legal advice.

During March and April 2000, his legal adviser attempted to resolve the matter with the respondent but was unable to do so.

The applicant admitted, in cross-examination, that he withdrew his nomination at the meeting of the Australian Labour Party (hereinafter referred to as the "ALP") State Executive on 13 December 1999.

He was not pre-selected by that party for the six person ticket for a seat in that region. He subsequently nominated himself in accordance with ALP rules for further seats in the Mining and Pastoral Region, but was not pre-selected. He received one vote at that meeting of the ALP State Executive.

There are 19 delegates of the respondent to the ALP State Executive. The ALP State Executive consists of approximately 220 members. No evidence was adduced on behalf of the respondent. Those are the facts as I have found them.

ISSUES AND CONCLUSIONS

The applicant's complaint is that he was not afforded procedural fairness in the manner in which the nominations for the position of Member for the Mining and Pastoral Region were called for by the respondent, nor in the way in which the motion was put to the Caucus seeking that his nomination be withdrawn.

The applicant asserted, also, that the respondent, through its State Administration, has exercised its power over its Caucus in order to remove him from his current position as a pre-selected candidate for the position of Member for the Mining and Pastoral Region, without giving him an opportunity to be heard and without giving members of the Caucus a reasonable and fair opportunity to consider the issue of the nomination on its merits.

The respondent called no evidence.

It is to state the obvious that the "pleadings" are not evidence. The respondent, through Counsel, announced that it did not agree with all of the evidence of the applicant, even though it did not dispute that evidence by calling its own evidence. However, where the applicant's evidence is not contradicted, as in this case, I accept it.

The respondent's case is, shortly put, that the relief sought was futile and, even if granted, would not and could not alter the fact that the applicant had failed to gain ALP pre-selection for any seat in the Mining and Pastoral Region. Since the relief sought, or any relief which is granted, is incapable of altering the outcome, namely that the applicant will not be pre-selected for any seat within the Mining and Pastoral Region, no relief should be granted, it was submitted. Stead v SGIC [1968] 161 CLR 141 was cited to support that proposition.

It was submitted by the applicant that he had a legitimate expectation that he would be accorded a hearing and a fair

hearing by the respondent, through its Administrative Committee, in accordance with the rules of procedural fairness. It was also submitted that there was a failure to give the applicant notice that the Administrative Committee or Mr Sharp-Collett proposed to recommend or put a motion to the respondent's Caucus that the applicant be asked to withdraw his nomination.

It was submitted that there was a failure to give to the applicant notice of the grounds on which the Administrative Committee or Mr Sharp-Collett proposed to recommend or put a motion that the applicant be asked to withdraw his nomination and that there was a failure to give the applicant any or any proper opportunity to put his case against such action being taken.

It was also submitted that it was implied in the respondent's rules that the powers of the Administrative Committee and of Mr Sharp-Collett would be exercised—

- (a) For the purpose of promoting and not contrary to the interests and welfare of the respondent's members, including the applicant.
- (b) In accordance with the rules of procedural fairness.
- (c) Fairly in relation to any member affected by the exercise of those powers.

In my opinion, the rules of procedural fairness do not apply to the functions of an organisation under its rules, save and except where a domestic or disciplinary tribunal operates under the rules of the organisation.

O'Neill v SSTU (1993) 73 WAIG 2368 is not authority for the proposition that natural justice or procedural fairness pertain to organisations, except insofar as it relates to disciplinary proceedings conducted under the rules, or to the other activities of "domestic tribunals" operating under the rules. This was not a case where such was occurring and, accordingly, there could not be, as a matter of law, any "legitimate expectation" on the part of the applicant, nor could there be any duty on the respondent to comply with the rules of procedural fairness or natural justice. Indeed, O'Neill v SSTU (op cit) related to a disciplinary body dealing with the "charges" of misconduct under the rules of an organisation (see also Drake v Carter and Others 73 WAIG 255 at 271 per Sharkey P).

There is power in the Commission, constituted by the President, to deal with implied rules. The rules of an organisation are the expressions of a consensual arrangement between members, so that terms and conditions can be implied into the rules. A discriminatory resolution against a member or members would be voidable or not carried out bona fide, but also because it was unfair and/or unreasonable (see Drake v Carter and Others (op cit) at page 271).

In my opinion, therefore, it is an implied rule that power exercised under the rules be not exercised unfairly or unreasonably.

The central element of the alleged unfairness was that the applicant was not given an opportunity at the Caucus meeting to speak against the motion to withdraw his nomination on 13 December 1999, he having been told by Mr Sharp-Collett that he would have his opportunity to argue his case before the Caucus. The applicant's own affidavit acknowledges that Mr Sharp-Collett advised him that the Caucus would be voting to ask him to withdraw his nomination. This was in his conversation with Mr Sharp-Collett on 9 December 1999 (exhibit 6).

He had, of course, contacted a number of members of the Caucus, 13 of them, and said in his evidence that, as a result, he was confident of their support in relation to his nomination for a further term.

The applicant's evidence was that, during the meeting, discussion turned to the Mining and Pastoral Region and a motion was put by Mr Sharp-Collett, on behalf of "the Executive", that the applicant withdraw his nomination. Whilst the applicant asserted that this was not in accordance with what Mr Sharp-Collett had told him about having an opportunity to put forward his arguments, the minutes of the meeting of 13 December 1999 (exhibit 4), which were tendered as part of the applicant's case, reveal clearly that he had the opportunity to put his case and did so before the motion was put, and that Mr Logan told the meeting that the motion was, to paraphrase, no reflection on the applicant's performance.

Indeed, the minutes reveal that the applicant spoke at length about his contributions and expressed concern about the process by which he was notified. Further, Mr Logan, the convenor of the Caucus, explained the reasoning behind the recommendation, emphasising that it was not due to the applicant's performance over 15 years, but that the respondent and the Left faction were spearheading the reform and renewal of the party.

As a matter of evidence, all three members of the negotiating group had spoken to the applicant beforehand and suggested that he stand aside, the minutes revealed. The members of that group were Mr Sharp-Collett, Mr Ferguson and Mr Logan. That, of course, was the case, on the evidence of the applicant.

There was then debate. Mr Logan asked if the applicant would withdraw because the negotiating group believed that the endorsement of Mr Jon Ford as No 1 on the ticket was in the best interests of the respondent. The recommendation that the ticket for the Region be—1. Jon Ford, 2. Tom Stephens, 3. Samantha Ogden, was carried by 19 votes to 10, with several abstentions.

It was said that the Caucus was recognised as a body set up under the rules of the respondent and, as such, its policy or recommendations were matters subject to approval by State Council, State Administrative Committee and the State Secretary (see the Minutes of the State Administrative Committee Meeting of 21 December 1999) (exhibit 5).

It is not correct, therefore, to say that the Administrative Committee or Mr Sharp-Collett merely intended to put a motion to the Caucus that the applicant be asked to withdraw his nomination.

He was given a full opportunity to put his case against such action being taken. He did so and he raised no protest that he was given no or no adequate opportunity at the time. Thus, because of the warning of what was to occur, given by Mr Sharp-Collett, Mr Ferguson and Mr Logan and there was adequate notice given to the applicant. Indeed, he had the chance to and did lobby a number of the members of the Caucus.

Further, he was able to put his case for nomination to the Committee. Further, ten members voted for him. If natural justice or procedural fairness applied, which it did not, there was no non-compliance with the rules. Because of the notice given and the opportunity to speak and, indeed, the content of Mr Logan's remarks, there was no unreasonableness or unfairness, there was merely a vote favouring the nomination of candidates other than the applicant.

Given that the basis of the respondent's decision was that new members were required and no criticism of the applicant was made, it cannot be said that the Administrative Committee and Mr Sharp-Collett did not exercise their powers for the purpose of promoting the welfare of the respondent, on the available evidence. The process went through a committee. The applicant and others spoke. The matter was put to the vote and decided against the applicant 19 to 10. It was, it seems, a normal committee process of voting on a motion.

In any event, the final decision as to who is nominated is one for the ALP, a political party where, one would think, as is the nature of political parties, unbridled political factors determine these sorts of matters.

I am not persuaded, for those reasons, that there was any breach of any rule of the respondent, express or implied.

In any event, even if there were, I agree with Mr Schapper that the process has advanced too far. The matter has been decided by the ALP, which is not a body within the jurisdiction of the Commission and which, as I understand what was put to me, is the ultimate arbiter of who will be nominated as one of its candidates for election. As I understand the evidence, too, matters can still be changed or adjusted within the fora of that body, which is a matter which cannot concern me.

As Mr Schapper submitted for respondent, the making of an order would be futile (see Holmes v O'Toole (1957) 1 FLR 212 and Magner v Fowler (1979) AILR 257). I say that because, whilst there is some evidence that candidates can withdraw, it is only very remotely likely that the applicant would be supported by the respondent. I place little weight on that fact, therefore.

I have no doubt that the applicant was hurt and shocked as a result of what occurred and that is understandable, given his

long and uncriticised service and membership. However, those matters are decided by political or partly political processes within the organisation. My concern is, and can only be, with the rules, their observance or non-observance or the manner of their observance.

For those reasons, I can find nothing which requires me to find any breach of any rule of the respondent (including any breach of Rule 10.3 by Mr Sharp-Collett as Secretary), express or implied, or any unreasonableness or unfairness of action under the rules, and nothing which requires me, having regard to s.26(1)(a) or (c) of the Act, to make orders for the observance of the rules of the respondent or the manner of their observance.

For those reasons, I am not persuaded that the application is made out. I will dismiss the application.

Order accordingly

APPEARANCES: Mr R L Le Miere (of Queens Counsel), by leave, and with him Mr S J Woodbury (of Counsel), by leave, on behalf of the applicant

Mr D H Schapper (of Counsel), by leave, on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Thomas Richard Helm
Applicant

and

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

No PRES 8 of 2000.

BEFORE HIS HONOUR THE PRESIDENT
P J SHARKEY.

2 May 2000.

Orders and Directions.

This matter having come on for a directions hearing before me on the 2nd day of May 2000, and having heard Mr S J Woodbury (of Counsel), by leave, on behalf of the applicant and Mr J Sharp-Collett and with him Mr G C Sturman on behalf of the respondent, and having made such orders and given such directions as are necessary or expedient for the expeditious and just hearing and determination of this matter, and the parties herein having consented to the waiving of the requirements of s.35 of the Industrial Relations Act 1979 (as amended) and the Commission having waived said requirements therefore as unnecessary, it is this day, the 2nd day of May 2000, ordered and directed as follows—

- (1) THAT the applicant herein specify with particularity its claim to the respondent herein by close of business on Monday, the 8th day of May 2000.
- (2) THAT the respondent herein specify with particularity its answer and any counter proposal to the application to the applicant herein by close of business on Tuesday, the 16th day of May 2000.
- (3) THAT the parties provide discovery and inspection of all documents or records (whether in written or electronic form) relating to the matters raised in the grounds to the application by way of written list served on the other party by Tuesday, the 16th day of May 2000.
- (4) THAT the applicant file and serve any witness statements upon which he proposes to rely on or before Tuesday, the 23rd day of May 2000.
- (5) THAT the respondent file and serve any witness statements upon which it proposes to rely on or before Tuesday, the 30th day of May 2000.
- (6) THAT the applicant file and serve any witness statements in reply and an outline of submissions on or before Tuesday, the 6th day of June 2000.

- (7) THAT the respondent file and serve any witness statements in reply and an outline of submissions on or before Tuesday, the 13th day of June 2000.
- (8) THAT evidence-in-chief herein will be given by the said witness statements and any further evidence-in-chief to be given orally not be given without the leave of the Commission.
- (9) THAT the application herein be and is hereby adjourned for hearing and determination to 10.00 am on Wednesday, the 14th day of June 2000 and Thursday, the 15th day of June 2000, subject to any other orders and directions.
- (10) (a) THAT the parties shall give notice to each other in writing by close of business on Friday, the 9th day of June 2000 of the names of those witnesses whom they seek to cross-examine and the same shall be produced for cross-examination by the applicant or respondent seeking to adduce their evidence.
(b) If no such notification is given, then such witnesses shall not be required to attend.
- (11) THAT the parties have liberty to apply for a further directions hearing upon written notice to the President's Associate.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Thomas Richard Helm
Applicant

and

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

No PRES 8 of 2000.

BEFORE HIS HONOUR THE PRESIDENT
P J SHARKEY.

26 June 2000.

Order.

This matter having come on for hearing before me on the 14th day of June 2000, and having heard Mr R L Le Miere (of Queens Counsel), by leave and with him Mr S J Woodbury (of Counsel), by leave, on behalf of the applicant and Mr D H Schapper (of Counsel), by leave, on behalf of the respondent, and I having reserved my decision on the matter, and reasons for decision being delivered on the 26th day of June 2000 wherein I found that the application should be dismissed, it is this day, the 26th day of June 2000, ordered and directed as follows:—

- (1) THAT leave be and is hereby granted to the applicant to file out of time the witness statement of Thomas Richard Helm and the outline of submissions on behalf of the applicant.
- (2) THAT leave be and is hereby granted to the applicant to amend the terms of the orders sought in the application herein by deleting the existing paragraphs (a) and (b) in the Notice of Application filed hearing and substituting therefore for paragraphs (10) (a), (b), (c) and (d) in the applicants outline of submissions filed herein.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Thomas Richard Helm
Applicant

and

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

No PRES 8 of 2000.

BEFORE HIS HONOUR THE PRESIDENT
P J SHARKEY.

26 June 2000.

Order.

This matter having come on for hearing before me on the 14th day of June 2000, and having heard Mr R L Le Miere (of Queens Counsel), by leave and with him Mr S J Woodbury (of Counsel), by leave, on behalf of the applicant and Mr D H Schapper (of Counsel), by leave, on behalf of the respondent, and I having reserved my decision on the matter, and reasons for decision being delivered on the 26th day of June 2000 wherein I found that the application should be dismissed, it is this day, the 26th day of June 2000, ordered that application No PRES 8 of 2000 be and is hereby dismissed.

(Sgd.) P. J. SHARKEY,

[L.S.]

President.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia
Incorporated
Applicant

and

Director General, Department of Transport
Respondent.

No PRES 9 of 2000.

BEFORE HIS HONOUR THE PRESIDENT
P J SHARKEY.

14 June 2000.

Reasons for Decision.

INTRODUCTION

THE PRESIDENT: This is an application by an organisation of employees, The Civil Service Association of Western Australia Incorporated (hereinafter referred to as "the CSA"), for an order for the stay of operation of a decision made by a Public Service Arbitrator on 23 May 2000 (and deposited in the office of the Registrar on the same day) in matter No P5 of 2000.

By his decision, the Commissioner, as Public Service Arbitrator (hereinafter referred to as "the Arbitrator"), dismissed an application by the CSA pursuant to s.80E(1) of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act") for orders to "halt" disciplinary proceedings instituted under the Public Sector Management Act 1994 (as amended) (hereinafter referred to as "the PSM Act", pertaining to alleged misconduct on the part of a CSA member, Dr Robert Charles Kay.

The respondent is the Director General of a Department of Government. It was not in issue that Dr Kay was and is an officer of the public service for the purposes of the PSM Act.

The disciplinary hearing is to take place on Thursday, 15 June 2000, its procedure being prescribed by s.86 of the PSM Act.

On 11 October 1999, Dr Kay was charged by police with six offences under s.83 of the Criminal Code. It seems to be

common ground that Dr Kay is charged, for the purposes of s.80 of the Act, with misconduct constituted by substantially the same acts as are alleged in the criminal charges to constitute criminal offences. The criminal charges have, after about eight months, not yet come on for trial, and it would seem that no trial date has yet been fixed.

It was not in issue that an appeal had been instituted by the applicant herein (having been filed on 9 June 2000) and that the applicant had, as a party at first instance, sufficient interest to make this application. I was therefore satisfied these requirements had been complied with.

The two orders sought by the applicant are as follows—

1. That the decision of the Commission constituted by Commissioner Gregor given on the 23rd day of May 2000 in matter P5 of 2000 be stayed pending the hearing and determination of the appeal to the Full Bench in matter No 31 of 2000.
2. That the Disciplinary Hearing proposed to be held on 15 June 2000 into alleged breaches of discipline by Dr Robert Kay, to be conducted by Mr Harris on behalf of the Respondent, not proceed until such time as the criminal charges against Dr Robert Kay are concluded."

JURISDICTION OF PRESIDENT

Whether the matter before the Arbitrator was an "industrial matter" is not a matter relevant to the jurisdiction of the President conferred by s.49(11) of the Act. S.49 confers specific jurisdiction on the Full Bench in appeals from a single Commissioner (separate from and independent of s.23 of the Act) and on the President to stay the operation of decisions of a single Commissioner.

S.49(11) of the Act confers on the President both the jurisdiction and the power to order—

"that the operation of the decision appealed against be stayed pending the hearing and determination of the appeal".

Although there was not a serious argument to the contrary, a question did arise as to whether the second order sought was an order that the operation of the decision appealed against be stayed.

The decision, in its terms, was a dismissal of an application to stay disciplinary proceedings.

Next arose the question of whether the orders sought or either of them was within jurisdiction and power.

The core of the case before the Arbitrator was that Dr Kay, who was facing criminal charges, should not be subjected to a disciplinary hearing where he might be forced either procedurally or, in order to defend himself against any penalty including dismissal, to incriminate himself.

In my opinion, the words "the operation of the decision" are deliberately included in s.49(11) of the Act. S.18 of the Interpretation Act 1984 (as amended) provides that—

"In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object."

First, the section confers jurisdiction and power to stay the operation of the order made at first instance. "Operation" is, as defined in the Macquarie Dictionary, *inter alia*—

"The act process or manner of operating"

"The power of operating; efficacy influence or virtue"

In the Shorter Oxford English Dictionary, the most appropriate definition is—

"3. Power to operate or work; efficacy, influence, virtue, force, now chiefly of legal instruments"

Applying those definitions, the efficacy of the order at first instance, its efficacy, influence, virtue or force, and hence its operation was its dismissal of an application to stay the disciplinary proceedings, and accordingly its efficacy, influence, virtue or force was to permit the disciplinary hearing to proceed.

The purpose of the provision, as expressed, is to prevent the operation of a decision appealed against, where the President

adjudges in accordance with s.26(1)(a) of the Act that this should not occur.

If that be wrong, then that is the clear purpose of the provision and, in this case, that purpose can only be secured by an order preventing the disciplinary hearing proceeding. That is because the effect of the dismissal was to permit the disciplinary hearing to proceed. It would be, therefore, absurd, given the clear purpose of s.49(11) of the Act, to construe the section as enabling something to occur to render negating an appeal, where there was a serious issue to be tried involving a decision as to the dismissal of an application.

The operation of a dismissal of an application can often be, and this is such a case, a vehicle for permitting to occur or continue something which the applicant sought to prevent or put a stop to.

Accordingly, one stays the operation of the dismissal order by staying it in its terms, power, force, efficacy and effect. The proof of the pudding lies in the fact that the Arbitrator's decision, if not stayed, renders nugatory the appeal and enables that to occur pending the appeal of which the applicant complains. There is, therefore, competence in the Commission, as constituted by the President, to make the orders sought.

I now turn to the merits of the application.

PRINCIPLES

These principles have been laid down in a number of cases, including Gawooleng Dawang Inc v Lupton and Others 72 WAIG 1310, Director General of the Ministry for Culture and the Arts v CSA and Others 79 WAIG 670 and City of Geraldton v Cooling 80 WAIG 1751.

It is for the applicant to establish that the stay should be granted. It is, of course, an underlying principle that the successful party is entitled to the fruits of her/his/its order, award or declaration.

For the applicant to succeed, it must be established that there is a serious issue to be tried, that the balance of convenience favours the applicant and that other factors consistent with the application of s.26(1)(a), s.26(1)(b) and/or s.26(1)(c) of the Act, if they exist, require that the application be granted.

If these ingredients exist, then exceptional circumstances exist which warrant the granting of the application as a matter of equity, good conscience and the substantial merits of the case. (I say that to further explain the principles.)

Serious Issue to be Tried

The appeal to the Full Bench raises a number of serious issues. First, it raises the issue whether the charging of an employee (assuming that Dr Kay is an employee) and the making of any decision by way of prescribed penalty and the "potential abrogation" of his privilege against self-incrimination is not an industrial matter.

There is an issue to be tried as to whether a decision by that disciplinary hearing to be conducted on behalf of his employer is to be pursued, notwithstanding the CSA's request to defer it, and the risk of his suffering detriment by self-incrimination is an "industrial matter" within the meaning of s.7 of the Act.

On the one hand, no decision detrimental to him has been made. On the other hand, whether there is a duty upon his employer not to invade or risk invading his right against self-incrimination, and that constitutes an "industrial matter", seems to be in issue. There is a serious issue to be tried.

Next, of course, and as a further expression of that issue, there is the issue of the actual right of the employee to maintain his privilege against self-incrimination in the face of an inquiry where, even if he were not required to answer questions which would incriminate him, he might be, practically, put in a position where he has to incriminate himself or risk incriminating himself in order to defend himself against a finding of misconduct and the consequent penalties including fines, demotion or even dismissal.

There is also raised the issue of the operation of the principle approved by Steytler J, with whom Kennedy J agreed in Martins and Others v Racing Penalties Appeal Tribunal of Western Australia (unreported) (No 1190 of 1997) delivered 10 October 1997 (Supreme Court of WA) (hereinafter referred to as "Martins Case").

The jurisdiction of the Arbitrator to intervene is the merit or otherwise of doing so. The question of whether the Commission should or could have intervened was clearly canvassed, as Steytler J said in *Martins Case* (op cit) at pages 9-10—

"In *Edelsten v Richmond* (1987) 11 NSWLR 51 Hope JA (with whom Priestley and Clarke JJA were relevantly in agreement), at p58, stressed the principle that the general law protects the right to silence "most jealously". It is for that reason that the privilege against self incrimination "can only be abrogated by the manifestation of a clear legislative intention" (*Hamilton v Oades* (1989) 166 CLR 486 at 495, per Mason CJ). In *Hamilton v Oades* Deane and Gaudron JJ said, at 502-3—

"The public examination on oath or affirmation of a person charged with an indictable offence on matters with which the charge is concerned will ordinarily be viewed as seriously and unfairly burdensome, prejudicial or damaging if for no reason other than that it will ordinarily be viewed as constituting a real risk to the fairness and integrity of the trial of that charge. That is so whether or not the examination involves questions the answers to which have a tendency to incriminate."

It seems to me that the same holds true in a case such as this, in which the evidence is not on oath or affirmation but in which access to the transcript could readily be obtained by the prosecuting authority. Nor does it seem to me to matter, for present purposes, whether the offence charged or, as in this case, having the potential to be charged, is or is not indictable (although a different view appears to have been taken, in this respect, by Southwell J in *Lee v Naismith & Ors* [1990] VR 235 at 239).

In *Edelston v Richmond*, supra, at 59, Hope JA said—

"Views have been expressed and implemented that so long as related criminal proceedings may be instituted or are pending, it is generally undesirable that disciplinary proceedings should be dealt with: *Re a Solicitor* (1938) 55 WN (NSW) 110; *Re Levy; Ex parte Incorporated Law Institute of New South Wales* (1887) 8 LR (NSW) 347. A possibly stronger view was expressed by McHugh JA in *Herron v McGregor* (1986) 6 NSWLR 246 at 266 that, while criminal proceedings are pending, it was only proper that disciplinary proceedings should not be brought on for hearing."

Hope JA went on to say (*ibid*) that the views to which he referred did not appear to have been based on any power to compel witnesses to give incriminating answers."

I am satisfied, upon those dicta, on the facts of this case and for the reasons which I have expressed, that there is a serious issue to be tried.

Balance of Convenience

As to the balance of convenience, that clearly lies with Dr Kay, through the organisation representing him. The detriment to him is that he is forced into a position where he might be required to incriminate himself as a matter of circumstance in the course of trying to defend himself against being found guilty of misconduct and being dismissed or demoted, etc.

I have considered Mr Andretich's submissions, on behalf of the respondent, from the bar table that his client is in limbo because Dr Kay is not suspended, that he has been transferred from Fremantle to Head Office, that it is not known when his trial will be conducted and that the respondent, to paraphrase what was submitted, is somewhat in limbo.

Mr Andretich also submitted that his client would be placed in a position where it might be criticised if disciplinary proceedings were delayed for a long time after the trial on the basis that, after such a long delay, the proceedings were unfair. I do not think that such a criterion could be validly levelled if there were no undue delay in bringing on the disciplinary proceedings after the trial.

In my opinion, that argument, if there were otherwise no undue delay, could not stand in the face of the dictum of Steytler J cited by me above.

Because of the jeopardy to Dr Kay inherent in this sort of situation and adverted to by Steytler J (in a case where no charges had even be laid), the balance of convenience lies with

the applicant and Dr Kay, as a person directly affected under s.26(1)(c) of the Act. That jeopardy also outweighs the uncertainty for the respondent. I make no comment as to whether it is now appropriate to suspend or not.

I am satisfied that the equity, good conscience and the substantial merits of the case lie with the applicant and that there are exceptional circumstances warranting my ordering a stay of operation of the orders made at first instance.

For those reasons, the applicant has established that I should order that there be a stay of operation of the orders made at first instance by making both orders sought.

The stay will, in accordance with s.49(11) of the Act, be in force only pending the hearing and determination of the appeal or until any further order is made prior to that.

I therefore issued a minute accordingly.

APPEARANCES: Mr P L Harris (of Counsel), by leave, on behalf of the applicant

Mr R J Andretich (of Counsel), by leave, on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia
Incorporated
Applicant

and

Director General, Department of Transport
Respondent.

No PRES 9 of 2000.

BEFORE HIS HONOUR THE PRESIDENT
P J SHARKEY.

13 June 2000.

Order.

This matter having come on for hearing before me on the 13th day of June 2000, and having heard Mr P L Harris (of Counsel), by leave, on behalf of the applicant and Mr R J Andretich (of Counsel), by leave, on behalf of the respondent, and I having reserved my decision on the matter, and having determined that my reasons for decision will issue at a future date, it is this day, the 13th day of June 2000, ordered and declared as follows—

- (1) THAT the applicant has a sufficient interest as required by s.49(11) of the Industrial Relations Act 1979 (as amended) ("the Act") and was therefore entitled to apply for the orders which appear hereunder.
- (2) THAT appeal No FBA 31 of 2000 has been instituted within the meaning of s.49(11) of the Act.
- (3) THAT the order made by the Public Service Arbitrator on the 23rd day of May 2000 in application No P5 of 2000 be and is hereby wholly stayed pending the hearing and determination of appeal No FBA 31 of 2000, or until further order.
- (4) THAT the Disciplinary Hearing proposed to be held on the 15th day of June 2000 pursuant to the provisions of the Public Sector Management Act 1994 (as amended) concerning alleged breaches of discipline by Dr Robert Kay be and is hereby wholly stayed pending the hearing and determination of appeal No FBA 31 of 2000 or until further order.

(Sgd.) P. J. SHARKEY,

[L.S.]

President.

AWARDS/AGREEMENTS— Application for—

ABB ALSTOM POWER LTD—POWER PLANT
MAINTENANCE (WA) AGREEMENT.
AG 114 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

ABB Alstom Power Limited

and

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

AG 114 of 2000.

ABB Alstom Power Ltd—
Power Plant Maintenance (WA) Agreement.

COMMISSIONER S J KENNER.

26 June 2000.

Order.

HAVING heard Mr P Cooke on behalf of the applicant and Mr G Sturman 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 ABB Alstom Power Ltd—Power Plant Maintenance (WA) Agreement as filed in the Commission on 17 April 2000 in the terms of the following schedule be and is hereby registered as an industrial agreement.

(Sgd.) S. J. KENNER,

[L.S.]

Commissioner.

OBJECTIVES OF AGREEMENT

For the successful completion of this Powerhouse Maintenance Contract at the Worsley Alumina Refinery the following objectives will be endeavoured to achieve and all Parties associated with the Agreement will seek to—

Excel in employer/employee relations, safety and welfare, quality, productivity, flexibility, communication and timeliness.

The above will be achieved by—

1. Providing a healthy, safe, harmonious working environment.
2. Enhancing productivity and efficiencies within the workplace.
3. Continuing to create a flexible work environment which will enable all personnel to work to the limit of their skills and capabilities.
4. Ongoing communication and consultation with all personnel being encouraged to participate in matters that have a constructive impact on their overall working environment.
5. Constantly seeking improvement in services to the Client, safety and welfare, quality and efficiency.
6. Providing stable and secure employment for personnel during their periods of engagement on the Powerhouse Maintenance Contract at the Worsley Alumina Refinery.
7. Developing relationships that foster commitment and trust.
8. Positive Union Representation that will contribute to the interests of all personnel and the overall quality and efficiency of the Maintenance Contract.

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1.—TITLE

This Agreement shall be known as the—

ABB ALSTOM POWER LTD—Power Plant Maintenance (W.A.) Agreement.

2.—APPLICATION—INCIDENCE OF AGREEMENT

This Agreement shall apply to employees of ABB ALSTOM POWER LTD, 2 Giffnock Ave, North Ryde NSW 2113, engaged on contracted maintenance work on the Worsley Alumina Refinery Powerhouse within the State of Western Australia. This Agreement covers pay and conditions for all employees so employed.

3.—PARTIES

3.1 The parties to this Agreement are—

3.1.1 ABB ALSTOM POWER LTD.

3.1.2 All employees, whether members of organizations of employees listed in this clause or not, who may from time to time be employed in any of the occupations/classifications/levels provided for in Appendix "A" of this Agreement. There were ten (10) employees covered by this Agreement when it was made.

3.2 Organisations representing employees herein defined, viz—

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch (AFMEPKIU).

4.—DATE AND PERIOD OF OPERATION

4.1 This Agreement shall operate from a date no later than the date of certification of this Agreement by the Western Australian Industrial Relations Commission and shall expire on 30 June 2001.

4.2 The Parties of this Agreement may undertake to meet three (3) months prior to the expiry date of the Agreement to establish grounds for the renewal of this Agreement in its present and/or modified form.

5.—RELATIONSHIP TO PARENT AWARD

This Agreement shall be read and interpreted wholly in conjunction with the: **Metal Trades (General) Award** provided that where there is any inconsistency, this Agreement shall prevail.

6.—NO FUTURE CLAIMS

During the period of operation of this Agreement there shall be no further wage increases or extra claims for allowances or employment conditions sought (including those related to National or State Wage decisions and/or economic adjustment, GST) except as provided for under the terms of this Agreement.

7.—CONTINUITY OF WORK

It is a specific condition of employment pursuant to this Agreement that during the currency of this Agreement, all parties undertake to use their best endeavours to ensure that all industrial grievances and/or disputes shall be dealt with strictly in accordance with Clause 10 Avoidance of Dispute Procedure. The Power Plant Shutdowns are not to be affected by industrial disputes.

8.—DEFINITIONS

For the purposes of this Agreement—

The Company means ABB ALSTOM POWER LTD.

The Union means Australian Manufacturing Workers Union (registered as AFMEPKIU Western Australian Branch).

Employer means ABB ALSTOM POWER LTD.

Employer Representative means Chamber of Commerce & Industry W.A.

Employee means ABB ALSTOM POWER LTD employee.

Week means that period of time commencing 12.00 pm Sunday and ending 12.00 pm on Sunday, seven days hence.

Ordinary Hours means an average of 38 hours per week Monday to Friday, inclusive, as varied, pursuant to Clause 14 Hours of Work of this Agreement. Ordinary rates, ordinary wages and ordinary pay will have corresponding meanings.

Site refers to the Worsley Powerhouse within the Worsley Alumina Refinery within the State of Western Australia.

Maintenance Work includes work to repair, replace, renovate, rehabilitate, upgrade and/or upkeep the plant, machinery, equipment and associated buildings of the Worsley Powerhouse within the Worsley Alumina Refinery within the State of Western Australia.

Award means Metal Trades (General) Award.

Casual Employee means an employee hired and paid as such as per Clause 12.2 of this Agreement.

Project means the Worsley Powerhouse Maintenance Contracts to which the company is contracted to carry out maintenance work.

Mechanical Tradesperson—Special Class means subject to paragraph (c) hereunder, a mechanical tradesperson who—

- (a) (i) is engaged on work on or in connection with fluid power circuitry, which work requires for its performance the standard of knowledge and skills referred to in subparagraphs (iii) and (iv) hereof; and
- (ii) is able, where necessary and practicable, to perform such work without supervision and to examine, diagnose and modify systems comprising interconnected fluid power circuits; and
- (iii) has satisfactorily completed the following TAFE units—

Course	Syllabus No
Industrial Hydraulics 1 and	85007
Industrial Pneumatics 1 and either	85009
Industrial Hydraulics 2	85008

Course	Syllabus No
and Hydraulic Component Repair or Pneumatic System Maintenance (Industrial)	85012 85010
and Pneumatic System Control (Industrial)	85014; or

- (iv) has, whether through practical experience or otherwise, achieved a standard of knowledge comparable to that which would be achieved under subparagraph (iii) hereof or in the case of a dispute has been satisfactorily assessed and/or examined pursuant to the Fluid Power Exemptions Course detailed in paragraph (d); but does not include such an employee unless the work on which the employee is engaged requires for its performance knowledge in excess of that gained by the satisfactory completion of the appropriate Technical College Trade course.

(b) For the purpose of this award an employee shall be deemed to be a Mechanical Tradesperson – Special Class only for the time during which the employee meets the foregoing conditions unless—

- (i) that time exceeds sixteen hours per week; or
- (ii) in the opinion of his/her employer or, in the event of disagreement, in the opinion of the Board of Reference, that time is likely during the course of employment to exceed sixteen hours per week on average,

in which case the employee shall be classified as Mechanical Tradesperson—Special Class for as long as the employment continues on either of those bases.

(c) For the purpose of this definition, employees who have completed courses in any other states shall, in the event of a dispute, submit their credentials for assessment by TAFE or be assessed in accordance with (a)(iv) above.

(d) Fluid Power Exemption Course

Course exemptions for Fluid Power Certificate Units can only be granted on completion of the TAFE divisional exam. However, class attendance exemptions may be granted for the following reasons—

- (i) attending Short Vocational course (30 hours). This will exempt the student from the practical component of the course. However, the theory component can be completed by 24 hour correspondence course with TAFE External Studies.
- (ii) students claiming exemption from the practical course requirements due to their industrial skills, could obtain an exemption through a documented case presented by their employer. Full course accreditation can then be obtained by completing the 24 hour correspondence course with TAFE External Studies.
- (iii) Students without documented evidence may obtain a practical exemption through 5 hours skill testing. These students if successful may then enter the correspondence mode to obtain full unit accreditation.
- (iv) Students who have claimed subject exemptions in the certificate of workshop technology, can only gain an automatic exemption from the introductory units on full completion of the certificate.

(e) For the purpose of this definition, fluid power circuitry involves Industrial Hydraulics and/or Industrial Pneumatics.

9.—BEST PRACTICES

9.1 The parties agree that Best Practice is simply the best way of doing things—it is a process of constantly changing and adapting to new pressures and work methods. Best Practices are not fixed. It is the method of operation to achieve exemplary levels of performance. Best Practices are not restricted to an examination of cost, but also include quality and timely completion of work in a safe and efficient manner.

9.1.1 Our Best Practices Programme includes—

- Understanding and measuring Client needs.

- Multi skilled workforce.
- Flexible workforce, committed to change (working hours, elimination of demarcation, etc.)
- Employee involvement.
- Provision of healthy and safe working environment and work practice.
- The achievement of excellence through improvement.

9.1.2 All parties agree that international or other relevant best practices may be identified and adopted in measuring and improving the efficiency of all workplace functions.

9.2 Efficiency and Quality

9.2.1 The parties are committed to continuously improving efficiency and quality of work and as a consequence the following arrangements will be adopted—

- (i) **Efficient Safe Work Practices and Active Safety Programmes**—consistent with our goal of zero lost time injuries.
- (ii) **Skills Enhancement**—to develop/extend an employee's skills consistent with the productivity and flexibility requirements of the work to be completed and to extend the employees' competence so he/she can ideally perform the whole task.
- (iii) **Promotion of Industrial Harmony**—by combining effective grievance resolution, consultation with and involvement of employees about their work and good management practices to prevent all disputation.
- (iv) **Flexible Assignment**—where the employer may utilise an employee on any task that is within the employees competence, classification, consistent with relevant statutory requirements and our duty to provide a safe and healthy work environment.

10.—AVOIDANCE OF DISPUTE PROCEDURE

Any dispute arising on the Project shall be dealt with in the following manner—

1. The employee concerned shall raise the matter with the appropriate supervisor for resolution.
2. If not resolved, the employee and/or the shop steward will raise the matter with the next more senior manager of the employer for resolution.
3. If not resolved, the employer will involve Project Management in respect of the matter.
4. If not resolved, the matter may be referred to the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch who will discuss the matter with the Project Manager for the employer.
5. If still not resolved, the matter may be referred to the Western Australian Industrial Relations Commission for resolution. Provided that before doing so, all reasonable attempts must be made to resolve the dispute.

At any level of the above procedure, the employee may choose to have another employee or representative in attendance and shall be advised of this right. While the above process is being pursued, work shall continue as normal.

11.—EMPLOYEE INDUCTION

11.1 All employees before commencing work on the site will attend and successfully complete a Site Induction Programme (SIP). The SIP shall explain safety rules and regulations, client requirements, site requirements and the application and responsibilities of this Agreement.

11.2 The SIP will be conducted at the Worsley Induction Room. The Company reserves the right to alter the duration of the programme and to conduct further and/or refresher programmes where necessary.

11.3 Each employee shall receive a Site Safety/ABB ALSTOM POWER LTD House Rules Booklet, a Worsley Safety Booklet and a copy of this Agreement. All employees on receipt of the Booklets will acknowledge in writing that they have received the booklet.

11.4 After successful completion of the SIP, each employee, where necessary, will be issued with a Personal Site Identification Pass, which will allow entry to and exit from the site.

11.5 The Site Identification Pass may also be used as a personal ID when requisitioning tools and/or materials.

12.—CONTRACT OF EMPLOYMENT

12.1 Weekly Employment

All employees not specifically engaged as casuals shall be employed by the week.

12.2 Casual Employment

12.2.1 Casual employees may be employed at any time for periods of engagement of not less than one day and for longer periods as agreed to between the Company and the employees.

12.2.2 A casual employee for working ordinary time, shall be paid per hour one thirty-eighth of the weekly wage applicable to the relevant classification rate contained in this Agreement, plus twenty percent (20%). This loading shall be in lieu of all paid leave otherwise applying to weekly hired employees under this agreement.

12.2.3 Termination of a casual employee's period of engagement shall be given by no less than one (1) hours notice or by payment in lieu of notice.

12.2.4 A casual employee is not entitled to any paid leave provisions of this Agreement.

12.3 Probationary Employment Period

12.3.1 Subject to the unfair dismissal provisions contained in sub-clause 13.5 of this Agreement employment for other than casual employees will be on the basis of an initial four (4) week probationary period for new employees during which time (subject to no less than one (1) days notice) either party may notify its intention to withdraw from the contract of employment.

12.3.2 Where the Company terminates the employment of an employee for reasons other than misconduct, during the four (4) week probationary period, the employees service will be deemed to be casual.

12.4 Timekeeping

Notwithstanding anything elsewhere stated in this Agreement, the Company may select and utilise for time keeping purposes any fraction or decimal proportion of an hour (not exceeding six minutes) and shall apply such proportion in the calculation of working time (including overtime) of an employee.

12.5 Payment of Wages

12.5.1 Wages shall be paid weekly on a set pay day, by Electric Funds Transfer to the employee's bank account or other financial institution nominated by the employee. When necessary, the recognised pay days may be altered to accommodate Public Holiday delays. Provided not more than four days pay shall be kept in hand.

12.5.2 Where due to unforeseen circumstances adequate Electronic Funds Transfer (EFT) facilities are not available, the parties to this Agreement shall immediately confer and arrange a method of payment so as to enable employees to access their pay.

12.5.3 An employee whose service is terminated shall, within a reasonable time period, be paid the full amount of wages and accrued payment due. Provided no employee shall be required to wait for a longer period than three (3) ordinary working days.

12.6 Time and Wages Record

12.6.1 The Company shall keep or cause to be kept a time and wages book or other time and wages record in which shall be recorded hours worked and wages paid to each employee.

12.6.2 The Company, on request, will produce such records for inspection to an authorised representative of the Union. Provided the Company is satisfied that statutory requirements have been met.

13.—TERMINATION OF EMPLOYMENT

13.1 Notice Period

13.1.1 In order to terminate the employment of a weekly hired employee, the Company shall give to the employee the following notice—

Employee's Period of Continuous Service	Period of Notice
Not more than 1 month	at least 1 day
Thereafter:	at least 1 week

13.1.2 In addition to the notice in subclause 13.1.1, weekly hired employees over 45 years of age at the time of the giving of the notice with not less than two years continuous service, shall be entitled to an additional week's notice.

13.1.3 Payment in lieu of the notice prescribed in subclause 13.1.1 shall be made and may be made for the notice prescribed in 13.1.2.

13.1.4 In calculating any payment in lieu of notice, the wages a weekly hired employee would have received in respect of the ordinary time the employee would have worked during the period of notice had employment not been terminated, shall be used.

13.1.5 For the purpose of this Clause, continuity of service shall be calculated in the manner prescribed in the Annual Leave Clause of this Agreement, viz Calculation of Continuous Service.

13.2 Termination of Employment by Employee

Employment is terminable by an employee in accordance with sub-clause 13.1

(13.1.1) above.

If an employee fails to give notice, the Company shall have the right to withhold moneys due to the employee with a maximum amount equal to the ordinary time rate of pay for the period of notice not given.

13.3 Statement of Employment

The Company will, 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 of the type of work performed by the employee.

13.4 Instant Dismissal

Notwithstanding the provisions of subclause 13.1 hereof, the Company will have the right to dismiss any employee, without notice, for conduct that justifies instant dismissal, in such cases the wages and accrued entitlements shall be paid up to the time of dismissal only.

13.5 Unfair Dismissal

Termination of employment by the Company will not be harsh, unjust, or unreasonable.

13.6 Standing Down of Employees

Notwithstanding anything elsewhere contained in this Clause, the Company will have the right to stand an employee down where the employee cannot be usefully employed because of a strike, or through any breakdown in machinery or any stoppage of work by any cause for which the Company cannot reasonably be held responsible.

14.—HOURS OF WORK

14.1 Ordinary Hours

The ordinary hours of work shall be an average of 38 per week to be worked 8 hours per day on any or all days of the week, Monday to Friday, inclusive, between the hours 6.00 am and 6.00 pm. Provided that the hours of work (within the spread of hours) may be altered by mutual agreement between the Company and employees.

14.1.1 For employees engaged on a casual basis their ordinary hours of work shall be an average of 38 per week to be worked as 7 hours and 36 minutes per day on any or all days of the week, Monday to Friday inclusive.

14.1.2 Unless otherwise agreed between the Company and weekly hired employees, the ordinary working hours shall be worked in accordance with the provisions of sub-clause 14.2 Rostered Days Off, of this Agreement.

14.2 Rostered Days Off

14.2.1 Weekly engaged employees shall be entitled to one day off every four weeks (of 7.6 hours each) to be taken at mutually agreed times to suit the needs of the maintenance program.

RDO accrual shall involve—

- Working an actual eight (8) hour day and being paid 7.6 hours.
- "Banking"/accruing the remaining 0.4 hours/day towards the RDO of 7.6 paid hours.
- The RDO shall accrue after each nineteen (19) working day cycle (this cycle shall include Public Holidays).

To provide maximum flexibility to meet the needs of the maintenance program, subject to agreement, an employee/s may be required to work on a nominated RDO and take an alternative day off at a mutually agreed date. Up to six (6) RDO's may be banked.

14.3 Public Holidays

Where the agreed RDO falls on a Public Holiday the next working day shall be taken in lieu unless an alternate day is agreed.

14.4 Paid Leave (e.g. Annual, Sick, Long Service, Bereavement, Public Holiday, Jury Service or Workers Compensation)

Leave taken and paid for during any cycle of four weeks shall be regarded as a day worked for accrual purposes and as in the case of actual days worked the first 24 minutes (0.4 hours) shall be the designated accrual.

14.5 Transfer of Ordinary Hours

Notwithstanding anything contained elsewhere in this Agreement a day worker who in lieu of ordinary day work works on afternoon or night shifts for periods of not less than eight hours for less than five consecutive nights shall be paid at single time extra rates of pay for such shifts worked in lieu, except on a Saturday or, Sunday when single time extra rates shall apply. On a Public Holiday a penalty rate of double time and a half shall apply. In this sub-clause 'night' means any hour between 9.00 pm and 5.00 am. The penalty rates applying in this sub-clause shall be paid in lieu of shift loadings.

15.—SHIFT WORK

15.1 Definitions

For the purposes of this clause—

- "Afternoon Shift" means any shift finishing after 6.00 pm and at or before midnight.
- "Continuous Work" means work carried on with consecutive shifts of people throughout the twenty-four hours of each of at least five consecutive days without interruption except during breakdowns or meal breaks or due to unavoidable causes beyond the control of an employer.
- "Night Shift" means any shift finishing subsequent to midnight and at or before 8.00 am.
- "Rostered Shift" means a shift of which the employee concerned has had at least forty-eight hours notice.

15.2 Hours—Continuous Work Shifts

- The ordinary hours of shift workers on continuous work as defined in subclause 15.1 hereof shall not exceed—
 - An average of 38 hours per week over a 4 week cycle.
 - A shift shall consist of not more than a total of twelve (12) hours other than by agreement with the Company.
 - Twenty minutes shall be allowed to shift workers each shift, for crib, which shall be counted as time worked (paid meal break).
 - An employee shall not be required to work more than five (5) ordinary hours without a break for a meal.

15.3 Hours—Other than Continuous Work

- The ordinary hours of shift workers not on continuous work as defined in subclause 15.1 hereof shall not exceed—
 - An average of 38 hours per week over a 4 week cycle.
 - A shift shall consist of not more than twelve (12) hours other than by agreement by the company.
 - Twenty minutes shall be allowed to shift workers each shift, for crib, which shall be counted as time worked (paid meal break).
 - An employee shall not be required to work more than five (5) ordinary hours without a break for a meal.

15.4 One Shift in Twenty-Four Hours

Except at regular changeover of shifts an employee shall not be required to work more than one ordinary shift in each twenty-four hours.

15.5 Rosters

Shift rosters shall specify the commencing and finishing times of ordinary working hours of the respective shifts.

15.6 Variation by Agreement

- The method of working shifts may in any case be varied as to all or a section of the employees by agreement between the Company and the said employees.
- The time of commencing and finishing shifts once having been determined may be varied by agreement between the Company and the employees to suit the circumstances of the maintenance program or, in the absence of agreement, by five days notice of alteration given by the Company to the employees.

15.7 Public Holidays, Weekend Work—Continuous Shift Workers:

The minimum rate to be paid to any continuous shift worker for work performed—

- between midnight on Friday and midnight on Saturday shall bedouble time,
- between midnight on Saturday and midnight on Sunday shall be double time;
- on a public holiday shall be double time and a half,
- on a Rostered Day Off shall be double time and the payment of the RDO time accrued;

15.8 Shift Work Loading

An employee working shift work in accordance with the provisions of sub clause 15.2 and 15.3 of this Clause, shall be entitled to a "flat" shift loading of twenty five percent (25%) of their ordinary hourly rate, for each shift hour worked.

16.—OVERTIME

16.1 Overtime

All time worked in excess of ordinary hours on any day or outside the ordinary hours set out in Clause 14 shall be paid for at the rate of time and one half for the first two hours and double time thereafter. Each days overtime shall stand alone.

16.2 Requirement to Work Reasonable Overtime

The Company may require any employee to work reasonable overtime.

16.3 Weekends and Public Holidays

Employees required to work overtime on weekends and public holidays shall be paid as follows—

- **Saturday Work:** time and a half for the first two hours and double time thereafter, provided that overtime worked after 12 noon shall be at double time.
- **Sunday Work:** double time.
- **Public Holiday:** double time and a half

Provided that an employee required to work overtime on a weekend or public holiday shall be provided with a minimum of four hours work or paid for a minimum of four hours work at the appropriate rate.

16.4 Rest Period After Overtime

16.4.1 When overtime work is necessary it shall wherever reasonably practicable, be so arranged that employees have at least ten consecutive hours off duty between the work of successive days.

16.4.2 An employee who works so much overtime between the termination of his/her ordinary work on one day and the commencement of his/her ordinary work on the next day that he/she has not had at least ten consecutive hours off duty between those times, shall, subject to this sub-clause, be released after completion of such overtime until he/she has had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

16.4.3 If on the instructions of the Company such an employee resumes or continues work without having had such ten consecutive hours off duty he/she shall be paid at double rates until he/she is released from duty for such period and he/she shall then be entitled to be absent until he/she has had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

16.4.4 In the case of shift work and/or continuous shift work eight (8) hours shall substitute for ten (10) hours.

16.5 Recalls

16.5.1 An employee recalled to work overtime after leaving the site (whether notified before or after leaving the site) shall be paid for a minimum of four (4) hours work at the appropriate rate for each time he/she is so recalled provided that except in the case of unforeseen circumstances arising, the employee shall not be required to work the full four (4) hours if the job he/she was recalled to perform is completed within a shorter period.

16.5.2 Where the overtime is continuous (subject to reasonable meal break) with the commencement of ordinary working time, the employee will be paid, for such period of ordinary working hours falling within a four (4) hour period, from the commencement of such recall at the appropriate overtime rate for such recall in lieu of the ordinary rate of pay for such period.

16.5.3 Where the actual time worked is less than four (4) hours on such recall or on each of such recalls, overtime worked in the circumstances specified in this sub-clause shall not be regarded as overtime for the purposes of sub-clause 16.4.

16.6 Overtime Meals/Allowance

An employee required to work for two hours or more without being notified on the previous day or earlier that they will be so required to work shall be paid for the first meal and each subsequent meal after a further four hours of overtime.

Where applicable the meal allowance as prescribed at Appendix "A" A2.7 shall be paid.

16.7 Overtime Crib Breaks

16.7.1 An employee working overtime shall be allowed a crib time of twenty minutes without deduction of pay after each four hours of overtime worked if the employee continues work after such crib time.

Provided that where a day worker is required to work overtime on a Saturday, Sunday, Public Holiday, the first prescribed crib time shall if occurring between 10.00 am and 1.00 pm be paid at ordinary rates, (i.e. single time).

16.7.2 Unless the period of overtime is less than one and half hours an employee before starting overtime after working ordinary hours shall be allowed a meal break of 20 minutes which shall be paid for at the appropriate rates. The Company and employee/s may agree to any variation of this provision to meet the circumstances of the work in hand provided that the Company shall not be required to make any payment in respect of any time allowed in excess of 20 minutes.

17.—MEAL BREAK AND REST PERIOD

17.1 Meal breaks and rest periods will generally be structured as per the table below, however the company reserves the right to vary the table to meet the contract requirements.

- 8 hour day Start 0700
Break 0930—0940 (10 min paid)
Break 1200—1230 (30 min unpaid)
Finish 1530
- 10 hour day Start 0700
Break 1000—1020 (20 min paid)
Break 1300—1320 (20 min unpaid)
Finish 1700
- 11.5 hour day Start 0700
Break 1030—1100(30 min paid)
Break 1430—1500(30 min unpaid)
Finish 1830
- 10 hour night Start 1700
Break 2100—2120 (20 min paid)
Break 0120—0140 (20 min paid)
Finish
- 11.5 hour night Start 1830
Break 2230—2250 (20 min paid)
Break 0250—0310 (20 min paid)
Finish 0600

17.1.1 Generally meal breaks will be scheduled between the fifth and sixth hour from the commencement time of ordinary hours.

18.—PUBLIC HOLIDAYS

18.1 Prescribed Holidays

A weekly hired employee shall be entitled, without loss of pay, to public holidays as follows—

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

or such other day as is generally observed in a locality as a substitute for any of the above days.

18.2 Substitute Days

When any of the days mentioned in 18.1 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. In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.

19.—ANNUAL LEAVE

19.1 Period of Leave

A period of four (4) weeks leave shall be allowed annually to an employee on weekly hire after twelve months continuous service (less the period of annual leave).

Continuous shift workers, as defined at Clause 15 (15.1) of this Agreement, shall in addition to the leave specified above, be allowed seven consecutive days' leave including non-working days.

19.2 Annual Leave is Exclusive of Public Holidays

Subject to this sub-clause, the annual leave prescribed by this clause shall be exclusive of any public holiday, and, if any such holiday falls within a weekly employees period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, there shall be added to that period one day of each holiday falling as aforesaid.

Where a holiday falls as aforesaid and the employee fails without reasonable cause, proof whereof shall be upon the employee, to attend for work at the weekly employees ordinary starting time on the working day immediately following the last day of the period of the employee's annual leave, the weekly hired employee shall not be entitled to be paid for any such holiday.

19.3 Calculation of Continuous Service

For the purpose of this clause, service shall be deemed to be continuous notwithstanding—

- Any interruption or determination of the employment by the employer if such interruption or determination has been made merely with the intention of leave of absence;
- Any absence from work on account of personal sickness or accident or on account of leave granted, imposed or agreed to by the Company, or
- Any absence with reasonable cause proof whereof shall be upon the employee.

In cases of personal sickness or accident, or absence with reasonable cause, the weekly hired employee to become entitled to the benefit of this sub-clause shall notify the Company, if practicable within twenty-four hours of the commencement of such absence, of the employee's inability to attend for duty.

In calculating the period of twelve months' continuous service, any such absence in a twelve monthly period as aforesaid shall not, except to the extent of more than 152 ordinary working hours or the period for which an employee is entitled to and is paid sick leave in accordance with the provisions of this Agreement (whichever period is the longer) in the case of sickness or accident, be taken into account in calculating the period of twelve months continuous service.

19.4 Leave to be Taken

The annual leave provided by this clause shall be allowed and shall be taken and, except as provided in sub-clause (19.7) hereof, payment shall not be made or accepted in lieu of annual leave.

19.5 Time of Taking Leave

Annual leave shall be given at a time fixed by mutual agreement, or failing that, a time fixed by the Company. Provided

that no less than 4 weeks notice is given for the weekly hired employee to proceed on annual leave.

19.6 Payment for Period of Leave

Each weekly hired employee before going on leave shall be paid such wages which have accrued on account of annual leave at the rate applicable at the time the leave became due.

19.7 Proportionate Leave on Termination

If, after one week's continuous service in any qualifying twelve monthly period, a weekly hired employee leaves his/her employment, or his/her employment is terminated by the Company for any reason, the employee shall be paid at the applicable rate of wage for 2.923 hours in respect of each completed week of continuous service, being service in respect of which leave has not been granted hereunder. Where a weekly hired employee leaves their employment within 4 weeks of commencement, they shall be paid as a casual employee as set out in Clause 12.2 and the provisions of this sub-clause shall not apply.

19.8 Annual Leave Loading

A weekly hired employee who proceeds on annual leave shall receive a loading of 17.5% calculated on the total amount of holiday pay received. This loading shall also apply to proportionate leave on termination.

19.9 Split Leave

Annual leave may be split into leave periods of less than four (4) weeks by mutual agreement.

20.—SICK LEAVE

20.1 A weekly hired employee shall be entitled to paid sick leave where genuine non-work related illness or injury prevents him/her from attending work subject to—

- a) he/she shall not be entitled to paid sick leave for any period where he/she is entitled to Worker's Compensation.
- b) he/she shall, as soon as reasonably practicable and during the ordinary hours of the first day or shift of such absence, inform the Company of—
 - his/her inability to attend for duty.
 - the nature of the illness or injury and estimated length of time he/she expects to be absent as far as is practicable.

20.1.1 If it is not reasonably practicable to inform the Company during the ordinary hours of the first day or shift or such absence the employee shall do so within 4 hours of such absence.

20.1.2 He/she shall prove to the satisfaction of the Company that he/she was unable on account of such illness or injury to attend for duty on the day or days for which sick leave is claimed.

20.2 During their first year of employment with the Company a weekly hired employee shall be entitled to sick leave at the rate of one day or eight hours, which ever is the lesser at the beginning of each of the first ten (10) calendar months of their employment. Such sick leave shall be cumulative.

Provided that a weekly hired employee who has completed one year of continuous employment shall be credited with further 10 days sick leave entitlement at the beginning of their second and each subsequent year. Unused sick leave will accumulate, from year to year.

20.3 The provisions of this clause do not apply to an employee who fails to produce a certificate from a medical practitioner dated at the time of the absence or who fails to supply such other proof of the illness or injury as the Company may reasonably require provided that the employee shall not be required to produce a certificate from a medical practitioner with respect to total absences of two days or less in any year of service and until they have been advised of the requirement in writing by the employer.

20.4 Family Leave

20.4.1 Use of Sick Leave

a) A weekly hired employee with responsibilities in relation to either members of their immediate family or members of their household who need their care and support shall be entitled to use in accordance with this sub clause up to 5 days sick leave from their sick leave accruals at 20.2 each year

for absences to provide care and support for such persons when they are ill. This shall not be cumulative.

b) The weekly hired employee shall, if required, establish by production of a medical certificate or statutory declaration, the illness of the person concerned.

c) The entitlement to use sick leave in accordance with this sub clause is subject to—

- i) the employee being responsible for the care of the person concerned; and
- ii) the person concerned being either:
 - 1) a member of the employee's immediate family, or
 - 2) a member of the employee's household.
- iii) The term "immediate family" includes—
 - 1) a spouse (including a former spouse, a de facto spouse) or the employee. A de facto spouse, in relation to a person, means a person of the opposite sex to the first mentioned person who lives with the first mentioned person as the husband or wife of that person on a bona fide domestic basis although not legally married to that person; and
 - 2) a child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee or spouse of the employee.

20.4.2 The weekly hired employee shall, wherever practicable, give the Company notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee shall notify the Company by telephone of such at the first opportunity on the day of absence.

20.4.3 Unpaid Leave for Family Purpose

A weekly paid employee may elect, with the consent of the Company, to take unpaid leave for the purpose of providing care to a family member who is ill.

20.5 The provisions of this clause shall not apply to casual employees.

21.—BEREAVEMENT LEAVE

21.1 A weekly hired employee, shall on the death of a wife, husband, father, mother, brother, sister, child or stepchild, be entitled on notice of leave up to and including the day of the funeral of such relation and such leave shall be without deduction of pay for a period not exceeding the number of hours worked by the employee in two ordinary working days. Proof of such death shall be furnished by the employee to the satisfaction of the Company.

21.2 Payment in respect of compassionate leave is to be made only where the employee otherwise would have been on duty and shall not be granted in any case where the employee concerned would have been off duty in accordance with any shift roster or on long service leave, annual leave, sick leave, workers' compensation, leave without pay or on a public holiday.

21.3 For the purposes of this clause the pay of an employee employed on shift work shall be deemed to include any usual shift allowance.

22.—PARENTAL/MATERNITY/PATERNITY/ADOPTION LEAVE

22.1 Where a weekly hired employee applies for any unpaid leave associated with parental, maternity, paternity, adoption leave then the relevant provisions relating to such leave of the: Australian Workplace Relations Act 1996 shall apply.

23.—LONG SERVICE LEAVE

23.1 The provisions of the Construction Industry Portable Paid Long Service Leave Act 1985 shall apply.

24.—ON SITE REGISTER

The Company shall keep a register containing the following information of every employee. The register shall at all times contain current information.

- (i) Name of employee
- (ii) Classification
- (iii) Union ticket number if applicable
- (iv) Superannuation Fund number
- (v) Long Service Leave number
- (vi) Statutory Certificates of Competency/Ticket/Permit numbers
- (vii) Drivers License

25.—NOTICE BOARD

A notice board of reasonable dimensions will be situated in a prominent position. A Union representative or a Company representative may put on the notice board notices signed by the posting party.

26.—SAFETY AND OCCUPATIONAL HEALTH

26.1 The Mines Safety and Inspection Regulations 1995, The Western Australia: Occupational Safety and Health, Act, 1984 and the: Safety and Health Regulations 1996 shall apply for work carried out under this Agreement.

26.2 It is recognised that the Company is primarily responsible for safety on its Projects, irrespective of whether work is carried out by Company Employees or by Subcontractors, but this is in no way removes any obligation from Company Employees, individual Subcontractors, or their employees, for proper safety practices to prevail at all times. *Safety is the Concern of Everyone.*

26.3 In order to clarify obligations under the abovementioned act and regulations so as to reduce the degree of accidents or near misses while at the same time minimising disruption to work, it is agreed—

- i) Where a genuine safety problem exists, work shall only cease in the disrupted area. Work will continue elsewhere unless access to other working areas is unsafe. However, any problems of access shall be immediately rectified and the employees will use any alternative safe access to such safe working areas while the usual access is being rectified.
- ii) Should the whole project be in dispute on the basis that the whole project is thought to be unsafe then whilst the following procedures are undertaken, employees shall not leave the site, but shall remain in a safe area provided for by the Company.

Procedures

a) Immediate inspection involving both Company and employee representative shall take place to identify what needs to be done in the area(s) where the safety problem exists.

b) All employees who can be gainfully employed immediately rectify whatever needs to be rectified.

c) Once the inspection team verifies by inspection that the rectification work has been carried out, productive work then resumes.

d) Such resumption of work shall take place in stages once each area has been certified as safe by the inspection team.

27.—SAFETY FOOTWEAR AND CLOTHING

27.1 All employees will be required to attend for work suitably attired in safety footwear and clothing to Worsley Alumina standards.

27.2 For employees who are hired for work which is likely to have an employment duration of longer than 6 weeks the following footwear and clothing provisions will apply. Provided that where an employee has been issued with safety footwear or clothing by the Company within the previous 12 months of his/her commencement date than such an employee will not be entitled to another issue, other than on a fair wear and tear basis.

27.2.1 Safety Footwear

Appropriate safety footwear will be replaced on a fair wear and tear basis provided it is produced to the Company as evidence.

27.2.2 Clothing

One set of protective clothing will be replaced on a fair wear and tear basis provided they are produced to the Company as evidence.

Protective clothing shall be of sleeved overalls, long work trousers, long sleeved work shirt which will be made of cotton material.

NOTE

a) Where procurable, items will be Australian made products of good quality.

b) Where an individual does not wear the required protective safety equipment, including safety footwear, helmets, harnesses, glasses, sunscreen lotions and protective clothing on the job then such employee shall be counseled in the presence of a Safety representative.

Further infractions in relation to the non-wearing of the said protective equipment/clothing referred to above shall result in the individual being required to show cause why the said individual should not be removed from the workplace.

28.—COUNSELLING AND DISCIPLINARY PROCEDURE

28.1 The Company will ensure that prior to pursuing the disciplinary procedures outlined at points 1), 2) and 3) herein, and subject to the gravity of the transgression, employees will receive, where applicable, verbal warnings or counseling. Thereafter—

- 1) First Written Warning.
- 2) Final Written Warning.
- 3) Termination of employment by the Company.

28.2 In all the above steps the employee concerned shall be made aware of his/her entitlements or to have a witness present. A request for a witness or a Union representative where practical to be present, shall not be unreasonably withheld.

28.3 Notwithstanding the above, the Company shall have the right to dismiss an employee without notice for conduct that justifies instant dismissal and in such cases the wages shall be paid up to the time of dismissal only.

29.—SHOP STEWARD/DELEGATE

29.1 An employee appointed shop steward/elected delegate shall, upon notification thereof to the Company be recognised as the accredited Union representative of the Union to which he/she belongs.

29.2 A shop steward/elected delegate shall not leave their place of work to carry out their representative role unless on each occasion they first obtain permission to do so from their foreperson or supervisor. The granting of permission, which will not be unreasonably withheld, will be subject to operational requirements.

29.3 Subject to the prior approval of the Company Manager an accredited Union representative shall be allowed a reasonable period of time during working hours to confer with a duly accredited Union Official of the Union to which he/she belongs on legitimate Union business.

30.—RIGHT OF ENTRY OF UNION OFFICIALS

For the purpose of interviewing members on legitimate Union business, or for the purpose of investigating complaints concerning the application of this Agreement and subject to client requirements and the Company's Safety and Security requirements a duly accredited Union official shall have the right to enter the Company's site office and should make appropriate arrangements with the Company's Manager or his nominee.

Nothing in this clause shall affect the right of a Union Official to confer with Company management on Union business at reasonable times and by prior notification.

For the purposes of this clause, meetings with employees may only be held during the employees meal times or other breaks or in conjunction with the start or finish of work periods.

Where a union official seeks to exercise right of entry under this clause they shall give the employer at least 24 hours notice of their intention to do so.

31.—EFFECTIVE USE OF RESOURCES

In certain situations it may be necessary for staff employees not covered by this Agreement to perform work covered by this Agreement. These situations are defined as—

1. In the performance of job training.
2. For the induction of new employees into the workforce.
3. Areas which have a critical nature to safety of people, environment or equipment.
4. Where there is a request for assistance from an employee covered by this Agreement.
5. Commissioning of equipment by commissioning engineers in conjunction with relevant employees.

NOTE: Nothing in this clause is intended for staff personnel to do the work of, or replace employees covered by this Agreement.

32.—HIGHER DUTIES

An employee engaged on duties carrying a higher rate than the employee's ordinary classification shall be paid the higher rate for the time the employee is engaged but if so engaged for more than two hours of one day or shift the employee shall be paid the higher rate for the whole day or shift.

33.—JOURNEY ACCIDENT INSURANCE

The Company will provide journey accident insurance cover for employees.

34.—AGREEMENT NOT TO BE USED AS PRECEDENT

34.1 The Parties to this Agreement accept that the document was negotiated having regard to the special circumstances existing to employees working on Maintenance Work on Power Plant within the state of Western Australia and subject to sub-clause 34.2 hereof are not to be used as a precedent by any Party.

34.2 Where the Company undertakes a similar Maintenance Work within the State of Western Australia this Agreement may be used as a basis or interim agreement towards the formation of a Project Specific Agreement.

35.—APPRENTICES

Apprentices engaged on work covered by this Agreement shall be paid a wage per week expressed as a percentage of the Level ME3 Tradespersons rate, as set out below—

Four Year Term	%
First year	42
Second year	55
Third year	75
Fourth year	88
Three and a Half Year Term	
First six months	42
Next year	55
Next year	75
Final year	88
Three Year Term	
First year	55
Second year	75
Third year	88

36.—TRAINING AND SKILLS DEVELOPMENT

Training and skills development opportunities will be made available to weekly hired employees including opportunities to participate in continuous improvement, personal development, skill enhancement, occupational health and safety and, for agreed employees, trade union training.

37.—DISTANT WORK

Where an employee is engaged or selected or advised by the employer to proceed to work at such a distance that the employee cannot reasonably return to home each night and the employee does so, the employer shall provide the employee with suitable board and lodging or shall pay the employee \$289.70 per week to cover the expenses reasonably incurred by the employee for board and lodging.

The provisions of subclause (1) of this clause do not apply with respect to any period during which the employee is absent from work without reasonable excuse and in such a case,

where the board and lodging is supplied by the employer, the employer may deduct from moneys owing or which may become owing to the employee an amount equivalent to the value of that board and lodging for the period of the absence.

38.—INCOME PROTECTION INSURANCE

ABB Alstom Power Ltd shall provide income protection insurance for employees covered by this Agreement, subject to the cost to ABB Alstom Power Ltd not exceeding 1.1 per cent of their anticipated gross wages expected to be paid on the work covered by this Agreement.

APPENDIX "A"

A1. WAGE RATES

A1.1 Occupational/Classification/Levels

This Agreement provides for a minimum six (6) level classification structure—the classification title being "Maintenance Employee" (ME).

A1.1.1 Employees will be classified into one of the following classification levels which is compatible to the Company's needs provided the employee has the appropriate qualifications. Employees will be required to carry out such duties as are within the limits of the employees' skill, competence, and training, including work that is incidental or peripheral to the employee's main function.

A1.2 Skills Enhancement Programme Progression

All weekly hired employees shall have a reasonable opportunity of progressing to a higher classification level. Advancement to a higher level will result from—

- (a) Requirement/needs of the Company for skills within the classification levels specified.
- (b) Capacity of the employee to competently perform the work.

NB: Classification advancement is dependent upon vacancies and the needs of the Company. Classifications and/or wage adjustment is not advanced on a skills acquired basis.

A1.3 Classification Levels

Persons employed at any one of the following levels will have successfully completed the Site Induction Programme and be a person who has the necessary qualifications. For reference purposes classification definitions/qualifications will be as prescribed at Clause 5 and/or Appendix I—Metal Trades (General) Award 1966.

The Classification Levels will be—

ME—LEVEL 1
ME—LEVEL 2
ME—LEVEL 3
ME—LEVEL 4
ME—LEVEL 5
ME—LEVEL 6

The Classifications mentioned are not considered to be inclusive of all classifications likely to be used by the Company, other classifications/levels may be included from time to time, provided discussion will take place between the relevant Parties to the Agreement and agreement between the parties is reached.

ME—LEVEL 1—

Classifications recognised at this level, but not limited to, are—

- Instrument and Control Tradesperson (Electrical or Mechanical)
- Welder Advanced—Special Class (Mirror Welding)

Employees at this level will have the skills, qualifications and competency and be substantially assigned to exercise where relevant the skills of an advanced tradesperson.

In addition to performing **relevant** duties within **ME-Level 1 employees** in this level will perform any of the duties of other levels provided that such duties are—

- Within the skills, competence, qualification and training of the employees concerned; and
- Consistent with occupational health and safety and relevant statutory requirements; and
- Related to the Company's scope of work and incidental to the employees substantive role.

Dates	Base Wage	Construction Allowance	Tool Allowance	Total 38 Hr Weekly	Hourly Rate	Casual Hourly Rate
From 1.03.00 to 30.06.01	730.99	31.81	10.50	773.30	20.35	24.42

ME—LEVEL 2—

Classifications recognised at this level, but not limited to, are—

- Mechanical Tradesperson—Special Class
- Welder—Special Class (Coded X-ray)

Employees at this level will have the skills, qualifications and competency and be substantially assigned to exercise where relevant the skills of an advanced tradesperson.

In addition to performing relevant duties within **ME-Level 2** employees in this level will perform any of the duties of other levels provided that such duties are—

- Within the skills, competence, qualification and training of the employees concerned; and
- Consistent with occupational health and safety and relevant statutory requirements; and
- Related to the Company's scope of work and incidental to the employees substantive role.

Dates	Base Wage	Construction Allowance	Tool Allowance	Total 38 Hr Weekly	Hourly Rate	Casual Hourly Rate
From 01.03.00 to 30.06.01	681.21	31.81	10.50	723.52	19.04	22.85

ME—LEVEL 3—

Classifications recognised at this level, but not limited to, are—

- Fitter
- Boilermaker
- Electrician
- Welder
- Sheetmetal Worker—1st Class

Employees at this level will **have the** skills, qualifications and competency and be substantially assigned to exercise where relevant the skills of a tradesperson.

In addition to performing relevant duties within **ME-Level 3** employees in this level will perform any of the duties of levels 4, 5 and 6 provided that such duties are—

- Within the skills, competence, qualification and training of the employees concerned; and
- Consistent with occupational health and safety and relevant statutory requirements; and
- Related to the Company's scope of work and incidental to the employees substantive role.

Dates	Base Wage	Construction Allowance	Tool Allowance	Total 38 Hr Weekly	Hourly Rate	Casual Hourly Rate
From 01.03.00 to 30.06.01	646.63	31.81	10.50	688.94	18.13	21.76

ME LEVEL 4—

Classifications recognised at this level, but not limited to, are—

- Certificated Rigger
- Certificated Scaffolder
- Storeperson—In Charge

Employees at this level will be the holders of a current drivers license and will have the skills, qualifications and competency and be substantially assigned to exercise the skills of their relevant classifications.

In addition to performing relevant duties within **ME-Level 4** employees in this level will perform any of the duties of levels 5 and 6 provided that such duties are—

- Within the skills, competence, qualification and training of the employees concerned; and
- Consistent with occupational health and safety and relevant statutory requirements; and
- Related to the Company's scope of work and incidental to the employees substantive role.

Wage Rates—Dual Certificate Rigger/Scaffolder

Dates	Base Wage	Construction Allowance	**Dual Cert Allowance (If applicable)	Total 38 Hr Weekly	Hourly Rate	Casual Hourly Rate
From 01.03.00 to 30.06.01	602.97	31.81	26.80	661.58	17.41	20.89

** Denotes Allowance paid to Certified Rigger/Certified Scaffolder who hold dual tickets for rigging and scaffolding and who are required by the Company to utilize their dual qualifications. A Certified Rigger or Certified Scaffolder holding a single ticket shall be paid an Allowance in accordance with Clause 10(2)(b) of the Award for responsibility and supervision required of a Certified Rigger pursuant to the Construction Safety Act 1972. (The Allowance is paid as an 'all purpose payment')

Wage Rates—Single Certificate Rigger/Scaffolder

Dates	Base Rate	Construction Allowance	Certificate Allowance	Total 38 Hr Weekly	Hourly Rate	Casual Hourly Rate
From 01.03.00 to 30.06.01	602.97	31.81	18.00	652.78	17.18	20.62

Wage Rates—Storeperson—In Charge

Dates	Base Wage	Construction Allowance	Total 38 Hr Weekly	Hourly Rate	Casual Hourly Rate
From 01.03.00 to 30.06.01	602.97	31.81	634.78	16.70	20.04

ME LEVEL 5—

Classifications recognised at this level, but not limited to, are—

- Fork Lift Driver
- Lagger
- TradesAssistant

Employees at this level will be the holders of a current drivers license and will have the skills, qualifications and competency and be substantially assigned to exercise the skills of their relevant classifications.

In addition to performing relevant duties within **ME-Level 5** employees in this level will perform any of the duties of level 6 provided that such duties are—

- Within the skills, competence, qualification and training of the employees concerned; and
- Consistent with occupational health and safety and relevant statutory requirements; and
- Related to the Company's scope of work and incidental to the employees substantive role.

Dates	Base Wage	Construction Allowance	Tool Allowance	Total 38 Hr Weekly	Hourly Rate	Casual Hourly Rate
From 01.03.00 to 30.06.01	591.01	31.81	0	622.82	16.39	19.67

ME LEVEL 6—

Classifications recognised at this level, but not limited to, are—

- Labourer
- Peggy/Cleaner
- New Entrant

Employees at this level will be the holders of a current drivers license and will have the skills, qualifications and competency and be substantially assigned to exercise the skills of their relevant classifications.

In addition to performing relevant duties within **ME-Level 6** employees in this level will perform any other duties provided that such duties are—

- Within the skills, competence, qualification and training of the employees concerned; and
- Consistent with occupational health and safety and relevant statutory requirements; and
- Related to the Company's scope of work and incidental to the employees substantive role.

Dates	Base Wage	Construction Allowance	Tool Allowance	Total 38 Hr Weekly	Hourly Rate	Casual Hourly Rate
From 01.03.00 to 30.06.01	551.87	31.81	0	583.68	15.36	18.43

A2. ALLOWANCES

A2.1 Disability Allowance

A2.1.1 In addition to the rates of pay as prescribed at A1 Wage Rates of this Agreement, a disability allowance as outlined at A2.1.3 herein will be paid for hours worked by the employee, in respect to any work performed under the terms and conditions of this Agreement.

A2.1.2 The disability allowance will be paid in lieu of and not in addition to any relevant Award/Agreement disability payments, power house allowance, special rates including confined space, wet underfoot, dirty work, boiler work, hot work and other similar or like payments which may be provided for in any relevant Award/Agreement and not expressly provided for elsewhere in this Agreement, and/or relating to the scope of work to be undertaken where the terms and conditions of this Agreement apply.

A2.1.3 Subject to the provisions as mentioned at A2.1.1 and A2.1.2 above, the disability allowance will be—

\$1.50 per hour worked

A2.2 Construction Allowance

The allowance as shown in the wages schedule at A1 shall be paid as an 'all purpose' payment.

A2.3 Tool Allowance

The allowance as shown in the wages schedule at A1 shall be paid as an 'all purpose' payment to all tradesperson who supply, use and maintain their own tools of trade.

A2.4 Travelling Allowance

A2.4.1 Each employee who is not provided with transport by the Company to travel to and from the job shall be paid as follows—

Per Day Travelled

- a) Employees residing within the Collie district shall be paid \$15.70
- b) Employees residing within the Bunbury district shall be paid: \$36.50

Note: Metal Trades (General) Award Part II—Construction, Clause 6 shall be used as a reference on any issue relating to travelling allowance.

A2.5 First Aid Allowance

An employee, holding either a Third Year First Aid Medalion of the St. John Ambulance Association, or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the Company to perform first aid duties, shall be paid \$6.35 per week in addition to the employee's ordinary rate.

A2.6 Electrical License Allowance

An electronic tradesperson, an electrician—special class, and electrical fitter and/or armature winder or an electrical installer who holds and, in the course of employment may be required to use, a current "A" Grade or "B" Grade license issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the Electricity Act 1945, shall be paid an allowance of \$13.20 per week.

A2.7 Meal Allowance

An employee who qualifies for a meal allowance in accordance with the provisions of Sub-clause 16.6 of this Agreement shall be entitled to a payment of \$10.00 for the first meal and \$5.00 for the second and subsequent meals.

A2.8 Leading Hand Allowance

An employee appointed as a leading hand by the Company will be entitled to the following weekly allowance, which shall be paid for 'all-purposes'

- a) If placed in charge of not less than three and not more than ten other workers \$18.00
- b) If placed in charge of more than ten and not more than twenty other workers \$27.60
- c) If placed in charge of more than twenty other workers \$35.70

A3. ALL PURPOSE

A3.1 Rates of Pay—Definition

A3.1.1 The rates of pay expressed in this Appendix provide for all conditions of employment. They are the minimum rates of pay to be paid.

A3.1.2 The weekly/hourly rates as specified at A1 and relevant allowances as specified at A2 (2.2), (2.3), (2.5) and (2.8)

reflect, where applicable, the all-purpose' 38 hr Weekly Wage Rate. These wage rates comprehend all/any allowances including, without limiting, Agreement/Award entitlements, industry or Company Agreements, over Award payments, the generality of site disability payments including Award special rates, i.e. wet underfoot, height, dust, dirt, special skill payments, wind, training, laundry and other similar or like payments which may be provided for in any other relevant Awards or Agreements (be they Federal or State) and not expressly provided for elsewhere in this Agreement, and/or relative to the scope or work to be undertaken.

A3.1.3 All Award/Parent Award provisions, which provide for an industry or like allowance disability or like allowance, special rates, fare and/or travelling allowances other than those stated elsewhere in this clause, are deemed to be incorporated in this Agreement.

A4. SUPERANNUATION

Superannuation

(i) The Company will make a payment of \$60 per week per employee or the percentage rate that is prescribed under the Superannuation Guarantee Charge, whichever is the greater.

The Company will advise all employees subject to the Agreement of their right to have payments made to a complying superannuation fund of their choice. The Company is bound by the employee's election. The aforementioned payment will then be made to that fund.

Until each employee nominates the fund of their choice the Company will make payments into the Construction + Building Unions Superannuation Scheme (the "C+BUSS").

In the event that any employee chooses a fund other than the C+BUSS the Company will, within seven days of the employee advising the Company of the fund of their choice, advise the Union in writing of the employee's decision.

In the event that the employee and the Company reach an agreement pursuant to section 49C(2)(d) of the Act to change the complying superannuation fund or scheme the Company will, within seven days of the employee and the Company reaching such an agreement, advise the Union in writing of the agreement. The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by the employee.

(ii) "Ordinary Time Earnings" (which for the purposes of the Superannuation Guarantee (Administration) Act 1992 will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, industry allowance, trade allowances, shift loading, special rates, qualification allowances (eg. first aid, laser safety officer), multi-storey allowance, site allowance, asbestos eradication allowance, leading hand allowances, in charge of plant allowance and supervisory allowances where applicable. The term includes any regular over-award pay as well as casual rates received and any additional rates and allowances paid for work undertaken during ordinary hours of work, including fares and travel.

A5. REDUNDANCY

The Company shall pay each employee for each full week they are engaged on the site (pro-rata contributions on a daily basis, shall apply for employees with less than a full week) a severance payment of \$45 per week. This payment is made in lieu of all or any other redundancy/severance provisions.

A6. SIGNATORIES TO AGREEMENT

The signatories to this Agreement are—

Automotive, Food, Metals, Engineering Printing and Kindred Industries Union (W.A. Branch)—

.....
(Signature) (Print Name)

.....
(Date)

ABB ALSTOM POWER LTD

.....
(Signature) (Print Name)

.....
(Date)

**AUSTRALIAN LABOR PARTY (WA BRANCH)
ENTERPRISE BARGAINING AGREEMENT 1999.**

No. AG 101 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Australian Municipal, Administrative, Clerical and Services
Union of Employees, WA Clerical and Administrative
Branch

and

Australian Labor Party (WA Branch).

AG 101 of 2000.

Australian Labor Party (WA Branch) Enterprise Bargaining
Agreement 1999.

COMMISSIONER J H SMITH.

30 June 2000.

Order.

Having heard Mr S Bibby as agent on behalf of the applicant and Mr Johnston 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 Australian Labor Party (WA Branch) Enterprise Bargaining Agreement 1999 as filed in the Commission on 3 April 2000 in the terms of the following schedule be and is hereby registered as an industrial agreement.

(Sgd.) J. H. SMITH,
Commissioner.

[L.S.]

1.—TITLE

This agreement shall be known as the Australian Labor Party (WA Branch) Enterprise Bargaining Agreement 1999.

2.—ARRANGEMENT

1. Title
2. Arrangement
- 3A. Scope
3. Parties Bound
4. Hours
5. Annual Leave
6. Sick Leave
7. Christmas Closedown
8. Overtime
9. Leave Without Pay
10. Relationship to Existing Agreement
11. Period of Operation
12. Enterprise Bargaining Payment
13. Incremental Progression
14. Renewal of Agreement
15. Parental Leave
16. Redundancy
17. Number of Employees covered by the Agreement
18. Signatories
 - Schedule A—Salary Rates
 - Schedule B—Dispute Resolution

3A.—SCOPE

This Agreement shall apply to all employees employed in the classifications in Schedule A at the Australian Labor Party WA Branch and to the Australian Municipal, Administrative, Clerical and Services Union WA Clerical and Administrative Branch.

3.—PARTIES BOUND

This agreement is binding upon the Australian Labor Party (WA Branch) and the Australian Municipal, Administrative, Clerical and Services Union WA Clerical and Administrative Branch in relation to the employees employed by the ALP WA Branch.

4.—HOURS

The ordinary hours to be 37.5 hours per week. The span of hours to be between 8.30 am and 5.30 pm Monday to Friday.

5.—ANNUAL LEAVE

(a) Period and Payment of Leave

- (i) A period of five consecutive weeks' leave with payment as prescribed in paragraph (c) of this sub-clause shall be provided annually to an employee after an period of twelve months' continuous service with the ALP. Provided that the Secretary and an employee may agree on alternative arrangements for taking of such leave.
- (ii) An entitlement to annual leave under subclause (i) accrues pro-rata on a weekly basis.
- (iii) An employee going on leave shall be paid the ordinary salary he/she would have received in respect of the ordinary time he/she would have worked had he/she not been on leave during the relevant period.
- (iv) All employees shall receive an annual leave loading of 17 ½ % calculated on the rate of ordinary salary prescribed by this Agreement. The annual leave loading entitlement shall apply to five weeks annual leave only and shall be paid on the employees taking of leave.

(b) Annual Leave and Public Holidays

If any prescribed holiday falls within an employees period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, there shall be added to that period one day, being an ordinary working day, for each such holiday observed as aforesaid.

(c) Leave on Termination

- (i) If, after one week's continuous service in any qualifying period, an employee lawfully leaves his/her employment or his/her employment is terminated by the ALP through no fault of the employee, the employee shall be paid pro-rata annual leave at the rate prescribed by sub-clause (a)(iv) of this clause.
- (ii) In addition to any payment to which he/she may be entitled under paragraph (i) of this sub-clause, an employee whose employment terminates after he/she has completed a twelve-month qualifying period and who has not been allowed the leave prescribed under this Agreement in respect of that qualifying period, shall be given payment in lieu of that leave or, in a case to which sub-clauses (d) and (e) of this clause apply, in lieu of so much of that leave as has not been allowed, unless—

- (1) he/she has been justifiably dismissed for misconduct; and
- (2) the misconduct for which he/she has been dismissed occurred prior to the completion of that qualifying period.

(d) Absence from Work

Any time in respect of which an employee is absent from work, except time for which he/she is entitled to claim sick pay or time spent on holidays or annual leave as prescribed by this Agreement, shall not count for the purpose of determining his/her right to annual leave.

(e) Taking of Leave

- (i) Annual leave shall be given and taken in such a period or periods and at such a time or at such times mutually convenient to the employer and the employee and, except as hereinafter provided, within twelve months of the date upon which the leave accrued is due.
- (ii) In special circumstances, and with the consent of the Secretary, an employee may defer the taking of any accrued annual leave, or any part thereof not taken, for a period not exceeding three years after the date when the leave accrued is due.
- (iii) Where the employer and the employee have not agreed as to when the employee is to take annual leave, subject to paragraph (iv) hereof, the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave the entitlement which accrued more than 12 months before that time.

- (iv) The employee is to give the employer at least 2 weeks notice of the period during which the employee intends to take the annual leave.

6.—SICK LEAVE

1 (a) An employee who is unable to attend or remain at work during ordinary office hours of work shall be entitled to paid leave of absence in accordance with the provisions of this clause for personal illness or injury, provided that an employee shall be entitled to use their accrued sick leave entitlement or part thereof, to supervise the convalescence of another person whose care is in the responsibility of the employee.

(b) An employee who is unfit for duty as a consequence of an illness or injury or who is absent to supervise the convalescence of a person whose care is the responsibility of the employee shall take all reasonable steps to inform the Secretary or arrange for the Secretary to be so informed, at the earliest opportunity.

2 The basis for determining the entitlement to leave in accordance with this clause shall be ascertained by crediting the employee concerned with the following cumulative periods—

	Leave on Full Pay Working Days
On date of appointment	5
On completion of six month's service	5
On completion of twelve month's service	15
On completion of each additional twelve month's service	15

3 Paid leave of absence pursuant to sub-clause 1 where three or more consecutive working days are involved shall be supported by a certificate from a registered medical practitioner or, where the nature of the illness consists of a dental condition, by a certificate from the dentist registered under the Dentists' Act 1939, giving details of the probable duration of indisposition.

7.—CHRISTMAS CLOSEDOWN

Employees have traditionally been entitled to a closedown between Christmas and New Year.

In special circumstances where it is not possible to observe a Christmas closure, employees will be entitled to an equivalent break on full pay at another mutually agreed time.

Special circumstances shall mean election campaigns.

8.—OVERTIME

All employees shall be paid overtime for hours worked in excess of 37 ½ per week in accordance with Clause 8 of the Trades Hall Agreement.

By Agreement between the employee and the employer, the employee concerned may take time off during ordinary hours instead of payment of overtime due under this clause. Such time off shall be equivalent to the amount of overtime worked multiplied by the appropriate penalty rate and may be added to annual leave or taken at a mutually convenient time.

9.—LEAVE WITHOUT PAY

Leave without pay is available subject to the approval of the State Secretary, who will also decide whether any such leave should count as service, eg, as required to qualify for superannuation purposes.

10.—RELATIONSHIP TO EXISTING AWARD AND AGREEMENTS

This agreement shall be read and interpreted wholly in conjunction with the Clerks' (Commercial, Social and Professional Services) Award No 14 of 1972 and the Clerks' (Trades and Industrial Unions Clerical Staff) Agreement of 1986 provided that where there is any inconsistency the terms of this agreement shall prevail to the extent of any such inconsistency.

11.—PERIOD OF OPERATION

(i) This agreement shall operate from the beginning of the first pay period commencing on or after 1 July 1999 and shall remain in force for a period of two years and negotiations shall reopen three (3) months prior to expiration of this agreement.

(ii) Further, notwithstanding subclause (i) above, the parties agree that nothing within this enterprise bargaining agreement will exclude employees from accessing benefits resulting from any National Wage Case after the nominal expiry date of this agreement if a new agreement has not been negotiated.

12.—ENTERPRISE BARGAINING PAYMENT

(a) Staff will receive 4% pay increases at the following intervals—

1st July 1999, 1st July 2000.

See Schedule A for Salary Scale

13.—INCREMENTAL PROGRESSION

All staff will move from one incremental level to the next within their appropriate classification upon completion of each year's service until the top level is attained. The anniversary date for all staff shall be the 1st of January.

Any employee employed for less than six (6) months prior to the increment payment date will not receive an increment until the following years incremental payment date, unless a case is made to the Secretary to justify an increase and the Secretary approves such an increase. Employees employed for six (6) to twelve months prior to the incremental payment date will receive the increment.

14.—RENEWAL OF AGREEMENT

This agreement shall remain in force until such time as either party seeks to renegotiate the terms and conditions. If no agreement is reached the terms and conditions shall continue. Provided this Agreement will be superseded by a new Trades Hall Enterprise Agreement.

15.—PARENTAL LEAVE

Parental leave is unpaid leave. However, an employee shall be entitled to utilise leave accrued in accordance with sick leave provisions and be paid at the ordinary rate of pay for up to the first six weeks of parental leave.

16.—REDUNDANCY

Discussion before terminations

(a) The Secretary shall hold discussions with the employees directly affected—

- (i) Where the Branch, for any reason, has made a definite decision that the Branch no longer wishes the job the employee has been doing done by anyone and that decision may lead to termination of employment; or
- (ii) where an employee is dismissed for any reason within 12 months of a change of employees or committee resulting from an election and as a result of that change, having had at least four years' service with the Union; or
- (iii) where an employee is dismissed at any other time for any reason other than misconduct or incompetence.

Severance Pay

(b) In addition to the period of notice prescribed for ordinary termination an employee whose employment is forcibly terminated for reasons set out in sub-clause (a) hereof, shall be entitled to receive in addition to any other entitlement, one month's salary for each completed year of service up to a maximum payment of 12 months, together with payment of superannuation on the basis of the maximum amount permissible under the rules of the fund.

Provided that an employee who, at the date of such election defeat or dismissal from office, is entitled to a retirement benefit from the superannuation fund, shall receive from the superannuation fund, that retirement benefit only.

Assistance to Obtain Alternative Employment

(c) All reasonable assistance shall be granted to redundant employees to obtain suitable alternative employment and in this regard the National Executive or Branch Executive, as the case may be, shall meet at the earliest opportunity to consider this question.

Employee Leaving During Notice

(d) An employee whose employment is terminated for reasons set out in sub-clause (a) hereof may terminate his or her

employment during the period of notice and, if so, shall be entitled to the same benefits and payments under this clause had he or she remained with the employer until the expiry of such notice. Provided that in such circumstances the employee shall not be entitled to payment in lieu of the remainder of the period of notice.

Alternative Employment

(e) The Union, in a particular redundancy case, may have the general severance pay prescription varied if the ALP obtains acceptable alternative employment for an Officer.

Time-off During Notice Period

(g) (i) During the period of notice of termination given by the employer an employee shall be allowed up to one day's time-off without loss of pay during each week of notice for the purpose of seeking other employment.

(ii) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the Secretary be required to produce proof of attendance at an interview or he or she shall not receive payment for the time absent.

For this purpose a statutory declaration will be sufficient.

Officers Exempted

(l) (i) This clause shall not apply to employees with less than one year's continuous service and then the general obligation on the employer should be no more than to give relevant employees the opportunity, and to take such steps as may be reasonable facilitate the obtaining by the employees of suitable alternative employment.

(ii) This clause shall also 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 temporary/casual employees or employees engaged for a specific period of time or for a specified task or tasks.

17.—NUMBER OF EMPLOYEES BOUND BY THE AGREEMENT

This Agreement shall apply to approximately 2 employees

18.—SIGNATORIES

Signed for and on behalf of the Australian Municipal, Administrative, Clerical and Services Union (WA) C & S Branch.

.....
Branch Secretary

.....
Witness

Dated 16 September 1999.

For and on behalf of the Australian Labor Party (Western Australian Branch).

.....
State Secretary

.....
Witness

Dated 16 September 1999.

SCHEDULE A

Salary Scale

	As at 1/7/98	As at 1/7/99 + 4%	As at 1/7/00 + 4%
Administration Officer Grade 1 Level 1	12, 842.96	13, 356.67	13, 890.93
Administration Officer Grade 1 Level 2	14, 275.04	14, 846.04	15, 439.88
Administration Officer Grade 1 Level 3	16, 350.88	17, 004.91	17, 685.10
Administration Officer Grade 1 Level 4	18, 436.08	19, 173.52	19, 940.46
Administration Officer Grade 1 Level 5	20, 501.52	21, 321.58	22, 174.44
Administration Officer Grade 1 Level 6	22, 027.20	22, 908.28	23, 824.61
Administration Officer Grade 2 Level 1	23, 954.32	24, 912.49	25, 908.98
Administration Officer Grade 2 Level 2	25, 855.44	26, 889.65	27, 965.23

	As at 1/7/98	As at 1/7/99 + 4%	As at 1/7/00 + 4%
Administration Officer Grade 2 Level 3	27, 131.52	28, 216.78	29, 345.45
Administration Officer Grade 2 Level 4	28, 416.96	29, 553.63	30, 735.77
Administration Officer Grade 3 Level 1	29, 869.84	31, 064.63	32, 307.21
Administration Officer Grade 3 Level 2	31, 334.16	32, 587.52	33, 891.02
Administration Officer Grade 4 Level 1	34, 243.04	35, 612.76	37, 037.27
Administration Officer Grade 4 Level 2	35, 724.00	37, 152.96	38, 639.07
Administration Officer Grade 4 Level 3	37, 218.40	38, 707.13	40, 255.41
Administration Officer Grade 5 Level 1	38, 994.80	40, 554.59	42, 176.77
Administration Officer Grade 5 Level 2	40, 782.56	42, 413.86	44, 110.41
Administration Officer Grade 5 Level 3	42, 557.84	44, 260.15	46, 030.55
Administration Officer Grade 6 Level 1	45, 536.90	47, 358.37	49, 252.70
Administration Officer Grade 6 Level 2	47, 672.49	49, 579.38	51, 562.55
Administration Officer Grade 6 Level 3	49, 694.07	51, 681.83	53, 749.10

SCHEDULE B

Dispute Resolution

(a) Subject to the provisions of the Western Australian Industrial Relations Act (as amended) any grievance, complaint, claim or dispute, or any matter which is likely to result in a dispute, between the employer and the Union shall be settled in accordance with the procedures set out herein.

(b) Where the matter is raised by an employee, or a group of employee, the following steps shall be observed—

- (i) The employee(s) concerned shall discuss the matter with the immediate supervisor. If the matter cannot be resolved at this level the supervisor shall, within 3 days, refer the matter to a more senior officer nominated by the employer and the employee(s) shall be advised accordingly.
- (ii) The senior officer shall, if he/she is able, answer the matter raised within one week of its being referred to him/her and, if he/she is not so able, refer the matter to the employer for its attention, and the employee(s) shall be advised accordingly.
- (iii) (1) If the matter has been referred in accordance with paragraph (ii) above the employee(s) or his/her shop steward shall notify the Manager (WA Branch) of his/her nominee, so that he/she may have the opportunity of discussing the matter with the employer.
- (2) The employer shall, as soon as practicable after considering the matter before it, advise the employee(s) or, where necessary the Management Committee of its decision. Provided that such advice shall be given within 5 days of the matter being referred to the employer.
- (iv) Should the matter remain in dispute after the above processes have been exhausted either party may refer the matter to the Western Australian Industrial Relations Commission.

(c) The settlement procedures provided by this clause shall be applied to all manner of dispute referred to in sub clause (a) hereof, and no party, or individual, or groups of individuals, shall commence any other action, of whatever kind, which may frustrate a settlement in accordance with its procedures. Observance of these procedures shall in no way prejudice the right of any party, or an individual, in dispute, to refer the matter for resolution by the Western Australian Industrial Relations Commission. Provided that before doing so, the persons involved in the grievance or dispute shall make all reasonable attempts to resolve the grievance or dispute.

**AUSTRALASIAN PILING COMPANY/BLPPU AND
THE CMETU COLLECTIVE AGREEMENT 2000.**
No. AG 147 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Western Australia Builders' Labourers'
Painters and Plasters Union of Workers and Other

and

Michael Christopher Vadasz
T/A Australasian Piling Company.

No. AG 147 of 2000.

COMMISSIONER J.F. GREGOR.

19 June 2000.

Order.

HAVING heard Mr N Hodgson on behalf of the Applicants and there being no appearance on behalf of the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the agreement made between the parties lodged in the Commission on 3 May 2000 entitled Australasian Piling Company/BLPPU and the CMETU Collective Agreement 2000, and as subsequently amended by the parties, to be registered in terms of the following schedule as an Industrial Agreement.

[L.S.] (Sgd.) J.F. GREGOR,
Commissioner.

Schedule.

1.—TITLE

This agreement shall be known as the *Australasian Piling Company/BLPPU and the CMETU Collective Agreement 2000*.

2.—ARRANGEMENT

	CLAUSE NO.
Title	1
Arrangement	2
Parties and Persons Bound	3
Application	4
Relationship to Parent Award	5
Period of Operation	6
Classification Structures & Rates of Pay	7
Industry Standards	8
Sick Leave	9
Negotiation of a Subsequent Agreement	10
Application of Project Agreements	11
Fares and Travelling Allowance	12
Seniority	13
All In Payments	14
Pyramid Sub-Contracting	15
Dispute Settlement Procedure	16
Safety Dispute Resolution	17
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Training and Related Matters	19
Drug & Alcohol, Safety & Rehabilitation Program	20
Clothing & Safety Footwear	21
Income Protection	22
Accident Pay	23
Union Membership	24
Y2K	25
Signatories to the Agreement	26
Appendix A—Drug & Alcohol, Safety and Rehabilitation	

3.—PARTIES AND PERSONS BOUND

This agreement shall be binding on *Australasian Piling Company* (hereinafter referred to as "the company"), the Western Australian Builders' Labourers, Painters and Plasterers Union of Workers and the Construction Mining Energy Timberyards Sawmills and Woodworkers Union of Australia—WA Branch (hereinafter referred to as "the

unions") and all employees of the company eligible to be members of the unions.

4.—APPLICATION

This agreement shall apply to all employees of the company engaged on work in or in connection with construction, alteration, maintenance, repair or demolition of buildings or other structures of any kind whatsoever.

This agreement shall apply in Western Australia only. There are approximately six employees covered by this agreement.

5.—RELATIONSHIP TO PARENT AWARD

1. This agreement is supplementary to, and shall be read and interpreted wholly in conjunction with, the Building Trades (Construction) Award 1987, Award No. R14 of 1978 and the Engine Drivers (Building and Steel Construction) Award, No. .20 of 1973.

Where this Agreement refers to the "Award" it shall be taken to mean Award No. R14 of 1978, and all terms and conditions that apply to employees employed under this agreement shall be underpinned by the Award, notwithstanding that employees may be employed under the scope of Award No. 20 of 1973.

2. In the event of any inconsistency between the award and an express provision of this agreement, the terms of this agreement shall prevail to the extent of such inconsistency, unless the express provision of the agreement provides otherwise.

6.—PERIOD OF OPERATION

This agreement shall come into force from the first pay period commencing on or after November 1st 1999 and shall remain in force until the 1st of November, 2002.

7.—CLASSIFICATION STRUCTURE & RATES OF PAY

1. All employees working under this agreement shall be paid according to the wage rates set out below.

2. Wage Rates (per hour at ordinary time)

	Previous EBA Rate Hourly Rate \$	1st November 1999 Hourly Rate \$	1st November 2000 Hourly Rate \$	1st November 2001 Hourly Rate \$
Up to 20 tonnes	17.41	18.28	19.19	20.15
20 to 100 tonnes	18.19	19.10	20.06	21.06
Labourer Group 1	17.15	18.01	18.91	19.86
Labourer Group 2	16.56	17.39	18.26	19.17
Labourer Group 3	16.12	16.93	17.78	18.67

3. In addition to the hourly rates set out above, all employees engaged in productivity work will be paid a sheet piling allowance of \$3 per hour worked for any disabilities associated to sheet piling only.

4. A1 site allowance of \$2.55 is payable on The Burswood Casino Project.

4. All expense related allowances not specifically mentioned in this agreement will be paid as per the award as varied from time to time.

5. Site allowances relating to particular sites shall be paid in accordance with Appendix B of this Agreement.

6. An additional payment will be made to compensate for the impact of the Goods and Services Tax on the Consumer Price Index. In the circumstance that the CPI limit below is exceeded the appropriate additional payment will be made to the wage rates. The CPI figure for the applicable dates will be the official figure released by the ABS for the preceding year.

Date	CPI Limit	Additional Payment
June 2001	5%	1% (paid 1/9/2001)
June 2001	6%	2% (paid 1/9/2001)
June 2002	5%	1% (paid 1/9/2002)
June 2002	6%	2% (paid 1/9/2002)

8.—INDUSTRY STANDARDS

Redundancy

The company shall increase redundancy contributions on behalf of each employee to the following sums on a weekly basis—

Rate on signing	\$50
Rate as of 1/05/2001	\$60

Superannuation

(i) The Company will make a payment of \$60 per week per employee or the percentage rate that is prescribed under the Superannuation Guarantee Charge, whichever is the greater.

The Company will advise all employees subject to the Agreement of their right to have payments made to a complying superannuation fund of their choice. The Company is bound by the employee's election. The aforementioned payment will then be made to that fund.

Until each employee nominates the fund of their choice the Company will make payments into the Construction + Building Unions Superannuation Scheme (the "C+BUSS").

In the event that any employee chooses a fund other than the C+BUSS the Company will, within seven days of the employee advising the Company of the fund of their choice, advise the Union in writing of the employee's decision.

In the event that the employee and the Company reach an agreement pursuant to section 49C(2)(d) of the Act to change the complying superannuation fund or scheme the Company will, within seven days of the employee and the Company reaching such an agreement, advise the Union in writing of the agreement. The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by the employee.

(ii) "Ordinary Time Earnings" (which for the purposes of the Superannuation Guarantee (Administration) Act 1992 will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, industry allowance, trade allowances, shift loading, special rates, qualification allowances (eg. first aid, laser safety officer), multi-storey allowance, site allowance, asbestos eradication allowance, leading hand allowances, in charge of plant allowance and supervisory allowances where applicable. The term includes any regular over-award pay as well as casual rates received and any additional rates and allowances paid for work undertaken during ordinary hours of work, including fares and travel.

9.—SICK LEAVE

For sick leave accrued after the date of signing this agreement the following will apply—

- (a) The Company's employees shall have the option of converting 100% of accrued sick leave entitlement to a cash payment on termination
- (b) If an employee who has been terminated by the Company without exercising the above option is re-engaged within a period of six months, the unpaid balance of sick leave shall continue from the date of re-engagement.
- (c) Where the Company has signed a previous Agreement with the Union that also allowed for the conversion to cash payment on termination for accrued sick leave, that accrued sick leave will be treated as if is accrued under this agreement.
- (d) Sick leave shall accrue, for the purposes of this clause, at the rate of one day at the beginning of each of the first ten calendar months of each year.

10.—NEGOTIATION OF A SUBSEQUENT AGREEMENT

The parties agree to commence negotiations for a new collective agreement to succeed this agreement at least 3 months before the nominal expiry date. The parties intend to conclude these negotiations prior to the nominal expiry date. These negotiations shall be conducted on a collective basis between all of the parties with the negotiated outcome being subject to approval of a vote of the employees collectively.

11.—APPLICATION OF PROJECT AGREEMENTS

1. This agreement shall apply to all persons employed in the employer's business and every part thereof throughout Western Australia until 1st November 2002 except where the company commences work on a project where a site agreement to which the union is a party exists that provides for higher rates of pay and conditions.

2. The conditions contained in any such site agreement will take precedence over this agreement for the duration of the project.

12.—FARES AND TRAVELLING ALLOWANCE

In addition to Clause 12A of the award a travel payment shall be made in the form of a daily payment (on days worked) of \$6.15 per day per employee.

13.—SENIORITY

1. The parties agree the continuity of employment is desirable wherever possible, and that where it is not possible, employees will be retrenched in order of seniority.

2. When applying the "first on last off" principle it is agreed subject to the caveat of "all things being equal", it is intended to apply on a Company basis rather than a site by site basis.

3. It is recognised that from time to time instances may arise where the employee's individual skills may be subject to this caveat. Where there is any disagreement as to the application of this the matter will be processed in accordance with Clause 16—Dispute Settlement Procedure.

4. An employee who has been retrenched by the Company shall have absolute preference and priority for re-employment/re-engagement by the Company. Where an employee is re-engaged within a period of six months the employee shall maintain continuity of service and all accrued entitlements with the Company.

14.—ALL IN PAYMENTS

1. All-in payments to employees will not be made. All-in payments are defined as an hourly rate or piece work rate which is meant to cover wages and all allowances, such as annual leave, sick leave, etc., on which tax is being paid using the Prescribed Payments System.

2. It is agreed that where a breach of this clause is discovered, the employer shall continue paying the "all-in" rate as the employees hourly rate, but shall pay all award and other entitlements on top of this amount, back-dated to the commencement of the all-in rate arrangement. The company shall not be entitled to offset any amount in excess of the ordinary hourly rate against any other entitlement in this agreement.

3. This clause shall not be applied to prevent the employer subcontracting specialised work outside of the normal scope of work which the employer performs. The union shall be notified when specialist sub-contractors are to be engaged.

15.—PYRAMID SUB-CONTRACTING

1. "Pyramid Sub-Contracting" is defined as the practice of a sub-contractor, to whom a sub-contract is originally awarded, sub-letting that contract or part thereof to another sub-contractor.

2. Provided that where a sub-contractor does not have the technical capacity to handle a specialist section of the contract and intends to engage a specialist sub-contractor to perform that work, that section may be re-let to a specialist sub-contractor.

3. Further provided that when a sub-contract is let for labour and material, a labour-only sub-contract may be let by the sub-contractor, but it is unacceptable as a principle for further labour-only sub-contracts to be re-let.

4. A bona fide sub-contractor is generally an employer of labour, save for a machine owner-operator.

5. Where a disagreement arises in relation to the definition or application of the term "Pyramid Sub-Contracting" the parties shall discuss and determine the issue in accordance with the agreement dispute resolution procedure. In any event of a disagreement, the matter shall be negotiated further between the parties or referred to the Western Australian Industrial Relations Commission. Whilst these procedures are undertaken no industrial action shall occur.

16.—DISPUTE SETTLEMENT PROCEDURE

1. Disputes over any work related or industrial matter should be dealt with as close to its source as possible.

2. An employee or the union delegate should initially submit any work related grievance and/or industrial matter to the site foreperson, supervisor or other appropriate site representative of the company.

3. If the matter remains unresolved the union delegate may then submit the matter to the appropriate senior management person.

4. If still not resolved the delegate shall refer the matter to an appropriate official of the union, who shall discuss the matter with the nominated representative of the employer.

5. Whilst the above procedures are being followed work should continue as normal.

6. This procedure is to be followed in good faith and without unreasonable delay by any party.

7. Should the matter remain unresolved it shall be dealt with in one of the following ways as agreed to between the parties—

- referred to the Western Australian Industrial Relations Commission for conciliation and if required arbitration. The Commission's decision will be accepted by all parties subject to legal rights of appeal; or
- referred to a disputes board for determination; or
- referred to a private arbitrator agreed to between the parties, for determination.

8. This dispute settlement procedure does not apply to health and safety issues.

9. Nothing in the above procedure or this agreement shall prevent employees taking industrial action on issues of industry, state or national significance.

17.—SAFETY DISPUTE RESOLUTION

1. The parties to this agreement are committed to the safe operation of plant and equipment, to the observance of safe working practices, and the provision by the employer and correct use of all personal protective equipment. The company recognises its responsibilities to provide a safe and healthy workplace.

2. In the event of any disagreements on the necessity to carry out any safety measure or modify, reinforce or reinstate any safety device whatsoever, the procedures set out in this clause will be adopted.

3. No person shall dismiss a safety complaint. Any complaint should be referred to the company safety officer or workers' safety representative to be dealt with in accordance with the following procedures—

- (i) Where any employee becomes aware of an unsafe situation, that employee will immediately notify the company safety officer or the workers' safety representative.
- (ii) The company safety officer and the workers' safety representative will take immediate action to have the unsafe situation rectified.
- (iii) Should the company safety officer consider that no safety precautions are necessary, he/she will notify the workers' safety representative accordingly as soon as possible.
- (iv) While there is disagreement on the ruling of the company safety officer, the company safety officer will arrange for the immediate transfer of all employees from the disputed area.
- (v) Should the company safety officer be of the opinion that no action is necessary and the worker's safety representative disagrees, an appropriate inspector from Worksafe/Workcover will be requested to undertake an inspection of the disputed area for the purpose of resolving any such matter.
- (vi) If disagreement still exists the chief inspector or his/her nominee will be called in to assist in the resolution of the dispute.
- (vii) If no agreement can be reached between the parties the matter will be dealt with in accordance with the dispute resolution procedure of this agreement.
- (viii) Whilst the above procedure is being followed there will be no stoppage of work in respect of the matter being considered, except in the area alleged to be unsafe.
- (ix) It is accepted that safety considerations override normal work practices and depending on the degree of potential risk to persons on the job, or the general public, can override normal demarcation practices.

18.—AMENITIES

1. The parties agree that it is the responsibility of the company to ensure that the amenities prescribed by the Award are provided as a minimum. Where, however, that standard is not maintained due to an action or event beyond the control of the company, the union agrees that the company should be allowed reasonable time in which to rectify the problem. If the company acts promptly to rectify the problem, there should be no interruption to work from industrial stoppages, bans and limitations.

2. In all instances, the following procedure shall be observed—

3. A uniformly high standard of amenities and facilities such as ablution blocks, change rooms, crib sheds, etc. shall be provided.

4. All Sheds shall be weatherproof and soundly constructed to an approved standard with sufficient windows and doors, adequate ventilation and lighting. They must have a floor above ground level and be lined on ceilings and walls.

5. Mess Shed/s fitted with fly screens are provided for exclusive use of workers and not for the storage of employers' equipment, tools and materials.

6. Shed/s shall provide not less than 0.75 square metres of floor space per person employed at any one time, provided that the area be not less than 4.65 square metres. Fixtures, other than tables and chairs, shall not be included when calculating floor space.

7. Where 5 or more persons are employed at one time, the floor area shall not be less than 9 square metres.

8. Adequate facilities are to be provided for warmth and for drying clothes eg. strip heaters.

9. Provided that 20 or more persons are employed on the site at any one time, the employer shall provide a separate shed or sheds for messing, which shall be of such dimension as to provide not less than 0.75 square metres of floor space per person.

10. Where less than 20 persons are employed on site, Regulation 3.20 – Workplace Facilities of the Occupational Safety and Health Regulations 1996 shall apply to provisions of messing and changing facilities.

11. In the changing facilities, separate clothes-hanging facilities for each person employed are to be provided (coat hooks only to be used).

12. In the changing facilities, sufficient seating accommodation for the changing of work apparel is to be provided.

13. In the messing facilities, sufficient tables with fixed washable laminated or vinyl surface, and seating for the taking of meals, are to be provided.

14. Food warming facilities to be supplied, together with a supply of cool, clean water conveniently accessible, as well as boiling water at meal/rest breaks.

15. Receptacle for garbage with bin liner and rat and fly proof is to be supplied in mess area, and emptied regularly.

16. A washable vinyl floor surface in all facilities is to be provided.

17. Shelving is to be supplied in the mess shed for storage (cups, lunch bags, etc).

18. All facilities are to be cleaned and disinfected on a regular basis.

19. All mess sheds shall be supplied with reverse cycle air-conditioning.

20. Toilet blocks shall be soundly constructed and roofed with weatherproof material. The floor of each toilet shall be well-drained and constructed of concrete, bricks and cement, or other approved materials which shall be impervious to water. Every toilet shall be well lighted by natural or artificial light and shall be ventilated. Each toilet shall have a hinged door, capable of being fastened on the inside, lift seats/flaps and toilet paper.

21. Where practicable, toilets to be connected to sewerage before commencement of the job.

22. Toilet/urinal location to be conveniently accessible to employees, but not so close as to cause a nuisance to those persons.

23. Where necessary, portable water seal toilets of an approved standard are to be provided and regularly serviced.

24. Conveniently accessible toilets and urinals are to be distributed every 5th floor on multi-storey constructions.

25. Toilets and urinals are to be washed daily with disinfectant and kept in clean, hygienic condition.

26. Adequate washing facilities, suitably drained, and was basins/troughs are to be supplied with running water.

27. Soap and towels are to be supplied.

28. The following toilet/urinal ratio shall be applied in respect to all employees—

Employees	Toilets	Urinals
1—5	1	Nil
6—10	1	1
11—20	2	2
21—35	3	4
36—50	4	6
51—75	5	7
76—100	6	8

NB. For each additional 20 persons or part thereof up to 200 persons or part thereof up to 200 persons, one additional urinal and one additional toilet is required. For each additional 35 persons or part thereof in excess of 200 persons, one additional urinal and one additional toilet is required. If a slab urinal is provided, each 600mm shall be regarded as one urinal.

19.—TRAINING AND RELATED MATTERS

1. A training allowance of \$13.00 per week per worker shall be paid by the employer to the Union Education and Training Fund. This shall increase to \$14.00 per week on 1 November 2000 and a further increase to \$15.00 per week on 1 November 2001.

2. Subject to all qualifications in this clause, an employee shall, upon application in writing to and with approval of the employer, be granted leave with pay each calendar year pro-rata to attend courses conducted or approved by the NBCITC. The employers approval shall not be unreasonably withheld.

The application for leave shall be given to the employer at least two weeks in advance of the date of commencement of the course.

The time of taking leave shall be arranged so as to minimise any adverse effect on the employer's operations. The onus shall rest with the employer to demonstrate an inability to grant leave where an employee is otherwise entitled.

An employer shall not be liable for any additional expenses associated with an employee's attendance at a course other than payment of ordinary time earnings for such absence.

For the purpose of this clause ordinary time earnings shall be defined as the agreement classification rate.

Leave of absence granted pursuant to this clause shall count as service for all purposes of this agreement.

3. The Company will actively encourage employees to seek formal recognition of their skills (recognition of prior learning), and will allow leave as per (2) above for such purposes including but not limited to securing Tradesmen's Rights Certificates.

20.—DRUG & ALCOHOL, SAFETY & REHABILITATION PROGRAM

The parties are committed to the Drug and Alcohol, Safety and Rehabilitation program as outlined in Appendix A—Drug and Alcohol, Safety and Rehabilitation Program.

21.—CLOTHING AND SAFETY FOOTWEAR

1. The following items will be supplied to each employee by the Company, upon the completion of five working days.

- (a) 1 pair safety boots, to be replaced on a fair wear and tear basis.
- (b) 2 T-shirts with collars, and will be replaced on a fair wear and tear basis.
- (c) 1 bluey jacket for each employee employed during the period 1 April to 31 October. (One issued per year)

2. The Company will also make available to each employee, when requested by them, sun screen lotion and sun brims to fit over safety helmets.

22.—INCOME PROTECTION

The Company agrees to insure employees covered by this Agreement for injury and sickness. The scheme is to be negotiated between the parties

23.—ACCIDENT PAY

1. The Company agrees to pay each employee accident pay where the employee receives an injury for which weekly payments or compensation are payable by or on behalf of the Company pursuant to the provisions of the Workers' Compensation and Rehabilitation Act 1981, as amended.

2. "Accident Pay" means a weekly payment of an amount being the difference between the weekly amount of compensation paid to the employee pursuant to the Workers Compensation and Rehabilitation Act and the employee's ordinary wage under this Agreement.

3. The Company shall pay accident pay during the incapacity of the employee arising from any one injury for a total of 39 weeks whether the incapacity is in one continuous period or not.

24.—UNION MEMBERSHIP

The employer will encourage, as far as possible, all employees covered by the agreement, to be financial members of the Unions.

25.—Y2K

On the following key dates the Company will issue written records of accrued entitlements to each employee. The accrued entitlements will include annual leave, sick leave, any accruing productivity bonuses, redundancy payments and Superannuation payments and also on each employees anniversary date—

- ❖ 31 December 1999
- ❖ 28 February 2000
- ❖ 31 December 2000
- ❖ 28 February 2001

26.—SIGNATORIES

BLPPU

KEVIN REYNOLDS Common Seal over name
Date: 26 / 5 / 00

CMETU

JOE McDONALD Common Seal over name
Date: 26 / 5 / 00
The Company:

.....
SIGNATURE

Date: 26 / 5 / 00
Company Seal

MICHAEL C VADASZ
PRINT NAME

APPENDIX A—DRUG AND ALCOHOL, SAFETY AND REHABILITATION PROGRAM

1. PRINCIPLE

People dangerously affected by alcohol, and/or drugs are a safety hazard to themselves and all other persons in the workplace.

2. FOCUS

- Site safety and the involvement of the site safety committee
- Peer intervention and support
- Rehabilitation

3. WORKPLACE POLICY

- a) A person who is dangerously affected by drugs or alcohol will not be allowed to work until that person can work in a safe manner.
- b) The decision on a persons ability to work in a safe manner will be made by the safety committee, or on projects with no safety committee, by a body of at

least equal numbers of employee/employer representatives.

- c) There will be no payment of lost time to a person unable to work in a safe manner.
- d) If this happens 3 times the worker shall be given a written warning and made aware of the availability of treatment/counselling. If the worker refuses help he/she may be transferred/dismissed the next time he/she is dangerously affected.
- e) For the purposes of disciplinary action a warning shall be effective for a period of 12 months from the date of issue.
- f) A worker having problems with alcohol and or other drugs—
 - Will not be sacked if he/she is willing to get help.
 - Must undertake and continue with the recommended treatment to maintain the protection of this program.
 - Will be entitled to sick leave or leave without pay while attending treatment.

4. IMPLEMENTATION

To assist with the adoption and implementation with this policy the company will—

- a) Clearly state its endorsement of the BTG Drug and Alcohol program and comply with it.
- b) Provide access at an agreed time and venue for a representative of the BTG Drug and Alcohol Program to address a meeting of employees to discuss and endorse the program.
- c) Authorise the attendance of appropriate company personnel eg. Safety delegate/officer, safety committee members, union delegate, consultative committee members(s) at the two hour BTG Drug and Safety in the Workplace training course.

AUSTRALIAN WOOL HANDLERS (SPEARWOOD) ENTERPRISE AGREEMENT, 1998.

No. AG 145 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Shop, Distributive and Allied Employees' Association
of Western Australia

and

Wooldumpers Australia Pty Ltd.

No. AG 145 of 2000.

Australian Wool Handlers (Spearwood) Enterprise
Agreement, 1998.

15 June 2000.

Order.

HAVING heard Mr T. Pope on behalf of The Shop, Distributive and Allied Employees' Association of Western Australia and Mr P. Connell on behalf of Wooldumpers Australia Pty Ltd and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Australian Wool Handlers (Spearwood) Enterprise Agreement, 1998 as filed in the Commission on 29 May 2000 and as amended by the parties be registered on and from 15 June 2000.

[L.S.]

(Sgd.) A. R. BEECH,
Commissioner.

Schedule.

1.—TITLE

This agreement shall be known as the Australian Wool Handlers (Spearwood) Enterprise Agreement, 1998.

2.—DEFINITIONS

“Company” means Wooldumpers Australia Pty Ltd (ACN 069 066 842), trading as Australian Wool Handlers (“AWH”) with respect to its site at Phoenix Road Spearwood and any other site within the Perth metropolitan area from which it may operate from time to time.

“Late shift” means any rostered shift which finishes after 6.30 p.m. and at or before 1.00 a.m.

“Public Holiday” means a public holiday provided by Clause 19 of this agreement.

“Sheetman” or “fossicker” means an employee whose duties include—

- marking bales of wool which are to appear on the show floor;
- marking bales of wool from buyers' orders after sale which are to be prepared for shipping;
- marking bales of wool for re-handling;
- handling catalogue sheets on the show floor.

“Union” means The Shop, Distributive and Allied Employees' Association of Western Australia.

“Wool stores” shall mean any store in which the following functions or any of them are performed—

- Receiving, storing, baling, packing, sorting, classing, dumping, selling or delivery of wool.
- Receiving, storing, packing, selling or delivery of produce, hides, tallow, skins, seeds, grain and wool grease.
- Packing of bales or of containers or other shipping or transporting equipment.

3.—PARTIES BOUND

The parties to this agreement are—

- (a) Wooldumpers Australia Pty Ltd (ACN 069 066 842) trading as Australian Wool Handlers (“the company”) in respect of its wool store operations located at Phoenix Road, Spearwood in the State of Western Australia.
- (b) The Shop Distributive & Allied Employees' Association of Western Australia (“the Union”).

4.—APPLICATION OF AGREEMENT

This agreement shall be binding on the company at its location at Phoenix Road, Spearwood, WA and any other location within the Perth metropolitan area from which it may operate from time to time, the Union and the employees of the company whose classifications are set out in Clause 20A of this agreement. This agreement will cover approximately 56 employees.

5.—PERIOD OF OPERATION

(a) This Agreement shall take effect from 1 July, 1998 and shall remain in force until 30 June, 2001.

(b) The parties agree to commence negotiations on a replacement agreement not later than 3 months prior to the expiration of this agreement with the objective of the replacement agreement being a single national comprehensive and collective agreement covering all wool store operations.

6.—RELATIONSHIP TO OTHER AWARDS AND AGREEMENTS

(a) In respect to the parties bound by this agreement, this agreement replaces—

- *The Wool, Hide and Skin Store Employees' Award No 8 of 1996* and the *Storemen Packers (Wool Industry—Superannuation) Award 1998*, provided that the long service provisions of the *Wool Hide and Skin Store Employees Award No. 8 of 1966* shall continue to apply;
- *Wesfarmers Wool Store Operation Employees Enterprise Agreement 1994 No. AG 6/94*;

- *Elders Limited (Spearwood Wool Store) Interim Enterprise Agreement 1994 No. AG 122 of 1994;*
- *Elders Limited (Spearwood Wool Store) Enterprise Agreement 1995 No. AG 235 of 1995;*
- *Wooldumpers Australia (Fremantle) Pty Ltd Enterprise Agreement 1995 No. AG 297 of 1995;*
- *Wesfarmers Wool Store Operation Employees Enterprise Amendment Agreement 1996 No. AG 136 of 1996;*
- *Wesfarmers Wool Store Employees Enterprise Agreement 1996 No. AG 245 of 1996;*
- *Elders Limited (Spearwood Wool Store) Enterprise Agreement No. AG 332 of 1996;*
- *Wooldumpers Australia (Fremantle) Pty Ltd Enterprise Agreement 1997 No. AG 57 of 1997.*

(b) All employees who transfer from Australian Wool Handlers Limited (ACN 079 099 540) or Wesfarmers Dalgety Limited (ACN 008 743 217) shall have their existing service and entitlements to sick leave, annual leave and long service leave transferred to the company. For the purposes of calculating such employees length of service prior service with Australian Wool Handlers Limited or Wesfarmers Dalgety Limited shall be regarded as service with the company.

No employee will as a result of the making of this agreement, suffer any loss of ordinary time earnings to which the employee is entitled prior to the date of the coming into operation of this agreement.

7.—CLOSED AGREEMENT

The terms and conditions detailed in of this agreement will not be varied during the period of operation of the Agreement except in a manner consistent with the *Industrial Relations Act 1979*.

8.—ARRANGEMENT

1. Title
2. Definitions
3. Parties Bound
4. Application of Agreement
5. Period of Operation
6. Relationship to Other Awards and Agreements
7. Closed Agreement
8. Arrangement
9. No Extra Claims
10. Objectives of Agreement
11. Contract of Employment
12. Juniors
13. Avoidance of Industrial Disputes
14. Hours of Work
15. Meal Period and Crib Breaks
16. Shift Premiums
17. Public Holiday Rates
18. Overtime
19. Public Holidays
- 20A. Classification Structure
- 20B. Wage Rates
- 20C. Translation Table
- 20D. First Aid Allowance
21. Payment of Wages by Electronic Funds Transfer
22. Group Productivity Bonus System
23. Annual Leave
24. Sick Leave
25. Bereavement Leave
26. Parental Leave
27. Redundancy
28. Termination of Employment
29. calculation of Length of Service
30. Family Leave
31. Right of Entry
32. Amenities
33. Posting of Agreement
34. Superannuation

9.—NO EXTRA CLAIMS

Subject to the provisions of Clause 5(b) of this agreement, it is a term of the agreement that the Union and the employees undertake that for the duration of this agreement they will not pursue any extra claims.

10.—OBJECTIVES OF AGREEMENT

- (a) The primary objectives of this Agreement are—
- (i) To allow the company to establish profitable wool stores which will provide a level of customer service, facilities and overall customer value unequalled by any other company operating in the wool selling broking industry.
 - (ii) To improve the productivity and customer service provided by woolstore employees, by providing greater organisational efficiency through increased flexibility and utilisation of employee skills and significantly more flexible arrangements with respect to employees working time.
 - (iii) Employees accept that total flexibility in the performance of required tasks and duties, subject to skills and abilities is needed in order to satisfy the objectives described in paragraph (i).
 - (iv) To provide more satisfying, secure and better paid employment for individual employees in line with operational objectives.
 - (v) To provide a safe working environment for all employees free of drugs and alcohol.
 - (vi) To provide a sound basis for expanded capital investment and employment opportunities within the woolstore operations.

11.—CONTRACT OF EMPLOYMENT

(a) Where an employee is terminated by summary dismissal for malingering, inefficiency, neglect of duty or misconduct or any other reason, wages shall be paid up to the time of dismissal.

(b) Where an employee has given or been given notice pursuant to Clause 28 of the Agreement the employee shall continue in their employment until the date of the expiration of such notice. Any employee who having given or been given notice as aforesaid, without reasonable cause (proof of which shall rest with the employee) is absent from work during such period, shall be deemed to have abandoned their employment and shall not be entitled to payment for work done within that period.

(c) It is a term and condition of this agreement that all employees shall perform such work in such manner and in such places as the company from time to time reasonably requires.

(d) The continued employment of all new employees will be subject to the satisfactory completion of three month probationary period. At the conclusion of the probationary period the company shall either confirm the employees continued employment or terminate the employment of the employee. Provided that the company may terminate the employment of a probationary employee prior to the completion of the probationary period.

(e) Types of Employment

(i) Weekly Employment

An employee who has not been specifically employed on a part time, limited tenure or casual basis shall be deemed to be employed by the week.

(ii) Part Time Employment

An employee who is employed on a Part Time basis shall be offered a regular roster not less than 417 hours in a year period and not more than 1668 hours in a year (or pro-rata in the case of a period of employment less than a year) as agreed and confirmed in writing at the time of engagement, or as varied by consent thereafter. A part time employee shall be entitled to all leave benefits contained in this agreement on a pro-rata basis. A Part Time employee shall only be engaged where a full time employee cannot be utilised.

(iii) Limited Tenure Employment

An employee who is employed on a Limited Tenure basis shall be employed for a period of not more than 26 weeks and shall work (or be paid) for a minimum of 380 hours in that period (or pro-rata in the case of a period of employment less than 20 weeks) as agreed and confirmed in writing at the time of engagement, or as varied by consent thereafter.

Where a limited tenure employee is unable to attend to work a rostered period of duty the minimum hours provided by this subclause shall be reduced by the number of hours rostered to be worked. The hourly rate for a limited tenure employee shall be calculated by dividing the weekly wage by 38. A limited tenure employee shall not be entitled to any leave, notice or severance benefits contained in this agreement but shall receive in lieu a premium of 12% of the ordinary rate of pay. Provided that a one off extension of the contract may occur in consultation with the Union.

(iv) Casual Employment

A casual employee is one engaged and paid as such. Each day's employment shall stand alone. The engagement of a casual may be terminated at any time upon 1 hour's notice or by payment in lieu. The hourly rate for a casual employees shall be calculated by dividing the weekly wage by 38. A casual employee shall not be entitled to any leave, notice or severance benefits contained in this agreement but shall receive in lieu a premium of 20% of the ordinary rate of pay.

12.—JUNIORS

The weekly wage rates for junior employees shall be calculated by multiplying the rate described in Clause 20B classification AWH Store Officer Level 1 by the percentage detailed in the table below—

Age	Percentage
At 17 years of age or under	70
At 18 years of age	80
At 19 years of age	90
At 20 years of age	100

13.—AVOIDANCE OF INDUSTRIAL DISPUTES

The object of the procedure is to ensure that any questions, disputes or difficulties are resolved as quickly as possible by measures based on consultation, co-operation and discussion and to avoid interruption to the performance of work and the consequential loss of production and wages.

The parties to this agreement shall observe the following agreed avoidance of industrial dispute procedure—

The procedure provides—

- (a) The opportunity for the Team Leader/Coach in the first instance to discuss with an employee any request or complaint.
- (b) An orderly and just method of reviewing an issue on its merits.
- (c) A means of resolving an issue without disruption to work and without prejudice to final settlement.

It is agreed by all parties that the following guidelines will be observed—

- (i) In the event that employees(s) has a grievance then it is agreed that the employee(s) should attempt to resolve the grievance with their Team Leader/Coach or Manager.
- (ii) If the issue has not been resolved, the matter will be referred to the State Manager or their nominee. The employee(s) may request the Store Delegate be present at these meeting(s).
- (iii) If the dispute has not then been resolved, the Store Delegate may request assistance from the Union. The matter shall then be discussed between a Management representative of the Company and an appropriate officer of the Union.
- (iv) In the event that the issue is still unresolved and provided the parties have conferred among themselves and made reasonable attempts to resolve questions, disputes or difficulties either party may seek the assistance of the Western Australian Industrial Relations Commission, whose decision shall, subject to any appeal, be final.

This procedure shall be facilitated by the earliest possible advice by one party to the other of any issue or problem which may give rise to a grievance or dispute. The parties shall cooperate to ensure that these procedures are carried out

expeditiously and shall endeavour to keep to the following time limits—

Procedure described by	Time
Subclause 13(i)	Within 24 hours (weekends and holidays excepted)
Subclause 13(ii)	No later than three working days after (i)
Subclause 13(iii)	No later than seven working days after (ii)

It is agreed that depending on the nature of the problem, the time limits set out above relate to a meaningful process being put in place to address the problem.

Further, it is agreed that no industrial stoppage or industrial action will be initiated without fully exhausting the dispute procedure set out in this agreement.

14.—HOURS OF WORK

It is the intention of this clause that during periods of peak demand for the provisions of services to clients the hours worked by employees will be such as to be able to provide a quality of service consistent with the objectives of this agreement, subject to the necessity to ensure a safe working environment. During periods of low demand for services employees working hours will be reduced to compensate for the greater hours worked during peak periods. Wages paid to employees (other than overtime or any shift or public holiday premium) will be averaged over the year to provide employees with a consistent income.

(a) (i) The ordinary hours of work shall not exceed 1981 hours per year inclusive of annual leave, sick leave, long service leave and other approved paid leave. Provided that the hours shall be applied on a pro rata basis where a new employee commences after 1 July in any year.

(ii) The ordinary hours of work shall be performed on any day of the week from Monday to Saturday inclusive between 5.00 a.m. and 6.30 p.m. Provided that an employee shall not be required to work more than 48 hours on Saturdays during a year as part of their ordinary hours.

(iii) The minimum number of rostered ordinary hours during the period Monday to Friday for weekly employees shall be seven and a half (7.5) hours (or such lesser period as agreed between the employee and the employer).

(iv) The minimum number of rostered ordinary hours on a Saturday for weekly employees shall be four (4) hours or such lesser period as agreed between the employee and the employer. The maximum number of rostered ordinary hours on a Saturday shall be eight (8).

(v) The maximum number of rostered ordinary hours in any one day shall be ten (10).

(vi) The maximum number of rostered ordinary hours in any week shall be fifty (50) plus any Saturday work in accordance with Clause 14(a)(ii).

(vii) Subject to subparagraphs (v),(vi) and (viii) of this clause an employee may be rostered to work up to six days in any week during period of peak demand. In periods of low demand employees may be required to work up to five days per week.

(viii) The company shall notify employees of their ordinary hours of work or change to their ordinary hours on any day by issuing a roster not less than forty eight (48) hours prior. This notice period may be waived by agreement between the company and employee(s) concerned. Where shift work is required to be worked the company will provide employees with seven days notice of the intention to introduce shift work, provided that this period may be reduce by agreement between the company and the employee(s) concerned.

(ix) Employees shall have input into the construction of rosters through employee nominated representatives to ensure an even spread of hours across the workforce and subject to meeting the operational requirements of the business will recognise each employees family responsibilities. Rosters showing each employees commencing and finishing times for ordinary hours on each day of the week shall be posted in advance in a place accessible to all employees.

(b) In the event of an employee's contract of employment being terminated (for any reason) prior to the expiration of the one year period the employee shall—

- (i) in the case where the employee has worked greater than an average of 38 hours per week during the period, be paid an amount calculated by multiplying the 'excess hours' by the employee's weekly rate divided by 38; or
- (ii) in the case where the employee has worked less than an average of 38 hours per week during the period, the company shall be entitled to deduct from any entitlement owed to the employee, an amount calculated by multiplying the 'un-worked hours' by the employee's weekly rate divided by 38.

15.—MEAL PERIOD AND CRIB BREAKS

(a) A meal break of 30 minutes shall be allowed for a meal.

(b) An employee shall not be required to work for more than six hours continuously without a break for a meal.

(c) An employee who works in excess of 6 hours in a day shall be given paid rest period(s) of totalling 25 minutes. The first rest period shall be taken in the period before the meal break and the second rest period shall be taken after the meal.

(d) An employee who works between more than 4 and not more than 6 hours on any day shall be entitled to a paid rest period of 10 minutes. Where the work period includes a meal break the rest period shall be taken by mutual agreement with store management.

16.—SHIFT PREMIUMS

Allowances

For the ordinary hours of shift, shift workers shall be paid the following extra percentages of the rate of pay prescribed for their respective classifications—

Shift	Percentage
Late Shift	15%

17.—PUBLIC HOLIDAY RATES

Work performed in ordinary hours on a public holiday shall be deducted from an employee's total annual hours at the rate of 2.5 times the ordinary rate. Where an employee does not work on a Public Holiday, 7.6 hours shall be deducted from the total number of ordinary hours to be worked. Where the Company seeks work to be performed on a Public Holiday, it shall first call for volunteers to perform such work.

18.—OVERTIME

(a) All time worked which is not ordinary hours (except 'additional hours' worked by agreement between an employee and the company, in excess of 1981 hours in a year) shall be termed overtime and paid at the rate of double time. Work performed on Sunday shall be paid at the rate of double time. Over time performed on a Public Holiday shall be paid at the rate of double time and a half. Additional hours will be paid at the rate of single time.

Rest Period after Overtime

(b) Where overtime work is necessary it shall so far as is practicable, be arranged so that employees have at least 8 consecutive hours off duty between rostered duty, and subject to this subclause, be released after completion of such overtime until they have had 8 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

(c) An employee who is required to work overtime for two hours or more without being notified on the previous day or earlier of such a requirement shall either be supplied with a meal by the employer or paid \$7.10 provided that the amount of the meal allowance will increase to \$7.30 from 1 July, 1999 and \$7.60 1 July, 2000

Time Off in Lieu of Payment for Overtime

(d) (i) An employee may elect, with the consent of the company, to take time off in lieu of payment for overtime at a time or times agreed with the company.

(ii) Overtime taken as time off during ordinary time hours shall be taken at the ordinary time rate, that is an hour for each hour worked.

(iii) The company shall, if requested by an employee, provide payment, at the rate provided for the payment of overtime in the agreement, for any overtime worked under paragraph (d)(i) of this subclause where such time has not been taken within four weeks of accrual.

(iv) On each occasion that the employee elects to use this provision the resulting agreement shall be recorded in the time and wages records or personnel file or forms appropriate to the enterprise at the time when the agreement is made.

19.—PUBLIC HOLIDAYS

(a) An employee shall be entitled to a holiday on the following days—

- (i) New Year's Day, Good Friday, Easter Saturday, Easter Monday, Christmas Day and Boxing Day; and Foundation Day.
- (ii) The following days as prescribed in the relevant States, Territories and localities: Australia Day, Anzac Day, Queen's Birthday and Labour Day; and

(b) (i) When Christmas Day is a Saturday or a Sunday, a holiday in lieu thereof shall be observed on 27 December.

(ii) When Boxing Day is a Saturday or a Sunday, a holiday in lieu thereof shall be observed on 28 December.

(iii) When New Year's Day or Australia Day is a Saturday or Sunday, a holiday in lieu thereof shall be observed on the next Monday.

(c) Where in a State, Territory or locality, public holidays are declared or prescribed on days other than those set out in (a) and (b) above, those days shall constitute additional holidays for the purpose of this agreement.

(d) (i) The company with the agreement of the Union may substitute another day for any day prescribed in this clause.

- (ii) (1) The company and its employees may agree in respect of the enterprise or a section of the enterprise, to substitute another day for any prescribed in this clause. For this purpose, the consent of the majority of affected employees shall constitute agreement.
- (2) An agreement made pursuant to paragraph (1) shall be recorded in writing and be available to every employee affected.
- (3) The Union which is party to this agreement shall be informed of an agreement made pursuant to paragraph (1) and may within seven days refuse to accept it. The union will not unreasonably refuse to accept the agreement.
- (4) If the union, pursuant to (3), refuses to accept an agreement, the parties will seek to resolve their differences to the satisfaction of the company, the employees and the union.
- (5) If no resolution is achieved pursuant to (4), the company may apply to the Commission for approval of the agreement reached with its employees. Such an application must be made fourteen or more days before the prescribed holiday. After giving the company and union an opportunity to be heard, the Commission will determine the application.

20A.—CLASSIFICATION STRUCTURE

AWH STORE OFFICER LEVEL 1

Relativity: 90%

Pre-requisites—

- Basic interpersonal and communication skills.
- Basic literacy and numeracy skills.

Skills/Duties—

- Become familiar with company policies and procedures.
- Responsible for quality of their own work subject to detailed direction.
- Obtain knowledge and apply appropriate manual handling skills.
- Ability to work in a team environment and/or under routine supervision.
- Ability to exercise discretion within the limits of skills and/or training.

- Ability to undertake duties in a safe and responsible manner.

The following tasks are indicative of the tasks which an employee at this level may be required to perform—

1. Core sampling (non-mechanical)
2. Feeding wool into blending machines
3. Head marking or branding of head bale at receipt or weighing
4. Inserting lot plates or dividers
5. Lobbing
6. Opening or closing bales (including fudging and boodling)
7. Pushing into or taking from elevators or drops
8. Sewing
9. Wheeling baskets
10. Hand trucking
11. Use of non-licensed material handling equipment
12. Operate Wool Blending Machine
13. Responsible for housekeeping in own work environment

Promotional Criteria

An employee remains at this level until they are capable of completing the tasks required of this level so as to enable them to be considered for promotion to the next level when a position becomes available.

AWH STORE OFFICER LEVEL 2

Relativity: 92.4%

Pre-requisites—

- AWH Store officer Level 1 level or equivalent

Skills/Duties—

In addition to the skills/duties required of a AWH Store officer Level 1 the following skills/duties are required—

- Able to work in a team environment under limited supervision.
- Responsible for quality of their own work.
- Appropriate Licence to operate required materials handling equipment, (other than crane or fork lift rated in excess of 20,000 kg), (as required).

The following tasks are indicative of the tasks which an employee at this level may be required to perform—

1. Breaking out of specified bales for shipping, showing, pooling or blending.
2. Breaking out for rail trucks (including the use of mechanical aids).
3. Breaking down stacks of wool.
4. Port marking and branding of wool for shipment.
5. Operating and in charge of semi automatic dump press.
6. Operation of all appropriate materials handling equipment (other than crane or fork lift rated in excess of 20,000 kg), not requiring ancillary or incidental clerical functions.
7. Sheetman or fossicker.
8. Wool pressing.
9. Weight adjusting.

Promotional Criteria

An employee remains at this level until they are capable of completing the tasks required of this level so as to enable them to be considered for promotion to the next level when a position becomes available.

AWH STORE OFFICER LEVEL 3

Relativity: 94.5%

Pre-requisites—

- AWH Store Officer Level 2 or equivalent.

Skills/Duties—

In addition to the skills/duties required of a AWH Store officer Level 2 the following skills/duties are required—

- Understands and is responsible for quality control standards.

- Advanced level of interpersonal and communications skills.
- Keyboard Skills.
- Able to perform work required under minimal supervision.
- Ability to operate computerised inventory equipment (as required).

Indicative of the tasks which an employee at this level may perform are the following—

1. Sworn Weigher or employee (including forklift driver) recording or carrying out clerical functions in receiving, weighing and delivering or shipping of bales including notifying locations of bales by radio or other electronic means.
2. Employee in charge of an out-store.
3. Operation of semi automatic core line.
4. Employee responsible for the actual packing of containers with dumped bales.

Promotional Criteria

An employee remains at this level until they are capable of completing the tasks required of this level so as to enable them to be considered for promotion to the next level when a position becomes available.

AWH STORE OFFICER LEVEL 4

Relativity: 97%

Pre-requisites—

- AWH Store Officer Level 3 or equivalent

Skills/Duties—

In addition to the skills/duties required of a AWH Store Officer Level 4 the following skills/duties are required—

- Appropriate licence to operate required materials handling equipment and/or container handling equipment an/or crane, with capacity rated greater than 20,000 kg (as required).
- Knowledge of operation of fully automated core line operation.
- Ability to operate computerised wool handling equipment and/or sortation machines (as required).
- Maintain all relevant equipment (non trade level).

Indicative of the tasks which an employee at this level may perform are the following—

1. Operator in charge of a fully automated core line operation.
2. Operator in charge of fully automatic Dump Press (ie TriPak).
3. Operator of container handling equipment rated greater than 20,000kg.
4. Employee charged by company with the responsibility of supervising and directing not more than 10 employees (not being a number of employees working as a team).

Promotional Criteria

An employee remains at this level until they are capable of completing the tasks required of this level so as to enable them to be considered for promotion to the next level when a position becomes available.

AWH STORE OFFICER LEVEL 5

Relativity: 100%

Pre-requisites—

AWH Store Officer Level 4 or equivalent.

Appropriate Trade Certification.

Skills/Duties—

In addition to the skills/duties required of a AWH Store Officer Level 4 the following skills/duties are required—

- Ability to sort all types of wool to desired graded lines.
- Ability to allocate bin types and calculate bin weights and percentages.
- Responsible for sorting wool to Industry Quality Control Standards.

- Understanding of operation of a Wool Re-handling Department.
- Schedule and Maintain all relevant equipment (Trade Level).

Indicative of the tasks which an employee at this level may perform are the following—

1. Classing or sorting wool with or without mechanical aids.
2. Undertake appropriate recording functions.

Promotional Criteria

An employee remains at this level until they are capable of completing the tasks required of this level so as to enable them to be considered for promotion to the next level when a position becomes available.

AWH STORE OFFICER LEVEL 6—TEAM LEADER/COACH

Relativity: 105%

Pre-requisites—

- AWH Store Officer Level 4/5 or equivalent.

Skills/Duties—

In addition to the skills/duties required of a Level 4/5 employee the following skills/duties are required—

- Proven ability to train and supervise.
- Must be able to work as part of a team.
- Proficient in maintaining records.
- Proficient in monitoring section output.
- Ability to supervise section performance.
- Ability to conduct workplace assessments.

(c) An employee who performed work at a higher grade (other than a structured training program) for a continuous period of greater than six months shall be re classified at the higher level. Provided that this requirement shall not apply where the employee is performing those duties due to an absence as a result of long service leave, paternity leave or a prolonged period of sick leave.

20B.—WAGE RATES

All weekly employees who are employed by the company as at 1 July, 1998 will receive a once off payment of \$500.00 (gross).

First Payment

Payable from 1 July, 1998

The total wage rate per week for adult employees performing the work described by the classifications detailed in Clause 20A of this agreement shall be as detailed in the table below with effect from 1 July, 1998 until 30 June, 1999.

Classification	Total Rate
Level 1	\$476.90
Level 2	\$492.40
Level 3	\$500.10
Level 4	\$524.70
Level 5	\$554.20
Level 6	\$567.10

Second Payment

Payable from 1 July, 1999

The total wage rate per week for adult employees performing the work described by the classifications detailed in Clause 20A of this agreement shall be as detailed in the table below with effect from 1 July, 1999 until 30 June, 2000.

Classification	Total Rate
Level 1	\$500.80
Level 2	\$517.00
Level 3	\$525.10
Level 4	\$550.90
Level 5	\$581.90
Level 6	\$595.50

Third Payment

Payable from 1 July, 2000

The total wage rate per week for adult employees performing the work described by the classifications detailed in Clause 20A of this agreement shall be as detailed in the table below

with effect from 1 July, 2000 until the termination or replacement of this agreement.

Classification	Total Rate
Level 1	\$520.80
Level 2	\$537.70
Level 3	\$546.10
Level 4	\$573.00
Level 5	\$605.20
Level 6	\$619.30

20C.—TRANSLATION TABLE

Employees who were previously employed under the *Wesfarmers Wool Store Operation Employees Enterprise Agreement 1996* as at 30 June, 1998 who are offered and accept employment with the company shall be employed at the levels detailed in the table below—

WDL Classification Structure	New Classification Structure
Grade E Level 1	Level 1
Grade E Level 2	Level 1
Grade D Level 1	Level 1
Grade D Level 2	Level 2
Grade C Level 1	Level 2
Grade C Level 2	Level 3
No equivalent position	Level 4
Grade B Level 1	Level 5
Grade B Level 2	Level 5
Grade A Level 1	Level 5
Grade A Level 2	Level 6

20D.—FIRST AID ALLOWANCE

Employees who are the holder of a current First Aid Certificate and who are appointed by the company as a First Aid Officer shall be entitled to an allowance of \$4.20 per week. Provided that the amount of the allowance will increase to \$4.30 from 1 July, 1999 and \$4.70 from 1 July, 2000

21.—PAYMENT OF WAGES BY ELECTRONIC FUNDS TRANSFER

Wages for all employees shall be paid weekly by Electronic Funds Transfer into an appropriate account nominated by the employee.

22.—GROUP PRODUCTIVITY BONUS SYSTEM

The parties have agreed that a productivity based bonus system recognises the positive contribution that a motivated work team can make towards the profitability, competitiveness, job security and safety of the company.

A team comprising of employee and management representatives will be responsible for the consideration and the implementation of an appropriate productivity based remuneration system designed to further the objectives of this agreement.

23.—ANNUAL LEAVE

(a) Except as hereinafter provided, a period of 152 working hours annual leave shall be allowed annually to an employee after twelve months continuous service (less the period of annual leave).

(b) Annual leave shall be given and taken at a time(s) agreed between the company and the employee. It is agreed that unless exceptional circumstances exist annual leave will not be granted at a time of peak client demand.

(c) The company may allow an employee to take annual leave prior to the employee becoming entitled to leave. Where an employee takes such leave and subsequently leaves the employment of the company prior to meeting the service requirements for the leave taken, the company shall be entitled to recover leave paid in advance from the employees outstanding entitlements.

(d) If after one month's continuous service in any qualifying twelve monthly period an employee lawfully leaves his employment or his employment is terminated by the company through no fault of the employee, the employee shall be paid one third of a week's wages in respect of each completed month of continuous service in respect of which leave has not been granted hereunder.

(e) Each employee before going on leave shall be paid wages for the period of the leave to which he is entitled. For the

purpose of this subclause and of subclause (d) hereof the wages referred to shall be at the rate prescribed by this agreement for the occupation in which the employee was ordinarily employed immediately prior to the commencement of his leave or the termination of the employment as the case may be.

(f) The base rates provided in Clause 20B of this agreement are inclusive of annual leave loading.

(g) The annual leave prescribed by this clause shall be exclusive of any of the holidays mentioned in clause 19 of this agreement and if any such holidays fall within an employee's period of annual leave and are observed on a day which in the case of that employee would have been an ordinary working day, there shall be added to the period of annual leave one day for each holiday falling as aforesaid.

(h) (i) Notwithstanding the provision of this clause, an employee may elect, with the consent of the company, to take annual leave in single day periods not exceeding five days in any calendar year at a time or times agreed between them.

(ii) Access to annual leave, as prescribed in paragraph (h)(i) above, shall be exclusive of any shutdown period provided for elsewhere under this agreement.

24.—SICK LEAVE

(a) A weekly or part time employee who is unable to attend for work on account of personal illness or incapacity shall be entitled to leave of absence without deduction from pay subject to the following conditions and limitations—

- (i) the employee shall so far as is possible inform the company of their inability to attend for duty, the nature of the illness or incapacity and the estimated duration of the absence reason prior to scheduled commencement time;
- (ii) the employee shall not be entitled to paid leave of absence for any period in respect of which the employee is entitled to workers' compensation;
- (iii) the employee shall establish to the satisfaction of the company that the employee was unable on account of such illness or incapacity to attend for duty on the day or days for which sick leave is claimed;
- (v) the employee shall not be entitled to payment for sick leave taken during the first three months of service until the employee has completed three months' continuous service with the company;
- (vi) the employee shall be entitled to 76 hours sick leave per year which if not taken will continue to accumulate during the period of service.

(b) Where the contract of employment is continuous, sick leave shall accumulate from year to year so that any balance of the period specified in paragraph (a)(vi) hereof which has in any year not been allowed to an employee by the company as paid sick leave may be claimed by the employee and subject to the conditions hereinbefore prescribed shall be allowed by the company in a subsequent year without diminution of the sick leave prescribed in respect of that year.

25.—BEREAVEMENT LEAVE

An employee shall, on the death within Australia of a spouse, parent, parent-in-law, foster parent, step parent, child, foster child, sibling, grandparent, grandparent-in-law, or grandchild, be entitled on notice to leave up to and including the day of the funeral of such relation and such leave shall be without deduction from pay for a period not exceeding the number of hours worked by the employee in two ordinary days work. Proof of such death shall be furnished by the employee to the satisfaction of the company, if he so requests. Provided that this clause shall have no operation while the period of entitlement to leave under it coincides with any other period of leave. For the purpose of this clause the word 'spouse' shall not include a spouse from whom the employee is legally separated but shall include a person who lives with the employee as a de facto spouse.

26.—PARENTAL LEAVE

Subject to the terms of this clause employees are entitled to maternity, paternity and adoption leave and to work part-time in connection with the birth or adoption of a child.

(A) MATERNITY LEAVE

Nature of leave

(a) Maternity leave is unpaid leave.

Definitions

(b) For the purposes of this subclause—

- (i) "Employee" includes a part-time employee but does not include an employee engaged upon casual or seasonal work.
- (ii) "Paternity leave" means leave of the type provided for in subclause (b) whether prescribed in an award or otherwise.
- (iii) "Child" means a child of the employee under the age of one year.
- (iv) "Spouse" includes a de facto or a former spouse.
- (v) "Continuous service" means service under an unbroken contract of employment and includes—
 - (1) any period of leave taken in accordance with this clause;
 - (2) any period of part-time employment worked in accordance with this clause; or
 - (3) any period of leave or absence authorised by the employer or by the award.

Eligibility for maternity leave

(c) An employee who becomes pregnant, upon production to her employer of the certificate required by paragraph (d) hereof, shall be entitled to a period of up to 52 weeks maternity leave provided that such leave shall not extend beyond the child's first birthday. This entitlement shall be reduced by any period of paternity leave taken by the employee's spouse in relation to the same child and apart from paternity leave of up to one week at the time of confinement shall not be taken concurrently with paternity leave.

Subject to paragraphs (f) and (i) hereof the period of maternity leave shall be unbroken and shall, immediately following confinement, include a period of six weeks compulsory leave.

The employee must have had at least 12 months continuous service with that employer immediately preceding the date upon which she proceeds upon such leave.

Certification

(d) At the time specified in paragraph (e) the employee must produce to her employer—

- (i) a certificate from a registered medical practitioner stating that she is pregnant and the expected date of confinement;
- (ii) a statutory declaration stating particulars of any period of paternity leave sought or taken by her spouse and that for the period of maternity leave she will not engage in any conduct inconsistent with her contract of employment.

Notice requirements

(e) (i) An employee shall, not less than ten weeks prior to the presumed date of confinement, produce to her employer the certificate referred to in sub-paragraph (d)(i).

(ii) An employee shall give not less than four weeks notice in writing to her employer at the date upon which she proposes to commence maternity leave stating the period of leave to be taken and shall, at the same time, produce to her employer the statutory declaration referred to in sub-paragraph (d)(ii).

(iii) An employer by not less than 14 days notice in writing to the employee may require her to commence maternity leave at any time within the six weeks immediately prior to her presumed date of confinement.

(iv) An employee shall not be in breach of this clause as a consequence of failure to give the stipulated period of notice in accordance with subparagraph (ii) hereof if such failure is occasioned by the confinement occurring earlier than the presumed date.

Transfer to a safe job

(f) Where, in the opinion of a registered medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue at her present work,

the employee shall, if the employer deems it practicable, be transferred to a safe job at the rate and on the conditions attaching to that job until the commencement of maternity leave.

If the transfer to a safe job is not practicable, the employee may, or the employer may require the employee to, take leave for such period as is certified necessary by a registered medical practitioner. Such leave shall be treated as maternity leave for the purposes of paragraphs (j), (k), (l) and (m) hereof.

Variation of period of maternity leave

(g) (i) Provided the maximum period of maternity leave does not exceed the period to which the employee is entitled under paragraph (c) hereof—

- (1) the period of maternity leave may be lengthened only by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be lengthened;
- (2) the period may be further lengthened by agreement between the employer and the employee.

(ii) The period of maternity leave may with the consent of the employer, be shortened by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be shortened.

Cancellation of Maternity Leave

(h) (i) Maternity leave, applied for but not commenced, shall be cancelled when the pregnancy of an employee terminates other than by the birth of a living child.

(ii) Where the pregnancy of an employee then on maternity leave terminates other than by the birth of a living child, it shall be the right of the employee to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the employee to the employer that she desires to resume work.

Special maternity leave and sick leave

(i) (i) Where the pregnancy of an employee not then on maternity leave terminates after 28 weeks other than by the birth of a living child then—

- (1) she shall be entitled to such period of unpaid leave (to be known as special maternity leave) as a registered medical practitioner certifies as necessary before her return to work; or
- (2) for illness other than the normal consequences of confinement she shall be entitled, either in lieu or in addition to special maternity leave, to such paid sick leave as to which she is then entitled and which a registered medical practitioner certifies as necessary before her return to work.

(ii) Where an employee not then on maternity leave suffers illness related to her pregnancy, she may take such paid sick leave as to which she is then entitled and such further unpaid leave (to be known as special maternity leave) as a registered practitioner certifies as necessary before her return to work, provided that the aggregate of paid sick leave, special maternity leave and maternity leave shall not exceed the period to which the employee is entitled under paragraph (c) hereof.

(iii) For the purposes of paragraphs (j), (k) and (l) hereof, maternity leave shall include special maternity leave.

(iv) An employee return to work after the completion of a period of leave taken pursuant to this paragraph shall be entitled to the position which she held immediately before proceeding on such level or, in the case of an employee who was transferred to a safe job pursuant to paragraph (f) hereof, to the position she held immediately before such transfer.

Where such position no longer exists but there are other positions available which the employee is qualified for and is capable of performing she shall be entitled to a position as nearly comparable in status and salary or wage to that of her former position.

Maternity leave and other leave entitlements

(j) (i) Provided the aggregate of any leave, including leave taken under this subclause, does not exceed the period to which the employee is entitled under paragraph (c) hereof, an employee may, in lieu of or in conjunction with maternity leave, take any annual leave or long service leave or any part thereof to which she is entitled.

(ii) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave) shall not be available to an employee during her absence on maternity leave.

Effect of maternity leave on employment

(k) Subject to this subclause, notwithstanding any award or other provision to the contrary, absence on maternity leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose of any relevant award or agreement.

Termination of employment

(l)(i) An employee on maternity leave may terminate her employment at any time during the period of leave by notice given in accordance with this award.

(ii) An employer shall not terminate the employment of an employee on the ground of her pregnancy or of her absence on maternity leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.

Return to work after maternity leave

(m) (i) An employee shall confirm her intention of returning to work by notice in writing to the employer given not less than four weeks prior to the expiration of her period of maternity leave.

(ii) An employee, upon returning to work after maternity leave or the expiration of the notice required by subparagraph (i) hereof, shall be entitled to the position which she held immediately before proceeding on maternity leave or, in the case of an employee who was transferred to a safe job pursuant to paragraph (f) hereof, to the position which she held immediately before such transfer or in relation to an employee who has worked part-time during the pregnancy the position she held immediately before commencing such part-time work.

Where such position no longer exists but there are other positions available which the employee is qualified for and is capable of performing, she shall be entitled to a position as nearly comparable in status and salary or wage to that of her former position.

Replacement employees

(n) (i) A replacement employee is an employee specifically engaged as a result of an employee proceeding on maternity leave.

(ii) Before an employer engages a replacement employee the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.

(iii) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising her rights under this subclause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.

(iv) Nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.

(B) PATERNITY LEAVE

Nature of leave

(a) Paternity leave is unpaid leave.

Definitions

(b) For the purposes of this subclause—

- (i) "Employee" includes a part-time employee but does not include an employee engaged upon casual or seasonal work.
- (ii) "Maternity leave" means leave of the type provided for in subclause (a) (and includes special maternity leave) whether prescribed in an award or otherwise.
- (iii) "Child" means a child of the employee or the employee's spouse under the age of one year.
- (iv) "Spouse" includes a de facto or a former spouse.
- (v) "Primary care giver" means a person who assumes the principal role of providing care and attention to a child.
- (vi) "Continuous service" means service under an unbroken contract of employment and includes—
 - (1) any period of leave taken in accordance with this clause; or

- (2) any period of part-time employment worked in accordance with this clause; or
- (3) any period of leave or absence authorised by the employer or by the award.

Eligibility for paternity leave

(c) A male employee, upon production to his employer of the certificate required by paragraph (d), shall be entitled to one or two periods of paternity leave, the total of which shall not exceed 52 weeks, in the following circumstances—

- (i) an unbroken period of up to one week at the time of confinement of his spouse;
- (ii) a further unbroken period of up to 51 weeks in order to be the primary care-giver of a child provided that such leave shall not extend beyond the child's first birthday. This entitlement shall be reduced by any period of maternity leave taken by the employee's spouse and shall not be taken concurrently with that maternity leave.

The employee must have had at least 12 months continuous service with that employer immediately preceding the date upon which he proceeds upon either period of leave.

Certification

(d) At the time specified in paragraph (e) the employee must produce to his employer—

- (i) 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;
- (ii) in relation to any period to be taken under subparagraph (c)(ii) hereof, a statutory declaration stating—
 - (1) he will take that period of paternity leave to become the primary care-giver of a child;
 - (2) particulars of any period of maternity leave sought or taken by his spouse; and
 - (3) for the period of paternity leave he will not engage in any conduct inconsistent with his contract of employment.

Notice Requirements

(e) (i) The employee shall, not less than ten weeks prior to each proposed period of leave, give the employer notice in writing stating the dates on which he proposes to start and finish the period or periods of leave and produce the certificate and statutory declaration required in paragraph (d) hereof.

(ii) The employee shall not be in breach of this paragraph as a consequence of failure to give the notice required in subparagraph (i) hereof if such failure is due to—

- (1) the birth occurring earlier than the expected date; or
- (2) the death of the mother of the child; or
- (3) other compelling circumstances.

(iii) The employee shall immediately notify his employer of any change in the information provided pursuant to paragraph (d) hereof.

Variation of period of paternity leave

(f) (i) Provided the maximum period of paternity leave does not exceed the period to which the employee is entitled under paragraph (c) hereof—

- (1) the period of paternity leave provided by subparagraph (c)(ii) may be lengthened once only by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be lengthened;
- (2) the period may be further lengthened by agreement between the employer and the employee.

(ii) The period of paternity leave taken under subparagraph (c)(ii) hereof may, with the consent of the employer, be shortened by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be shortened.

Cancellation of paternity leave

(g) Paternity leave, applied for under subparagraph (c)(ii) hereof but not commenced, shall be cancelled when the pregnancy of the employee's spouse terminates other than by the birth of a living child.

Paternity leave and other leave entitlements

(h) (i) Provided the aggregate of any leave, including leave taken under this subclause, does not exceed the period to which the employee is entitled under paragraph (c) hereof, an employee may, in lieu of or in conjunction with paternity leave, take any annual leave or long service leave or any part thereof to which he is entitled.

(ii) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave) shall not be available to an employee during his absence on paternity leave.

Effect of paternity leave on employment

(i) Subject to this subclause, notwithstanding any award or other provision to the contrary absence on paternity leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose of any relevant award or agreement.

Termination of employment

(j) (i) A employee on paternity leave may terminate his employment at any time during the period of leave by notice given in accordance with this award.

(ii) An employer shall not terminate the employment of an employee on the ground of his absence on paternity leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.

Return to work after paternity leave

(k) (i) An employee shall confirm his intention of returning to work by notice in writing to the employer given not less than four weeks prior to the expiration of the period of paternity leave provided by subparagraph (c) (ii) hereof.

(ii) An employee, upon returning to work after paternity leave or the expiration of the notice required by subparagraph (i) hereof, shall be entitled to the position which he held immediately before proceeding on paternity leave, or in relation to an employee who has worked part-time under this clause to the position he held immediately before commencing such part-time work.

Where such position no longer exists but there are other positions available which the employee is qualified for and is capable of performing, he shall be entitled to a position as nearly comparable in status and salary or wage to that of his former position.

Replacement employees

(l) (i) A replacement employee is an employee specifically engaged as a result of an employee proceeding on paternity leave.

(ii) Before an employer engages a replacement employee the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.

(iii) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising his rights under this subclause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.

(iv) Nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.

(C) ADOPTION LEAVE

Nature of leave

(a) Adoption leave is unpaid leave.

(b) For the purposes of this subclause—

- (i) "Employee" includes a part-time employee but does not include an employee engaged upon casual or seasonal work.
- (ii) "Child" means a person under the age of five years who is placed with the employee for the purposes of adoption, other than a child or stepchild of the employee or of the spouse of the employee or a child who has previously lived continuously with the employee for a period of six months or more.
- (iii) "Relative adoption" occurs where a child, as defined, is adopted by a grandparent, brother, sister, aunt or uncle (whether of the whole blood or half blood or by marriage).

- (iv) "Primary care-giver" means a person who assumes the principal role of providing care and attention to a child.
- (v) "Spouse" includes a de facto spouse.
- (vi) "Continuous service" means service under an unbroken contract of employment and includes—
 - (1) any period of leave taken in accordance with this clause;
 - (2) any period of part-time employment worked in accordance with this clause; or
 - (3) any period of leave or absence authorised by the employer or by the award.

Eligibility

(c) An employee, upon production to the employer of the documentation required by paragraph (d) hereof shall be entitled to one or two periods of adoption leave, the total of which shall not exceed 52 weeks, in the following circumstances—

- (i) an unbroken period of up to three weeks at the time of the placement of the child;
- (ii) an unbroken period of up to 52 weeks from the time of its placement in order to be the primary care-giver of the child. This leave shall not extend beyond one year after the placement of the child and shall not be taken concurrently with adoption leave taken by the employee's spouse in relation to the same child. This entitlement of up to 52 weeks shall be reduced by—
 - (1) any period of leave taken pursuant to subparagraph (i) hereof;
 - (2) the aggregate of any periods of adoption leave taken or to be taken by the employee's spouse.

The employee must have had at least 12 months continuous leave with that employer immediately preceding the date upon which he or she proceeds upon such leave in either case.

Certification

(d) Before taking adoption leave the employee must produce to the employer—

- (i) (1) A statement from an adoption agency or other appropriate body of the presumed date of placement of the child with the employee for adoption purposes; or
- (2) A statement from the appropriate government authority confirming that the employee is to have custody of the child pending application for an adoption order.
- (ii) In relation to any period to be taken under subparagraph (c)(ii) hereof, a statutory declaration stating—
 - (1) the employee is seeking adoption leave to become the primary care-giver of the child;
 - (2) particulars of any period of adoption leave sought or taken by the employee's spouse; and
 - (3) for the period of adoption leave the employee will not engage in any conduct inconsistent with his or her contract of employment.

Notice requirements

(e) (i) Upon receiving notice of approval for adoption purposes, an employee shall notify the employer of such approval and within two months of such approval shall further notify the employer of the period or periods of adoption leave the employee proposes to take. In the case of a relative adoption the employee shall notify as aforesaid upon deciding to take a child into custody pending an application for an adoption order.

(ii) An employee who commences employment with an employer after the date of approval for adoption purposes shall notify the employer thereof upon commencing employment and of the period or periods of adoption leave which the employee proposes to take. Provided that such employee shall not be entitled to adoption leave unless the employee has not less than 12 months continuous service with that employer immediately preceding the date upon which he or she proceeds upon such leave.

(iii) An employee shall, as soon as the employee is aware of the presumed date of placement of a child for adoption

purposes but no later than 14 days before such placement, give notice in writing to the employer of such date, and of the date of the commencement of any period of leave to be taken under subparagraph (c) (i) hereof.

(iv) An employee shall, ten weeks before the proposed date of commencing any leave to be taken under subparagraph (c) (ii) hereof give notice in writing to the employer of the date of commencing leave and the period of leave to be taken.

(v) An employee shall not be in breach of this subclause, as a consequence of failure to give the stipulated period of notice in accordance with subparagraphs (iii) and (iv) hereof if such failure is occasioned by the requirement of an adoption agency to accept earlier or later placement of a child, the death of the spouse or other compelling circumstances.

Variation of period of adoption leave

(f) (i) Provided the maximum period of adoption leave does not exceed the period to which the employee is entitled under paragraph (c) hereof—

- (1) the period of leave taken under subparagraph (c)(ii) hereof may be lengthened once only by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be lengthened;
- (2) the period may be further lengthened by agreement between the employer and employee.

(ii) The period of adoption leave taken under subparagraph (c)(ii) hereof may, with the consent of the employer, be shortened by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be shortened.

Cancellation of adoption leave

(g) (i) Adoption leave, applied for but not commenced, shall be cancelled should the placement of the child not proceed.

(ii) Where the placement of a child for adoption purposes with an employee then on adoption leave does not proceed or continue, the employee shall notify the employer forthwith and the employer shall nominate a time not exceeding four weeks from receipt of notification for the employee's resumption of work.

Special leave

(h) The employer shall grant to any employee who is seeking to adopt a child, such unpaid leave not exceeding two days, as is required by the employee to attend any compulsory interviews or examinations as are necessary as part of the adoption procedure. Where paid leave is available to the employee the employer may require the employee to take such leave in lieu of special leave.

Adoption leave and other entitlements

(i) (i) Provided the aggregate of any leave, including leave taken under this subclause, does not exceed the period to which the employee is entitled under paragraph (c) hereof, an employee may, in lieu of or in conjunction with adoption leave, take any annual leave or long service leave or any part thereof to which he or she is entitled.

(ii) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during the employee's absence on adoption leave.

Effect of adoption leave on employment

(j) Subject to this subclause, notwithstanding any award or other provision to the contrary, absence on adoption leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose of any relevant award or agreement.

Termination of employment

(k) (i) An employee on adoption leave may terminate the employment at any time during the period of leave by notice given in accordance with this award.

(ii) An employer shall not terminate the employment of an employee on the ground of the employee's application to adopt a child or absence on adoption leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.

Return to work after adoption leave

(l) (i) An employee shall confirm the intention of returning to work by notice in writing to the employer given not less

than four weeks prior to the expiration of the period of adoption leave provided by subparagraph (c)(ii) hereof.

(ii) An employee, upon returning to work after adoption leave shall be entitled to the position held immediately before proceeding on such leave or in relation to an employee who has worked part-time under this clause the position held immediately before commencing such part-time work.

Where such position no longer exists but there are other positions available which the employee is qualified for and is capable of performing, the employee shall be entitled to a position as nearly comparable in status and salary or wage to that of the employee's former position.

Replacement employees

(m) (i) A replacement employee is an employee specifically engaged as a result of an employee proceeding on adoption leave.

(ii) Before an employer engages a replacement employee the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.

(iii) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising rights under this subclause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.

(iv) Nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.

(D) PART-TIME WORK

Definitions

(a) For the purposes of this subclause—

- (i) "Male employee" means an employed male who is caring for a child born of his spouse or a child placed with the employee for adoption purposes.
- (ii) "Female employee" means an employed female who is pregnant or is caring for a child she has borne or a child who has been placed with her for adoption purposes.
- (iii) "Spouse" includes a de facto spouse.
- (iv) "Former position" means the position held by a female or male employee immediately before proceeding on leave or part-time employment under this subclause whichever first occurs or, if such position no longer exists but there are other positions available for which the employee is qualified and the duties of which he or she is capable of performing, a position as nearly comparable in status and pay to that of the position first mentioned in this definition.
- (v) "Continuous service" means service under an unbroken contract of employment and includes—
 - (1) any period of leave taken in accordance with this clause;
 - (2) any period of part-time employment worked in accordance with this clause; or
 - (3) any period of leave or absence authorised by the employer or by the award.

Entitlement

(b) With the agreement of the employer—

- (i) A male employee may work part-time in one or more periods at any time from the date of birth of the child until its second birthday or, in relation to adoption, from the date of placement of the child or until the second anniversary of the placement.
- (ii) A female employee may work part-time in one or more periods while she is pregnant where part-time employment is, because of the pregnancy, necessary or desirable.
- (iii) A female employee may work part-time in one or more periods at any time from the seventh week after the date of birth of the child until its second birthday.

- (iv) In relation to adoption a female employee may work part-time in one or more periods at any time from the date of placement of the child until the second anniversary of that date.

Return to former position

(c) (i) An employee who has had at least 12 months continuous service with an employer immediately before commencing part-time employment after the birth or placement of a child has, at the expiration of the period of such part-time employment or the first period, if there is more than one, the right to return to his or her former position.

(b) Nothing in subparagraph (i) hereof shall prevent the employer from permitting the employee to return to his or her former position after a second or subsequent period of part-time employment.

Effect of part-time employment on continuous service

(d) Commencement on part-time work under this clause, and return from part-time work to full-time work under this clause, shall not break the continuity of service or employment.

Pro rata entitlements

(e) Subject to the provisions of this subclause and the matters agreed to in accordance with paragraph (h) hereof, part-time employment shall be in accordance with the provisions of this award which shall apply pro rata.

Transitional arrangements—annual leave

(f) (i) An employee working part-time under this subclause shall be paid for and take any leave accrued in respect of a period of full-time employment, in such periods and manner as specified in the annual leave provisions of this award, as if the employee were working full-time in the class of work the employee was performing as a full-time employee immediately before commencing part-time work under this subclause.

(ii) (1) A full-time employee shall be paid for any annual leave accrued in respect of a period of part-time employment under this subclause, in such periods and manner as specified in this award, as if the employee were working part-time in the class of work the employee was performing as a part-time employee immediately before resuming full-time work.

(2) Provided that, by agreement between the employer and the employee, the period over which the leave is taken may be shortened to the extent necessary for the employee to receive pay at the employee's current full-time rate.

Transitional arrangements—sick leave

(g) An employee working part-time under this subclause shall have sick leave entitlements which have accrued under this award (including any entitlement accrued in respect of previous full-time employment) converted into hours. When this entitlement is used, whether as a part-time employee or as a full-time employee, it shall be debited for the ordinary hours that the employee would have worked during the period of absence.

Part-time work agreement

(h) (i) Before commencing a period of part-time employment under this subclause the employee and the employer shall agree—

- (1) that the employee may work part-time;
- (2) upon the hours to be worked by the employee, the days upon which they will be worked and commencing times for the work;
- (3) upon the classification applying to the work to be performed; and
- (4) upon the period of part-time employment.

(ii) The terms of this agreement may be varied by consent.

(iii) The terms of this agreement or any variation to it shall be reduced to writing and retained by the employer. A copy of the agreement and any variation to it shall be provided to the employee by the employer.

(iv) The terms of this agreement shall apply to the part-time employment.

Termination of employment

(i) (i) The employment of a part-time employee under this clause, may be terminated in accordance with the provisions

of this award but may not be terminated by the employer because the employee has exercised or proposes to exercise any rights arising under this clause or has enjoyed or proposes to enjoy any benefits arising under this clause.

(ii) Any termination entitlement payable to an employee whose employment is terminated while working part-time under this clause, or while working full-time after transferring from part-time work under this clause, shall be calculated by reference to the full-time rate of pay at the time of termination and by regarding all service as a full-time employee as qualifying for a termination entitlement based on the period of full-time employment and all service as a part-time employee on a pro rata basis.

Extension of Hours of Work

(j) An employer may request, but not require, an employee working part-time under this clause to work outside or in excess of the employee's ordinary hours of duty provided or in accordance with paragraph (e).

Nature of part-time work

(k) The work to be performed part-time need not be the work performed by the employee in his or her former position but shall be work otherwise performed under this award.

Inconsistent award provisions

(l) An employee may work part-time under this clause notwithstanding any other provision of this award which limits or restricts the circumstances in which part-time employment may be worked or the terms upon which it may be worked including provisions—

- (i) limiting the number of employees who may work part-time;
- (ii) establishing quotas as to the ratio of part-time to full-time employees;
- (iii) prescribing a minimum or maximum number of hours a part-time employee may work; or
- (iv) requiring consultation with, consent of or monitoring by a union;

and such provisions do not apply to part-time work under this clause.

Replacement employees

(m) (i) A replacement employee is an employee specifically engaged as a result of an employee working part-time under this subclause.

(ii) A replacement employee may be employed part-time. Subject to this paragraph, paragraphs (e), (f), (g), (h), (i) and (l) of this subclause apply to the part-time employment of replacement employee.

(iii) Before an employer engages a replacement employee under this paragraph, the employer shall inform the person of the temporary nature of the employment and of the rights of the employee who is being replaced.

(iv) Unbroken service as a replacement employee shall be treated as continuous service for the purposes of subparagraph (a)(v) hereof.

(iv) Nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.

27.—REDUNDANCY

Transfer to lower paid duties

(a) Where an employee is transferred to lower paid duties due to the existing position being redundant the employee shall be entitled to the same period of notice of transfer as the employee would have been entitled to if their employment had been terminated, and the company may at its option, make a payment in lieu thereof of an amount equal to the difference between the former ordinary time rate of pay and the new lower ordinary time rate for the number of weeks of notice still owing.

Severance pay

(b) In addition to the period of notice prescribed for ordinary termination in subclause 28(a) of this agreement, and subject to further order of the Commission, an employee (other than a limited tenure or casual employee) whose employment

is terminated by way of redundancy shall be entitled to receive one and a half weeks wages (at the rate described in clause 20B) per completed year of service. Provided that the maximum severance payment payable shall be 40 weeks. An employee (other than a limited tenure or casual employee) with less than 6 years service shall receive a severance payment in accordance with the table below—

Period of continuous service	Severance pay
1 year or less	Nil
Over 1 year and up to the completion of 2 years	4 weeks
Over 2 years and up to the completion of 3 years	6 weeks
Over 3 years and up to the completion of 4 years	7 weeks
Over 4 years	8 weeks

“Weeks pay” means the ordinary time rate of pay for the employee concerned.

Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the company had proceeded to the employee's normal retirement date.

(c) “Weeks pay” means the ordinary time rate of pay for the employee concerned.

Employee leaving during notice

(d) An employee whose employment is terminated by way or redundancy may terminate their employment during the period of notice and, if so, shall be entitled to the same benefits and payments under this clause had the employee remained with the company until the expiry of such notice. Provided that in such circumstances the employee shall not be entitled to payment in lieu of notice.

Alternative employment

(e) The company in a particular redundancy case, may make application to the Commission to have the general severance pay prescriptions varied if the company obtains acceptable alternative employment for an employee.

Time-off during notice period

(f) (i) During the period of notice of termination given by the company as a result of a position becoming redundant an employee shall be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.

(ii) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the company, be required to produce proof of attendance at any interview or the employee shall not receive payment for the time absent.

For this purpose a statutory declaration will be sufficient.

Employees with less than one year's service

(g) This clause shall not apply to employees with less than one year's continuous service and the general obligation on company shall be no more than to give relevant employees an indication of the impending redundancy at the first reasonable opportunity, and to take such steps as may be reasonable to facilitate the obtaining by the employees of suitable alternative employment.

Employees exempted

(h) This clause shall not apply where employment is terminated as a consequence of conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, or in the case of casual employees, or employees engaged for a specific period of time or for a specified task or tasks, for a period of less than 12 months.

Incapacity to pay

(h) The company may in a particular redundancy case, make application to the Western Australian Industrial Relations Commission to have the general severance pay prescription varied on the basis of the company's incapacity to pay within eight weeks of the termination of the employee(s).

28.—TERMINATION OF EMPLOYMENT

Notice of termination by company

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

Period of continuous service	Period of notice
Less than 1 year	1 week
1 year and up to the completion of 3 years	2 weeks
3 years and up to the completion of 5 years	3 weeks
5 years and over	4 weeks

(ii) In addition to the notice in subclause (i) hereof, employees over 45 years of age at the time of the giving of the notice with not less than two years continuous service, shall be entitled to an additional weeks notice.

(iii) Payment in lieu of the notice prescribed in subclause (i) and/or (ii) hereof 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.

(iv) In calculating any payment in lieu of notice the wages an employee would have received in respect of the ordinary time he would have worked during the period of notice had his employment not been terminated shall be used.

(v) The period of notice in this clause shall not apply in the case of dismissal for conduct that justified instant dismissal, including malingering, inefficiency, dishonesty, misconduct, or neglect of duty, or for absence from work without reasonable cause, or in the case of casual employees or employees engaged for a specific period of time or for a specific task or tasks.

(vi) For the purpose of this clause, continuity of service shall be calculated in the manner prescribed by Clause 29 of this agreement.

Time-off work during the notice period

(b) Where the company has given notice of termination to an employee, the employee shall be allowed up to one days time off without loss of pay for the purpose of seeking other employment. Time off shall be taken at times that are convenient to the employee after consultation with the company.

Notice of termination by employees

(c) The notice of termination required to be given by an employee shall be the same as that required of the company, save and except that there shall be no additional notice based on the age of the employee concerned.

If an employee fails to give notice or complete the notice period the company shall have the right to withhold monies due to the employee with a maximum amount equal to the ordinary time rate of pay for the period of notice either required or not completed.

Where an employee has given or been given notice as aforesaid or payment made in lieu of the prescribed notice unless otherwise agreed between the company and the employee he shall continue in employment until the date of expiration of such notice. An employee having been given notice as aforesaid who absents himself from work during such period without reasonable cause (proof whereof shall be upon him) shall be deemed to have abandoned his employment and shall not be entitled to payment for work done within such period of notice.

Summary dismissal

(d) Notwithstanding the provisions of subclause (a)(i) hereof, the company shall have the right to dismiss any employee without notice for conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty and in such cases the wages shall be paid up to the time of dismissal only.

29.—CALCULATION OF LENGTH OF SERVICE

(a) In calculating the length of service for persons employed under this agreement, service shall be deemed to be continuous notwithstanding—

(i) Any interruption or termination of the employment by the company if such interruption or termination has been made merely with the intention of avoiding obligations in this Agreement.

(ii) Any absence from work on account of sickness or accident (subject to subclause (b) of this clause) or military service.

(iii) Any absence due to reasonable cause (other than as set out in subparagraphs (i) and (ii) hereof) proof whereof shall be upon the employee.

(b) For the purpose of this clause in calculating the period of twelve months continuous service, absence on account of sickness or accident shall be deemed to be part of the period of continuous service—

(i) Where the employee is not entitled to any sick leave accumulated under this agreement, to the extent of 76 hours in any twelve months.

(ii) Where the employee is entitled to sick leave accumulated under this agreement, to the extent of 76 hours or to the extent of the accumulated entitlement whichever is the greater.

(c) For the purpose of this clause a month shall be reckoned as commencing with the beginning of the first day of the employment or period of employment in question and as ending at the beginning of the day which in the following month has the same date number as that which the commencing day had in its month, and if there be no such day in such following month it shall be reckoned as ending at the end of such following month.

30.—FAMILY LEAVE

Use of Sick Leave

(a) An employee with responsibilities in relation to either members of their immediate family or members of their household who need their care and support shall be entitled to use, in accordance with this subclause, any sick leave entitlement which accrues after the date of this order for absences to provide care and support for such persons when they are ill.

(b) The employee shall, if required, establish by production of a medical certificate or statutory declaration, the illness of the person concerned.

(c) The entitlement to use sick leave in accordance with this subclause is subject to—

(i) the employee being responsible for the care of the person concerned; and

(ii) the person concerned being either—

(1) a member of the employee's immediate family; or

(2) a member of the employee's household.

(iii) the term "immediate family" includes—

(1) a spouse (including a former spouse, a de facto spouse and a former de facto spouse) of the employee. A de facto spouse, in relation to a person, means a person of the opposite sex to the first mentioned person who lives with the first mentioned person as the husband or wife of that person on a bona fide domestic basis although not legally married to that person; and

(2) a child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee or spouse of the employee.

(d) The employee shall, wherever practicable, give the company notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee shall notify the company by telephone of such absence at the first opportunity on the day of absence.

Unpaid Leave for Family Purpose

(e) An employee may elect, with the consent of the company, to take unpaid leave for the purpose of providing care to a family member who is ill.

Make-up Time

(f) (i) An employee may elect, with the consent of their company, to work 'make-up time', under which the employee takes time off ordinary hours, and works those hours at a later time,

during the spread of ordinary hours provided in the Agreement.

(ii) On each occasion that the employee elects to use this provision the resulting agreement shall be recorded in the time and wages records or personnel file or forms appropriate to the enterprise at the time when the agreement is made.

Grievance Process

(g) In the event of any dispute arising in connection with any part of this Clause, such dispute shall be processed in accordance with the Dispute Settling provision of this Agreement.

31.—RIGHT OF ENTRY

(a) Consistent with the terms of the *Labor Relations Legislation Amendment Act 1997* and S.23(3)(c)(iii) of the *Industrial Relations Act 1979* a representative of the Union shall not exercise the rights under this clause with respect to entering any part of the premises of the employer unless the employer is the employer, or former employer of a member of the Union.

(b) A Union official visiting the employer's premises for the purpose of dealing with an industrial matter involving a member of the union, will—

- (i) Upon arrival at the store, notify the Store Manager, or Duty Manager, if available, of the general intent and estimated length of the visit, prior to any discussion with employees;
- (ii) minimise their time and interaction with employees in customer contact areas of the store;
- (iii) discuss issues in detail with employees in non-service areas of the store;
- (iv) ensure there is no disruption to the general operation of the store;
- (v) prior to departure, notify the Store Manager of any concerns or issues with the intent of seeking a satisfactory solution including utilisation of the specified grievance procedure wherever appropriate;

provided that the employer shall provide reasonable access to employees who are members of the Union.

(c) If the Union requires group meetings with staff who are members of the union, an official will give at least 48 hours notice to the employer. The meeting will be arranged at a mutually convenient time to both staff and the employer.

32.—AMENITIES

The company will ensure that such amenities are provided for use by employees so as to meet its obligations under the relevant Occupational Health and Safety Legislation.

33.—POSTING OF AGREEMENT

(a) In each establishment, a copy of this Agreement, if supplied by the Union, shall be exhibited by the employer on the business premises in such a place where it may be conveniently and readily seen by each employee employed.

(b) The Secretary of the union, or any other duly accredited representative of the union, shall be permitted to post notices relating to union business in a place where it may be conveniently and readily seen by each employee employed. Provided that nothing in this subclause shall empower a duly accredited official of the union to enter any part of the premises of the employer, pursuant to this subclause, unless the employer is the employer or former employer of a member of the Union.

34.—SUPERANNUATION

(a) The employer shall provide such superannuation benefits as is necessary to meet the requirements of the Superannuation Guarantee Legislation.

(b) The employer shall provide the required superannuation benefit to a fund of the employee's choice which must be either the Labour Union Co-Operative Retirement Fund and/or the Australian Wool Selling Brokers Superannuation Fund.

(c) The definition of "ordinary time earnings" for the purpose of calculating an employees notional earnings base shall mean the wages received for the performance of the ordinary hours of work but shall not include any payment arising from the operation of a productivity reward scheme.

(c) The wages rates described in clause 20B of this agreement may be reduced (with the consent of the employee concerned) where the amount by which the weekly wage is reduced is contributed by the employer to the Superannuation Fund nominated by the employee in subclause (b) of this clause.

Compliance, Nomination and Transition

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;
- (g) Provided that on and from 30 June 1998, and until an employee thereafter nominates a complying superannuation fund or scheme, the employer shall make contributions to a fund nominated in accordance with this clause.

Signed For and on behalf of The Shop
SIGNATURE Distributive and Allied Employees'
Association of Western Australia

Mark Bishop
NAME

26/05/00
DATE

Signed For and on behalf of The Shop
SIGNATURE Distributive and Allied Employees'
Association of Western Australia

Joseph Bullock
NAME

23/05/00
DATE

Signed For and on behalf of Wooldumpers
SIGNATURE Aust. Pty Ltd

John Ward
NAME

16/05/00
DATE

**BHP BUILDING PRODUCTS MYAREE
ENTERPRISE AGREEMENT 2000/2001.**

No. AG140 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

BHP Steel (JLA) Pty Ltd Site,
T/A BHP Building Products Myaree.

No. AG140 of 2000.

COMMISSIONER J.F. GREGOR.

3 July 2000.

BHP BUILDING PRODUCTS MYAREE ENTERPRISE
AGREEMENT 2000/2001.

Order.

HAVING heard Mr J. Fiala for the applicant and Mr T Stockley for the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the agreement between the parties lodged in the Commission on 22 May 2000 entitled BHP Building Products Myaree Enterprise Agreement be registered in terms of the following schedule as an Industrial Agreement and replaces Industrial Agreement AG129 of 1999 which is hereby cancelled.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

BHP BUILDING PRODUCTS MYAREE ENTERPRISE
AGREEMENT 2000/2001

1.—TITLE

This Enterprise Agreement will be referred to as the BHP Building Products Myaree Enterprise Agreement 2000/2001

2.—ARRANGEMENT

- 1 Title
- 2 Arrangement
- 3 Application Of Enterprise Agreement
- 4 Parties To This Agreement
- 5 Date And Period Of Operation
- 6 Relationship To Parent Award
- 7 Challenges Facing The Industry
- 8 Principles Underpinning This Agreement
- 9 Wage Increase
- 10 Implementation Of The Steel Strategic Plan.
- 11 Relationship Between The Parties
- 12 Sick Leave.
- 13 Long Service Leave
- 14 Vision For Myaree
- 15 Performance Related Payment Scheme
- 16 Workers Compensation Provision
- 17 Union Delegate Training
- 18 Contractors
- 19 No Extra Claims
- 20 Discussions Regarding A Replacement Agreement
- 21 Procedure For Resolving Claims, Issues And Disputes
- 22 Superannuation and Salary Sacrifice of Contributions
- 23 Cooperative Relationships with Union Representatives
- 24 Signatories
Attachment 1—Site Specific Business Improvement Measures
Attachment 2—Wages Schedule as at 01/04/00 & 01/04/01

3.—APPLICATION OF ENTERPRISE AGREEMENT

This agreement will apply to the BHP Steel (JLA) Pty Ltd site trading as BHP Building Products at Myaree which is covered by the John Lysaght (Australia) Ltd Award (No 27 of 1967).

This agreement supersedes the operation of Agreement AG 129 OF 1999 which is canceled by registration of this agreement.

This Agreement covers approximately 22 Employees.

4.—PARTIES TO THIS AGREEMENT

The parties to this agreement are—

- (a) BHP Steel (JLA) Pty Ltd trading as BHP Building Products at Myaree;
- (b) Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electrical Division, WA Branch and its members;
- (c) All employees of BHP Building Products Myaree, whether members of the organisation specified above or not, engaged in any of the classifications contained in the John Lysaght (Australia) Limited Award (No 27 of 1967).

5.—DATE AND PERIOD OF OPERATION

This agreement will operate from 1st January 2000 and the term will expire 31st August 2001.

6.—RELATIONSHIP TO PARENT AWARD

This agreement is to be read and interpreted in conjunction with the John Lysaght (Australia) Limited Award (No 27 of 1967) and shall prevail to the extent of any inconsistency with that Award.

7.—CHALLENGES FACING THE INDUSTRY

7.1 The rapid globalisation of world steel markets, increased imports, world-wide over capacity and the Asian crisis have combined to challenge the medium and long term viability of BHP Steel's businesses. Price decreases have waned, but we face real price decline over the long term.

7.2 In October 1999 under the Steel Strategy Plan, BHP announced its intention to focus its steel operations on the manufacture and distribution of flat and coated products in the Australasian region, in order for the industry to deliver returns which exceed the cost of capital. As a consequence, this will see the divestment of Long Products, Packaging Products and our USA based businesses.

The divested businesses will have greater opportunity to prosper under a new owner which regards them as core assets.

7.3 Our collective focus over the term of this agreement will be to—

- Ensure all Steel businesses operate safely and efficiently.
- Maximise the value of the divested businesses through ongoing business improvement and sound industrial relations.
- Build a high performance, world's best BHP Steel business which effects change and improvement swiftly.
- Treating people fairly and ensure every employee accepts responsibility for business outcomes.

8.—PRINCIPLES UNDERPINNING THIS AGREEMENT

The principles which guided the parties in finalising the Agreement are—

- 8.1 Continuing to do whatever is safe, logical and legal to achieve operational and organisational excellence in our workplaces.
- 8.2 Maintaining competitive wages and conditions.
- 8.3 Minimising cost imposts on the business and readily support the implementation of cost and waste reduction initiatives.
- 8.4 Facilitating a smooth transition to divestment.
- 8.5 Eliminating the unnecessary impact of industrial action being borne by the business and employees.
- 8.6 Creating modern remuneration systems more closely aligned to the needs of the business and employees.

9.—WAGE INCREASE

The following increases will apply to the total weekly wage (ie. award wage, leading hand allowances and bonus or equivalent) and dollar amount shift work allowances—

- 4% from first pay period commencing in April 2000.
- A further 3% from first pay period commencing in April 2001.

10.—IMPLEMENTATION OF THE STEEL STRATEGIC PLAN.

10.1 The successful implementation of the Steel Strategic Plan is critical for BHP, BHP Steel and all employees. It will present significant challenges and require everyone working together to present the businesses in the most positive way to prospective owners. Business and safety performance must continue to be improved and the future owners must be confident to invest in these businesses.

10.2 The parties are committed to working cooperatively to ensure a period of stable industrial relations during the divestment process

11.—RELATIONSHIP BETWEEN THE PARTIES

11.1 Whilst relationships have improved over the past 15 years, industrial disputation continues to impact negatively on some parts of the business and employees.

11.2 The parties recognise that to be “world’s best” effective processes need to exist to eliminate the need for time lost through industrial action and are determined to eliminate lost time from the industry.

11.3 To this end, unless otherwise agreed unnecessary, agreement will be reached by July 2000 on revised dispute settlement procedures which ensure—

- fair, reasonable and timely outcomes.
- the parties take primary responsibility for their industrial relationships.
- proper recognition of individual grievances.
- proper consideration of the merits of issues in dispute. This may involve embracing concepts such as cooling off periods, mediation, arbitration, etc..
- resolution of matters as far as practical within the workplace in which they arise.
- the needs of the business are taken into account.
- genuine commitment of all concerned to the agreed processes and procedures.

Endorsement by all employees and union officials and a formal education programme to implement the agreed procedures will be an integral outcome of these discussions.

11.4 In the interim the existing dispute settlement procedures in this agreement will be observed

12.—SICK LEAVE

12.1 The parties to this and past agreements have supported the implementation of discretionary sick leave as part of a package of workplace reforms.

Discretionary sick leave when introduced provides a form of income protection in circumstances of journey and personal accident and illness.

12.2 The effective implementation of these arrangements including discretionary sick leave require at site level ownership and commitment. However, it is essential that discretionary sick leave arrangements include consideration for such things as—

- immediate notification of inability to attend work by the employee.
- effective and accurate attendance recording system.
- assist supervision to conduct attendance improvement interviews appropriately and to recognise good attendance.
- a clear and transparent procedure for managing employees with absentee problems.
- an effective review mechanism for extended sick leave periods (eg. up to and beyond two months) involving union representatives as appropriate.
- an effective appeals mechanism to allow questions of disputed managerial discretion to be, as

necessary, ultimately considered by officers other than those involved in the decision at first instance.

13.—LONG SERVICE LEAVE

13.1 The unions have advanced a claim for improved Long Service Leave (LSL) entitlements within the industry. BHP has raised concerns about the ability of the industry to sustain additional labour on-costs beyond those mandated by legislation.

13.2 Notwithstanding clause 19 of this agreement, leave is reserved to the unions to re-advance during the life of the agreement the matter of the rate of long service leave accrual.

13.3 State Long Service Leave provisions apply in each centre and these will continue. A pro rata payment for long service leave on termination of employment will be made in the following circumstances—

- * at least 5 years of continuous service as an adult termination of employment by the Company for any reason other than summary dismissal; or termination of employment by the employee for reasons of pressing or domestic necessity.

The amount of pro rata long service leave payable on termination will be calculated using accrual rates set out in local long service leave legislation.

14.—VISION FOR MYAREE

To have a high performance work culture and to be the Preferred supplier of Australian Made Steel Building Products through—

- * Continuous improvement,
- * Meeting customer requirements,
- * Achieving Company’s financial targets, and
- * Improving employees wealth, leisure and security.

15.—PERFORMANCE RELATED PAYMENT SCHEME

A Performance Related Payment Scheme will be used to promote business improvement in key areas.

A maximum of 6.5% of gross earnings will be payable each period. For the purposes of determining the performance related payment, gross earnings will include award and overaward payments, overtime and shift allowance earnings plus payments for paid leave. Payments not included in gross earnings are payments for periods of absence on workers’ compensation where the absence has been for more than 12 months and performance related payments relating to a previous period which may have been paid during this period.

A reasonably achievable target should be set to deliver 5.5% of gross earnings, however actual payments may range from 0% to 6.5%, dependent on the achievement of set targets.

Monthly performance figures are to be made available to the Myaree employees by the 3rd working day of each month.

Casuals, and new employees with less than 1 months service will not be paid PRPS. Contractors do not qualify for PRPS.

During The Term of this Agreement parties will Review productivity and Lump sum Payment Schemes. There is no assumption as to the acceptance of the outcome of this review.

16.—WORKERS COMPENSATION PROVISION

16.1 Employees who are eligible for Workers’ Compensation will be entitled to up to a maximum of 52 weeks Accident Pay within 104 weeks of the first day of work due to incapacity.

16.2 Accident Pay is the amount of weekly payment necessary to bring the weekly gross payment of injured employees up to their normal rate of pay (i.e. not including overtime, penalty rates and other allowances). Accident Pay is payable to injured employees either experiencing total incapacity or partial incapacity deemed total because the Company is unable to offer appropriate work.

16.3 Payment of Accident Pay is conditional upon the employee being willing to participate in appropriate rehabilitation.

If a Workers’ Compensation claim is finalised in this 104 week period, Accident Pay will cease.

16.4 If compensation rates are changed subsequent to the commencement of Accident Pay payments, the level of

Accident Pay payments will not increase in comparison to the original level. The normal rate of pay will be maintained.

This arrangement will apply to eligible injured employees absent from work as from the effective date of this agreement.

Accident Pay will not be paid—

- for periods of incapacity during the first two weeks of employment with the Company.
- for any periods of incapacity caused by an injury which occurred prior to the date of commencement of this agreement.
- for periods of incapacity caused by an injury which is substantially an exacerbation or deterioration of an injury which occurred prior to the employee's employment with the Company.
- for any period of annual or long service leave or public holidays.
- for any periods of incapacity, unless the Company is notified as soon as practical and a claim is made on the appropriate forms within 30 (thirty) days of the injury or as soon as practicable in the case of serious injuries (for example requiring hospitalisation).
- for any periods of incapacity unless the employee furnishes evidence reasonably required by the Company.
- for any periods of incapacity, unless the employee submits him/herself to reasonable and appropriate medical examinations, provided and paid for by the Company.
- after the death of the employee involved and no payment of Accident Pay will be paid to any other person with respect to that particular employee.

17.—UNION DELEGATE TRAINING

The Company will co-operate with Unions to facilitate release and pay ordinary wages to delegates attending agreed courses where—

- (a) there is prior consultation with the Company about course content and the ability to release particular employees from the job.
- (b) the course is aimed at improving industrial relations and deals with relevant matters in a positive and responsible manner. Relevant matters may include workers' compensation, occupational health and safety and legislative change affecting employment at the centre.
- (c) there is, where appropriate, an opportunity for Company participation in or contribution to the course.

18.—CONTRACTORS

BHP Building Products operates a seasonal business which is subject to significant variations in production demand. The Company reserves the right to utilise contractors where it is of benefit to the business to do so—the shop steward will be advised when contractors will be used and to the estimated period of engagement.

The use of contractors would include meeting fluctuating production demands, covering periods of annual leave, long service leave and sick leave and where projected demand is unclear or uncertain.

19.—NO EXTRA CLAIMS

19.1 The unions undertake for the duration of this agreement not to raise any further claims, award or overaward, including claims arising from National or State wage cases.

19.2 There will be agreed scope to arbitrate, if necessary, unresolved issues about classification restructuring or work value claims.

20.—DISCUSSIONS REGARDING A REPLACEMENT AGREEMENT

20.1 Discussions regarding a replacement agreement may commence in July 2001.

20.2 It is recognised that the new owners of the business to be divested may seek to have separate discussions for a replacement agreement.

20.3 This agreement is made in the expectation that the combination of wage increases flowing from this agreement and planned personal income tax cuts will offset anticipated inflation over the period (including the one time inflationary impact of GST). If during the period of this agreement the annual inflationary level of GST has a significant detrimental and unanticipated impact on employees, the Unions may seek discussions for a renewal Agreement earlier than July 2001.

21.—PROCEDURE FOR RESOLVING CLAIMS, ISSUES AND DISPUTES

This procedure aims to promote the resolution of disputes by measures based on consultation, co-operation and discussion, and to avoid interruption to the performance of work and the consequential loss of production and wages.

In the event of a dispute, question, difficulty arising out of this agreement, covering one or more employee(s) the following will apply

21.1 The matter is to be discussed between the employee concerned and the immediate supervisor. The employee will be offered the attendance of the delegate. If unresolved,

21.2 The delegate and the employee are to discuss the matter with the immediate supervisor. If unresolved,

21.3 They are to raise the matter with the Site Manager. If unresolved,

21.4 Site Manager to arrange for the matter to be discussed with the union organiser, involving Human Resources assistance as required.

21.5 If still unresolved, and the parties wish to pursue it further, the matter will be referred to the Western Australian Industrial Relations Commission. In order to allow for the peaceful resolution of grievances, the parties shall be committed to avoiding stoppages of work.

It is acknowledged that genuine attempts must be made to resolve the matter/s prior to referring to the WA Industrial Relations Commission.

22.—SUPERANNUATION AND SALARY SACRIFICE OF CONTRIBUTIONS

Employees can make superannuation contributions before their income tax is calculated, thereby reducing their taxable income and increasing their take home pay.

23.—COOPERATIVE RELATIONSHIPS WITH UNION REPRESENTATIVES

The mutual cooperation between the Company, employees and their unions has been constructive and collective arrangements have delivered benefits to employees and the Company. The Company undertakes to maintain and extend the sound consultative arrangements which are currently in place. Constructive relationships will be continued and this includes recognising accredited delegates and allowing union organisers rights of entry in accordance with currently established site practices.

24.—SIGNATORIES

CEPU

J D FIALA

Common Seal over name

Date: 22/5/00

The Company:

.....

Signature

Company Seal

Date: 22/5/00

Mr T Stockley

Print Name

ATTACHMENT 1—SITE-SPECIFIC BUSINESS IMPROVEMENT MEASURES

The following improvements and changes to work practices have been agreed at BHP Building Products Myaree.

1. In an effort to meet fluctuating demand and delivery performance requirements, the following shift patterns will apply.

Dayshift	6.45am to 3.20pm	Mon, Tues, Wed, Thurs
	6.00am to 1.00pm	Friday
Afternoon Shift	3.20pm to 11.35pm	Mon, Tues, Wed, Thurs
	1.00pm to 8.00pm	Friday

A 20 minute meal break on Friday, (day and afternoon shifts) will be granted and paid without any deduction to working

hours. Therefore, this shift structure allows for a 40 hour week so that RDO's will continue to be accumulated at a rate of 2 hours per week. The afternoon shift currently consists of 4 people. This may be increased if the needs of the business alter.

The Stores department of the business will continue to operate shift patterns of 7.00am to 3.20pm Monday to Friday.

2. In exchange for this shift pattern, including Friday afternoons, employees will be entitled to the accrual of up to 7 Roster Day Offs (RDO's) per annum. These may be used over normal Christmas close down or when the employee requires, provided that this is suitable for the business. No more than 10 RDO's may be accrued at any one time. In a situation where more than 10 RDO's are accrued, the company will insist that any outstanding, over and above the 7 RDO's allowed, be used as soon as possible.

3. Both parties acknowledge that payment increases will be linked to employees consistently demonstrating and applying the skills to which they have gained accreditation. The company has the right to place an employee on any job for which he/she is trained and capable.

4. To comply with all site Safety Policies and Procedures as agreed by the Occupational Health and Safety Committee.

5. Be active in all improvement team activities where required.

6. Work with the company on the reduction of errors.

7. Work with the Company on the reduction of scrap.

8. Be active in Safety Audits as and when required.

9. Develop Defined Agreed Crew Standards for all areas of the Operations.

SCHEDULE 2

MYAREE—31-Mar-00

THE JOHN LYSAGHT (AUSTRALIA) LTD AWARD CLASSIFICATIONS ADJUSTMENTS TO RATES OF PAY MADE UNDER THE BHP BUILDING PRODUCTS—MYAREE PRPS AGREEMENT 2000/2001

ADJUSTMENTS—effective first full pay period in—

Apr-00 4%

Classification	Pay Class No	Base	Supp Pay	Award	Overaward	Tool Allow.	Total	Hourly
Probationary	1301	431.2	24.3	455.5	25.2	0	480.7	12.64968
LEVEL 1	1302	447.7	26.8	474.4	25.5	0	499.9	13.156
LEVEL 2	1303	473.9	31.5	506.4	25.8	0	532.2	14.00442
LEVEL 3	1304	486.1	40.2	526.3	26.3	0	552.6	14.54113
LEVEL 4	1305	499.4	47.3	546.7	26.2	0	572.9	15.07726
LEVEL 5	1306	514.3	50.2	564.5	26.3	0	590.8	15.548
Leading Hand Allowance								
3- 10 employees		23.4						
11- 20 employees		34.8						
20+ employees		44.0						
Shift Allowance								
Afternoon Shift		80.1						
Night Shift		160.1						

SCHEDULE 2

MYAREE—31-Mar-00

THE JOHN LYSAGHT (AUSTRALIA) LTD AWARD CLASSIFICATIONS ADJUSTMENTS TO RATES OF PAY MADE UNDER THE BHP BUILDING PRODUCTS—MYAREE PRPS AGREEMENT 2000/2001

ADJUSTMENTS—effective first full pay period in—

Apr-01 3%

Classification	Pay Class No	Base	Supp Pay	Award	Overaward	Tool Allow.	Total	Hourly
Probationary	1301	444.1	25.0	469.1	26.0	0	495.1	13.02917
LEVEL 1	1302	461.1	27.6	488.7	26.2	0	514.9	13.55068
LEVEL 2	1303	488.1	32.5	521.5	26.6	0	548.1	14.42455
LEVEL 3	1304	500.7	41.4	542.1	26.5	0	586.6	14.96297
LEVEL 4	1305	514.4	48.8	563.1	27.0	0	590.1	15.52958
LEVEL 5	1306	529.7	51.7	581.5	27.0	0	608.5	16.01444
Tool Allowance		10.2						
Leading Hand Allowance								
3- 10 employees		24.1						
11- 20 employees		35.9						
20+ employees		45.3						
Shift Allowance								
Afternoon Shift		82.5						
Night Shift		164.9						

**BHP WESTERN AUSTRALIAN SERVICE
CENTRE ENTERPRISE BARGAINING
AGREEMENT 2000/2001.
No. AG 136 of 2000.**

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

BHP Steel (JLA) Pty Ltd t/as BHP Coated Steel
and

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

AG 136 of 2000.

BHP Western Australian Service Centre
Enterprise Bargaining Agreement 2000/2001.

COMMISSIONER S J KENNER.

23 June 2000.

Order.

HAVING heard Mr P Robertson on behalf of the applicant
and Mr J Fiala on behalf of the respondent and by consent the
Commission, pursuant to the powers conferred on it under
the Industrial Relations Act, 1979, hereby orders—

- (1) THAT the BHP Western Australian Service Centre Enterprise Bargaining Agreement 2000/2001 as filed in the Commission on 11 May 2000 in the terms of the following schedule be and is hereby registered as an industrial agreement.
- (2) THAT the BHP Western Australian Service Centre Enterprise Bargaining Agreement No. AG 121 of 1999 be and is hereby cancelled.

(Sgd.) S. J. KENNER,

[L.S.] Commissioner.

ENTERPRISE BARGAINING AGREEMENT

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1.—AGREEMENT

This agreement shall be referred to as the BHP Western Australian Service Centre Enterprise Bargaining Agreement 2000/2001.

2.—ARRANGEMENT

1. Agreement
2. Arrangement
3. Application of the Agreement
4. Parties Bound
5. Date and Period of Operation
6. Relationship to the Parent Award
7. Purpose of the Agreement
8. Dispute Resolution
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3.—APPLICATION OF THE AGREEMENT

(1) This agreement will apply at the BHP Steel (JLA) Pty Ltd, Coated Steel Australia, establishment located at Myaree in respect of employees bound by the terms of the John Lysaght (Australia) Limited Award in Western Australia.

(2) This agreement supersedes the operation of Agreement AG 121 of 1999 which is cancelled by the registration of this Agreement.

4.—PARTIES BOUND

- (1) The parties to this Agreement are—
 - (a) BHP Steel (JLA) Pty Ltd carrying on business as BHP Steel, Coated Steel Australia; and
 - (b) Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch; and
 - (c) This agreement covers approximately 21 employees.

(2) The parties accept they are bound by the terms of this Agreement for its period of operation and will oppose any application by other parties to be joined to this Agreement.

(3) The parties to this Agreement will comply with its terms, notwithstanding the provisions of any Award, Order or Industrial Agreement by which they are covered.

5.—DATE AND PERIOD OF OPERATION

This Agreement will operate from the beginning of the first pay period to commence on or after 1 January 2000. It will remain in force until 31 August 2001.

6.—RELATIONSHIP TO PARENT AWARD

(1) This Agreement is to be read and interpreted in conjunction with the John Lysaght (Australia) Limited Award (No 27 of 1967) (“the Award”).

(2) This Agreement and the Myaree Wages Compact attached herein shall prevail over the Award to the extent of any inconsistency.

7.—PURPOSE OF THE AGREEMENT

The purpose of this Agreement is to promote a site team approach to confront the challenges facing the Steel Industry and recognise employees for their involvement in this process.

Accordingly, this Agreement provides for—

- The revised Wages Compact Agreement (Ref WA-WP-HR06 which is attached)
- The revised Performance Related Payments Scheme (Refer WA-WP-HR05 which is attached)

8.—ELIMINATING INDUSTRIAL DISPUTATION

The parties recognise that to be “worlds best”, effective processes need to exist to eliminate the need for time lost through industrial action and are determined to eliminate lost time from the industry.

To this end the dispute settlement procedure will ensure—

- fair, reasonable and timely outcomes
- the parties take primary responsibility for their industrial relationships
- proper recognition of individual grievances
- proper consideration of the merits of issues in dispute. This may involve embracing concepts such as cooling off periods, mediation, arbitration, etc.
- resolution of matters as far as practical within the workplace in which they arise
- the needs of the business are taken into account
- genuine commitment of all concerned to the agreed processes and procedures.

In the event of a question, dispute or difficulty arising out of this agreement that may affect one or more employees, the following procedure shall apply—

- (1) The matter is to be discussed between the employee(s) concerned and the immediate supervisor. The employee(s) may invite a delegate to attend. If unresolved
- (2) The delegate and the employee(s) are to discuss the matter with the immediate supervisor. If unresolved
- (3) They are to raise the matter with the site manager. If unresolved

- (4) Manager to arrange for the matter to be discussed between union organiser and the industrial relations department.

If unresolved

- (5) If still unresolved and the employee(s) wish to pursue it further, the matter will be referred to the Western Australian Industrial Relations Commission. Prior to referral to the WAIRC genuine attempts must be made to resolve the dispute. In order to allow for the peaceful resolution of grievances, the parties are committed to eliminate stoppages of work.

9.—NO EXTRA CLAIMS

- The Union undertakes for the duration of this Agreement not to raise any extra claims award or overaward including claims arising from national or state wage cases.
- There will be agreed scope to arbitrate, if necessary, unresolved issues about classification restructuring or work value claims.

10.—DISCUSSION REGARDING A REPLACEMENT AGREEMENT

- Discussions regarding a replacement agreement may commence in July 2001.
- This Agreement is made in the expectation that the combination of wage increases flowing from this Agreement and planned personal income tax cuts will offset anticipated inflation over the period (including the one time inflationary impact of the GST). If during the period of this Agreement the annual inflationary level of GST has a significant detrimental and unanticipated impact on employees, the Union may seek discussions for a renewal Agreement earlier than July 2001.

APPENDIX 11.1—AGREEMENT RATIFICATION

The Western Australian Service Centre Enterprise Bargaining Agreement is comprised of the following parts:

Document	Reference No.
1. Enterprise Bargaining Agreement	WA.QP.HR.07 REV C
2. Wages Compact Agreement	WA.QP.HR.06 REV C
3. Performance Related Payment System	WA.QP.HR.05 REV C

The undersigned parties have agreed to the terms of this agreement on

Name:	Position:	Signature:	Date:
Neil Ribbens	Service Centre Manager	N. Ribbens	20/4/00

Name:	Position:	Signature:	Date:
George Freeman	Shop Steward	G. Freeman	20/4/00

Name:	Position:	Signature:	Date:
Joe Daniel Fiala	Metal Trades Organiser CEPU	J. D. Fiala	20/4/00

Name:	Position:	Signature:	Date:
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WAGES COMPACT AGREEMENT

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1 INDUSTRY CHALLENGES

- The rapid globalisation of world steel markets, increased imports, world-wide over capacity and the Asian crisis have combined to challenge the medium and long term viability of BHP Steel's businesses. Price decreases have waned, but we face real price decline over the long term.
- In October 1999 under the Steel Strategy Plan, BHP announced its intention to focus its steel operations on the manufacture and distribution of flat and coated products in the Australasian region, in order for the industry to deliver returns which exceed the cost of capital. As a consequence, this will see the divestment of Long Products, Packaging Products and our USA based businesses. The divested businesses will have greater opportunity to prosper under a new owner which regards them as core assets.
- Our collective focus over the term of this agreement will be to—
 - Ensure all Steel businesses operate safely and efficiently.
 - Maximise the value of the divested businesses through ongoing business improvement and sound industrial relations.
 - Build a high performance, world's best BHP Steel business which effects change and improvement swiftly.
 - Treating people fairly and ensure every employee accepts responsibility for business outcomes.
- There is an urgent need to achieve levels of financial returns that will ensure ongoing investment This agreement reflects the mutual commitment of management, employees and unions to secure a viable Australasian steel businesses by pursuing every cost and waste reduction initiative in all parts of our businesses.

2 AGREEMENT PRINCIPLES

The principles which guided the parties in finalising the Agreement are—

- continuing to do whatever is safe, logical and legal to achieve operational and organisational excellence in our workplaces
- maintaining competitive wages and conditions
- minimising cost imposts on the business and readily support the implementation of cost and waste reduction initiatives.
- facilitating a smooth transition to divestment.
- eliminating the unnecessary impact of industrial action being borne by the business and employees
- creating modern remuneration systems more closely aligned to the needs of the business and employees

3 WAGE INCREASES

3.1 Weekly Wages

The following increases will apply to the total weekly wage (ie Award wage, leading hand/ supervisory allowances and bonus or equivalent) and dollar amount shift allowances

- **4%** from the first pay period commencing in April 2000
- further **3%** from the first pay period commencing in April 2001

3.2 Allowances

The following allowance will be increased to the amount shown below, commencing in April 2000—

- Tool allowance \$10.20 per week

3.3 New arrangements to give extra take home pay were introduced from early 1999. They enable employees to transfer their superannuation contributions to their "before tax" wage rate and thereby increase their take home pay. These are shown in attachment 1.

3.4 Wage Schedules

3.4.1 The 4% increase commencing in April 2000 will update the wage schedule accordingly

Classification	Award	Overaward	Total
Probation	\$480.20	\$1.2	\$481.40
Level 1	\$499.30	\$17.80	\$517.10
Level 2	\$531.30	\$21.90	\$553.20
Level 3	\$551.40	\$37.90	\$589.30
Level 4	\$571.90	\$47.00	\$618.90
Level 5	\$589.90	\$81.60	\$671.50

3.4.2 The 3% increase commencing in April 2001 will further update the wage schedule accordingly

Classification	Award	Overaward	Total
Probation	\$494.60	\$1.20	\$495.80
Level 1	\$514.30	\$18.30	\$532.60
Level 2	\$547.20	\$22.60	\$569.80
Level 3	\$567.90	\$39.10	\$607.00
Level 4	\$589.10	\$48.40	\$637.50
Level 5	\$607.60	\$84.00	\$691.60

4 DEVELOPING MODERN REMUNERATION STRUCTURES

- Existing Lump Sum Payment Schemes generally in place across the industry have enjoyed mixed success. Questions have been raised as to whether these schemes accurately reflect the true financial performance and improvement priorities of the businesses.
- During the term of this agreement, a joint review will take place to explore options for revised short term variable payments which meet the following objectives—
 - reinforcing everyone's commitment to key business objectives;
 - allowing employees to share in business success;
 - minimising the levels of fixed labour costs;
 - funded from genuine and sustainable business improvement.
- It is recognised that whilst common principles for the design of short term variable payments across the industry may be appropriate, such arrangements need to be developed within each of the businesses.
- There is no assumption as to acceptance of the outcome of this review.

5 REVIEW WORK ARRANGEMENTS

5.1 Safety—The common goal is a workplace in which no one gets injured. The key initiative in pursuing this must focus on the actions of people. Accordingly the following safety beliefs will guide behaviour of all at Myaree:

- Working safely is a condition of employment
- Employee involvement is essential
- Management is accountable for safety
- All injuries can be prevented
- Training employees to work safely is essential
- All operating exposures can be safeguarded.

All employees will be actively involved in the site safety audit teams which will be responsible for the following on going improvements in their natural work teams.

- Building improvements to safety procedures.
- Implementing corrective actions resulting from audits, near misses, incident reports in their work team area.
- Responsible for coaching employees to comply with the agreed personal protective equipment policy for the site.

5.2 Business improvement

In order to improve workplace arrangements and to improve business performance, all parties agree to pursue achievement and maintenance of

- an injury free workplace
- manufacturing excellence
- excellent customer service

All parties accept this will be done by focussing on "The Five Zeroes" and cost reduction in the Coated Steel Australia Business Plan.

5.3 RDO Roster

The site RDO concept will continue to apply with the attached calendar dates agreed to by the parties.

5.4 Higher Duties Payment

5.4.1 Purpose

This procedure defines the criteria for payment of the Myaree Site "Higher Duties Allowance"

5.4.2 Scope

This procedure applies to all personnel who operate at the Myaree site. The allowance will be paid to the following persons who assume the responsibilities of Section 5.4.3—

- One person per operating shift on MSL1
- One person per operating shift on MSL2
- One person per operating shift on MSH1

5.4.3 Actions

- Site Security
 - Locking all roller doors and the boundary gates.
 - Shutting down the line equipment.
 - Shutting off the factory lights and the air compressor.
- Coordinate Production Flow
 - Being proactive to communicate the schedule order changes to all relevant persons.
 - Ensuring shift communication between the operating crews.
 - Ensuring job requests are raised for maintenance issues.
 - Co-ordination of call out duties.
 - Co-ordinating resources to ensure the line KPI's are showing positive improvement.
- Production Supplies
 - Receipt of the supplies for unit deliveries.

5.4.4 Payment

The hourly rate shall be \$1.25 flat payment for each operating hour worked.

5.5 Sick Leave

- The parties to this and past agreements have supported the introduction of discretionary sick leave as part of a package of workplace reforms.
- Discretionary sick leave provides a form of income protection in circumstances of journey and personal accident and illness.
- The ongoing discretionary sick leave provisions require site level ownership and commitment. However, it is essential that discretionary sick leave arrangements include consideration for such things as—
 - immediate notification of inability to attend work by the employee
 - effective and accurate attendance recording system
 - assist supervision to conduct attendance improvement interviews appropriately and to recognise good attendance
 - a clear and transparent procedure for managing employees with absentee problems
 - an effective review mechanism for extended sick leave periods involving union representatives as appropriate.
 - an effective appeals mechanism to allow questions of disputed managerial discretion to be, as necessary, ultimately considered by officers other than those involved in the decision at first instance.

The Myaree sick leave provisions will be reviewed for consistency with these requirements.

5.6 Long Service Leave

- The Company will apply the NSW Long Service Leave Act, 1955 provisions in respect of paying pro rata long service leave after five consecutive years' continuous service. This provides pro-rata long service to an employee with at least 5 years service when the Company terminates that employee for any reason other than the employee's serious and wilful misconduct; or where the employee resigns on account of illness, incapacity or domestic or other pressing necessity, or by reason of the death of the worker.
- The unions have advanced a claim for improved Long Service Leave (LSL) entitlements within the industry. BHP has raised concerns about the ability of the industry to sustain additional labour on-costs.

- Notwithstanding Clause 9 of "Enterprise Bargaining Agreement", leave is reserved to the unions to re-advance during the life of the agreement the matter of the rate of long service leave accrual.

5.7 Superannuation

In the event that the Federal Government reintroduces legislation providing "choice of fund", there will be discussions between Company and Union representatives about protecting employees from disadvantage [of the type experienced in the United Kingdom] and maintaining the viability of the BHP Superannuation Fund.

5.8 Delegates Training

The Company will co-operate with the Union to facilitate release and pay ordinary wages to delegates attending agreed courses where—

- there is prior consultation with the Company about course content And the ability to release particular employees from the job;
- the course is aimed at improving industrial relations and deals with matters in a positive and responsible manner. "Relevant matters" will be viewed expansively to include matters such as WorkCover, OH&S, legislative change affecting Myaree; and
- where appropriate, there is an opportunity for Company participation in or contribution to the course.

6 MAKING A DIFFERENCE IN CSA's NEW WORLD

The principles outlined in this Agreement will be the framework to work towards formulating a new working arrangement for the Western Australian Service Centre. This will commence during the budget process for 2000 / 2001 and be guided by defining—

"WHAT BUSINESS PERFORMANCE OUTCOMES ARE POSSIBLE?"

There is a commitment to challenge the existing culture which may lead to a team based organisation that implements flexible solutions to secure positive outcomes for Customers, Employees and the Company.

Typically this will involve discussions around the following site issues—

- Elimination of non value add tasks
- Creating effective training systems
- Resolving historical demarcation issues
 - coil unpacking

- maintenance
- utilising bar code equipment
- loading and unloading of trucks
- Significantly reducing the hours of overtime thus spending less time at work for all employees
- Developing effective modern remuneration systems which reward employees based on business outcomes

APPENDIX 7.1

AGREEMENT FOR ALTERNATIVE REMUNERATION (SALARY SACRIFICE)

Despite any other provision of this Agreement, for the purpose only of calculating ordinary time earnings, the rate of pay per week prescribed in clause 3.3.1 and 3.3.2 shall be reduced by the amount which an employee elects by notice in writing to the Company, to sacrifice in order to enable the Company to make a superannuation contribution for the benefit of the employee.

For an employee's election to be valid the employee must complete the election form provided by the Company.

The reduced rate of pay and the superannuation contributions provided for in this attachment shall apply for periods of annual leave, long service leave and other periods of paid leave.

All other award payments, including termination payments, calculated by reference to the employee's rate of pay shall be calculated by reference to the rate of pay per week specified for the employee in clause 3.3.1 and 3.3.2.

Employees may start, vary or stop their elections at any time by completing a new election form. Not less than one months notice shall be given by the employee of revocation or variation. If variations become too frequent, the Company may allow employees to vary or revoke the election only once in each twelve months.

If at any time while an employee's election is in force, there are changes in taxation or superannuation laws, practice or rulings, that materially alter the benefit to the employee or the cost to the employer of acting in accordance with the election, either the employee or the Company may, upon one months notice in writing to the other, terminate the election.

The Company shall not use any superannuation contribution made in accordance with an employee's election to meet its minimum employer obligation under the Superannuation Guarantee Act or any legislation which succeeds or replaced it.

APPENDIX 7.2

2000 / 2001 PRODUCTION MONTH CALENDAR

Western Australian Service Centre
Production Month Calendar 2000-2001

<p>JULY (4 wks)</p> <p>S 27 28 29 30 M 3 10 17 24 T 4 11 18 25 W 5 12 19 26 T 6 13 20 27 F 7 14 21 28 S 8 15 22 29</p>				<p>AUGUST (4 wks)</p> <p>S 31 32 33 34 M 31 7 14 21 T 1 8 15 22 W 2 9 16 23 T 3 10 17 24 F 4 11 18 25 S 5 12 19 26</p>				<p>SEPTEMBER (5 wks)</p> <p>S 35 36 37 38 39 M 27 3 10 17 24 T 28 4 11 18 25 W 29 5 12 19 26 T 30 6 13 20 27 F 31 7 14 21 28 S 1 2 9 16 23 30</p>				
<p>OCTOBER (4 wks)</p> <p>S 1 8 15 22 M 2 9 16 23 T 3 10 17 24 W 4 11 18 25 T 5 12 19 26 F 6 13 20 27 S 7 14 21 28</p>				<p>NOVEMBER (4 wks)</p> <p>S 29 5 12 19 M 30 6 13 20 T 31 7 14 21 W 1 8 15 22 T 2 9 16 23 F 3 10 17 24 S 4 11 18 25</p>				<p>DECEMBER (5 wks)</p> <p>S 26 49 50 51 52 M 27 4 11 18 25 T 28 5 12 19 26 W 29 6 13 20 27 T 30 7 14 21 28 F 31 8 15 22 29 S 1 2 9 16 23 30</p>				
<p>JANUARY 2001 (4 wks)</p> <p>S 1 2 3 4 M 31 7 14 21 T 2 8 15 22 W 3 9 16 23 T 4 10 17 24 F 5 11 18 25 S 6 12 19 26</p>				<p>FEBRUARY 2001 (4 wks)</p> <p>S 5 6 7 8 M 28 4 11 18 T 29 5 12 19 W 30 6 13 20 T 31 7 14 21 F 1 8 15 22 S 2 9 16 23</p>				<p>MARCH (5 wks)</p> <p>S 9 10 11 12 13 M 25 4 11 18 25 T 26 5 12 19 26 W 27 6 13 20 27 T 28 7 14 21 28 F 1 8 15 22 29 S 2 9 16 23 30</p>				
<p>APRIL (4 wks)</p> <p>S 14 15 16 17 M 1 8 15 22 T 2 9 16 23 W 3 10 17 24 T 4 11 18 25 F 5 12 19 26 S 6 13 20 27</p>				<p>MAY (4 wks)</p> <p>S 18 19 20 21 M 29 6 13 20 T 30 7 14 21 W 1 8 15 22 T 2 9 16 23 F 3 10 17 24 S 4 11 18 25</p>				<p>JUNE (5 wks)</p> <p>S 22 23 24 25 26 M 27 3 10 17 24 T 28 4 11 18 25 W 29 5 12 19 26 T 30 6 13 20 27 F 31 7 14 21 28 S 1 8 15 22 29</p>				

- CHRISTMAS SHUTDOWN (TO BE CONFIRMED)
 - SITE RDO
 - Public Holiday

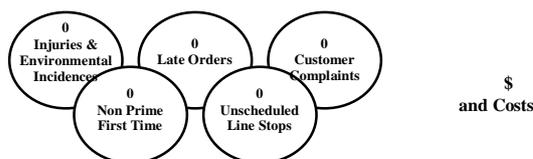
PERFORMANCE RELATED PAYMENTS SCHEME

Contents

1. KEY PERFORMANCE INDICATORS
2. TARGETS
3. PAYMENT
4. ELIGIBILITY FOR PAYMENT
5. IMPROVEMENT PROJECTS
6. REVIEW

1 KEY PERFORMANCE INDICATORS

Coated Steel Division is committed to accelerating the pace of improvement necessary to help us achieve world class performance. The Western Australia Service Centre will be striving to achieve the "Five Zero" targets and its contribution will be focused on site based work aimed at achieving budget targets in the following areas—



The Western Australian Service Centre's contribution will largely consist of—

- (i) improving the level of prime material from the processing lines by 50%
- (ii) reducing the number of operational complaints by 50%
- (iii) achievement of budget operating costs of
 - slitting \$22 per tonne
 - shearing \$47 per tonne
 - services \$12 per tonne
- (iv) achieve 100% delivery performance for Mill cycle and COM orders

To support the achievement of these site based targets, projects will be identified and implemented by all parties to this agreement. These appear in "Clause 5—Projects".

By implementing these projects, the targets set out in "Clause 2—Targets" will be achieved, although it is acknowledged that other initiatives may be identified to further assist.

For the first 4 quarters of the operation of this Agreement, the Key Performance Indicators will be—

- (i) Productivity
- (ii) Customer Service
- (iii) Product Quality

2 TARGETS

Targets for the first 4 quarters are set out below.

- (i) Productivity 0.9367
 - Current = tones per hour worked on all three process lines
 - Outstanding >0.8750
 - Good >0.7750 to <0.8750
 - Adequate >0.6750 to <0.7750
 - Poor <0.6750

Productivity = total production from all three processing lines divided by the total hours worked on all three processing lines

- (ii) Customer Service
 - Current average 97%
 - Outstanding >96%
 - Good 90 to 95%
 - Adequate 85 to 89%
 - Poor <85%

Delivery Performance = the number of Service Centre orders delivered on time divided by the total Service Centre orders during a weekly period.

- (iii) Product Quality
 - Current 146
 - Outstanding >170 order items per complaint

Good	150-170 order items per complaint
Adequate	130-150 order items per complaint
Poor	<130 order items per complaint

The number of order items loaded per complaint received during a weekly period.

* Christmas shutdown will be excluded for the purposes of PRPS calculation.

In this agreement

	Year 1	Year 2
Quarter 1 ends	01 July 2000	30 June 2001
Quarter 2 ends	30 September 2000	29 September 2001
Quarter 3 ends	30 December 2000	
Quarter 4 ends	31 March 2001	

3 PAYMENT

To foster the ongoing co-operation required for the achievement of the targets and to recognise improved performance, lump sum quarterly payments will be available as follows

PRPS MATRIX

Max Percentage Outstanding	Poor	Adequate	Good	
Productivity = 2%	0%	1.0%	1.5%	2%
Product = 2%	0%	1.0%	1.5%	2%
Quality				
Customer = 2.5%	0%	1.0%	1.5%	2.5%
Service				

The total percentage amount will be calculated by the addition of appropriate results from the target measures.

The amount as determined above, shall be applied to the gross wage of each qualifying employee for the relevant quarter, to calculate that employee's performance related payment.

For the purposes of determining the quarterly performance related payments, gross wage will include the total of the following earnings for the quarter; award and over award payments, overtime and shift allowance earnings, plus payments in respect of paid leave.

Excluded from gross earnings will be (1) payments for periods of absence on workers compensation where the absence has been for a period of more than twelve months and (2) performance related payments relating to a previous quarter which may have been paid during the quarter.

The parties acknowledge that whilst quarterly lump sum payments of 5.5% are targeted, actual payments may range from 0% to 6.5%. Targets to be met for a 5.5% quarterly lump sum payment, we believe, are realistically achievable, but to provide an added "insurance", topping up arrangements will be available. If in a particular quarter, a payment of less than 5.5% is made, an adjustment may be warranted in the payment for the fourth quarter. Such adjustment will be made only if the performance target of good/good/good or better is achieved in the fourth quarter.

When an adjustment is appropriate, the final quarter payment will include an additional amount equal to the difference between the sum of payments for the four quarters and 5.5% of gross earnings for the four quarters.

No top up will apply in quarter where the results were affected by strike or other forms of industrial action.

Subject to Australian Taxation Office approval employees will be able to choose to enter into "salary sacrifice" arrangements for PRPS (in part or in full) so that the payment becomes an employer contribution to the employee's superannuation account.

4 ELIGIBILITY FOR PAYMENT

Employees eligible for quarterly PRPS payment under this Agreement will be those employees employed by the week and in employment as at the end of the quarter. Accordingly, casual employees are not eligible for quarterly PRPS payments.

5 IMPROVEMENT PROJECTS

As with the previous Performance Related Payments Scheme Agreements, this agreement carries a commitment from employees to strictly comply with standard operating procedures.

There is an agreed commitment to the following improvement initiatives during the operation of this Agreement—

1. Scheduling improvement project to achieve the following outcomes—
 - Schedule arrives to the units on time.
 - Schedule covers a 24 hours operating period.
 - Optimisation of head setting efficiencies.
 - Decrease schedule changes for a 24 hour operating period.
2. MSHI Productivity target of 30t/shift to be obtained by identifying current line delays.
3. Improved order accuracy to match operational requirements.
4. Improved information flow to the crews with focus on quality and timeliness of data.

6 REVIEW

A review of the previous quarters results will occur at the end of each quarter which may facilitate change to targets. The emphasis on the review will be to

- Update project status.
- Assess the target suitability with the option of increasing or decreasing as necessary.

BUTTERCUP BAKERIES MALAGA (WA) BAKEHOUSE—ENTERPRISE AGREEMENT 2000. No. AG 144 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.
Industrial Relations Act 1979.

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

and

Quality Bakers Australia Limited.
t/a Buttercup Bakeries WA.

No. AG 144 of 2000.

Buttercup Bakeries Malaga (WA) Bakehouse—Enterprise
Agreement 2000.

6 June 2000.

Order.

HAVING heard Mr J. Ridley on behalf of the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch and Mr P. Watson on behalf of Quality Bakers Australia Limited t/a Buttercup Bakeries WA and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Buttercup Bakeries Malaga (WA) Bakehouse—Enterprise Agreement 2000 as filed in the Commission on 29 May 2000 be registered on and from 6 June 2000.

(Sgd.) A. R. BEECH,
Commissioner.

[L.S.]

Schedule.

1.—TITLE

This Agreement is to be referred to as the “Buttercup Bakeries Malaga (WA) Bakehouse—Enterprise Agreement 2000” (“the Agreement”).

2.—ARRANGEMENT

1. Title
2. Arrangement
3. Intent of Agreement
4. Operation of Agreement
5. Application
6. Awards
7. Wage Increases

8. Dispute Settling Procedures
 9. Carer’s Leave
 10. Compassionate Leave
 11. Disciplinary Procedures
 12. Training and Related Leave
 13. Leave to attend Trade Union Courses
 14. Regulation of Casual Employment and use of Labour Hire
 15. Availability of Agreement
 16. Re-open Negotiations
 17. Variation to Agreement
 18. Notice of Termination
 19. Redundancy
 20. Hours
 21. Role of the Union
 22. Signatories
- Schedule I Wages
Schedule II Disciplinary Warnings Procedure

3.—INTENT OF AGREEMENT

3.1 It is the intention of this Agreement to maintain and foster improved industrial relations in Quality Bakers Australia Limited t/a Buttercup Bakeries—Malaga (“the employer”).

3.2 This Agreement facilitates the parties’ aim of creating a harmonious industrial relations environment between the Union and the employer by ensuring, inter alia, the consistent implementation of fair and practical procedures to manage change and resolve disputes.

4.—OPERATION OF AGREEMENT

This Agreement will come into force on and from the beginning of the first pay period commencing on or after the date of registration in the Western Australian Industrial Relations Commission and remains in force until 20 May 2001.

5.—APPLICATION

- (a) This Agreement is binding according to its terms upon—
- (i) Australian Liquor, Hospitality and Miscellaneous Workers Union (“the Union”);
 - (ii) Quality Bakers Australia Limited t/a Buttercup Bakeries [at 38 Crocker Drive, Malaga] (“the employer”);
 - (iii) and applies to all employees employed by *the employer* who are, or eligible to be, members of the Australian Liquor, Hospitality & Miscellaneous Workers Union, Western Australian Branch (“the employees”).
- (b) This Agreement applies to an estimated 38 employees.

6.—AWARDS

This Agreement operates and must be read and interpreted wholly in conjunction with the following award—

Bakers’ (Metropolitan) Award No 13 of 1987 (“the Award”)

and replaces the *Buttercup Bakers (Malaga) Enterprise Agreement 1993*.

Where there is any inconsistency between the Award and this Agreement, this Agreement is to prevail to the extent of any inconsistency.

7.—WAGE INCREASES

7.1 This Agreement includes an immediate wage increase of three percent back dated to the 13 March 2000. Accordingly, (notwithstanding any provision on the contrary in the Award total minimum wages for *the employees* are set out in Schedule I—Wages.

7.2 Notwithstanding the above, no employee during the life of this Agreement is to be paid a rate less than that which would be payable under the Award.

8.—DISPUTE SETTLING PROCEDURES

Subject to the *Industrial Relations Act 1979*, any dispute or claim must be dealt with in the following manner—

- (1) In the first instance all the facts of the dispute matter or grievance will be discussed without delay between the employee/s concerned and the appropriate supervisor/s. The appropriate Shop Steward/s to be present if requested by the employee/s.

- (2) If not settled, the matter must be discussed between an accredited Union Representative and the delegated Officer of the Company.
- (3) If agreement has not then been reached, the matter must be discussed between a Management Representative of the Company and an appropriate Official of the Union.
- (4) If the matter is still not settled, it must be submitted to the Western Australian Industrial Relations Commission for decision which must, subject to any appeal in accordance with the Act, be final.
- (5) Until the matter is determined, work must continue in accordance with the pre-dispute conditions. No party must be prejudiced as to the final settlement by the continuance of work in accordance with this subclause.
- (6) The parties will co-operate to ensure that these procedures are carried out expeditiously.
- (7) In the event of a work stoppage, such employees as are necessary must, where appropriate, complete production in process to avoid spoilage and clean the plant according to hygiene requirements before stopping work.

9.—CARER'S LEAVE

9.1 Amount of Paid Personal/Carer's Leave

An employee is entitled to sick leave as specified in the Award subject to the variations to those entitlements contained in Clause 9 of this Agreement.

9.2 An employee is entitled, in any twelve (12) month period, to use up to five (5) days from the pool of paid leave credits for the purpose of caring for an ill or injured member of the employee's immediate family or household, in accordance with the following provisions—

- (i) the employee must be responsible for the care of the ill or injured person and in normal circumstances must not take leave under this clause where another person has taken leave to care for the same ill or injured person;
- (ii) the employee must, where practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee, the reasons for taking such leave and the estimated length of absence. All endeavours are to be made by the employee to notify the employer of his/her absence prior to the commencement of the shift. If, however, it is not practicable for the employee to give prior notice of absence, the employee must notify the employer by telephone of such absence;
- (iii) the employee must, if required by the employer, establish by production of a medical certificate or statutory declaration, the illness of the person concerned and that the illness is such as to require care by another where the employee is absent and requests Carer's leave for a period of three (3) days or more consecutive days;
- (iv) leave may be taken for part of a single day.

9.3 For the purposes of this clause, the employee's immediate family includes—

- (i) a spouse, former spouse, defacto spouse or former defacto spouse;
- (ii) The son or daughter, step-daughter or step-son, parent, step-parent or legal guardian, grandparent, grandchild, or sibling of the employee or the employee's spouse, or defacto spouse.

9.4 For the purposes of this clause, a defacto spouse means a person of the same or opposite sex who lives with the employee in an established relationship on bona fide domestic basis.

9.5 Where an employee has used the entitlement to Carer's leave on full pay for five (5) working days and requires additional Carer's leave for the same twelve (12) month period, the employee must be entitled to use accumulated paid sick leave credits to cover the additional period of Carer's leave.

9.6 Where the pool of leave credits provided pursuant to Clause 16 of the Award has been reduced by period of sick leave to the extent that insufficient credits remain for the employee to use his or her entitlement to up to five working days Carer's leave, the employee must be entitled to use entitled sick leave credits to cover the balance of the period of Carer's leave required after the remaining credits provided pursuant to Clause 16 have been exhausted.

9.7 An employer may grant, on application from an employee, leave without pay to cover a period of Carer's leave.

10.—COMPASSIONATE LEAVE

In applying Clause 22 of the Award the employer must allow a minimum period of three days (not two as prescribed by Clause 22(1)).

The employer may grant additional leave on a case by case basis.

11.—DISCIPLINARY PROCEDURES

The Disciplinary Warnings Policy incorporated in Schedule II – Disciplinary Warnings Procedure must be applied.

This Policy can only be amended with the agreement of the parties.

12.—TRAINING AND RELATED LEAVE

12.1 An employer must develop a training programme, in consultation with the Unions, consistent with—

- (a) the current and future skill needs of the enterprise;
- (b) the size, structure and nature of the operations of the enterprise;
- (c) the need to develop vocational skills relevant to the enterprise and the industry through courses conducted by accredited educational institutions and providers;
- (d) the ongoing development of a highly skilled and effective work force;
- (e) the identification of defined career opportunities and paths.

12.2 Should it be agreed between the employer and the Unions that a training committee be established, such committee is to be constituted by equal numbers of employer and Union representation and have a charter which clearly states its role and responsibilities. The charter may include, for example—

- (a) formulation of a training programme and availability of training courses and career opportunities to employees;
- (b) dissemination of information on the training programme and availability of training courses and career opportunities to employees;
- (c) recommendation of individual employees for training and reclassification;
- (d) monitoring and advising management and employees regarding the ongoing effectiveness of the training.

12.3 An employee who is approved to attend, and so attends, additional training established by a programme developed pursuant to this clause, must—

- (a) not lose wages for a period of absence from duty to attend such training when it is undertaken during the employee's normal rostered hours of duty;
- (b) be paid the appropriate ordinary time rates for any period of attendance at such training which occurs outside of, or in excess of, the employee's normal rostered hours of duty.

13.—LEAVE TO ATTEND TRADE UNION COURSES

13.1 Leave of absence must be granted to delegates/representatives of the LHMU to attend short trade union courses or seminars on the following conditions—

- (a) That the employers operating requirements permit the granting of leave.
- (b) That the scope, content and level of the short courses are such as to contribute to a better understanding of industrial relations.

- (c) Leave of absence under this clause must be with full pay, that is, pay must not include shift and penalty payments or overtime.
- (d) Leave of absence granted under this clause must count as service for all purposes.
- (e) For the purpose of condition 13(b), any short course conducted by or with the support of the Trade Union Training Authority Inc. or the LHMU will be considered as contributing to a better understanding of industrial relations and promoting knowledge and skills to optimise resolution of matters at the enterprise level.

13.2 At the written request of the Union, and with a minimum of fourteen (14) days notice to the employer, subject to operational requirements, an employee may be released, with no deduction from the employee's wages, to attend a Training Course, conducted or sponsored by the Trade Union Training Authority (TUTA) or their Union.

The employer's liability for such training leave is limited to 5 days per delegate/representative per calendar year. No more than a total of ten days can be taken by delegates/representatives in any one year. The employer is not responsible for any expenses incurred by the attendees at this training.

14.—REGULATION OF CASUAL EMPLOYMENT AND USE OF LABOUR HIRE

14.1 (a) A casual is an employee who is engaged (by the hour), directly by the employer, intermittently and not on a continuous basis or a person provided by a 'labour hire' company (which is Ready Workforce at the time of signing this Agreement) and must only be engaged in the circumstances set out in 14.3. For the purpose of this clause reference to a 'casual' includes a person directly employed by the employer and a person supplied by a labour hire company.

(b) A casual must not be employed for more than three continuous months in any one year.

(c) The employer must roster a casual for three or more consecutive hours of duty.

(d) The parties to this Agreement confirm their commitment to the permanent directly employed workforce and ensure that casuals must not be used to the detriment or to disadvantage full or part-time employees.

14.2 Casuals may be engaged only in the following circumstances—

- to meet short term work demands;
- to relieve a permanent part-time or full-time employee whilst they are on leave;
- perform work unable to be practicably rostered to permanent employees;
- carry out work in emergency circumstances;
- perform work for which a demand has arisen with respect to particular events or circumstances (eg; Easter) that are planned or forecast to be in excess of normal fluctuations in demand.

14.3 Before a casual is engaged to perform any additional work, the additional hours of work required to be performed must be offered to—

- permanent part-time employees;
- permanent full-time employees as overtime.

14.4 (a) A casual will be deemed to be a weekly employee employed on a full-time basis, where the employee has been working 38 hours or more; or a weekly employee employed on a part-time basis, where the employee has been working less than 38 hours per week, after a total continuous period of three months employment.

(b) Where a casual is deemed to be a weekly employee in accordance with 14.4(a), he/she will be deemed to have service for the purposes of redundancy as from the date of commencement of his/her employment as a casual.

14.5 (a) A casual (whether short term, ongoing or seasonal) must be engaged—

- for a minimum daily period of three hours and a maximum of 10 hours in any 24 hour period.

14.6 A casual (other than a person supplied as labour hire, eg: by Ready Workforce) will be paid a loading for all purposes of 20 per cent of the ordinary weekly rate as provided for in this Agreement. Those casuals not directly employed by the employer must be paid at the Award rates, which includes the 20% loading in lieu of paid leave entitlements.

14.7 A (short term) casual is entitled to all entitlements under the Award/this Agreement, with the exception of all paid leave.

15.—AVAILABILITY OF AGREEMENT

A copy of this Agreement must be kept in an easily accessible place within the Bakehouse and be available for inspection upon request by any employee.

16.—RE-OPEN NEGOTIATIONS

16.1 The parties undertake to re-open negotiations at least three months prior to the expiry of the period of this Agreement with a view to negotiating and settling any replacement agreement. The parties undertake not to seek to re-open matters covered by this Agreement during its life except as provided in Clause 7.

16.2 A replacement agreement will be negotiated within the following framework—

- (i) The parties undertake to continue the process of bargaining relating to employees employed by the employer. The parties must make every reasonable effort in good faith to reach agreement during enterprise bargaining.

17.—VARIATION TO AGREEMENT

Where the discussions/negotiations referred to in Clause 7 result in a variation to the Agreement, the parties will make application pursuant to Section 43 of the *Industrial Relations Act 1979* to vary this Agreement.

18.—NOTICE OF TERMINATION

18.1.1 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 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.

18.1.2 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 Clause 18.1.2 and the contract terminates when that period expires.

18.2 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 than 5 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, is entitled to one week's notice in addition to the notice prescribed in Clause 18.2(a).

(c) Payment in lieu of the notice prescribed in Clause 18(2)(a) and (b) must be made if the appropriate notice period is not given. 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 clause 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 is not 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;

In the calculation of continuous service under this clause, 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”) does 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, although there is no requirement for additional period of 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

The period of notice of termination in the case of a casual employee must be one hour.

If the required notice of termination is not given one hour’s wages must be paid by the employer or forfeited by the employee.

(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 the Award or such absence is on account of holidays to which the employee is entitled under the provisions of this Award.

19.—REDUNDANCY

19.1 Discussions Before Termination(s)

(a) Where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone and this is not due to the ordinary and customary turnover of labour and that decision may lead to termination of employment, the employer must hold discussions with the employee(s) directly affected and with their union or unions.

(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 Clause 19(1)(a) 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 or unions, 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. The employer is not required to disclose confidential information, the disclosure of which would be inimical to the employer’s interests.

19.2 Transfer to Lower Paid Duties

Where an employee agrees to be transferred to lower paid duties for reasons set out in Clause 19.1(a), the employee is 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 employee’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.

19.3 Notice of Termination

19.3.1 Notice of termination as per Clause 18.2 must apply.

19.3.2 An employee to whom such notice is given may by giving at least one weeks notice to the employer, terminate his/her employment during the period of notice provided for in this subclause.

19.3.3 All such notice periods whether paid out or nor not must be treated as service for the purpose of computing any service related entitlements of the employee.

19.4 Severance Pay

(a) An employee whose employment is terminated for reasons set out in Clause 19.1(a) is entitled, in addition to the periods of notice provided for in Clause 19.3, 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. Part-time and casual employees will be pro rata based on the average ordinary hours worked.

(b) In addition to the amount of severance pay detailed in Clause 19(4)(a) an employee is entitled to an additional 2 weeks pay for each completed year of service to a maximum of 52 weeks severance pay pursuant to Clause 19.4 (a) and (b).

(c) For the purpose of Clause 19, continuity of service is not 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.

In the calculation of continuous service under this clause, 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", does not count as time worked.

(d) 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.

19.5 Employee Leaving During Notice

An employee whose employment is to be terminated for reasons set out in Clause 19.1(a) 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.

19.6 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 Clause 19.1(a) that employee must for the purpose of seeking other employment is 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 may not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

19.7 Notice to Centrelink

Where a decision has been made to terminate employees in the circumstances outlined in Clause 19.1(a), the employer must notify the 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.

19.8 Employees With Less Than One Year's Service

This clause does 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.

19.9 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.

19.10 Long Service Leave

Where an employee is made redundant he/she will also receive payment of pro rata long service leave where service is ten years or more.

20.—HOURS

20.1 Ordinary hours mean the following: 10am Sunday to midnight Friday but in all other respects the Award applies including Schedule B.

20.2 No employee is to exceed a maximum of 12 hours continuous duty. In cases of emergency and then only with

the agreement of all of those employees affected can the hours worked exceed a total of 12 hours but cannot exceed a total of 16 hours. If any employee feels fatigued during such extended hours of work to such an extent that their continued presence in the workplace may be a health and safety matter then the employer must ensure they be relieved from their duties. The employer is to ensure appropriate transport is arranged for the employee to get home. At all times the employer must ensure that, especially in circumstances of 'extended hours' there is a safe work environment and sufficient staffing to ensure a safe working environment.

21.—ROLE OF THE UNION

21.1 The employer must recognise the Union and confer with the Union on matters affecting their members.

21.2 The employer must recognise duly appointed Union Stewards, but only after having received written notification of their appointment from the State Secretary of the Union.

21.3 Union Stewards will be permitted sufficient time and provided with adequate resources to perform their representative role.

21.4 Union Stewards are not to leave their place of work to carry out their representative role unless on each occasion they first obtain permission to do so from their Supervisor/Line Manager.

The granting of permission, which will not be unreasonably withheld, will be subject to operational requirements.

Once having obtained permission, the Union Steward will be released to attend to their representative business with no deduction from the employees wage. The representative business includes negotiations and/or conferences between the employer and the Union, preparation for attendance at the Industrial Relations Commission proceedings, and consultative processes.

21.5 On notifying management a duly accredited representative of the Union must subject to operational requirements, have the right to visit any job at any time when work is being carried out to interview employees covered by this Agreement provided that this does not unduly interfere with work in progress.

21.6 A duly accredited Representative of the Union may post any official notice of the Union on the employer's premises or site.

21.7 Where the Union provides reasonable and adequate notice, it may conduct an inspection of the employer's wages and records for employees covered by this Agreement.

22.—SIGNATORIES

Signed for and on behalf of the Australian Liquor, Hospitality and Miscellaneous Workers Union

H. Creed

in the presence of

J. Ridley

Dated 22 May 2000

AND

Signed for and on behalf of Quality Bakers Australia Limited trading as Buttercup Bakeries—Malaga WA

W. Richards

in the presence of

M. Hartley

Dated 18 May 2000

SCHEDULE 1—WAGES

	Current Weekly Wage	Plus 3% Increase
	\$	\$
Doughmaker/Single hand baker	527.95	543.80
Baker	509.52	524.80
Baker's Assistant	427.70	440.53

SCHEDULE II

DISCIPLINARY WARNINGS PROCEDURE

(AS ATTACHED AND DATED SEPTEMBER 1999)

Title: Disciplinary Warnings

Initial Issue: September 1999

Authorised By: HR Directors Milling & Baking

Next Review—

Pages: 1 of 28

Disciplinary Warnings

The Goodman Fielder Disciplinary Warnings Policy is divided into the following sections—

- (A) PURPOSE
- (B) SCOPE
- (C) REFERENCES
- (D) REVIEW
- (E) DISCIPLINARY POLICY
- (F) DISCIPLINARY OVERVIEW
- (G) STEP 1: IDENTIFICATION OF POOR PERFORMANCE, COUNSELING, & VERBAL WARNING
- (H) GUIDELINES ON ASSESSING & DISCUSSING JOB PERFORMANCE ISSUES
- (I) STEP 2: FIRST WRITTEN WARNING
- (J) STEP 3: FINAL WRITTEN WARNING
- (K) STEP 4: DISMISSAL

(A) PURPOSE

The purpose of this policy is to establish minimum standards by which matters of discipline and termination will be handled within Goodman Fielder.

As discipline and termination are matters with potentially serious consequences for individuals and the organisation, we will act with integrity when applying this policy and its procedures.

Any questions about the purpose and application of this policy should be directed towards your State / Regional HR Manager or your HR Director.

(B) SCOPE

The following procedures apply to all Goodman Fielder employees (ie staff and non staff) in all categories of employment.

For employees covered by an award or industrial agreement or contract of employment, these procedures should be read in conjunction with the appropriate documents. Where the award or industrial agreement or contract of employment provides more favourable conditions or procedures than apply under this policy, then the award or industrial agreement or contract of employment will apply. Where an award, industrial agreement or contract of employment provide for lessor conditions or procedures than those applying under this policy, then this policy will apply.

(C) REFERENCES

The parent policy is the Goodman Fielder Disciplinary Warnings Policy.

(D) REVIEW

This policy is to be reviewed and updated as necessary by the Human Resources Director, Milling and Baking.

(E) DISCIPLINARY POLICY

The Goodman Fielder Performance Management Process provides the framework for planning and evaluation of performance, both business and personal. On-going coaching and feedback is crucial to ensure employees achieve successful results. When an employee's performance or conduct is unsatisfactory Goodman Fielder is committed to ensuring that the formal disciplinary process of counselling and feedback, formal written disciplinary warnings and, where necessary, dismissal is handled sensitively, impartially and with discretion.

When unsatisfactory work performance issues or conduct arise, managers and supervisors should hold discussions promptly with their employees to ensure that they are aware that there is a performance or a behaviour problem. The discussion should be fair, factual and frank and should identify effective solutions. Most performance issues are satisfactorily resolved by discussion and agreement on appropriate corrective action.

Where performance problems and issues within the employee's control are not corrected, managers and supervisors should provide the employee with a formal written disciplinary warning. A disciplinary warning should identify the issue(s),

confirm the modifications to be made, quantify the performance standards required and advise the consequences of not meeting the required standards.

Where formal disciplinary warnings(s) fail to bring about the required level of work performance the employee's contract of employment may be terminated with the approval of the Business Group Human Resources Director. An employee may also be suspended (pending investigation) or dismissed when guilty of serious or wilful misconduct or of a fundamental breach of the contract of employment.

(F) DISCIPLINARY OVERVIEW

Unsatisfactory Work Performance

Unsatisfactory work performance covers a multitude of situations and causes. Some examples of the matters which the disciplinary process are intended to cover include, but are not limited to—

- Unsatisfactory work performance in terms of quality, quantity, timeliness;
- Poor attitude which affects work performance;
- Inability to prioritise effectively;
- Poor attendance and/or punctuality;
- Poor teamwork and/or people skills affecting work performance and interpersonal relationships;
- Breach of rules.

Disciplinary Process

The disciplinary process involves the following steps—

1. Identification of poor performance counselling / verbal warning(s)
2. First written warning
3. Final written warning
4. Dismissal

In the majority of cases the above steps should be followed.



However

Work performance issues vary significantly in nature, severity and impact or potential impact on the business. Depending on the circumstances and severity of the performance issues(s), it may on occasions, be necessary to move directly to a written warning. In fact some offences or problems may be so serious as to warrant moving directly to a final written warning or even to dismissal. Prudent judgment is required.

(G) STEP 1: IDENTIFICATION OF POOR PERFORMANCE, COUNSELING & VERBAL WARNING

Counselling

Ongoing counselling and coaching is an integral part of the management of employees and includes providing advice to employees about unsatisfactory work performance or behaviour. When unsatisfactory work performance issues or conduct arise managers and supervisors should hold discussions promptly with their employees to ensure that they are aware that there is a performance or a behaviour problem. The discussion should be fair, factual and frank and should identify effective solutions. Most performance issues are satisfactorily resolved by discussion and agreement on appropriate corrective action. Counselling should be a two way communication process.

Verbal Warning

When normal counselling and discussions fail to result in an acceptable level of work performance, a Verbal Warning(s) should be given. A Verbal Warning(s) is a serious phase of the disciplinary process with the potential to lead to dismissal if the performance issues are not satisfactorily resolved.

The Steps taken in a Verbal Warning are as follows—

1. Advise the employee of the standards of work performance and/or behaviour required;
2. Clearly identify where the employee is not meeting the required standards;

3. Identify precisely what steps the employee will need to take to meet the required standards;
4. Ascertain whether the employee would benefit from additional training or other resources to assist with meeting the required standards;
5. Advise the time frame within which an acceptable improvement in performance is required;
6. Advise when the next meeting will be held to discuss progress.

Who Gives a Verbal Warning?

A Verbal Warning(s) would normally be given by the employee's immediate supervisor/manager. It is not essential to have a witness present. Depending upon the seriousness of the performance issue(s) and an assessment of the likelihood of an acceptable improvement; the supervisor/manager giving the verbal warning may elect to have another supervisor/manager present as a witness. It is also acceptable, if the employee so desires, to have their union delegate or another colleague present.

Formal Record—File Note

A formal record of a Verbal Warning should be retained as a file note on the employee's file.

Satisfactory Outcome

If the performance issues are satisfactorily resolved by this process then the employee should be advised accordingly and, if a file note was drafted, the improvement in performance should be recorded on this note.

Unsatisfactory Outcome

If counselling and a Verbal Warning(s) fail to result in an acceptable level of performance then it is necessary to move to the written warning(s) stage.

(H) Guidelines on Assessing & Discussing Job Performance Issues

1. Accurately identify the performance problems, issues, and discrepancies observed in the employee's work performance and behaviour. Some useful questions in assessing causes are:

- *is the performance discrepancy?*
- *What have you observed?*
- *Is the discrepancy important?*
- *Are skills deficient and will training correct the deficiency?*
- *Could the employee perform the job satisfactorily in the past?*
- *Is the employee capable of reaching a satisfactory level?*
- *Is performing the job satisfactorily important to the employee?*
- *Are there any obstacles to perform that are correctable by the supervisor or the employee?*
- *Is the problem within the employee's control?*

2. Identify the possible causes of the performance problems.

3. Identify the possible solutions to the problems including action(s) to be taken by the employee and the supervisor.

4. Discuss your observations of performance problems with the employee.

5. Listen to the employee's explanation and assessment of the problems and causes. Allow the employee to talk freely and openly. Retain an open mind as the problems may be caused by work factors beyond the employee's control, may be caused by you or the assessment may be inaccurate.

6. Set goals for future action by employee and supervisor. Specify areas for improvement, the standards required, action to be taken by both parties and the time period over which performance will be reassessed.

7. Ensure the employee understands what is required and the standards expected.

8. Regularly follow up the employee's progress.

9. Set a date to review the issues and action taken.

(I) STEP 2: FIRST WRITTEN WARNING

Written Warning

A written warning is provided in circumstances where counselling and a Verbal Warning(s) have failed to rectify the work

performance or behavioural standards as required or where the severity of the performance issue(s) is such that it is appropriate to move directly to a First Written Warning.

The steps taken in a First Written Warning are as follows:

1. Advise that despite previous counseling and/or a Verbal Warning(s) the performance issues have not been satisfactorily resolved;
2. Advise the employee of specific standards of work performance and/or behaviour required;
3. Clearly and explicitly identify where the employee is not meeting the required standards;
4. Identify precisely what steps the employee will need to take to meet the required standards and advise how the employee will know when the appropriate standards have been achieved;
5. Give the employee an opportunity to comment about the issues identified. Give due regard to the employee's views and to any mitigating circumstances that should be taken into account. On some occasions at this stage the manager or supervisor may elect not to issue a First Written Warning but to revert instead to ongoing counselling;
6. Determine whether additional training and/or resources may assist the employee in overcoming the performance problems;
7. Give a time limit within which an acceptable improvement in performance must be achieved;
8. Warn that if satisfactory performance is not achieved the employee may ultimately be dismissed;
9. Advise the date the next meeting will be held to review performance and subsequent steps.

Who gives a verbal warning?

A First Written Warning would normally be given by the employee's immediate supervisor/manager with another manager or supervisor present as a witness. If the employee is a union member he/she should be offered the opportunity of having their union delegate or another colleague present at this meeting.

Formal Record—First Written Warning—signed

A suggested pro forma document entitled "First Written Warning" is attached. An alternative to using the pro forma document is to confirm the details of discussion with a letter to the employee using similar content. This may be more appropriate for monthly paid managerial staff.

After the documentation is completed the employee should be requested to sign a copy of the "First Written Warning" as being an accurate reflection of the issues addressed at the formal meeting. If the employee refuses to sign the document this does not negate the fact that the warning was given and such refusal should be noted on the form along with the names and signature of witnesses to the meeting. A copy of the First Written Warning should then be given to the employee, the union delegate (if present), the supervisor/manager and the Department Manager and the original retained on the employee's file. For monthly paid managerial staff, a copy should also be forward to the Business Group Human Resources Director.

Outcome—How long is the warning in force?

The First Written Warning should be used for a specified period of time determined by the nature of the problem(s), the employee's performance record to date and the length of time reasonably required to demonstrate improvement. A period of one to three months would be typical. The First Written Warning should not be in force for more than six months.

Outcome—Review—First Written Warning

At the end of the period that the First Written Warning is in force, the employee's performance should be formally reviewed. Following that review the First Written Warning may be withdrawn, extended or a Final Written Warning may be issued. The outcome should be formally conveyed to the employee with witnesses present as before. Details of this review should be recorded in writing and signed by those present.

A suggested pro forma document entitled "Review-First Written Warning" is below. An alternative to using the pro

forma document is to confirm the discussion with a letter to the employee using similar content. This may be more appropriate for monthly paid managerial staff.

Where performance issues are satisfactorily resolved by the end of the designated period but later re-emerge, this may result in the issuing of a further First Written Warning or proceeding direct to a Final Written Warning. The employee should be advised of this fact at the performance review meeting.

(Pro forma Document)

**STRICTLY CONFIDENTIAL
RECORD OF FIRST WRITTEN WARNING**

DATE: _____

NAME: _____

SITE: _____

Dear Mr/Mrs/Ms

This note serves as a written warning to you that your work performance and/or behavioural standards are currently unsatisfactory.

The standards of work performance and/behaviour required are as follows—

You are not meeting the required standards in the following areas—

Following are the steps you will need to take to meet the required standards—

Employee's Comments

The First Written Warning has been issued in accordance with the Goodman Fielder Group Disciplinary Policy and Procedures. Under this Policy, failure to meet work performance and/or behavioural standards may result in the termination of your employment.

A further review of your performance will be held on (date) _____

Supervisor/Manager's Name _____

Signature _____

Employee's Signature _____

(If employee declines to sign, note accordingly)

Witness Name _____

Signature _____

Witness Name _____

Signature _____

(Pro forma Document)

**STRICTLY CONFIDENTIAL
REVIEW—FIRST WRITTEN WARNING**

DATE: _____

NAME: _____

SITE: _____

Dear Mr/Mrs/Ms

This note is a formal record of review following your first written warning given on (date) _____

Are the standards of work performance and / or behaviour now satisfactory?

The standards of work performance and / or behavioural improvement required are as follows—

Further agreed action—

Employee's Comments—

Supervisor/Manager's Name _____

Signature _____

Employee's Signature _____

(If employee declines to sign, note accordingly)

Witness Name _____

Signature _____

Witness Name _____

Signature _____

(J) STEP 3: FINAL WRITTEN WARNING

Final Written Warning

A Final Written Warning is given in circumstances where counselling, a Verbal Warning(s) and a First Written Warnings(s) have failed to rectify the unsatisfactory work performance or behavioural standards as required or where the severity of the performance issue(s) is such that it is appropriate to move directly to a Final Written Warning stage.

As this is the final stage of the process that may ultimately lead to the employee's dismissal, the employee should be advised, verbally and in writing of this fact in the presence of at least one witness.

The Business Group Human Resources Director should be advised of the circumstances prior to issuing a Final Written Warning. The Business Group Human Resources Director is required to approved the employee's dismissal should this follow the Final Written Warning.

The steps to be taken in a Final Written Warning are as follows:

1. Advise that despite previous counselling, a Verbal Warning(s) and a First Written Warning(s), the performance issues have not been satisfactorily resolved;
2. Once again advise the employee of specific standards of work performance and/or behaviour required;
3. Clearly and explicitly identify where the employee is not meeting the required standards;
4. Identify precisely what steps the employee will need to take to meet the required standards and advise how the employee will know when the appropriate standards have been achieved;
5. Give the employee an opportunity to comment about the issues identified. Give due regard to the employee's views and to any mitigating circumstances that should be taken into account. On some (rare) occasions, at this stage the manager or supervisor may elect not to issue a Final Written Warning but to revert instead to ongoing counselling;
6. Determine whether additional training and/or resources may assist the employee in overcoming the performance problems;
7. Give a time limit within which an acceptable improvement in performance must be achieved;
8. Warn that if satisfactory performance is not achieved within the time specified the employee will be dismissed;
9. Warn that if there is a further deterioration in performance following the issuing of the Final Written Warning then the employee may be dismissed before the time limit expires;
10. Advise the date that the next meeting will be held to review performance and subsequent steps.

Who gives the Final Written Warning?

A Final Written Warning would normally be given by the employee's immediate supervisor with another manager or supervisor present as a witness. If the employee is a union member the union delegate should be requested to attend. If the employee is not a union member he/she should be offered the opportunity of having another colleague present at the meeting.

Formal Record—Final Written Warning—Signed

A suggested pro forma document entitled “Final Written Warning” is attached. An alternative to using the proforma document is to confirm the details of discussion with a letter to the employee using similar content. This may be more appropriate for monthly paid managerial staff.

After the documentation is complete the employee should be requested to sign a copy of the “Final Written Warning” as being an accurate reflection of the issues addressed at the formal meeting. If the employee refuses to sign the document, this does not negate the fact that the warning was given and such refusal should be noted on the form, along with the names and signature of witnesses to the meeting. A copy of the Final Written Warning would then be given to the employee, the union delegate (if present), the supervisor/manager and the Department Manager and the original retained on the employee’s file. For monthly paid managerial staff, a copy should also be forwarded to the Business Group Human Resources Director.

Outcome—How long is the warning in force?

The Final Written should be issued for a specified period of time determined by the nature of the problem(s), the employee’s performance record to date, steps already taken in an effort to improve the employee’s performance and the length of time reasonably required to demonstrate further improvement. A period of one to three months would be typical. The final Written Warning should not be in force for more than six months.

Outcome—Review—Final Written Warning

At the end of the period that the Final Written Warning is in force, the employee’s performance should be formally reviewed. Following that review the Final Written Warning may be withdrawn, extended or the employee may be dismissed. The outcome of the review should be formally conveyed to the employee at that meeting.

A suggested proforma document entitled “Review-Final Written Warning” is attached. An alternative to using the proforma document is to confirm the details of discussion with a letter to the employee using similar content. This may be more appropriate for monthly paid managerial staff.

Where performance issues are satisfactorily resolved by the end of the designated period but later re-emerge, this may result in the issuing of a further Final Written Warning or proceeding directly to dismissal. The employee should be advised of this fact at the performance review meeting.

If the outcome is dismissal the most senior manager on site should attend the meeting.

(Pro forma Document)

**STRICTLY CONFIDENTIAL
RECORD OF FINAL WRITTEN WARNING**

DATE: _____

NAME: _____

SITE: _____

Dear Mr/Mrs/Ms

This note serves as a final written warning to you that your work performance and / or behavioural standards are unsatisfactory.

The standards of work performance and / or behaviour required are as follows—

Following are the steps you will need to take to meet the required standards—

Employee’s Comments—

The Final Written Warning has been issued in accordance with the Goodman Fielder Group Disciplinary Policy and Procedures. Under this Policy, failure to correct the work problems and meet the standards specified will result in the termination of your employment.

Your work performance and/or behavioural standards will be monitored over the next _____ weeks

The next formal review of your performance will be held on (date) _____

Supervisor/Manager’s Name _____

Signature _____

Employee’s Signature _____

(If employee declines to sign, note accordingly)

Witness Name _____

Signature _____

Witness Name _____

Signature _____

(Pro forma Document)

**STRICTLY CONFIDENTIAL
REVIEW—FINAL WARNING**

DATE: _____

NAME: _____

SITE: _____

Dear Mr/Mrs/Ms

This note is a formal record of review following your first written warning given on (date) _____

Are the standards of work performance and / or behaviour now satisfactory?

The standards of work performance and / or behavioural improvement required are as follows—

Further agreed action—

Employee’s Comment—

Supervisor/Manager’s Name _____

Signature _____

Employee’s Signature _____

(If employee declines to sign, note accordingly)

Witness Name _____

Signature _____

Witness Name _____

Signature _____

(K) DISMISSAL

Dismissal, or terminating an employee’s contract of employment is the most serious application of this policy. Except for cases of serious and/or wilful misconduct, dismissal should only apply after formal disciplinary procedures detailed above are followed but fail to result in the employee being able to make the improvements necessary to demonstrate consistent and acceptable work performance and/or behavioural standards.

In such cases an employee’s contract of employment may be terminated with the approval of the Business Group Human Resources director who should have been informed of the circumstances prior to the issuing of a Final Written Warning.

On occasions, particularly in cases of potential serious and/or wilful misconduct it may be necessary for a full and thorough investigation of all the circumstances. In such cases it may be appropriate to suspend the employee without loss of normal pay and conditions whilst the investigations is carried out. Clearly suspension is a serious step and should only be applied in extreme circumstances.

The steps taken for dismissal are as follows:

1. In cases of unsatisfactory work performance advise the employee that despite counselling, a Verbal Warning(s) a First

and Final Written Warning(s) the performance issues have not been satisfactorily resolved. In cases of summary dismissal advise the employee of the Company's concerns regarding activities or instances of serious and willful misconduct;

2. Advise the employee that the Company intends to terminate the contract of employment and advise the effective date of termination;

3. Ask the employee if he/she has any comments regarding the issues raised. Due regard should be given to the employee's views and any mitigating circumstances taken into account. Following the employee's comments it may on occasions be necessary to adjourn the meeting to a later date to enable further investigations to be carried out. The supervisor/manager may also elect not to dismiss the employee at this stage and revert to an earlier stage of the disciplinary process. Such reversals of intent will be very rare however if thorough fact based investigations are carried out in advance and/or the formal disciplinary procedure followed;

4. The employee should be given a letter confirming that he/she has been dismissed and advising of moneys owing at the date of termination;

5. If the employee is summarily dismissed there is no requirement for any period of notice to apply. In other circumstances the appropriate period of notice or pay in lieu of notice should apply.

Who dismisses the employee?

Advice of dismissal should be conveyed by the employee's immediate supervisor/manager, the senior manager on site or the responsible Human Resources Manager. In any case the senior manager on site should be present at the meeting. If the employee is a union member the union delegate should be requested to attend. If the employee is not a union member he/she should be offered the opportunity of having another colleague present at the meeting.

Formal Record—Letter of Dismissal

A suggested pro forma document entitled "Notice of Employment Termination" is attached. An alternative to using the pro forma document is to confirm the details of discussion with a letter to the employee using similar content. This may be more appropriate for monthly paid managerial staff.

[TO BE PUT ON GF LETTERHEAD]

Notice of Employment Termination

Employee Name:

Classification:

Site:

Date:

This notice of Termination is issued to you by [Name of Site Manager]

Holding the position of [Title of Site Manager]

In the presence of [Witness]

This letter is to formally advise you that you have been terminated from your employment with [Company name] due to your [Gross Misconduct, Misconduct, unsatisfactory performance; as applicable] effective [immediately or final date if to work out notice period].

This follows a meeting and [investigation or counselling] on (list date or over a period of time) which was attended by myself and [put in name of other witness/es] and yourself and [name of employee's representative], at which you were asked to give an explanation of your conduct in terms of—

- [Incident/performance warranting termination]

Your explanation of your actions in that your [conduct or performance] was for reasons of [insert reason for conduct] is not acceptable.

Previously, you have been counselled and warned on [specify previous warnings]. These warnings have clearly stated that if there was no improvement in your [conduct, performance] your continuing employment with [Company] would be in jeopardy.

Unfortunately there has not been any sustained improvement in your [performance or conduct] as has been identified and agreed in past counselling, therefore the Company believes that the appropriate action with regard to this matter is to terminate your employment.

Your final payment is—

Hours in this pay period:	\$
Annual Leave Owing:	\$
Payment in Lieu of Notice Period ([?] weeks)	\$
Long Service Leave [If appropriate]	\$
Deductions	\$
Total:	\$

I regret that this action is necessary and I wish you well for the future.

Signed: _____ Date:

[Name & Title of Site Manager/Supervisor]

I acknowledge receipt of this notice.

Signed: _____ Date:

[Name of Employee]

- Copy to:
- Dept. Manager
 - Site/Unit Manager
 - Human Resources Manager
 - Employee



Summary Dismissal

Occasionally an employee commits an act of misconduct so serious as to warrant instant dismissal either with or without notice, or payment in lieu of notice. Termination without payment in lieu of notice is known as **summary dismissal**. Summary dismissal may be exercised by an employer if the employee commits a fundamental and serious breach of contract including serious and willful misconduct.

Summary dismissal is a very serious act and must be fact based. In some cases it will be necessary to carry out detailed analysis and investigation of all the circumstances prior to deciding on a course of action. In such cases it may be appropriate for the employee to be suspended without loss of normal pay and conditions until such time as the investigation has been completed and a final decision made.

It is not possible to define in detail all acts which warrant summary or instant dismissal as the facts and consequences of the employee's actions should be assessed in each case. Guidance should be sought from the Business Group Human Resources Department.

**DEPARTMENT OF CONSERVATION AND LAND
MANAGEMENT/AUTOMOTIVE, FOOD, METALS,
ENGINEERING, PRINTING AND KINDRED
INDUSTRIES UNION OF WORKERS, WESTERN
AUSTRALIAN BRANCH ENTERPRISE
AGREEMENT 2000.**

AG 138 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Department of Conservation and Land Management.

AG 138 of 2000.

Department of Conservation and Land Management/
Automotive, Food, Metals, Engineering, Printing and
Kindred Industries Union of Workers, Western Australian
Branch Enterprise Agreement 2000.

COMMISSIONER S J KENNER.

16 June 2000.

Order.

HAVING heard Mr G Sturman on behalf of the applicant and
Mr G Wibrow 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 Conservation and Land Man-
agement/Automotive, Food, Metals, Engineering,
Printing and Kindred Industries Union of Workers, West-
ern Australian Branch Enterprise Agreement 2000 as filed
in the Commission on 17 May 2000 in the terms of the
following schedule be and is hereby registered as an in-
dustrial agreement.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

1.—TITLE

This Agreement shall be known as the Department of Con-
servation and Land Management / Automotive, Food, Metals,
Engineering, Printing and Kindred Industries Union of Work-
ers—Western Australian Branch Enterprise Agreement 2000.

2.—ARRANGEMENT

- 1 Title
- 2 Arrangement
- 3 Parties Bound
- 4 Definitions
- 5 Date and Period of Agreement
- 6 Relationship to Parent Award
- 7 No Further Claims
- 8 Number of Employees Covered
- 9 Renewal of Agreement
- 10 Dispute Resolution Procedure
- 11 Objectives
- 12 Measures to Achieve Productivity Initiatives
- 13 Minimum Call Out Payment
- 14 Fixed Term and Casual Employment
- 15 Wages
- 16 Wage Increases
- 17 Leave Loading
- 18 Payment of Wages
- 19 Higher Duties Allowance
- 20 Accrued Days Off
- 21 Recovery of Overpayments/Debts
- 22 Performance Management
- 23 Fire Duties
- 24 Salary Packaging
- 25 Annual Leave
- 26 Long Service Leave
- 27 Family Carer's Leave
- 28 Ceremonial/Cultural Leave
- 29 Effect of Policy, Circulars and Administrative In-
structions
- 30 Fitness for Fire Fighting

- 31 Dress Code
- 32 Intellectual Property
- 33 Right of Transfer/Transfer Policy
- 34 Signatories

SCHEDULES

A Wage Rates

3.—PARTIES BOUND

This Agreement shall apply to and be binding upon—

- (i) the Department of Conservation and Land Manage-
ment;
- (ii) the Automotive, Food, Metals, Engineering, Print-
ing and Kindred Industries Union of
Workers—Western Australian Branch; and
- (iii) those employees of the Department of Conservation
and Land Management who are subject to the Engi-
neering Trades (Government) Award 1967.

4.—DEFINITIONS

In this Agreement the following expressions shall have the
following meaning—

“A Day” shall mean from midnight to midnight.

“Employee” means a public sector employee as defined
by the Public Sector Management Act 1994.

“Executive Director” means the person immediately re-
sponsible for the general management of the Department
to the Minister of the Crown for the time being adminis-
tering the Department of Conservation and Land
Management (CALM).

“Fire Control” shall be deemed to include fire detec-
tion, suppression, prescribed burning, mopping up
operation and patrols.

“Union” means the Automotive, Food, Metals, Engi-
neering, Printing and Kindred Industries Union of
Workers—Western Australian Branch.

5.—DATE AND PERIOD OF OPERATION

This Agreement shall operate from the beginning of the first
pay period commencing on or after the date that this Agree-
ment is registered in the Western Australian Industrial Relations
Commission, and shall remain in force for a period of two
years thereafter.

6.—RELATIONSHIP TO PARENT AWARD

This Agreement shall be read and interpreted wholly in con-
junction with the Engineering Trades (Government) Award
1967.

Provided that where there is any inconsistency between this
Agreement and the Award this Agreement shall prevail to the
extent of that inconsistency.

7.—NO FURTHER CLAIMS

(1) The parties to this Agreement undertake that for the du-
ration of this Agreement there shall be no further salary or
wage increases sought or granted except for those provided
under the terms of this Agreement or provided for in State
Wage Case Decisions.

(2) This Agreement shall not operate so as to cause an em-
ployee to suffer a reduction in ordinary time earnings.

8.—NUMBER OF EMPLOYEES COVERED

As at the date of registration this Agreement covers approxi-
mately 10 employees.

9.—RENEWAL OF AGREEMENT

(1) No later than three months before the expiry of this Agree-
ment, the parties shall meet to discuss the arrangements to
apply after this Agreement expires.

(2) The parties agree that where agreement is not reached to
renew or replace this Agreement on or after expiry of this
Agreement, this Agreement may be cancelled effective from
the beginning of the first pay period on or after 30 days fol-
lowing written prior notice having been given by one party to
the other. In the event that this Agreement is cancelled then
the parties shall revert to the terms and conditions prescribed
in the Award.

10.—DISPUTE RESOLUTION PROCEDURE

(1) This dispute resolution procedure will apply to any issues, questions, disputes or difficulties that arise about the implementation or interpretation under this Agreement. The intent of the parties is to use this procedure to, wherever possible, resolve issues at local or workplace level.

(2) The principle of conciliation and direct negotiation shall be adopted for the purpose of prevention and settlement of any industrial dispute that may arise.

(3) The parties shall take an early and active part in discussion and negotiations aimed at preventing or settling disputes in accordance with the agreed procedure set out subclause (4) of this clause.

(4) Procedure for Settlement of disputes

(a) The employee and the employee's supervisor should confer, clearly identify the facts and where possible, resolve the issue.

(b) If the issue remains unresolved then the employee, the union representative, the supervisor and the Department manager shall confer, and where possible, resolve the issue.

(c) If the issue remains unresolved then the union shall confer with the Manager Human Resources on the matter, and where possible, resolve the issue.

(d) If the matter is still not settled, either party may submit the matter for conciliation/arbitration by the Western Australian Industrial Relations Commission. Provided that persons involved in the question, dispute or difficulty will confer amongst themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission.

11.—OBJECTIVES

The objectives of this Agreement are—

- (a) Improving working arrangements that will contribute to the long term viability of CALM.
- (b) Maximising the efficiency, flexibility, productivity and revenue of CALM for the benefit of employees, CALM and the people of Western Australia.
- (c) Developing and maintaining productive, cooperative and harmonious relationships.
- (d) Maintaining and enhancing occupational health, safety and welfare throughout CALM.
- (e) In accordance with wage fixing principles, the parties acknowledge that a broad agenda must be considered in the implementation of improved productivity within CALM.

12.—MEASURES TO ACHIEVE PRODUCTIVITY IMPROVEMENTS

(1) The Parties to this Agreement will participate in, and support the following initiatives—

- AWU employee's career development
- Volunteer Projects
- Contractors
- Continuous Improvement
- Business Units
- Flexibility
- Health and Fitness
- Management of Work, Technology and Resource utilisation
- Training and Skills acquisition

(2) As part of this Agreement, the parties agree to establish and reinforce processes which will facilitate employee involvement to initiate the processes and measure the outcomes, including, but not necessarily limited to—

- (a) Individual employees in the workplace and work teams involved in identifying, implementing and quantifying productivity improvements.
- (b) Workplace Consultative Committees implementing and quantifying productivity improvements.

(3) Continuous Improvement

It is agreed that there will be full support for, and involvement with the ongoing process of continuous improvement to

achieve reduced costs, less waste and improve quality, technology, work Organisation, customer service, timeliness, safety, training and enhanced conservation outcomes.

A fundamental ingredient in facilitating this strategy is the involvement of all CALM employees in its development and implementation. The parties agree to promote the involvement of all employees in continuously improving their workplaces and to pro-actively work to remove barriers to its implementation.

(4) Management of Work, Technology and use of Resources
The parties agree to improve work practices across all areas of CALM, particularly—

- (a) Improved efficiency of planning, allocation, performance and reporting of work undertaken,
- (b) Increased workplace flexibility (both geographical and functional),
- (c) Use of best practice and benchmarking to promote, measure and monitor team performance,
- (d) Compare performance results with other work teams and taking appropriate action to continually improve performance,
- (e) Improved management and supervisory practices to give more responsibility to work teams within developed guidelines,
- (f) Increased devolution of accountability and responsibility leading to self managed work teams,
- (g) Simplification and improvement of work processes and procedures,
- (h) Optimising the use of existing technology,
- (i) Implementation and use of new technologies including advanced communication and information technology systems,
- (j) The formation and operation and of Business Units,
- (k) Utilisation of contractors.

(5) Flexibility

(a) Employees may perform work outside the union's coverage where such work is not the major part, and is peripheral and incidental to, their normal duties, provided that such work is within their level of skill, knowledge, competence and lawful.

(b) JCC's will be committed to resolving demarcation issues at their workplaces as they arise. The parties reject "demarcation resolutions" which limit career path opportunities for employees.

(6) Health and Safety

(a) No measures adopted in this Agreement shall in any way prejudice occupational health and safety programs already in place in any workplace in CALM.

(b) The parties are committed to the rehabilitation of any employee who is incapacitated through any work related injury.

13.—MINIMUM CALL OUT PAYMENT

An employee who is recalled to work within four hours of the cessation of his/her normal work period or between 6.00 am and his/her normal starting time shall not be entitled to any minimum payment for such a recall.

Provided that any employee who is recalled twice within that same four hour period will be entitled to a minimum four hour penalty payment.

14.—FIXED TERM AND CASUAL EMPLOYMENT

(1) (a) Fixed Term Employees

A fixed term employee is an employee who is employed for a specific task or time, and may be employed on a part time or full time arrangement.

(b) Casual employees

(i) A casual employee is an employee who has unpredictable hours of work, is not entitled to any leave conditions in this Agreement, and receives a loading of 20% in lieu of an entitlement to any leave conditions.

(ii) The employment of a casual employee may be terminated by one hours notice or pay in lieu by either the employer or employee.

(2) Seasonal Employees

(a) The parties agree to the utilisation of seasonal employees for fixed term employment for the purpose of meeting seasonal work requirements.

(b) Seasonal employees will be in addition to full-time employee numbers and shall not be utilised to the detriment of full-time employees.

(c) Where a seasonal employee has been engaged on a fixed term basis for two or more consecutive seasons, then the employee concerned may have such previous service recognised for the purposes of accrual of annual, sick and long service leave, provided that these entitlements shall be calculated on a pro rata basis in accordance with the following formula—

$$\frac{\text{Number of hours worked per annum}}{1976} = \text{Proportion of entitlement}$$

15.—WAGES

(1) Each employee covered by this Agreement shall be entitled to receive the appropriate weekly rate of pay as set out in Schedule A—Wage Rates, in accordance with the employee's classification.

16.—WAGE INCREASES

(1) CALM has developed an organisational productivity model based on Output Based Management financial reporting. The model includes Key Performance Indicators to assess labour productivity, which in turn provides the justification for the productivity based wage payments provided for in this Agreement.

(2) From the beginning of the first pay period on or after registration of this Agreement a wage increase of 3.5 % will apply. This comprises 2.5% from the productivity model, plus 1% for the new initiatives detailed in this agreement.

(3) From the beginning of the first pay period following twelve months after registration of this Agreement, an increase of 3.5 % for justified and demonstrated productivity for the 1998/99 financial year as calculated from the productivity model will apply.

17.—LEAVE LOADING

(1) The leave loading prescribed in subclause (11) of clause 23—Annual Leave of the Award which is payable to employees who are subject to this Agreement shall be divided into twenty six equal instalments and paid to the employees in twenty six equal amounts throughout the year as a part of the normal wage.

(2) The wage rates provided for in Schedule A—Wage Rates of this Agreement are inclusive of the annual leave loading entitlement.

18.—PAYMENT OF WAGES

(1) Wages shall be paid fortnightly but, where the usual pay day falls on a public holiday, payment shall be made on the previous working day.

(2) Wages shall be paid by direct funds transfer to the credit of an account nominated by the employee at a Bank, Building Society or Credit Union approved by the Treasurer or an Accountable Employee.

(3) For the calculation of wages the pay period shall be from Monday to Sunday, or as otherwise agreed between the parties.

(4) Claims for payment for other than normal wages, eg overtime and allowances shall be submitted on a fortnightly basis.

(5) Payments for such claims shall be made no later than one month in arrears.

19.—HIGHER DUTIES ALLOWANCE

Higher duties shall be payable for all periods of 10 days or more. In such cases the payment will apply to the full period of higher duties.

Provided that in cases which involve an employee undertaking a designated role during fire control activities, the employee shall be paid at the appropriate rate for all hours worked in that role.

20.—ACCRUED DAYS OFF

(1) Employees nominated by the employer shall accumulate rostered days off during the high risk fire period to a maximum of five days. The accumulated days shall be cleared (annually) to the next fire season as one period mutually convenient to the employee and employer or in conjunction with annual leave.

(2) An employee may request payment for accumulated rostered days off and by mutual agreement such payment shall be made. Any such payment made will be at the employee's normal ordinary time rate of pay.

21.—RECOVERY OF OVERPAYMENTS/DEBTS

(1) Subject to written notification to the employee, CALM may recover any wages overpayments which may occur to employees, or any personal debts owing to CALM by employees arising from the course of their employment.

(2) Subject to the provisions of this clause, CALM may recover the amount by deduction via the payroll system.

(3) Procedure

(a) Advise the employee of details of the overpayment or debt, including any necessary documentation.

(b) If the employee disputes the facts as presented, CALM's Management Audit Branch will undertake a separate investigation.

(c) If the employee still disputes the final facts as presented and the issue cannot be resolved, then the provisions of the Dispute Settlement Procedure will apply.

(d) Repayment Options

(i) The employee may elect to repay the amount owing immediately ie in the next pay period, or

(ii) Agree on a repayment schedule. In the event of no agreement the following provisions will apply.

(iii) Repay the amount of overpayment owing over the same period of time as the overpayment occurred, or up to six months, whichever is the lesser, or

(iv) For amounts up to \$500

Repay the amount owing at 20% of normal wages to a maximum of \$50 per week, whichever is the lesser.

(v) Amounts greater than \$500

Repay the amount owing at 10% of normal wages to a maximum of \$50 per week, whichever is the lesser.

(vi) Any dispute with relation to the repayment quantum and timeframe, which is unable to be resolved between the employee and CALM may be referred to the Western Australian Industrial Relations Commission. Any decision of the Commission will be accepted by the parties.

(4) Where it is agreed that an overpayment is through no fault of the employee, or due to mitigating circumstances, the Executive Director may allow an extended period for the repayment.

(5) Nothing in this clause limits CALM from seeking to recover through legal process any overpayments/debts owed to CALM by employees.

22.—PERFORMANCE MANAGEMENT

(1) All employee's performance will be subject to regular reviews; provided that such reviews are in accordance with the guidelines provided by CALM's preferred performance management system, and that such reviews occur at least every twelve months.

(2) The intent of this provision is to provide an opportunity for employees to discuss their performance with their manager/supervisor, and will not of itself have any impact on the wage classifications which apply under this agreement.

23.—FIRE DUTIES

(1) Subject to meeting the necessary criteria and the provision of training, employees covered by this agreement may be called upon to assist with emergency fire suppression.

(2) Where employees who are subject to this Agreement perform detention for the purposes of Fire Control the provisions applying at the time to CALM employees covered by the Australian Workers Union shall apply.

(3) If called to work in a fire suppression situation to undertake duties other than those provided for in subclause (2) of this clause, the provisions of this Agreement shall apply.

24.—SALARY PACKAGING

(1) An employee may, by agreement with CALM, enter into a salary packaging arrangement.

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

(4) The TEC for purposes of salary packaging is calculated by adding—

The base salary

Other cash allowances, eg no fixed hours loading

Non cash benefits, eg superannuation, motor vehicle etc

Any Fringe Benefit Tax liabilities currently paid, and

Any variable components, eg performance based incentives (where they exist).

(5) Where an employee enters into a salary packaging arrangement they will be required to enter into a separate written agreement with CALM that sets out the terms and conditions of the arrangements.

(6) The salary packaging arrangements must be cost neutral in relation to the total cost to CALM.

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

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

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

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

(11) CALM shall not unreasonably withhold agreement to salary packaging on request from an employee.

(12) 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, either party may refer the matter to the Western Australian Industrial Relations Commission.

25.—ANNUAL LEAVE

(1) Compaction of Leave and Cash Out of Leave

(a) If any employee has more than one year's accrued annual leave entitlement, with the employer's approval, the employee may compact any portion in excess of that entitlement on a two for one basis.

(b) If any employee has more than two year's accrued annual leave entitlement, with the employer's approval, the employee may cash out any portion in excess of that entitlement.

(2) By mutual agreement between an employee and CALM, an employee may clear annual leave in individual days up to a maximum of 5 days per year.

26.—LONG SERVICE LEAVE

(1) Compaction of leave

Where an employee has accrued long service leave, subject to the approval of CALM, the employee may take some or all of that leave in compacted form, on the basis of payment of two weeks pay for each week of leave actually cleared, providing that no portion of entitlement cleared is less than two weeks ie a minimum of one week of leave actually taken.

(2) Where an employee has accrued long service leave in excess of 13 weeks of entitlement, subject to the approval of CALM, the employee may cash out any part of that entitlement in excess of 13 weeks, provided that the employee does this before the nominated expiry date of this Agreement.

(3) In addition to the provisions of subclauses (1) and (2) of this clause if any of an employee's entitlement to long service leave has been accrued whilst employed wholly or partially on a part time basis, that employee may request to compact the period of leave entitlement due to the equivalent of full time ordinary hours.

(4) Subject to the approval of CALM, long service leave may be taken in minimum periods of one (1) week.

27.—FAMILY CARER'S LEAVE

(1) Definitions

For the purposes of this clause, the following expressions shall have the following meaning—

"Immediate family" shall mean a spouse (including a former spouse, de facto spouse, and a former de facto spouse), a child (including an adopted child, a step-child, or an ex-nuptial child), a grandchild, a parent, a grandparent or a sibling of the employee or of the employee's spouse.

"De facto spouse" in relation to an employee shall mean a person of the opposite sex to the employee who lives with the employee on a bona fide domestic basis although not legally married to the employee.

(2) Entitlement

An employee bound by this Agreement may with the consent of CALM, utilise accrued sick leave to provide care to another person subject to—

(a) the employee being responsible for the care of the person who requires care, and

(b) the person who requires care being either a member of the employee's immediate family or a member of the employee's household, and

(c) the employee being able to produce satisfactory evidence to CALM of the illness or incapacitation of the person who requires care.

Provided that no more than five days accrued sick leave may be utilised in each calendar year for the purposes of this clause.

(3) Notification to CALM

An employee who wishes to take Family Carer's Leave in accordance with the provisions of this clause shall as soon as is reasonably practicable advise CALM of the following—

(a) that he or she will be unable to attend the workplace;

(b) the reason for his or her absence;

(c) the estimated duration of his or her absence.

Provided that such advice will be given within twenty four hours of the commencement of the absence.

28.—CEREMONIAL/CULTURAL LEAVE

(1) Subject to organisational requirements, an employee covered by this Agreement is entitled to apply for leave for tribal/ceremonial/cultural purposes.

(2) Such leave shall include leave to meet the employee's customs, traditional law and to participate in ceremonial/cultural activities.

(3) Each day or part thereof, taken in accordance with subclause (1) may be deducted from annual leave entitlements. Where such leave is of one or more periods of five days on any one occasion, portions of five days may also be deducted from accrued long service leave, where the employee has qualified for such leave and has such leave accrued.

(4) Time off without pay may be granted by agreement between CALM and the employee for tribal/ceremonial/cultural purposes.

(5) Ceremonial/cultural leave shall be available, but not limited to, Aboriginals and Torres Strait Islanders.

29.—EFFECT OF POLICY, CIRCULARS AND ADMINISTRATIVE INSTRUMENTS

(1) Subject to subclause (3) of this clause, the provisions of all Western Australian Government Policy, Circulars and

Administrative Instructions shall apply to employees bound by this Agreement.

(2) Subject to subclause (3), of this clause, the provisions of all CALM policy, circulars and administrative instructions, including the Code of Conduct and the Alcohol and Other Drugs Policy shall apply to employees bound by this Agreement.

(3) Where any such policy, circular or administrative instruction is in conflict with the provisions of this Agreement, then this Agreement will apply.

30.—FITNESS FOR FIRE FIGHTING

Employees engaged in fire fighting duties accept they are required to adhere to CALM’s Fitness For Fire Fighting Policy dated 1 July 1999, and to undergo the Physical Performance Assessment detailed within the policy.

31.—DRESS CODE

The parties agree that the agreed dress code for CALM employees shall be adhered to by all parties to this Agreement.

32.—INTELLECTUAL PROPERTY

All works, items, material or information of whatever nature produced or developed by the employee in the course of employee’s employment shall be and become the sole and the complete property of the Crown in right of the State of Western Australia whether such property is tangible or is in the nature of industrial or intellectual property rights (including copyright and rights of confidential information).

33.—RIGHT OF TRANSFER/TRANSFER POLICY

(1) Employees acknowledge and accept that in the course of their employment, subject to justified operational requirements, they may be required by CALM to move from one locality to another.

(2) Transfer Procedure

(a) An employee, promoted or transferred by CALM in the normal course of their employment shall be reimbursed for all reasonable expenses actually incurred in connection with such transfer or promotion.

(b) An employee transferred at their own request, or for disciplinary reasons, will be responsible for their own removal expenses.

(c) An employee, whose services are terminated by CALM through no fault of the employee, shall be reimbursed for reasonable removal expenses incurred in returning from the place of employment to their original place of engagement.

(d) All travelling time in connection with promotion, transfer or termination pursuant to paragraphs (a) and (c) of this subclause shall be paid for at a maximum travelling time per day of eight hours at the rate applicable to the time of day and the day of the week.

(3) If an employee resigns or is terminated (other than at no fault of the employee) within twelve months of a relocation initiated by the employee, then any costs paid by CALM associated with the relocation may be recovered from the employee on a sliding scale of two percent of the costs paid by CALM for each week short of the twelve month period. Any such costs may be deducted against final entitlements due to the employee.

34.—SIGNATURES

.....Signed.....
EXECUTIVE DIRECTOR
 Department of Conservation and Land Management
 Date: 15/5/00

.....Signed.....
BRANCH SECRETARY
 Automotive, Food, Metals, Engineering, Printing and Kindred Industries union of Workers—Western Australian Branch
 Date: 16/5/00

SCHEDULE A—WAGE RATES

(1) The fortnightly wage rates in subclause (2) of this schedule are inclusive of Annual Leave Loading.

(2) Fortnightly wage rates (\$) applying from the beginning of the first pay period on or after registration of this Agreement by the Western Australian Industrial Relations Commission, and from the beginning of the first pay period following twelve months after the date of effect of this Agreement are as follows.

Classification	Rate Per Fortnight	
	From Date of Effect	After 12 months
(C 5)	1,307.14	1,352.89
(C 6)	1,261.40	1,305.55
(C 7)	1,174.13	1,215.23
(C 8)	1,128.40	1,167.89
(C 9)	1,086.86	1,124.90
(C 10)	1,041.13	1,077.57
(C 11)	971.69	1,005.70
(C 12)	925.95	958.36
(C 13)	876.44	907.12
(C 14)	839.94	869.34
Apprentice (88%)	915.72	947.77
Apprentice (75%)	780.41	807.72
Apprentice (55%)	572.30	592.33
Apprentice (48%)	499.50	516.98
Apprentice (42%)	436.99	452.28
Apprentice (40%)	416.22	430.78

DEPARTMENT OF ENVIRONMENTAL PROTECTION ENTERPRISE AGREEMENT 2000.

No. PSA AG50 of 2000.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

PARTIES: CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED V CHIEF EXECUTIVE OFFICER, DEPARTMENT OF ENVIRONMENTAL PROTECTION.

HEARD: SENIOR COMMISSIONER GL FIELDING.

DELIVERED: TUESDAY, 4 JULY 2000.

FILE NO/S: PSAAG 50/2000.

Result: Agreement registered

Representation:

Applicant/Appellant: Mr K E Ross

Respondent: Mrs D Lutz

Order:

HAVING heard Mr K E Ross as agent for the Applicant and Mrs D Lutz on behalf of the Respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the agreement made between the parties as lodged in the Commission on the 19th day of June 2000 entitled Department of Environmental Protection Enterprise Agreement 2000 and as subsequently amended by direction of the Commission be registered in the terms of the following Schedule as an industrial agreement and replaces the Department of Environmental Protection Enterprise Agreement 1998 (No. PSA AG 62 of 1998) which is hereby cancelled.

(Sgd.) G. L. FIELDING,
 Senior Commissioner/
 Public Service Arbitrator.

[L.S.]

SCHEDULE.

1.—TITLE

This Agreement shall be known as the “Department of Environmental Protection Enterprise Agreement 2000” and replaces the 1998 Department of Environmental Protection Agreement.

2.—ARRANGEMENT

1. Title
2. Arrangement
3. Scope of the Agreement
4. Number of Employees
5. Parties to the Agreement
6. Definitions
7. Date and Period of Operation of the Agreement
8. No Further Claims
9. Relationship to Parent Award and Agreements
10. Single Bargaining Unit
11. Objectives of the Agreement
12. Productivity Improvements and Milestones
13. Hours of Duty
14. Flexible Working Conditions
15. Leave Conditions
 15. (i) Short Leave
 15. (ii) Ceremonial / Cultural Leave
 15. (iii) Long Service Leave
 15. (iv) Parental leave
 15. (v) Paid Parental leave
 15. (vi) Sick Leave
 15. (vii) Carer's Leave
 15. (viii) Annual Leave loading
 15. (ix) Compaction of Annual Leave
 15. (x) Regional Officers' Annual Leave Travel Allowance
 15. (xi) Purchased Leave
 15. (xii) Leave Without Pay
 15. (xiii) Career Break Scheme
 15. (xiv) Study Leave
16. Salary Increases
17. Recovery of Overpayments
18. Salary Packaging
19. Dispute Settlement Procedure
20. Signatories To The Agreement
 - Schedule A—Salary Schedule
 - Schedule B—Salary Schedule—Specified Callings

3.—SCOPE OF THE AGREEMENT

This Department of Environmental Protection Enterprise Agreement 2000 shall apply to all employees, including Senior Executive Service employees with the exception of the Chief Executive Officer, who are members of or eligible to be members of the Civil Service Association of Western Australia, and who are employed within the Department of Environmental Protection.

4.—NUMBER OF EMPLOYEES

As at 2 June 2000 the number of employees in the department was 272.

5.—PARTIES TO THE AGREEMENT

(a) The Employer party to the Department of Environmental Protection Enterprise Agreement 2000 is the Chief Executive Officer, Department of Environmental Protection.

(b) The Union party to the Department of Environmental Protection Enterprise Agreement 2000 is the Civil Service Association of Western Australia.

6.—DEFINITIONS

For the purposes of the Department of Environmental Protection Enterprise Agreement 2000 the following definitions will apply—

- (a) Agreement—means the Department of Environmental Protection Enterprise Agreement 2000.
- (b) "Award"—means the Public Service Award 1992 as amended.
- (c) "CSA"—means the Civil Service Association of Western Australia Incorporated.
- (d) "Department"—means the WA Department of Environmental Protection.
- (e) "Employee"—means any employee bound by the scope of this Agreement.
- (f) "Employer"—means the Chief Executive Officer, Department of Environmental Protection.
- (g) "Family"—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 for whom the employee has responsibility of care.

- (h) "Government"—means the State Government of Western Australia.
- (i) "Minister"—means the Minister or Ministers of the Crown responsible for the administration of the Department of Environmental Protection.
- (j) "Ordinary average daily hours"—means 7 hours 30 minutes for employees working 37 hours 30 minutes per week and 7 hours and 48 minutes for employees working 39 hours per week.
- (k) "Parties"—means the Employer and the Union when referred to jointly in this Agreement.
- (l) "Spouse"—means an employee's spouse including a defacto relationship.
- (m) "Union"—means the Union which is party to this Agreement.
- (n) "WAIRC"—means the Western Australian Industrial Relations Commission.

7.—DATE AND PERIOD OF OPERATION OF THE AGREEMENT

(a) This Agreement will operate from the beginning of the first pay period commencing on or after the date of registration for a period of 2 years.

(b) Six months prior to the expiry of this Agreement the parties will review the Agreement and commence negotiations for an agreement to replace it.

(c) The parties will assess achievements in performance, productivity, quality, timeliness, efficiency and effectiveness during the term of this Agreement.

(d) The pay quantum achieved as a result of this Agreement will remain and form the new base rates for future agreements or continue to apply in the absence of a further agreement except where the Award rate is higher, in which case the Award shall apply.

(e) The Agreement will continue in force after the expiry of its terms until such time as either party withdraws from the Agreement by notification in writing to the other party and to the WAIRC.

(f) The implementation of the objectives, Productivity Improvements and Milestones of this Agreement will be reviewed within the first 12 months of this Agreement and a report produced, which will be the basis for seeking approval to pay the second pay increase contained in this Agreement.

8.—NO FURTHER CLAIMS

(a) The parties to this Agreement undertake that for its duration there shall be no further salary or wage increases sought or granted except for those provided under the terms of this Agreement.

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

9.—RELATIONSHIP TO PARENT AWARDS AND AGREEMENTS

(a) This Agreement shall be read in conjunction with the Award, which applies to the parties bound by this Agreement. In the case of any inconsistencies, this Agreement shall have precedence to the extent of the inconsistencies.

(b) Where the Agreement is silent the Award shall apply.

10.—SINGLE BARGAINING UNIT

This Agreement has been negotiated through a Single Bargaining Unit.

11.—OBJECTIVES OF THE AGREEMENT

The shared objectives of the parties to this Agreement are to—

- (a) ensure that the following corporate objectives of the department are met: *ensure the environment is managed so that it is conserved and enhanced; and ensure that development in Western Australia is environmentally acceptable.*

- (b) satisfy the requirements of the department's clients and stakeholders through the provision of effective, efficient and reliable services;
- (c) gain commitment for the implementation of measures that will improve the effectiveness, productivity and efficiency within the Department of Environmental Protection.
- (d) gain employee commitment and contribution to the short term and long term direction of the Department of Environmental Protection;
- (e) improve the quality of the working life of employees and to provide more flexible working conditions;
- (f) measure and share increases in performance.

12.—PRODUCTIVITY IMPROVEMENTS AND MILESTONES

The following productivity improvements have been initiated to achieve the objectives of this agreement.

12.1 Productivity Measurement

During the life of the previous Agreement productivity was monitored using the department's Performance Management/Productivity Measurement Model, which incorporates divisional productivity measures, key performance indicators and milestones.

This model will be reviewed during the life of this agreement.

The distribution of any affordable productivity gains through the use of this model or a revised version will be shared in accordance with the Department of Environmental Protection Productivity Model.

CORPORATE PRODUCTIVITY IMPROVEMENTS

12.2 Corporate Strategic Plan

To obtain commitment to and ownership of the strategies and initiatives to achieve the department's objectives as detailed in the Corporate Strategic plan, employees and management agree to pursue the following broad objectives during the life of this Agreement.

(a) Office of Chief Executive Officer/Corporate Services Division

The objective of both the Office of Chief Executive Officer and the Corporate Services Division is to provide a range of essential administrative and advisory services to the department's operational programs to ensure the department meets its external reporting requirements for accountability and statutory purposes. Auditing and reporting on the performance of the department's operations to ensure appropriate compliance is a key responsibility.

(b) Environmental Systems Division

The objectives of the Environmental Systems Division are to plan and implement projects aimed at increasing our knowledge and understanding of environmental systems under threat or pressure and apply this knowledge to the development of environmental objectives, strategies and policies to improve the management and protection of the environment by government, industry and the community.

(c) Evaluation Division

The objectives of the Evaluation Division are to manage the environmental impact assessment process for the Environmental Protection Authority and enforcement of conditions for the Minister, enabling sound environmental advice and development proposals and planning schemes/amendments to be provided to the government, developers and the public to ensure that the environment is protected for the community.

(d) Pollution Prevention Division

The objectives of the Pollution Prevention Division are to develop and enhance systems, processes and policies to ensure that discharges into the environment are minimised and pollution of the environment is prevented or abated. To administer the provisions of Part V of the Environmental Protection Act 1986, and apply the provisions of other Parts of the Environmental Protection Act 1986 in a manner uniform and consistent with the requirements and policy of the Environmental Protection Authority, other divisions and sections of the department.

(e) Regional Services Division

The objectives of the Regional Services Division are to provide a locally responsive environmental protection service in key regions, this includes a pollution response service to the community and industry in defined regions and provides a regional input into strategic studies and environmental assessments.

(f) Policy Co-ordination Division

The objectives of the Policy Co-ordination Division are to coordinate the development and analysis of environmental policy, ensure effective implementation, manage the Environmental Protection Authority's formulation of statutory Environmental Protection Policies, coordinate state of environment reporting and national initiatives undertaken at State level, implement the National Greenhouse Strategy in Western Australia and provide for community programs.

(g) Waste Management Division

The objectives of the Waste Management Division are to reduce the amount of waste produced and its impact on the environment and public health, through the application of the waste management hierarchy (ie reduce, recycle, safe disposal). This output develops and implements a best practice approach to waste management to reduce the solid, liquid and hazardous waste generated by society (other than those liquid wastes managed by the Water Corporation). The output is designed to ensure (where practicable) that the waste produced is recycled, and that any waste generated is managed to ensure appropriate public health and environmental protection standards are maintained for the community.

12.3 Continuous Learning / Skills Development

The department has a commitment to developing its workforce to its fullest potential so that each employee is able to contribute effectively to meet departmental goals and business needs.

The purpose of continuous learning and skill development of employees is—

- (a) the development, retention and recognition of appropriate technical, scientific and professional skills; and
- (b) the development of career paths for employees by the provision of appropriate study incentives.

The parties agree that career paths must reflect both the needs of the department and the employee.

Skills development and continuous learning should begin as soon as possible in an employee's career within the department. In that regard, an Induction Program has been developed and implemented which has been designed to provide new employees with an understanding of the department's functions and inter-relationships, as quickly and as effectively as possible.

This program is seen as the first important building block in the learning strategy for the department's employees. Thereafter the department wishes to encourage the retention of its workforce for as long as is mutually beneficial.

To assist this process an annual Study Tour Award exists to encourage the enhancement of individual skills and experience. Applications for the Award are called in February each year, and are assessed according to guidelines established for the Study Tour Award.

The department's skills requirement, linked to its goals and objectives, are being progressively identified and documented under generic headings within every employee's Job Description Form.

The detail derived from the new generic job descriptions will provide an essential information base on which to base the development of a series of modules, which will contribute to the continuous learning process, by covering three broad areas where enhancement of the skills base would be mutually beneficial—

- (a) Line management development;
- (b) Environmental management; and
- (c) Administrative support.

These modules will be specifically developed in conjunction with the department and tertiary institutions, and delivered on a modular basis. The environmental management module

will be developed having regard to the need within the agency to enhance skills in both scientific knowledge and in the development of sound policy on environmental management. The parties to the agreement anticipate that these modules would be introduced during the life of the Agreement.

Participation in the modular program will be dependent upon the anticipated outcome being consistent with the training and development jointly identified and agreed upon during the employee's annual individual performance management interview.

Participation in the modular program will be voluntary and dependent upon adequate funds being available to meet the cost of the Course Module. Cost sharing with the participant may be negotiated, with any employer contributions being most likely to be offered at the successful completion of each Course Module.

As a demonstration of joint commitment to the program the employer will provide for paid leave for 50% of the time of the Course Module duration. The employee will contribute the other 50% through the accumulation of additional hours above standard flexitime accruals over the 12 weeks leading up to attendance at the Course Module.

The employee's manager will certify the banked accumulated time is correct and must be supportive of the employee's participation in the program.

Funds will be limited for the granting of this program, therefore it is in the employee's interest that endorsement from the Chief Executive Officer for the planned program is obtained 12 weeks prior to the employee intending to attend the Modular Course. Such a request will be submitted on the appropriate form, which will include advice from the Human Resources Manager on whether or not the request contributes to the employee's career development.

By way of further enhancing the skills and experience of professionals within the department, consideration will be given to developing and implementing an exchange program with other Environmental Authorities within Australia or relevant industry within Western Australia. This program will be linked to an individual's jointly agreed performance targets and thus sponsored by the employee's Director and Manager and have the approval of the Chief Executive Officer.

12.4 Individual Performance Management

Parties to this Agreement are committed to the implementation of the Individual Performance Management program introduced for all employees, under the department's policy for Performance Management (August 1999 and reviewed annually). This policy is linked to an individual having their job described so that performance can be discussed against the requirements and criteria for the position. It is agreed that employees therefore need to have a clear understanding of their job and the processes involved and this is captured under generic factors in their job description.

It is acknowledged that performance management is intended to assist an employee to reach full potential in the role they are required to perform.

Attaining and sustaining a standard that a person may reasonably be expected to reach, requires regular dialogue and feedback. This will be provided on an ongoing basis, however every 12 to 18 months these discussions will be consolidated and direction for the coming year determined. The introduction of this process under the performance management policy will be achieved in a consultative way, with prototype forms for the annual Individual Performance Management Interview being progressively trialed as the generic job descriptions are finalised. The annual Individual Performance Management Interview should result in an understanding as to whether performance exceeds, matches or is substandard to that required. It will also ensure that outcomes are linked to the department's business plan and that career development issues are identified.

It is understood that career development issues may involve the employee being required to undertake skills training in order to fully achieve the requirements of the job. It is also understood that the performance management process has to be mutually agreed between management and staff, for it to succeed.

12.5 Quality of Work Life Improvements

This Agreement provides for flexible working conditions, which have been designed to ensure that—

- (a) The department's commitments are able to be met;
- (b) Employees are treated fairly and consistently;
- (c) Employees' individual needs are taken into account within the context of the department meeting the requirements of its stakeholders and customers.

These conditions are outlined in the next section of this Agreement.

12.6 Family Friendly Initiatives.

Family-friendly work practices are contained in this Agreement in acknowledgment of the benefits to the department and to its employees through the provision of flexible work practices. These work practices and conditions include the availability of—

- (a) Permanent part-time work;
- (b) Job sharing;
- (c) Flexible working hours;
- (d) Working from home;
- (e) Purchasing of leave entitlements (48/50 for 52);
- (f) Parental leave and paid parental leave;
- (g) Carer's leave.

The conditions associated with these flexible working practices are detailed in subclauses (12.7) Working from Home of this clause and Clauses (14)-Flexible Working Conditions, and (15) Leave Conditions including (15.xiii) Career Break Scheme within this Agreement.

12.7 Working From Home

With the agreement of both the employer and employee, and in accordance with the department's Working from Home Policy, working from home may be considered. The Working from Home Policy (March 1999 reviewed annually) is a formal arrangement and does not include those periods where, with management approval, employees may work at home, from time to time, on an *ad hoc* basis. Where employees request and are permitted to work from home on an *ad hoc* basis the employee does so at their own risk. The Employer does not accept any responsibility for the OH&S of the home environment nor accept any responsibility with regard to workers compensation for any accidents, which may occur, nor any damage to the employee's equipment.

13.—HOURS OF DUTY

An employee may be employed on a full time, part-time, permanent or fixed term contract basis.

(a) A Full time employee is an employee engaged in regular and continuing employment for an average 37.5 hours per week (Option A) or 39 hours per week (Option B).

(b) A part-time employee is an employee who is engaged in regular and continuing employment for less than 37.5 hours per week (Option A) or 39 hours per week (Option B).

(c) The rate of pay for a part-time employee will be proportionate to the hours worked relative to a full time employee, which will be dependent upon the Option chosen.

(d) The part-time employee will be entitled to the same leave and conditions described in this Agreement, as for a full time employee proportionate to the hours worked.

(e) Payment of a part-time employee proceeding on annual or long service leave will be calculated on a pro-rata basis having regard for any variations to the employee's ordinary working hours during the accrual period.

(f) A part-time employee shall be allowed the prescribed Public Holidays, without deduction of pay in respect of each holiday which is observed on a day ordinarily worked by the part-time employee.

(g) Except with the prior agreement of the part-time employee, the employer will give four weeks notice of any requirement to vary the normal days or hours of work.

(h) Full time employees may be granted approval by the Chief Executive Officer to work part-time subject to the operations of the department not being disrupted unduly and appropriate work, for their classification and experience, being available.

(i) Part-time employees may be granted approval by the Chief Executive Officer to work full-time, subject to—

- the operations of the department not being disrupted unduly;
- funding being available;
- work appropriate to their classification and experience, being available.

14.—FLEXIBLE WORKING CONDITIONS

14.1 Working Hours

It is agreed that, primarily, the provision of flexible working hours will take account of customer needs, business needs and the preferences of employees.

The purpose of such flexible arrangements is to—

- (a) ensure the appropriate allocation of employee resources to meet demand, especially peak work loads, eg. Parliamentary Questions and Ministerial enquiries; and
- (b) provide effective customer response during the department's business hours of 8.00 am to 5.00pm, Monday to Friday.

It is the clear responsibility of managers and employees to ensure that these requirements are met.

Full time employees will work 450 hours over a 12 week cycle (6 pay periods) for Option A (37.5 hours) or work 468 hours over a 12 week cycle (6 pay periods) for Option B (39 hours).

Officers must work in the core periods of 9.30am to 12 noon and 2.00pm to 3.30pm unless—

- (c) absent due to illness;
- (d) on approved leave;
- (e) subject to negotiation, and approval of the Chief Executive Officer, operating on an alternative working arrangement.

14.2 Prescribed hours

(a) Ordinary hours of work shall be between 7.00am and 7.00pm, Monday to Friday.

(b) Ordinary hours may be worked on the weekend with prior agreement of supervisor and employee.

(c) Sufficient employees, as determined by the Chief Executive Officer, shall be on duty to meet the needs of the public, and both internal and external clients between 8.00am and 5.00 pm, Monday to Friday.

(d) Provided managers ensure that all criteria contained within subclauses a and b of this clause are met, in developing the arrangement for work times within their branch, then no core hours are prescribed.

14.3 Debit and Credit of Flexitime Hours

(a) Unless in the Chief Executive Officer's opinion, exceptional circumstances prevail, employees utilising flexitime provisions will not carry over more than 15 hours (Option A) or 15.6 hours (Option B) of flexitime debits or 15 hours (Option A) or 15.6 hours (Option B) credits in any 3 month (6 timesheet) cycles. Credits and debits exceeding 15 and 15.6 hours (Option A and B respectively) may be carried over to the next timesheet cycle within the 3 month cycle.

(b) Unless in the Chief Executive Officer's opinion, exceptional circumstances prevail, eligible employees will not take more than 22.5 hours (Option A) or 23.4 hours (Option B) of flexi leave in any monthly (2 timesheet) cycle. The granting of such leave is subject to the Department's operational requirements and does not count towards the required average of hours per week; i.e. 37.5 hours for Option A and 39 hours for Option B.

(c) It is the responsibility of managers and officers to ensure that an employee's hours are managed so that these limits of debits and credits are not exceeded. Where exceptional circumstances interfere with this managed process, managers must seek Chief Executive Officer approval to vary the provisions of subclause 14.3 (a) above.

(d) In the event that debit hours exceed the maximum allowed, the employee's fortnightly salary will be reduced by an amount equal to the debit hours in excess of the maximum allowed. The employee may also be placed on standard hours

as specified in the Award or other disciplinary action may be taken.

14.4 Course Modules accumulation of hours

For those employees who are undertaking Course Modules under the provisions of Clause 12.3 of this Agreement, Chief Executive Officer approval to their participation needs to have been gained 12 weeks prior to the employee attending the module. The employee's manager will also have to certify the correct accumulation of hours. Under this arrangement it may be necessary to carry more than the hours referred to in subclause 14.3 (a) above, from one 12 week cycle to another. This provision will be separately agreed and appropriately documented.

14.5 Leave

For the purposes of Leave, Public Holidays and Public Service Holidays, a day shall be equivalent to 7.5 hours (Option A) and 7.8 hours (Option B).

15.—LEAVE CONDITIONS

In order to provide greater ability for the department to manage its workload and to achieve improved leave management, the taking of annual and long service leave will be in line with the department's policy for Leave Management and the repackaging of conditions contained in this Agreement.

These conditions apply to all employees covered by this Agreement.

15. (i) Short leave

For employees on Option A working arrangements, the facility for short leave is 22.5 hours in any calendar year, as per Clause 26.-Short Leave of the Award.

For employees choosing Option B the facility for short leave no longer applies.

15. (ii) Ceremonial/Cultural Leave

(a) An employee covered by this Agreement is entitled to reasonable time off without pay for tribal, ceremonial or cultural purposes.

(b) This time off may be granted by the Chief Executive Officer, taking account of the employee's tribal, ceremonial or cultural reasons and departmental convenience. In this instance, usual leave without pay conditions will apply.

15. (iii) Long Service Leave

This subclause shall be read in conjunction with Clause 21—Long Service Leave of the Award.

(a) An employee is entitled to 13 weeks long service leave after a period of seven years continuous employment.

(b) Subject to an offer from time to time by the Chief Executive Officer, and by agreement in writing between the Chief Executive Officer and the employee, an equivalent benefit, in payment, can be accepted by the employee instead of taking accrued long service leave entitlement.

(c) By agreement in writing between the Chief Executive Officer and employee, and subject to the Department's operational requirements, long service leave may be taken at half the normal rate of pay and hence for double the period of time. In this instance conditions associated with the non accrual of long service leave will apply to the full period of long service leave taken.

(d) The minimum period of long service leave that can be taken is one (1) working day or its equivalent.

(e) An employee must complete the appropriate form requesting Long Service Leave (full pay, or half pay). The timing for the taking of Long Service Leave (full pay) will be arranged through discussion with an employee's immediate manager. An employee shall give the employer not less than four weeks notice of intention to take long service leave (full pay). A lesser period of notice may be agreed between the relevant manager and employee where exceptional circumstances prevail.

(f) Long Service leave must be taken within three years of being accrued and if this cannot be achieved, must have Chief Executive Officer approval to defer beyond that period. Such a deferral will carry with it a leave management plan for the taking of the Long Service Leave.

(g) Long Service Leave can only be deferred once beyond the three year period of taking the leave and the deferral management plan must be implemented.

(h) Where an employee has taken Long Service Leave in a year they have the option to convert their annual leave for that year into an equivalent benefit in payment, subject to Chief Executive Officer approval.

(i) Where an employee has not taken their accrued Long Service Leave within the three years allowed (either all or in part) and no Chief Executive Officer approved deferral plan exists, then an employee's period of "continuous employment" for the purposes of calculating an employee's next Long Service leave entitlement shall not include the period from the date when the Long Service Leave should have been fully taken until the date the overdue Long Service Leave is actually taken.

15. (iv) Parental Leave

This subclause shall be read in conjunction with Clause 23—Maternity Leave of the Award.

(a) Eligibility for Parental Leave

An employee is entitled to a period of up to 52 weeks unpaid parental leave in respect of the birth of a child to, or the placement of a child on adoption with, the employee or the employee's spouse/partner.

If both parents are employed by the department then the 52 weeks unpaid parental leave may be shared between both parents, but not taken at the same time, other than following the birth or placement of the child when two weeks concurrent leave is available.

(b) Other Leave Entitlements

An employee proceeding on parental leave may elect to utilise any accrued annual leave or accrued long service leave for the whole or part of the period of parental leave or extend the period of parental leave with such leave.

An employee may extend the maximum period of parental leave with a period of leave without pay subject to departmental approval.

An employee on parental leave is not entitled to paid sick leave or other paid Award absences except where otherwise provided for in this clause.

(c) Notice and Variation

The employee shall give not less than ten week's notice in writing to the department of the date the employee proposes to commence parental leave stating the period of leave to be taken. A pregnant employee shall commence parental leave 6 weeks prior to the expected date of birth. However, a later date may be agreed upon if supported by a medical certificate.

An employee seeking to adopt a child shall not be in breach of the above requirement, as a consequence of failure to give the stipulated period of notice, if such failure is due to the requirement of the adoption agency to accept an earlier or later placement of a child; or other compelling circumstances.

At any time during the period of leave the employee may apply to reduce or extend the period stated in the original application provided eight weeks written notice is provided.

(d) 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 of the same classification until the commencement of parental leave.

If the transfer to a safe job is not practicable, the employee may, or the employer may require the employee, to take leave for such period as is certified necessary by a duly qualified medical practitioner. Such leave shall be treated as parental leave for continuous service considerations.

(e) Effect of Leave on Employment Contract

Fixed Term Contract

An employee on a fixed term contract shall have the same entitlement to parental leave however, the period of leave granted shall not exceed beyond the term of that contract.

Continuous Service

Absence on parental leave shall not break the continuity of service of an employee, but shall not count as qualifying service for leave purposes.

Return to Work

An employee on return from parental leave shall be entitled to the position which the employee occupied immediately prior to proceeding on parental leave or, if not available, a comparable position. Where an employee was transferred to a safe job pursuant to subclause (d), the employee is entitled to return to the position occupied immediately prior to the transfer or, if not available, a comparable position.

15.(v) Paid Parental Leave

(a) Definition for the purposes of sub clause 15.(v) Paid Parental Leave only)

"Employee" includes full time, part-time, permanent and fixed term contract employees.

"Primary care giver" means the parent who has primary responsibility for the care of the child(ren), this includes any periods in hospital following the birth of the child(ren) of either the child and/or mother and child.

"Child(ren)" for the purposes of adoption means a child under the age of 5 years.

(b) Subject to department policy, an employee who has completed 12 months service with the employer will be entitled to 2 weeks paid parental leave, for each year of service up to a maximum of 6 weeks immediately following the birth of a child or the adoption of a child.

(c) Paid leave of up to 6 weeks will only be available to the primary care giver.

(d) The maximum period of absence on parental leave, inclusive of any period of paid parental leave is 52 weeks.

(e) If both parents are employed by the department, only one parent can be the primary care giver for the purposes of this sub clause.

(f) If the pregnancy results in other than a live child or the child dies in the weeks immediately thereafter the birth, the entitlement to paid parental leave remains intact.

(g) If application for paid parental leave has been granted for the adoption of a child(ren), which does not eventuate, then the period of paid parental leave no longer applies.

(h) Absence on paid parental leave will not count as service for the purposes of accruing an entitlement to sick leave, annual leave or long service leave.

15. (vi) Sick Leave

This subclause shall be read in conjunction with Clause 22.—Sick Leave of the Award.

(a) The department will credit each full time employee with the following sick leave credits, which are cumulative—

	Sick leave on full pay	Sick leave on half pay
On the day of initial appointment;	5 days	2days
On completion of 6 months continuous service;	5 days	3 days
On completion of 12 months continuous service;	10 days	5 days
On completion of each further period of 12 months continuous service.	10 days	5 days

(b) An employee employed on a fixed term contract for a period greater than 12 months, shall be credited with the same entitlement as a permanent employee. An employee employed on a fixed term contract for a period less than 12 months shall be credited with the same entitlement on a pro rata basis for the period of the contract.

(c) A part-time employee shall be entitled to the same sick leave credits, on a pro rata basis according to the number of hours worked each fortnight. Payment of sick leave shall only be made for those hours that would normally have been worked had the employee not been on sick leave.

15. (vii) Carer's Leave

This subclause shall be read in conjunction with subclause 15.(vi) of this agreement.

(a) An employee with responsibilities in relation to either members of his/her family or members of his/her household who need his/her care and support, shall be entitled to use up to 10 days per annum of accrued sick leave credits to provide care and support for such persons.

(b) For the first 5 days of Carer's Leave in a year the employee is required to produce a medical certificate if care and support requirements exceed two consecutive working days.

(c) For any carer's leave period that accumulates in excess of 5 days in any one year, a medical certificate is required for that period.

(d) No more than 10 days carer's leave shall be taken in any one year.

15. (viii) Annual Leave Loading

Annual leave loading referred to in Clause 19—Annual Leave of the Award has been incorporated into the quantum salary increase associated with this Agreement.

15. (ix) Compaction of Annual Leave

This subclause shall be read in conjunction with Clause 19—Annual leave of the Award.

Subject to an offer from time to time by the Chief Executive Officer, and agreement in writing between the Chief Executive Officer and employee, an equivalent benefit, in payment for up to 50% of accrued annual leave, can be accepted by the employee instead of taking the accrued annual leave. For example, four weeks accrued annual leave can be taken as two weeks annual leave with payment for the four weeks entitlement. The offer of this arrangement by the Chief Executive Officer will be subject to affordability, the department's operational requirements and due regard for the employee's need for rest and recreation.

15. (x) Regional Officers' Annual Leave Travel Allowance

(a) This subclause shall be read in conjunction with subclause 10—Annual Leave Travel Concessions of Clause 19—Annual Leave of the Award, of which subclause (a) is entitled "Officers stationed in remote areas". The spirit and intent is to provide some travel concession to those employees working for more than 12 months in remote locations, so that they may return to Perth. As a consequence the travel concessions are based on a return journey to Perth once a year and remote locations are defined as being offices located 240 kilometres or more from Perth.

(b) The Department at the date of this Agreement has five regional offices, Kwinana, Bunbury, Kalgoorlie, Geraldton and Karratha. For the purposes of this subclause, and consistent with the Award, Kwinana and Bunbury are not considered remote locations and employees working from those offices would not be eligible for the provisions of this subclause.

The following travel concessions have been agreed for employees based at Karratha.

Regional centre	Approved mode of travel	Travel concession	Travelling time
9.b). Karratha	(aa) Air	Return air fare for the employee, dependent spouse & dependent children.	One day each way.
	(bb) Road	Full motor vehicle allowance rates, but reimbursement not to exceed the cost of the return airfare.	Two and a half days each way.

(c) The airfare will be booked by the Department and will ordinarily be the cheapest available return airfare. Exceptional circumstances may arise where the Department requires the employee to take annual leave at short notice. Where this arises, there may be insufficient notice to make the cheapest available airfare booking and in such circumstances, the Department will meet the full cost of the return airfare to Perth for the employee (and any dependents) where appropriate.

(d) In the case of subclause 9.b) (bb) of this subclause, the motor vehicle allowance will not exceed the cost of the cheapest available return airfare.

(e) This travel concession allowance may also be payable for travel to any destination, conditional upon the employee (with dependents, where appropriate) actually travelling out of the region. The concession in such cases will be the equivalent of the cheapest available return airfare to Perth for the employee (with dependents, where appropriate).

(f) The following travel concessions have also been agreed for employees based at Kalgoorlie and Geraldton.

Regional centre	Approved mode of travel	Travel concession	Travelling time
8.f) Kalgoorlie	(aa) Road/Rail	Return rail fare for employee, dependent spouse and dependent children.	One and a half days each way
8.f) Geraldton	(bb) Road	Return coach fare for the employee, dependent spouse and dependent children.	One day each way

15. (xi) Purchased leave

A permanent employee covered by this Agreement, subject to requirements listed herein, shall be entitled to apply to receive either 50 weeks or 48 weeks ordinary time pay spread over the full 52 weeks of the year. The employee will be entitled to take either two (2) or four (4) weeks extra leave in addition to their normal leave entitlements.

The additional 2 or 4 weeks per year will not be able to be accrued. In the event that the employee cannot take the leave, his/her salary will be adjusted at the completion of the 12 month period to take account of the time worked during the year that was not included in the salary.

For purchased leave requirements to be available—

- (a) Approval must be obtained from the Chief Executive Officer to purchase leave. Such approval is at the discretion of the Chief Executive Officer and will be based on customer, stakeholder and operational requirements; and
- (b) The leave is purchased over 26 pay periods; and
- (c) The employee is expected to stay in the scheme for 26 pays; and
- (d) Employees can commence the scheme at the beginning of any pay period; and
- (e) The employee will receive a reduction in salary that will result in either 50 or 48 weeks of pay (depending upon whether 2 or 4 weeks respectively are purchased) spread over the full 52 weeks of the year—the calculation being either 2 or 4 weeks salary divided by 26 pays; and
- (f) Deductions from the employee's gross salary will be made each fortnight over the 26 pay periods; and
- (g) Higher duties allowance will not be included in the deduction and is not payable whilst on purchased leave; and
- (h) With the exception of Workers' Compensation payments, there will be no effect on the employee's conditions of service; and
- (i) Half of the purchased leave is available after 13 pay periods, the remaining half is available at the end of the 26th pay period; and
- (j) The purchased leave may be taken in weekly amounts; and
- (k) The employee must take the purchased leave within 12 months of purchasing it. Purchased Leave can be taken in conjunction with Annual Leave, Long Service Leave, Parental Leave and Leave Without Pay; and
- (l) If the employee falls sick while on purchased leave and produces a medical certificate confirming the employee was restricted to his/her home for seven (7) consecutive days or more, the department will grant Sick Leave and reinstate the Purchased Leave credits for that period.

15. (xii) Leave Without Pay

The application of leave without pay within the department shall be in accordance with Clause 24—Leave Without Pay of the Award and in line with the Department's policy on the management of leave without pay entitled "Leave Without Pay".

15. (xiii) Career Break Scheme

With the approval of the Chief Executive Officer, and taking into account the employee's and departmental requirements, an employee may take unpaid leave for a pre-determined time to care for elderly or other dependents in need or to undertake formal education.

This leave may be for the purposes of extending the normal 12 month parental leave period.

This leave may also be combined with a period of part-time work.

Leave under the circumstances described in this sub clause would be sought and may be granted in accordance with the department's policy on Leave without Pay.

15. (xiv) Study Leave

This clause shall be read in conjunction with Clause 25 of the Award. Time off with pay may be granted up to a maximum of five hours per week, including travelling time, for subjects of approved courses, where scheduled classes are only available during normal working hours.

Where approved study by correspondence is undertaken, in remote locations lacking the required educational facilities, time off with pay up to a maximum of 200 hours per annum, including travelling time may be granted.

Where approved work specific study by correspondence is undertaken, time off with pay up to a maximum of 160 hours per annum may be granted. Approved work specific study by correspondence means that the study has been identified as part of the annual Individual Performance Management Interview and has been approved by the employee's manager and Director.

This clause does not apply to skills development Course Modules covered by Clause 12.3 of this Agreement.

16.—SALARY INCREASES

The salary increases are payable on the basis of implementation and continued cooperation of all parties in implementation of those improvements in productivity and/or work practice changes contained in this Agreement, and are detailed in Schedule A—Salary Schedule and Schedule B—Salary Schedule—Specified Callings of this Agreement.

Employees will receive the following increases payable from the first pay period on or after the dates mentioned below. The increases, approved by the Chief Executive Officer of the Department of Productivity and Labour Relations or the Cabinet Sub-Committee on Labour Relations, are subject to the achievement of the productivity targets outlined in the Productivity Model utilised by the Department.

The increases are identified as—

- (a) 3% payable as from the first pay period on or after the date of registration, this being a maximum of 3% for increased productivity; and
- (b) a further productivity-based increase, to a maximum of 3% payable, 12 months after the first pay period on or after the date of registration of this Agreement.

17.—RECOVERY OF OVERPAYMENTS

Where an overpayment of salary has occurred, irrespective of who is at fault—

- (a) Overpayments will be repaid to the employer as soon as practicable.
- (b) The employee will be contacted as soon as possible after an overpayment has been discovered to discuss and agree upon an arrangement for repayment of monies. In discussing the recovery of any overpayment, the employee's personal circumstances will be taken into account, should the employee raise them as an issue for consideration, in reaching agreement on the repayment of monies.
- (c) It is preferable that these arrangements are in writing before the salary adjustment occurs, but in any event the employee will receive written confirmation of the arrangement with an explanation for the overpayment and its recovery.
- (d) If agreement cannot be reached, the employer may deduct the amount of overpayment at a rate not exceeding 10% of the employee's gross pay in any one pay period.
- (e) Where the employee only has one pay period left, as in the case of fixed term contracts then the employer may deduct all the overpayment from the employee's last pay.
- (f) Where an employee has not provided sufficient notice to the employer about changes affecting their pay, and the employer deems it necessary to effect

adjustments immediately to prevent an overpayment occurring, then the employer may adjust the employee's pay accordingly. Every effort will be made by the employer to discuss these arrangements with the employee, where the employee is available.

18.—SALARY PACKAGING

(a) An employee may, by agreement with the employer, enter into a salary packaging arrangement in accordance with the provisions of the Public Sector Salary Packaging Guidelines and the Department of Environmental Protection's salary packaging arrangements.

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

(c) For the purposes 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.

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

- the base salary;
- other cash allowances;
- non cash benefits, eg superannuation, motor vehicles etc;
- any Fringe Benefit Tax liabilities currently paid; and
- any variable components, eg performance based incentives (where they exist).

(e) 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.

(f) The salary packaging arrangement must be cost neutral in relation to the cost to the Employer.

(g) 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.

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

(i) In the event of significant increases in Fringe Benefit Tax liability or administrative costs relating to arrangements under this clause, the employee may vary or cancel a salary packaging arrangement. Where subclause (6) of this Clause is affected, the employer may vary or cancel a salary packaging arrangement.

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

19.—DISPUTE SETTLEMENT PROCEDURE

In the event of any disagreement in connection with questions, disputes or difficulties arising under the Enterprise 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 or a mutually agreed person of their choosing. The supervisor may be accompanied by a representative nominated by the Chief Executive Officer.
- (b) If the matter is not resolved within five (5) working days following the discussion in accordance with subclause (a) hereof, the matter shall be referred in writing by the CSA representative or the employee to the Department's Chief Executive Officer or his/her nominee for resolution.
- (c) If the matter is not resolved within five (5) working days of the notification of the dispute in writing to the Department's Chief Executive Officer, it may be referred by either party to the WAIRC.
- (d) Pending resolution of the matter, work will continue in its present form.

20.—SIGNATORIES TO THE AGREEMENT

EMPLOYER

Signed by the Chief Executive Officer,
Department of Environmental Protection*(signed: indecipherable)*

Date 16.6.2000

UNION

Signed for and on behalf of the
Civil Service Association, Western
Australia Incorporated by*(signed: D Robinson)*

Date 16/6/00

COMMON SEAL

SCHEDULE A—SALARY SCHEDULE.

Classification Levels	Current Annual Salary OPTION A	Payable with effect from first pay period commencing on or after day of registration	Classification Levels	Current Annual Salary OPTION B	Payable with effect from first pay period commencing on or after day of registration
LEVEL 1			LEVEL 1		
U/17 years old	\$12,282	\$12,651	U/17 years old	\$12,806	\$13,191
17 year old	\$14,354	\$14,785	17 year old	\$14,966	\$15,415
18 year old	\$16,743	\$17,245	18 year old	\$17,458	\$17,982
19 year old	\$19,381	\$19,963	19 year old	\$20,207	\$20,814
20 year old	\$21,765	\$22,418	20 year old	\$22,693	\$23,373
1st year	\$23,910	\$24,627	1st year	\$24,929	\$25,677
2nd year	\$24,646	\$25,386	2nd year	\$25,696	\$26,467
3rd year	\$25,382	\$26,143	3rd year	\$26,464	\$27,258
4th year	\$26,112	\$26,895	4th year	\$27,226	\$28,043
5th year	\$26,848	\$27,653	5th year	\$27,992	\$28,832
6th year	\$27,583	\$28,411	6th year	\$28,759	\$29,622
7th year	\$28,428	\$29,281	7th year	\$29,641	\$30,530
8th year	\$29,013	\$29,884	8th year	\$30,251	\$31,159
9th year	\$29,880	\$30,777	9th year	\$31,153	\$32,087
LEVEL 2			LEVEL 2		
1st year	\$30,915	\$31,843	1st year	\$32,233	\$33,200
2nd year	\$31,710	\$32,661	2nd year	\$33,062	\$34,054
3rd year	\$32,544	\$33,521	3rd year	\$33,932	\$34,950
4th year	\$33,427	\$34,430	4th year	\$34,852	\$35,897
5th year	\$34,350	\$35,380	5th year	\$35,814	\$36,889
LEVEL 3			LEVEL 3		
1st year	\$35,619	\$36,687	1st year	\$37,137	\$38,251
2nd year	\$36,607	\$37,705	2nd year	\$38,167	\$39,312
3rd year	\$37,625	\$38,754	3rd year	\$39,230	\$40,406
4th year	\$38,672	\$39,832	4th year	\$40,320	\$41,530
LEVEL 4			LEVEL 4		
1st year	\$40,106	\$41,309	1st year	\$41,817	\$43,071
2nd year	\$41,230	\$42,467	2nd year	\$42,988	\$44,278
3rd year	\$42,387	\$43,659	3rd year	\$44,195	\$45,521
LEVEL 5			LEVEL 5		
1st year	\$44,614	\$45,952	1st year	\$46,517	\$47,913
2nd year	\$46,121	\$47,505	2nd year	\$48,087	\$49,530
3rd year	\$47,686	\$49,116	3rd year	\$49,719	\$51,211
4th year	\$49,308	\$50,787	4th year	\$51,411	\$52,953
LEVEL 6			LEVEL 6		
1st year	\$51,919	\$53,477	1st year	\$54,133	\$55,757
2nd year	\$53,694	\$55,305	2nd year	\$55,984	\$57,664
3rd year	\$55,530	\$57,196	3rd year	\$57,899	\$59,636
4th year	\$57,492	\$59,217	4th year	\$59,944	\$61,742
LEVEL 7			LEVEL 7		
1st year	\$60,498	\$62,313	1st year	\$63,079	\$64,972
2nd year	\$62,580	\$64,457	2nd year	\$65,249	\$67,207
3rd year	\$64,844	\$66,789	3rd year	\$67,609	\$69,638
LEVEL 8			LEVEL 8		
1st year	\$68,524	\$70,579	1st year	\$71,445	\$73,588
2nd year	\$71,158	\$73,293	2nd year	\$74,193	\$76,419
3rd year	\$74,426	\$76,659	3rd year	\$77,601	\$79,929
LEVEL 9			LEVEL 9		
1st year	\$78,507	\$80,863	1st year	\$81,855	\$84,311
2nd year	\$81,265	\$83,703	2nd year	\$84,730	\$87,272
3rd year	\$84,410	\$86,942	3rd year	\$88,010	\$90,650
CLASS			CLASS		
1	\$89,166	\$91,841	1	\$92,969	\$95,758
2	\$93,922	\$96,740	2	\$97,927	\$100,865
3	\$98,675	\$101,635	3	\$102,884	\$105,970
4	\$103,431	\$106,534	4	\$107,841	\$111,077

SCHEDULE B—SALARY SCHEDULE—SPECIFIED CALLINGS

Classification Levels	Current Annual Salary OPTION A	Payable with effect from first pay period commencing on or after day of registration	Classification Levels	Current Annual Salary OPTION B	Payable with effect from first pay period commencing on or after day of registration
LEVEL 2/4			LEVEL 2/4		
Year 1	\$30,915	\$31,843	Year 1	\$32,233	\$33,200
Year 2	\$32,544	\$33,521	Year 2	\$33,932	\$34,950
Year 3	\$34,350	\$35,380	Year 3	\$35,814	\$36,889
Year 4	\$36,607	\$37,705	Year 4	\$38,167	\$39,312
Year 5	\$40,106	\$41,309	Year 5	\$41,817	\$43,071
Year 6	\$42,387	\$43,659	Year 6	\$44,195	\$45,521
LEVEL 5			LEVEL 5		
1st year	\$44,614	\$45,952	1st year	\$46,517	\$47,913
2nd year	\$46,121	\$47,505	2nd year	\$48,087	\$49,530
3rd year	\$47,686	\$49,116	3rd year	\$49,719	\$51,211
4th year	\$49,308	\$50,787	4th year	\$51,411	\$52,953
LEVEL 6			LEVEL 6		
1st year	\$51,919	\$53,477	1st year	\$54,133	\$55,757
2nd year	\$53,694	\$55,305	2nd year	\$55,984	\$57,664
3rd year	\$55,530	\$57,196	3rd year	\$57,899	\$59,636
4th year	\$57,492	\$59,217	4th year	\$59,944	\$61,742

DIRECT ENGINEERING SERVICES/AFMEPKIU ENTERPRISE BARGAINING AGREEMENT 2000.**No. AG149 of 2000.**WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Direct Engineering Services Pty Ltd

and

The Automotive, Food, Metals, Engineering, Printing and
Kindred Industries Union of Workers

No. AG149 of 2000.

COMMISSIONER J.F. GREGOR.

29 June 2000.

DIRECT ENGINEERING SERVICES/AFMEPKIU
ENTERPRISE BARGAINING AGREEMENT 2000.*Order.*

HAVING heard Mr S Foy for the applicant and Mr G Sturman for the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the agreement between the parties lodged in the Commission on 2 June 2000 entitled Direct Engineering Services AFMEPKIU Enterprise Bargaining Agreement to be registered in terms of the following schedule as an Industrial Agreement, and replaces agreement No. AG 128 of 1998.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

DIRECT ENGINEERING SERVICES (NORTH WEST AIRCONDITIONING—PORT HEDLAND OPERATIONS) ENTERPRISE BARGAINING AGREEMENT**1.—TITLE**

This Agreement shall be known as the Direct Engineering Services (North West Airconditioning—Port Hedland Operations) Enterprise Bargaining Agreement and replaces Agreement No. AG 128 of 1998.

2.—ARRANGEMENT

1. Title
 2. Arrangement
 3. Area and Scope
 4. Relationship to Award/Order
 5. Parties Bound
 6. Date and Period of Operation
 7. Aims and Objectives
 8. Productivity Aims
 9. Dispute Resolution
 10. Wages
 11. Hours of Work
 12. Callouts
 13. Annual Leave
 14. Special Leave
 15. Annual Leave Travel Assistance
 16. Housing Assistance
 17. Travelling on Engagement and Termination
 18. Occupational Superannuation
 19. Extended Sick Leave Benefit Plan
- Signatories to Agreement

3.—AREA AND SCOPE

This agreement shall apply to Direct Engineering Services Pty Ltd in respect of tradespersons employed by the company at their Port Hedland operations.

4.—RELATIONSHIP TO AWARD/ORDER

This agreement shall be read and interpreted wholly in conjunction with the—

- (a) Metal Trades (General) Award 1966 No. 13 of 1965;
- (b) Airconditioning and Refrigeration Industry Construction and Servicing Award No. 10 of 1979; and
- (c) Airconditioning and Services (North-West) Order 1985 No. C449 of 1985.

In the event of any inconsistency the conditions prescribed in this agreement shall prevail.

5.—PARTIES BOUND

5.1 The parties to this agreement are—

- (a) Direct Engineering Services Pty Ltd (“the company”);
- (b) The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers’, Western Australian Branch (“the union”);

- (c) Employees of the company who are located in Port Hedland and engaged in any of the tradespersons classifications contained in the parent awards;
- (d) At the time this agreement was made it was estimated that it would apply to approximately twenty (20) employees.

6.—DATE AND PERIOD OF OPERATION

This agreement shall operate from 1 April 2000 until 31 March 2002.

Initiatives for the renewal of this agreement may commence after the nominal expiry date has passed.

7.—AIMS AND OBJECTIVES

7.1 The purpose of entering this agreement is to ensure the productivity, efficiency and flexibility of the company's operations and to ensure the company remains competitive in the sheet metal/airconditioning service and repair industry.

7.2 The company and the employees bound by this agreement agree to working in an open, friendly, communicative workplace so that co-operation and change will ensure harmony and bring with it a productive marketplace.

7.3 This will be brought about by—

- (a) Effective consultation and communication procedures between management and employees. We are committed to co-operate positively to exchange information to assist any change process and to interactively participate in training and development.
- (b) Continuous change in workplace practice such as flexible shift rosters and flexible work practices so that we will improve the efficiency of the operations and enhance the skills and job satisfaction of the employees in a safe working environment.
- (c) Our aim to minimise callbacks and reduce customer complaints to a minimum.
- (d) Remaining committed to the application of continuous improvement philosophy to all operations and using our best efforts to achieve productivity improvements.
- (e) Realising the importance to the business of good customer service and assisting in all ways possible to further the Company's business objectives of improved customer service.
- (f) Commitment to maintaining and improving quality so that our customers receive high quality service, on time and to their specifications, at a competitive price. It is understood that quality not only leads to bigger markets and higher profitability but also to the Company being more competitive.
- (g) Understanding the need to involve employees in taking more responsibility for their work.

8.—PRODUCTIVITY AIMS

8.1 To achieve agreed productivity the employee and the company agree the following objectives must be achieved—

- (a) Care must be taken in the production of quality work in a thorough and workmanlike manner in as short a time as possible.
- (b) To satisfy customers wherever possible through acceptable quality and standards delivered in accordance with customers requirements wherever possible.
- (c) To make a concerted effort to keep down-time to a minimum.
- (d) To make every endeavour to keep absenteeism in the company to a minimum. The parties are committed to pursuing a reduction of unplanned absences within DES operations during the life of the agreement.
- (e) You are bound by this agreement to working with management to identify and implement suggestions to improve the reduction of waste.
- (f) Whilst your ordinary hours of work are thirty eight per week you agree to work reasonable overtime where required by the company to ensure that the company's contractual obligations to the client are met.

- (g) Workloads, sickness or holidays by workmates, machinery breakdowns or job deadlines may necessitate your assistance.

(h) Housekeeping

- (i) Your commitment is required at all times to ensuring that satisfactory housekeeping practices are maintained in workshop areas and yard for a safe and orderly work environment.
- (ii) Work vehicles are to be kept in a clean safe and presentable manner at all times.

(i) Administration Tasks

Your co-operation is required in completing all client service and repair documentation.

9.—DISPUTE RESOLUTION

9.1 Where a question, dispute or difficulty arises, concerning his or her employment, the employee or employees concerned shall initially discuss the matter with their immediate supervisor.

9.2 If the question, dispute or difficulty remains unresolved, the employee or employees concerned shall discuss the matter with the Site Manager and, if they so desire, in the presence of their union delegate.

9.3 Where the matter remains unresolved, it shall be referred to a senior management representative for discussion with an appropriate full time union official.

9.4 The parties agree to record and identify all relevant facts and issues that arise throughout the dispute resolution process.

9.5 If the matter still remains unresolved, the parties involved shall refer the matter to the Western Australian Industrial Relations Commission ("WAIRC").

9.6 Whilst any of the above steps are being followed work shall continue normally and no industrial action including any ban or limitation shall be taken.

9.7 The parties to this agreement will only refer a question, dispute or difficulty to the WAIRC in the event that they have made all reasonable attempts to resolve the question, dispute or difficulty before hand, by adhering to the dispute resolution procedure.

10.—WAGES

10.1 The wage rates paid to trades people employed by the company as at 31 March 2000 excluding location allowance and housing assistance allowance are as follows—

Base Rate—Tradesperson	\$16.1092 per hour
Level 1—Leading Hand not less than 3 and not more than 10 other workers	\$16.6242 per hour
Level 2—Leading Hand more than 10 and not more than 20 and other workers	\$16.9024 per hour
Level 3—Leading Hand more than 20 other workers	\$17.1392 per hour

10.2 The wage rates paid to trades people by the company as at 31 March 2000 as set out in Clause 10.1 shall be increased by 4% as from the first pay period commencing on or after 1 April 2000 and shall be further increased by 4% as from the first pay period commencing on or after 1 April 2001.

10.3 The wage rates for trades people covered by this agreement include a sixty-one cents per hour allowance and are to be paid for all purposes. This allowance is paid in lieu of the allowance contained in Clause 7 – Disability Allowance prescribed in AG146 of 1995.

11.—HOURS OF WORK

11.1 Ordinary hours of work shall be thirty eight (38) per week, worked between 7.00 am to 7.00 pm Monday to Friday and be of eight (8) hours duration daily.

11.2 Flexibility to vary starting and finishing time each day may be required in specific occasions to suit the requirements of customers and, by arrangement between the company and the employees, such flexibility may be extended.

11.3 Time worked outside of ordinary hours will be paid at penalty rates as prescribed by the award.

11.4 Acceptance of Service Calls

To facilitate the company's goal to provide the highest level of customer satisfaction, employees shall make themselves available to accept break down calls up to the scheduled completion of their particular shift. Where an employee is not able to work over time on any particular day, due to prearranged personal commitments, that employee shall advise their supervisor prior to the mid shift meal break of that shift.

12.—CALLOUTS

12.1 Callout personnel to be available between 5.30 pm to 7.00 pm Monday to Friday and to cover the 24 hours for Saturday and Sunday. Each refrigeration tradesperson shall be available for the call out roster.

12.2 A dedicated mobile phone, workshop keys and customer access plus use of works vehicle will be made available to the duty person.

12.3 Service person is responsible to accept all service calls and arrange assistance if considered essential.

12.4 The mechanic on call is to receive \$120.00 standby fee per week.

12.5 Once a call out has been received the three hours at double time will apply, however any subsequent calls undertaken within this period will be covered by the original call fee and if extending beyond three hours, will only attract over-time payment for actual hours worked.

12.6 For a further three hour call fee to apply, a minimum of 15 minutes must have elapsed between the original three hour period and the subsequent call.

12.7 For callouts between the hours of 10.00 pm and 4.00 am an eight hour uninterrupted break will be allowed with no deduction from base wages and entitlements. (DES to cover wages from 7.00 am until 8 hour break is complete. Penalty rates will only apply if the mechanic works past 3.30 pm). The eight hour break will commence from the time the job is completed and the duty person will be required to attend normal work that day.

12.8 Callouts from 4.00 am to 7.00 am will be paid at a minimum 3 hours. No rest period will apply and the mechanic will be required to start at 7.00 am. (Provided no calls are received between 10.00 pm and 4.00 am).

12.9 The Friday after a callout week to be taken as a R.D.O. if required.

12.10 A \$35.00 standby fee shall be paid to any tradesperson required by the Company to standby on any of the ten gazetted Hedland public holidays.

12.11 Callouts received on a public holiday shall be paid for at double time with a minimum payment for 3 hours.

13.—ANNUAL LEAVE

13.1 All annual leave entitlements shall be taken in the year they fall due unless the employee otherwise obtains written permission from the company.

13.2 Subject to clause 13.1 a maximum of ten (10) days of accrued annual leave may be carried over and added to the next entitlement.

13.3 The provisions prescribed by paragraph (3) (c) in Clause 21 of the *Airconditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979* shall not apply to employees engaged pursuant to this agreement.

13.4 Time of Taking Annual Leave

Subject to the provisions of this clause, where because of seasonal conditions or because of a downturn in business workloads are at a reduced level, the company may give an employee ten (10) days notice requiring him to take annual leave accrued due for a period of up to ten (10) days.

13.5 DES may at its discretion allow the employee to take a portion of his annual leave before the right thereto has accrued due, provided that in no case shall the period of leave exceed the proportionate amount of leave which would have otherwise been due had the employee terminated his employment at the date of commencement of such leave.

13.6 Rostered days off may be accrued to a maximum of three (3).

14.—SPECIAL LEAVE

Leave without pay may be considered for extra special purposes, but only to a maximum of thirty-eight (38) hours per year.

15.—ANNUAL LEAVE TRAVEL ASSISTANCE

15.1 All tradespersons hired on or after 21st August 1995 shall be entitled to two (2) return adult-economy airfares to Perth each year on the completion of twelve (12) months' service.

15.2 When applying for travel assistance the period of leave to be taken must be a minimum of three (3) days.

15.3 (a) If so requested, an employee shall receive payment in full, but must make a declaration that the travel assistance will be used for bonafide travel.

(b) Within seven (7) days of returning from leave employees must complete another declaration stating that the travel assistance was used for bonafide travel, otherwise PAYE tax shall be deducted for the payment made.

16.—HOUSING ASSISTANCE

The following provisions with respect to housing assistance shall apply in lieu of any award entitlements—

16.1 The company shall provide single employees with suitable accommodation.

16.2 Single employees who opt to live out, and all other employees shall be paid the following weekly allowance for board and/or lodging—

New employee	\$160 untaxed subject to the filing of a living away from home declaration
After 12 months service	\$300 taxable

16.3 The provisions of subclause (1) and (2) do not apply with respect to any period during which an employee is absent from work without reasonable excuse.

In such a case, where board and lodging is supplied by the company, an amount equivalent to the value of the board and lodging may be deducted by the company from money owing, or which may become owing to the employee for the period of the absence.

16.4 An employee who is paid the above allowance or is supplied with board and lodging in accordance with this clause, shall also be paid 33.33% of the applicable location allowance prescribed by Clause 22 – Location Allowance of the *Metal Trades (General) Award 1966*.

17.—TRAVELLING ON ENGAGEMENT AND TERMINATION

17.1 In this clause "airfare" means normal economy airfare and includes the cost of transporting any tools owned by the employee and required by such employee in his/her employment and, in the case of married employee travelling, on engagement only, "fare" shall include the cost of excess baggage to a limit of forty (40) kilograms per family unit.

17.2 Subject to the provisions of this clause, the fare of an employee from the place of engagement to any place of employment will be paid by the company and the employee shall be paid at ordinary rates, for not more than eight (8) hours in any day, for time spent in travelling to the place of employment, including time occupied in waiting for transport connections; however, if the employee uses a mode of travel not approved by the company, travelling time in excess of eight (8) hours shall not be allowed unless otherwise determined by the Western Australian Industrial Relations Commission.

17.3 The amount of the fare paid by the employer, pursuant to subclause (2) hereof, may be deducted from subsequent earnings of the employee concerned in such a manner as agreed in writing between the employee and the company.

17.4 If an employee completes three (3) months of continuous service with the company, or the employment is terminated before that time, any amount deducted by the company from the employee's wages pursuant to subclause (3) hereof, to the extent that it does not exceed the cost of an airfare from Perth to the site, shall be refunded to the employee.

17.5 Where an employee completes nine (9) months of continuous services with the company, or the employment is

terminated after completion of six (6) months service, the balance of any amount deducted pursuant to subclause (3) hereof, shall be refunded to the employee.

17.6 An employee who completes twelve (12) months of continuous service with the company and resigns or his employment is terminated, shall be given an airfare from the worksite to Perth.

17.7 Where an employee completes two (2) years of continuous service with the company and resigns or his employment is terminated, shall be given an airfare from site to the original point of engagement in Australia.

18.—OCCUPATIONAL SUPERANNUATION

An employee who is covered by this agreement shall be entitled to occupational superannuation in accordance with United Technologies Corporation Retirement Plan.

19.—EXTENDED SICK LEAVE BENEFIT PLAN

19.1 Preamble

DES recognises that long term illness or injury to an employee means suffering or hardship for the employee and their dependants.

In recognition of this, DES is prepared to implement an extended sick leave benefit plan which will provide up to twelve (12) months paid sick leave for an employee who is suffering from a genuine long term illness or injury.

19.2 Conditions

(a) Illness of Injury Benefits

- (i) The DES Extended Sick Leave Benefit Plan may provide an employee who is suffering from genuine long term illness or injury with up to 12 (twelve) months extended sick leave. This leave will be paid at the employee's base all purpose wage rate.
- (ii) An employee is covered for 24 hours per day 7 days per week including periods where the employee is on annual leave.
- (iii) During any period on the DES extended sick benefit plan, an employee cannot receive more pay, including any form of compensation, than that which they would have attracted had they been at work.

(b) Eligibility Conditions

- (i) The DES Extended Sick Leave Benefit Plan will be available to employees who are absent from work as a result of genuine illness or injury.
- (ii) The DES Managing Director and the DES E.H. & S. Manager will review and approve such cases.
- (iii) The DES Extended Sick Leave Benefit Plan does not apply to a casual employee or an employee who is on probation.
- (iv) There is a minimum waiting period of 7 days before an employee is eligible to apply.
- (v) Access to the DES Extended Sick Leave Benefit Plan will only be available to employees who have exhausted their award sick leave entitlement.
- (vi) In addition, any annual leave entitlements in excess of 30 days will need to be utilised prior to the Extended Sick Leave Benefit Plan becoming available.
- (vii) Public Holidays falling during an Extended Sick Leave Benefit Plan period, shall be taken by the employee in lieu of the extended sick leave benefit.
- (viii) Any additional leave entitlements accrued during an Extended Sick Leave Benefit Plan period shall be taken by the employee as part of the period of absence.

(c) Making an Application

Applications for the DES Extended Sick Leave Benefit Plan must be accompanied by medical certificates and should be forwarded to the DES E.H. & S. Manager in the first instance.

(d) Medical Assessment

- (i) DES reserves the right to require an employee requesting or participating in the extended sick leave plan, to undergo a medical assessment by a suitably qualified/registered medical practitioner, after consultation with employees and their nominated representatives.

- (ii) DES will meet all costs associated with such medical assessments.

(e) Exclusions

There is no cover for the insured person if the injury or sickness occurs—

- as a result of a war, invasion or civil war;
- when flying as a pilot or crew member on any aircraft or you engaging in any aerial activity except as a passenger in a properly licensed aircraft;
- intentional self-inflicted injury, suicide or attempted suicide;
- pregnancy or child birth other than complications occurring in the first 33 weeks of pregnancy and requiring hospitalisation;
- any pre-existing illness that you have or had treatment for or advice for treatment for the six months prior to the date of cover;
- any professional sporting activities;
- a criminal act committed by you;
- 28 day wait for all football injuries.

(f) Effect on Award Entitlements

- (i) Employees will continue to accrue 10 days sick leave per year in accordance with the Award, for the purpose of exercising the use of "normal" sick leave.
- (ii) Accrued long service leave is unaffected by any extended sick leave benefit period and service for the purpose of accruing such benefits is similarly unaffected.
- (iii) Rostered Days Off will not accrue during any period where an employee is participating in the DES Extended Sick Leave Benefit Plan.

(g) Workers Compensation

The DES Sick Leave Benefit Plan can be used in conjunction with an approved absence under Workers' Compensation, or other similar legislated compensation program. In this respect, the combination of any compensation program and the DES Extended Sick Leave program cannot exceed 12 months duration or exceed the ordinary weekly "all purpose" wage rate.

(h) Coverage of Employees Absence

DES reserves the right to employ labour hire personnel from a labour hire company, to fill the temporary vacancy created by an employee participating in the DES Extended Sick Leave Benefit Plan.

AFMEPKIU

John Sharp-Collette

Common Seal over name

The Company:

Ian Claydon

Company Seal

**EMAIL MAJOR APPLIANCES—BELMONT
SERVICE TECHNICIANS ENTERPRISE
AGREEMENT 2000.**

AG 137 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Email Limited Major Appliances.

AG 137 of 2000.

Email Major Appliances—Belmont Service
Technicians Enterprise Agreement 2000.

COMMISSIONER S J KENNER.

16 June 2000.

Order.

HAVING heard Mr G Sturman on behalf of the applicant and
Mr P Robertson 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 Email Major Appliances—Belmont Service
Technicians Enterprise Agreement 2000 as filed in the
Commission on 15 May 2000 in the terms of the follow-
ing schedule be and is hereby registered as an industrial
agreement.

(Sgd.) S. J. KENNER,

[L.S.]

Commissioner.

1.—TITLE

This Agreement shall be known as the Email Major Appli-
ances—Belmont Service Technicians Enterprise Agreement
2000.

2.—ARRANGEMENT

The Agreement is arranged as follows—

Subject Matter	Clause No.
Application	3
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Arrangement	2
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3.—APPLICATION

This Agreement shall apply at the establishment of Email
Major Appliances, 1 Frederick Street, Belmont to all employ-
ees being, Service Technicians who are bound by the terms of
the Metal Trades (General) Award No. 13 of 1966, employed
in the Service Division of the business. There are approxi-
mately 5 employees covered by this agreement.

4.—PARTIES BOUND

The parties to this Agreement are—

- 4.1 Email Limited Major Appliances of 1 Frederick
Street, Belmont, Western Australia (referred to in this
Agreement as “the employer” or “the Company”);
- 4.2 The Automotive, Food, Metals, Engineering, Print-
ing & Kindred Industries Union of Workers, Western
Australian Branch (“the Union”).

5.—DATE AND PERIOD OF OPERATION

This Agreement shall operate from the 1 October, 1999 and
shall remain in force until 30 June, 2001.

6.—RELATIONSHIP TO PARENT AWARD

6.1 This Agreement shall be read and interpreted wholly in
conjunction with the Metal Trades (General) Award No. 13,
1966 as it exists at the date of certification of this Agreement
provided that where there is any inconsistency between the
Agreement and the Metal Trades (General) Award No. 13,
1966 this Agreement shall take precedence to the extent of the
inconsistency.

The parties note that in the future there may be a require-
ment for the removal from awards of a number of provisions
that are not allowable award matters as well as the simplifica-
tion of award provisions within the areas covered by the
allowable matters.

In the event that this process results in changes to award
obligations, the status quo will remain in place at this opera-
tion whilst discussions take place in good faith. The intent
being to mutually agree on site arrangements that facilitate
the efficient Organisation and performance of work, whilst at
the same time providing fair and equitable terms and condi-
tions of employment. In the event that Agreement cannot be
reached on proposed changes, the matter may be referred to
the Western Australian Industrial Relations Commission by
either party.

6.2 The parties are committed to the Metal Trades (General)
Award No. 13, 1966 continuing to cover the basic standard of
employment in the industry.

6.3 Existing award and over award payments and condi-
tions of employment shall continue to apply as if they were a
term of this Agreement except where the expressly stipulated
terms of this Agreement provide otherwise.

6.4 An employee commencing his or her employment with
the employer after the date on which this Agreement comes
into operation shall be employed in accordance with the terms
of this Agreement.

6.5 The employer and the Union agree that no employee
who is a member of the Union, including apprentices and train-
ees, shall be employed other than under the terms of this
Agreement. To avoid doubt, this means that no employee who
is a member of the Union shall be offered an Australian
Workplace Agreement, or any other form of individual Agree-
ment, such as under common law or state legislation.

7.—PREVAILING BUSINESS ENVIRONMENT

7.1 The prevailing Australian economy has a significant
bearing on the Service activity.

7.2 Over the life of the Agreement, business conditions will
continue to be competitive which will mean there will be on-
going pressure for the Service area to achieve best practice
activities.

7.3 The benefits of productivity improvements must be directed to meeting the business challenges which will contribute to the long term interests of the Service Division of Email Major Appliances.

7.4 Significant areas of change impacting on the division include—

7.4.1 Product Design

The Company continues to design and develop products which have performance and features which meet and exceed customer expectations. These new products are technically advanced, more reliable and environmentally responsible.

7.4.2 Information System

The Company has not yet implemented many of the modern communication systems to improve information availability. A development program of new systems will be progressively implemented.

Key elements include provision of technical data such as QuicktrakII and route planning software for field staff.

Employees involved will perform the duties involved in utilising these systems as they are implemented.

8.—STRATEGIC INTENT

The strategic intent of this Enterprise Bargaining Agreement is to commit the Company to pursue its business interests in a stable environment over the period of the Agreement. In addition the Agreement aims to provide our employees with competitive wages and employment conditions.

9.—OBJECTIVES

The objectives of this Agreement are—

- 9.1 The establishment of an environment involving management and employees that contributes to the business development within the Company;
- 9.2 To provide a focus and understanding of the essential need for global growth of the Company;
- 9.3 To enhance the co-operation between the employer and its employees through more effective communication that allows understanding of each business unit's strengths, challenges and potential for growth;
- 9.4 To develop a working environment that adds to the competitiveness of the Company's position in the markets, not only through continuous improvements to efficiency and effectiveness of work methods but also in relation to promoting innovation and creative solutions to work problems thereby enhancing job security; and
- 9.5 To create a work culture that emphasises reward and recognition.
- 9.6 A commitment to avoid redundancies wherever possible.

10.—GLOBAL COMPETITION AND BUSINESS IMPROVEMENT

10.1 The parties recognise that the Company needs to achieve standards of excellence and flexibility to be competitive in both domestic and overseas markets as a result of the globalisation of world trade.

10.2 A process of continuous improvement is an essential component of achieving international competitiveness and maximising job security. Additionally, the following excellence and flexibility factors also apply.

- 10.2.1 World class operating practices and procedures (standardised and documented) so as to meet the challenge of global competition;
- 10.2.2 Achieve optimum employment levels and work practices to achieve world class performance standards and to create flexible team based organisational design; and
- 10.2.3 Consistent with Clause 34, the employer and the employees will consult about achieving a flexible management of the workforce by utilising labour hire and external contractors where agreed.

11.—ENTERPRISE DEVELOPMENT

11.1 In addition to the core business improvement initiatives and objectives that are summarised in Clauses 9 and 10 of this Agreement, the employer and the employees will pursue an ongoing agenda of continuous improvement by addressing those issues which are specific to the Company to enhance commercial viability and job security.

11.2 To implement improvements in a strategically advantageous manner, it is agreed that the appropriate timing of a positive initiative is linked to its relevance to the business environment and not necessarily to the cycle of Enterprise bargaining. It is further agreed that the Company will continue to develop in an environment that embraces effective communication, consultation, negotiation, learning culture and regular direct dialogue to keep employees informed on the state of the business.

12.—CONSULTATIVE COMMITTEE

12.1 A Site Consultative Committee will be established to assist the parties to improve productivity, efficiency and to provide for the effective involvement of Union members in the decision making processes. This committee will consist of up to an equal number of employer and rank and file Union representatives from each Union with members at the site. The Site Consultative Committee will liaise with the Email National Consultative Committee on issues consistent with this clause, where relevant.

12.2 This committee will meet at least every three (3) months.

12.3 The objects of the committee are to investigate, determine and make recommendations on matters including but not limited to—

- (i) Introduction of new technology;
- (ii) Changes to work organisation;
- (iii) Quality;
- (iv) Productivity improvement;
- (v) New management practices; and
- (vi) Removing demarcation and other restrictive work practices subject to regulatory requirements.

12.4 The business will develop, consistent with the mechanisms of the Email National Consultative Committee, specific proposals for discussion, and where agreed, implementation at site level.

13.—UNION OFFICIALS AND SHOP STEWARDS

13.1 An official or officer of the Union shall have the right to enter the employer's establishment at any time during working hours for the purposes of conducting Union business and matters incidental to Union business and shall act in accordance with site custom and practice.

13.2 The employer shall recognise appointed Union delegate/s or shop steward/s in the Company upon notification by the Union to which the employee belongs. The Union delegate/s or shop steward/s shall be allowed all reasonable time during working hours to interview employees and the employer or the employer's representative on matters affecting employees whom they represent.

13.3 The Union delegate/s or shop steward/s will follow established grievance and dispute resolution procedures.

13.4 The Union delegate/s or shop steward/s shall be allowed an appropriate meeting place to interview a Union official from their Union on legitimate industrial matters affecting them, during working hours, on the condition that the visits do not unduly affect customer service.

13.5 New starters shall be advised of the relevant shop steward/s.

14.—SERVICE AND SPARES OPERATION

14.1 Service Operation

The employer, its employees and the Union will continue to be committed to developing and implementing all processes and methods which provide long term productivity and customer satisfaction. This will be achieved by improvements through the elimination of all kinds of waste.

The employer, employees and the Union are committed to the implementation in the workplace of continuous improvement activities to achieve the objectives of this Agreement.

Those activities may include, but are not limited to, the following examples—

- 14.1.1 Commitment to extending hours of operation to meet changing customer needs;
- 14.1.2 Multi-skilling and upskilling for employees with the ability to take on upskilling activities. Training to be provided by the employer;
- 14.1.3 Elimination of waste and rework activities;
- 14.1.4 Work with contractors and consultants who are engaged by the Company;
- 14.1.5 Problem solving on a joint basis;
- 14.1.6 Adoption of business performance monitoring systems;
- 14.1.7 Customer relations improvement techniques;
- 14.1.8 Perform any work as the employer may from time to time reasonably require within the limits of the employee's competence and safe work practices.

Specific areas are described in subclause 14.2—

14.2 Field

The hours of work detailed in this clause are indicative hours and may be changed by the employer where a maximum of eight ordinary hours per day are worked to suit the needs of the business.

- 14.2.1 Hours of work will be a maximum of 38 ordinary hours per week and shall provide service as follows—

Peak periods (1st December—28th February)

- Monday to Friday between 7.00am—5.00pm;
- A Saturday roster between 7.00am—2.00pm;
- Each Technician to work 4 Saturdays between January 1st and 28th February—roster to be created in December.

Technicians may swap with others of equivalent skills, ensuring commitment to planned capacity is achieved.

Non-peak periods (1st March—30th November)

- Monday to Friday between 7.30am—4.00pm;
- Saturday work will continue to be on a voluntary basis.

- 14.2.2 Technicians will achieve a minimum of 55% on job time in any given month. For the first three months of this Agreement a weekly review will be held to remove any external impediments. Where a technician continues to fail to achieve this standard, they will be performance managed and possibly subject to disciplinary action;
- 14.2.3 Technicians will bank all cash, cheques and credit card vouchers using approved direct deposit procedures. A half-day training course covering security will be attended by all technicians;
- 14.2.4 All technicians will attend training programs and technicians will be involved in preparing the evaluation to verify their competence as part of the program;
- 14.2.5 Technicians will attend base when required or directed by the employer.
- 14.3 Paragraphs 14.1.1, 14.1.2, 14.1.4, 14.1.6 and 14.1.7 are only to be implemented by agreement with majority of employees affected.

15.—PREVIOUS ENTERPRISE AGREEMENTS

Both parties agree to maintain commitments entered into in previous Agreements, except where specifically modified in this Agreement.

16.—FULL UTILISATION OF SKILLS

16.1 The parties recognise that despite improved co-operation that now exists from previous Agreements, that further reductions in demarcation are required to bring about more

flexibility in order to meet demands imposed by variables such as competition, economic constraints and legislative requirements. Ability to respond to such demands is imperative to the viability of the Service Division and therefore the parties accept that resultant change is an integral part of our culture.

16.2 Employees will follow all lawful and reasonable directives by the employer and will utilise all their skills in the performance of allocated work where it is safe for them to do so.

16.3 Such change will be realised through greater team involvement and management will be dedicated to implementing change in a consultative and co-operative manner.

17.—WAGES

17.1 The following schedule sets out the timing and amount for wage increases within the Agreement period—

17.1.1 Employees' ordinary rate of pay as at 30th September, 1999 will increase from the beginning of the first pay period commencing on or after 1st October, 1999 by 3.07%.

17.1.2 Employees' ordinary rate of pay as at 30th June, 2000 will increase from the beginning of the first pay period commencing on or after 1st July, 2000 by 4%.

17.2 An authorised representative from the Union will have access to an employee's time and wages record in accordance with Clause 17 and Appendix—S49B of the Award.

18.—LONG SERVICE LEAVE

18.1 Employees will accrue, from 1st April, 1998, Long Service Leave at the rate of 1.3 weeks per year of continuous service. Pro-rata Long Service Leave will be phased in from the above date.

18.2 Long Service Leave is defined in Clauses 1, 2, 4 and 5 of the Long Service Leave General Order in Volume 66 of the Western Australian Industrial Gazette.

18.3 Long Service Leave shall be available on the accumulation of 9.1 weeks' leave. This provision applies on a pro-rata basis to part-time employees. Only that leave which has accrued will be able to be taken.

18.4 The terms of the Long Service Leave General Order (Vol. 66 of the WAIG) shall apply except for the quantum and accumulation rate of leave as prescribed above.

19.—REDUNDANCY

19.1 Consultation and provision of information

19.1.1 Where an employer has made a decision that the employer no longer wishes the job the employee has been doing done by anyone and this is not due to the ordinary and customary turnover of labour and that decision may lead to termination of employment, the employer shall hold discussions with the employees directly affected and with their Union.

19.1.2 The discussions shall take place as soon as is practicable after the employer has made a definite decision, which will invoke the provisions of paragraph 19.1.1 hereof and shall cover, inter alia, any reasons for the proposed terminations, measures to avoid or minimise the terminations and measures to mitigate any adverse effects of any terminations on the employees concerned.

19.1.3 For the purposes of the discussion the employer shall, as soon as practicable after making a decision but before any terminations, communicate to the employees concerned and their Union (in writing), all relevant information about the proposed terminations including the reasons for the proposed terminations, the number and categories of employees likely to be affected, and the number of workers normally employed and the period over which, or the time when the terminations are likely to be carried out. Provided that any employer shall not be required to disclose confidential information, the disclosure of which would be harmful to the interests of the business.

19.1.4 If redundancies are still necessary after following the procedures set out above the arrangements to apply are as set out in sub clause 19.2.

19.2 Redundancy Payments

In the event of unavoidable redundancies during the life of this Agreement the agreed redundancy payment shall be calculated as follows—

3.25 weeks pay per year of service to a maximum of seventy (70) weeks pay.

20.—SUPERANNUATION

20.1 Subject to the provisions of 20.3, the provisions of the *Email Limited (Superannuation) Award 1996* as at 1st July, 1999 shall apply as a term of this Agreement inclusive of amendments to Schedule E of the *Email Limited (Superannuation) Award* as varied from time to time.

20.2 The parties agree that all employees covered by this Agreement will be given a further opportunity to exercise a choice of fund membership effective 1st December, 1999 as per the provisions of the *Email Limited (Superannuation) Award 1996*. It is acknowledged that relevant information and briefing meetings of employees will be offered over the proceeding three (3) months.

20.3 In the event that legislation comes into force which has the effect of overriding, changing or suppressing the *Email Limited (Superannuation) Award 1996* as at 1st June, 1997, then the terms of this award prior to the legislation coming into force shall continue to apply as terms of this Agreement.

21.—STATEMENT OF EMPLOYMENT

The employer shall, upon receipt of a request from an employee whose employment has been terminated, provide to an employee a written statement specifying the period of his or her employment and the classification of or the type of work performed by the employee.

22.—SECURITY OF EMPLOYEE ENTITLEMENTS

22.1 If in the future it can be confirmed that a significant proportion of major companies in the manufacturing industry have agreed to participate in the MTFU Industry Trust Fund the employer undertakes to enter into negotiations with the MTFU Unions about participating into the Trust Fund.

22.2 The Company agrees to meet its obligations to the payment of statutory employee entitlements.

23.—TRADE UNION TRAINING LEAVE

23.1 There is to be, as a maximum, a pool of five (5) days paid leave, per annum, for use by members of the Union to attend trade Union training courses conducted or approved by Trade Union Training Australian Inc or the Union. Leave will be encouraged to be taken during non-peak periods of the Company's business. Reasonable notice in writing of the intention to take leave shall be provided. Such notice will identify the dates and duration of training and the topics and contents of the training. The Company's agreement to proceed on leave will not be unreasonably withheld.

23.2 Leave shall be non-cumulative.

23.3 Any dispute arising out of the application of this clause shall be handled in accordance with the dispute settlements procedure prescribed herein.

24.—INTRODUCTION OF CHANGE

24.1 The parties agree that effective early consultation on technological and work Organisation change will take place to maximise the benefits of change accruing to the Company and its employees.

24.2 The parties recognise that commitment to the implementation of major change is enhanced by the involvement of affected employees in the process of developing change proposals. To this end the Company will provide opportunities for employees to influence the decision making process through early advice to affected employees and their Union.

24.3 Where the Company has made a formal proposal to introduce change/s in organisational structures, work methods/practices and/or technology (including computer hardware and software) that are likely to have significant effects on employees, the Company will notify the affected employees and the Union to initiate discussions before implementation of the proposed change/s.

24.4 Significant effects includes the termination of employment, major changes in the composition, operation or size of

the Company's workforce or the skills required, the elimination or diminution of job opportunities, promotion opportunities or job tenure, the alteration of hours of work (excluding regular rostered changes), the need for retraining or the transfer of employees to other work locations, the restructuring of jobs or where there are occupational health or safety implications.

24.5 Consultation and communication will include but may not necessarily be limited to—

24.5.1 Reason/s for the change from the existing technology, system/s, practice or Organisation;

24.5.2 The measures taken (or to be taken) by the Company to avert or mitigate the possible adverse effects and matters raised by the employee and the Union;

24.5.3 Training, retraining, skill or qualification requirements; and

24.5.4 Assessment of the availability of required skills.

24.6 Employer's duty to discuss change—

24.6.1 The discussions with employees affected and their Union shall commence as early as practicable after the activities referred to in paragraph 24.1.

24.6.2 For the purposes of such discussion, the employer shall communicate to the employees concerned and their 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 effect employees, provided that any employer shall not be required to disclose confidential information the disclosure of which would be harmful to the interests of the business.

25.—NO EXTRA CLAIMS

The parties agree that they will not, for the duration of this Agreement, pursue any extra claims except where consistent with this Agreement including for clarity, the parties recognition that the Unions may pursue Clause 32.3, Apprentice rates.

26.—AVOIDANCE OF INDUSTRIAL DISPUTES

The parties to this Agreement shall observe the Avoidance of Industrial Disputes procedure under the Metal Trades (General) Award No. 13 of 1966.

27.—NOT TO BE USED AS A PRECEDENT

This Agreement shall not be used in any manner whatsoever to obtain similar arrangements or benefits in any other plant or Enterprise.

28.—CONTINUOUS IMPROVEMENT

The employer and its employees covered by this Agreement are committed to searching for areas where business operation improvements can be made and implementing such improvements as part of the Agreement.

29.—RENEWAL OF AGREEMENT

Discussions will take place no later than three (3) months prior to the expiry of the Agreement to discuss the nature of changes, if any, for any future Agreement.

30.—BEREAVEMENT LEAVE

An employee, including part-time employees, shall be entitled to a maximum of two (2) days without loss of pay on each occasion and on the production of satisfactory evidence of the death of the employee's spouse (including de-facto/partner, same sex partners, spouse), father, mother, (including foster father or mother or stepmother or stepfather) sister, brother, step sister, step brother, child, step child, grandparent, parent in law, brother in law, or sister in law, or a member of the employee's household.

31.—TRAINING

31.1 Paid training leave in accordance with the Award and the agreed Enterprise Training Plan will be provided. Where an employee undertakes such training it shall be conducted as far as practicable in the employee's usual working time and

the employee shall not lose pay for ordinary hours for attendance or extra travel associated with such training.

31.2 Email will make available on and off-the-job-training, and mentoring, by an agreed training provider for employees in the areas of—

- 31.2.1 Skill development;
- 31.2.2 Occupational health and safety;
- 31.2.3 Organisational developments including the progress of their respective business unit and developing opportunities; and
- 31.2.4 Where applicable, induction training and familiarisation.

31.3 Fees, materials or any other reasonable costs associated with the training referred to in 31.1 shall be reimbursed by the employer in accordance with the Award.

31.4 The provisions of 31.1 and 31.2 shall apply equally to apprentices, trainees, or other similar categories of persons engaged by the employer except where agreement to allow otherwise is reached with the relevant Union.

32.—APPRENTICES

32.1 The employer commits to promoting and maintaining the current system of apprenticeships.

32.2 All apprentices and trainees shall continue to receive paid training in accordance with their indentures and the Industrial Training Act. Such training shall meet the requirements of the Award and the industry training advisory board, resulting in a consistent national qualification.

32.3 The parties agree to jointly review apprentice's rates of pay within six (6) weeks of the registration date of this Agreement. The Company acknowledges the Union's position that apprentice's rates of pay will be no less than the greater of either the average rate or the shop rate.

33.—RECLASSIFICATION/COMPETENCY STANDARDS

The employer and the Union agree that employees have access to reclassification and career path progression in accordance with the Award.

34.—CASUAL AND CONTRACT LABOUR

For the purposes of this clause, "non-permanent workers" shall mean casual, contract, temporary or fixed term tradespeople engaged through a labour hire firm.

34.1

- 34.1.1 As a matter of principle the employer is committed to the maintenance of a permanent workforce whose skills and knowledge can be fully utilised in an ongoing and cost effective manner.
- 34.1.2 The employer will fully utilise its workforce on normal work, including production, maintenance and tooling, however, work may be let by the employer to contractors for a number of reasons—
 - (i) Where urgent breakdowns or unplanned work cannot be covered by the employer's employees;
 - (ii) Where work is required which the employer's employees are not qualified to perform;
 - (iii) Where work is so infrequent and/or specialised that it would not warrant employment of an individual to cover the requirement;
 - (iv) Where a work load peak cannot be performed by the employer's employees because of the time constraints, available labour, available facilities or work priorities;
 - (v) Major work involving design, supply, installation and commission of plant and equipment;
 - (vi) Initial maintenance of new equipment during training of the employer's personnel; and

(vii) Such other grounds as are related to the above mentioned reasons.

34.1.3 In the employment of non-permanent workers, the following conditions will also be observed—

In circumstances where the employer would seek to engage nonpermanent workers, the employer agrees to consult and seek agreement with the relevant Union/s. Any disagreement regarding the operation of this clause will be dealt with in accordance with Clause 26.

34.1.4 The employer will require contractors and their employees and other non-permanent workers to observe all site safety conditions;

34.1.5 The employer will seek to ensure that contractors and their employees and other non-permanent workers are appropriately trained and qualified to undertake the work to be performed on the employer's site;

34.1.6 The employer will ensure that all contractors and labour-hire firms comply with the terms of the relevant Awards and Agreements of which the Union/s are party.

34.2 In addition to the above sub-clauses, the following is to apply—

34.2.1 A non-permanent worker is to be engaged for no less than one shift or for no less than four consecutive hours with the agreement of the relevant Union/s and for no longer than three (3) months.

34.2.2 If it is proposed that a non-permanent worker be engaged past three (3) months (other than as provided in Clause 34.1) consultation shall occur with the relevant Union/s about reaching agreement about an appropriate period of engagement beyond three (3) months or an offer of permanent employment.

34.2.3 Casuals, for all purposes of the Award and Agreement, shall be paid the shop rate for the relevant classification with the addition of the appropriate loading.

34.3 It will be an agenda item at the Consultative Committee to discuss the observance by contractors, agencies and labour hire firms, and their employees, of the terms of this clause to ensure ongoing compliance.

34.4 Any dispute arising out of an inconsistency in relation to this clause and a casual and/or contract labour provision in a certified site agreement with the Union/s shall be dealt with in accordance with the dispute settlement procedure.

35.—FACILITIES

The employer shall continue to provide facilities to the satisfaction of the parties to this Agreement including the provision of lockers, drinking and boiling water, appropriate protective clothing, heating and cooling, ventilation, lunch room and toilets. Any disagreements about the adequacy of facilities shall be dealt with through the consultative process of this Agreement and the dispute settlement procedure.

36.—FIRST AID

In each work area there shall be at least one employee paid the appropriate first-aid allowance who is trained and qualified to render first aid, unless otherwise agreed at the site.

37.—OCCUPATIONAL HEALTH & SAFETY

37.1 There will be co-operation between the employer and employees in the implementation of all necessary measures to safeguard health and prevent accidents and occupational disease. Provision will be made for employees and employee representatives to be informed and consulted on matters relating to health protection.

37.2 The parties to this Agreement abhor the loss of life, sickness and disability caused at work. The parties agree to the establishment of a health and safety committee in every workplace and the recognition of rights and training for health and safety representatives.

37.3 The parties are committed to pursuing the means of safeguarding and improving the working life and health of employees, particularly those working twelve (12) hour shifts and rosters of more than five (5) days in seven (7).

BY THE COMMISSION

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

.....
(Signature)

Dated this 8th day of May 2000

Email Limited Major Appliances, Service and Spare Parts Division Western Australia

.....
(Signature)

Dated this 26th day of April 2000.

**FAMILY AND CHILDREN'S SERVICES
ENTERPRISE BARGAINING AGREEMENT 2000.**

No. PSG AG 2 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia
Incorporated

and

Chief Executive Officer,

Family and Children's Services.

No. PSG AG 2 of 2000.

Family and Children's Services Enterprise Bargaining
Agreement 2000.

PUBLIC SERVICE ARBITRATOR
COMMISSIONER P.E. SCOTT.

29 June 2000.

Order.

HAVING heard Ms K Franz on behalf of The Civil Service Association of Western Australia Incorporated and The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division, Western Australian Branch and Mr B Beaton on behalf of the Chief Executive Officer, Family and Children's Services, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Family and Children's Services Enterprise Bargaining Agreement 2000 in the terms of the following schedule be registered on the 28th day of June 2000 and shall replace the Family and Children's Services Enterprise Bargaining Agreement 1998.

(Sgd.) P.E. SCOTT,
Commissioner.

[L.S.]

Schedule.

SECTION ONE: PRELIMINARY

1.—TITLE

This Agreement shall be known as the Family and Children's Services Enterprise Bargaining Agreement 2000 and shall replace the Family and Children's Services Enterprise Bargaining Agreement 1998.

2.—ARRANGEMENT

SECTION ONE: PRELIMINARY

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2. Arrangement
3. Scope of the Agreement
4. Parties to the Agreement

5. Number of Employees Covered
6. Definitions
7. Term and Operation of Agreement
8. Re-Open Negotiations
9. No Further Claims
10. Single Bargaining Unit
11. Relationship to Parent Awards and Other Agreements
12. Availability of Agreement
13. Shared Objectives and Principles of the Parties
14. Consultation
15. Dispute Resolution Procedure

SECTION TWO: PRODUCTIVITY INITIATIVES

16. Productivity Initiatives
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23. Flexi-time
24. Part-time
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SECTION FIVE: WORK & FAMILY PROVISIONS

33. Objectives and Principles—Work & Family Provisions
34. Paid Parental Leave
35. Parental Leave
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38. Career Breaks
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40. Dependant Care Arrangements

SECTION SIX: COUNTRY PROVISIONS

41. Objectives and Principles—Country Provisions
42. Country Travel Concession
43. Study Leave (Remote Location)
44. Removal Allowance
45. Review of Country Provisions

SECTION SEVEN: SIGNATURES

46. Signatures

SCHEDULE A: PRODUCTIVITY

SCHEDULE B: SALARIES/WAGES

3.—SCOPE

3.1 This Agreement shall apply throughout the State of Western Australia to all employees employed by or working in Family and Children's Services who are members of or eligible to be members of the unions listed as parties to this Agreement.

3.2 The employer shall provide employees on secondment to Family and Children's Services the option of agreeing in writing to be covered by the terms and conditions of this Agreement, in accordance with the instrument of secondment negotiated with the home employer.

4.—PARTIES TO THE AGREEMENT

4.1 This Agreement is made between the Chief Executive Officer, Family and Children's Services, the Civil Service Association of Western Australia Incorporated and the Australian Liquor, Hospitality and Miscellaneous Workers' Union (WA Branch).

5.—NUMBER OF EMPLOYEES COVERED

5.1 As at the date of registration the approximate number of employees covered by this Agreement is one thousand and fifty employees (1050).

6.—DEFINITIONS

6.1 In this Agreement, the following terms shall have the following meanings.

“Agreement” means The Family and Children Services Enterprise Bargaining Agreement 2000

“Award” means the relevant parent awards listed at Clause 11, Relationship To Parent Awards And Other Agreements, of this Agreement

“Department” means Family and Children’s Services

“Employee” means for the purposes of this Agreement, someone who is referred to at Clause 3 of this Agreement.

“Employer” means The Chief Executive Officer responsible for the general management of Family and Children’s Services as appointed under the Public Sector Management Act 1994

“Family” A person who is related to the employee by blood, marriage, affinity (including a defacto relationship), adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the employee.

“GOSAC” means Government Officers Salaries, Allowances and Conditions Award 1989

“Government” means the State Government of Western Australia

“Headquarters” means the place in which the principal work of the employee is carried out as defined by the Chief Executive Officer

“Home based site” means a private dwelling agreed between the Family and Children Services and the employee.

“Home based work” means regular performance of ordinary hours of duty, or part thereof, at the home based site.

“Metropolitan Area” means the area within a radius of fifty (50) kilometres from the Perth City Railway Station

“Minister” means the Minister or the Ministers of the Crown responsible for the administration of the Department

“Office based site” means the location where the employee would ordinarily work if there were no home based work arrangement.

“Secondment” means the voluntary movement and placement of an employee from an employer, not party to this Agreement, for a specific and defined period without effect to the employment with that employer

“Union” means Civil Service Association of Western Australia (Inc.) and the Australian Liquor, Hospitality and Miscellaneous Workers’ Union (WA Branch).

“WAIRC” means the Western Australian Industrial Relations Commission

7.—TERM AND OPERATION OF THE AGREEMENT

7.1 This Agreement shall have effect from the date of registration in the Western Australian Industrial Relations Commission and continue for a period of two (2) years.

7.2 During the life of the Agreement the parties will continue to address a range of issue and reforms specifically aimed at increasing productivity. The parties agree that these issues will form the basis of future negotiations.

7.3 The pay quantum achieved as a result of this Agreement will remain and form the new base pay rates for future Agreements or continue to apply in the absence of a further agreement, except where the award rate is higher in which case the award shall apply.

7.4 The Agreement may be varied, renewed, replaced or cancelled as appropriate, within the term of this Agreement, by consent between the parties.

7.5 The Agreement will continue in force after the expiry of the term until such time as any of the parties withdraws from the agreement by notification in writing to the other party and to the WAIRC or replaces this Agreement with a subsequent Agreement.

8.—RE-OPEN NEGOTIATIONS

8.1 The parties agree to commence negotiations at least six (6) months prior to the expiration of the period of this Agreement to negotiate a replacement Agreement.

9.—NO FURTHER CLAIMS

9.1 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 for those provided under the terms of this Agreement.

9.2 This Agreement shall not reduce the ordinary time earnings of any employee subject to this Agreement.

10.— SINGLE BARGAINING UNIT

10.1 This Agreement has been negotiated through a Single Bargaining Unit (SBU). The SBU comprised representatives of the Unions party to this Agreement and the employer.

11.—RELATIONSHIP TO PARENT AWARDS AND OTHER AGREEMENTS

11.1 This Enterprise Agreement shall be read in conjunction with the existing Awards and Agreements that apply to the parties to this agreement. In the case of any inconsistencies, this Agreement shall have precedence to the extent of the inconsistencies and where the agreement is silent, the respective award(s) will apply.

11.2 All parties recognise that the relevant Parent Awards and Other Agreements consist of—

- (a) Public Service Award 1992
- (b) Government Officers Salaries Allowances and Conditions Award 1989
- (c) Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990, Award No. PSA A 1 of 1989
- (d) Catering and Tea Attendants (Government) Award 1982
- (e) Gardeners (Government) Award 1986
- (f) Community Welfare Department Hostels Award 1983
- (g) Cleaners and Caretakers (Government) Award 1975
- (h) Miscellaneous Government Conditions and Allowances Award 1992

12.—AVAILABILITY OF AGREEMENT

12.1 Every employee shall upon request to the employer be entitled to a copy of this Agreement.

12.2 This Agreement will be kept in an easily accessible place or places within the department, and the location of the copies will be clearly communicated to all employees.

12.3 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 12.1 will apply.

13.—SHARED OBJECTIVES AND PRINCIPLES OF THE PARTIES

13.1 The shared objectives of the parties are—

- a) To satisfy the requirements of clients and customers through the provision of reliable, efficient and competitive services;
- b) To achieve Family and Children’s Services mission and improve productivity and efficiency in the department’s services through ongoing improvements;
- c) To promote the development of trust and motivation and to continue to foster enhanced employee relations;
- d) To facilitate greater flexibility in decision making and allocation of human and other resources;
- e) To promote increased satisfaction from jobs and secure employment opportunities;
- f) To develop and pursue changes on a co-operative basis by using participative practices

14.—CONSULTATION

14.1 The parties are committed to working together to improve the business performance and working environment in Family and Children’s Services. Whilst it is acknowledged by the parties that decisions will continue to be made by Family and Children’s Services, which is responsible and accountable to Government by statute for the effective and efficient

operation of its business, the parties are committed to effective communication and agree, in particular, that—

- a) Where Family and Children's Services proposes to make changes likely to affect existing parties, working conditions or employment prospects of employees, the relevant Union and the employees affected shall be consulted and notified by Family and Children's Services as early as possible.
- b) Consultation with employees and the union parties on proposed changes to work organisation shall occur prior to final implementation decisions being made.
- c) Employees will be involved in contributing to the efficiency and effectiveness of their workplace within policies and guidelines.
- d) In the context of this clause consultation shall mean information sharing and discussion on matters relevant to the decision making processes which shall be conducted in such a way as to enable the parties to contribute to the decision making process.

15.—DISPUTE RESOLUTION PROCEDURE

15.1 This dispute settlement procedure will apply to any questions, dispute or difficulties that arise under this Agreement—

- a) The Union representative and/or the employee/s concerned shall discuss the matters with the immediate supervisor in the first instance. An employee may be accompanied by a Union representative.
- b) If the matter is not resolved in writing within five (5) working days following the discussion in accordance with paragraph (a) the matter shall be referred by the Union representative or employee to the employer for resolution.
- c) If the matter is not resolved within five (5) working days of the Union representative's or employee's notification of the dispute to the employer, it may be referred by the Union or the employer to the WAIRC.
- d) While the above procedures are being followed, no party shall be prejudiced as to the final settlement by the continuation of work in accordance with this procedure.
- e) Where the dispute involves proposed changes to this agreement or any relevant award matter, negotiations shall take place directly between the union/s and the employer.

SECTION TWO: PRODUCTIVITY INITIATIVES

16.—PRODUCTIVITY INITIATIVES

16.1 The parties recognise that the department will be implementing the process of continuous improvement, designed to increase the efficiency and effectiveness of the program and service delivery of Family and Children's Services.

16.2 The department will implement systems that will allow employees to identify areas in which they can improve their productivity, and agree and implement action plans to achieve the improvements. To facilitate this, employees shall be provided with appropriate information and support.

17.—IMPLEMENTATION OF EBA INITIATIVES

17.1 The parties agree to the formation of a joint forum that will meet as agreed to monitor the implementation of this Agreement.

17.2 The parties to this joint forum will consist of management representatives from the department and representatives from the union.

17.3 The department will ensure that adequate resources are allocated to support the implementation of a process of continuous improvement in order to achieve the required performance levels within the life of the Agreement.

17.4 Notwithstanding sub-clause 18.2 of clause 18, Salary Increase Quantum of this Agreement, there may be special circumstances that will affect the ability to achieve the required performance levels detailed in Schedule A—Productivity. To account for this and to provide fairness and equity to the process, non-compliance indicators and required performance levels may be adjusted by mutual

agreement. Adjustments shall be supported by an auditable justification that reflects that employees would have been disadvantaged had such an adjustment not occurred.

SECTION THREE: SALARIES & ALLOWANCES

18.—SALARY INCREASE QUANTUM

18.1. An employee covered by this agreement shall be allocated a salary/wage level applicable to their classification as detailed in Schedule B—Salaries/Wages.

18.2. The salaries/wages detailed in Schedule B—Salaries/Wages, reflect the following salary/wage increases to be paid over the life of the agreement.

- a) From the date of registration of this agreement, a salary/wage increase of three percent (3%) to be provided;
- b) A second salary/wage increase of three percent (3%) will be payable 12 months from the date of registration of this agreement subject to the achievement of—
 - I. a financial performance target equating to one percent (1%) of the department's annual payroll budget (this represents financial savings to be achieved from productivity improvements); and
 - II. organisational performance within the required performance ranges, or better, in a minimum of three (3) of the performance measures detailed in Schedule A—Productivity; and
 - III. organisational performance above that of the non-compliance indicator (NCI) in the remaining measures detailed in Schedule A—Productivity.

19.—LEVEL ONE INCREMENTAL PAY POINTS

19.1 It is agreed that Level 1 salaried positions shall retain the existing seven incremental pay points detailed in Schedule B – Salaries/Wages of this Agreement.

20.—VARIATION OF ALLOWANCES

20.1 Wherever an Award allowance is calculated by reference to a classification salary point, the parties agree that all such allowances shall be so varied by reference to the same classification salary point as provided by this Agreement.

20.2 All such allowances shall be applicable from the same date as provided for any salary variation under this Agreement.

21.—DIRECT CARE WORKERS' COMMUTED ALLOWANCE

21.1 Direct Care Workers engaged in shift work will be paid a commuted allowance in lieu of all shift, weekend and public holiday penalties.

21.2 Separate commuted allowances have been determined on the basis of the rosters worked in each unit. Direct Care Workers will be entitled to payment of the relevant allowance in accordance with sub-clause 21.5 of this clause.

21.3 In the event of an employer initiated variation to a roster, the relevant commuted allowance for that work unit will be recalculated to reflect the new roster being worked.

21.4 During the life of this Agreement employees may be required to move between work units in an area based on client needs and/or employee development opportunities. Employees will be consulted prior to this occurring.

21.5 Commuted allowances determined for each work units as at the date of registration of this Agreement are as follows—

- | | |
|-------------------------------------|-------|
| a) Emergency Accommodation | 25% |
| b) Darlington Hostel | 20.5% |
| c) Stoneville Assessment & Planning | 24% |
| d) Immediate Response | 24.5% |
| e) Equip Programme | 22% |

21.6 The parties will survey the views of all Direct Care Workers as to 'whether or not' they support averaging of the commuted allowance across the work units. The survey will be conducted within three months of the agreement being registered and the majority view of employees will prevail. If the

outcome of the survey is to average the allowance, the parties agree to vary this Agreement accordingly. If the outcome of the survey is to retain the allowance as is, then the Agreement shall not be varied in this regards.

SECTION FOUR: GENERAL EMPLOYMENT CONDITIONS

22.—HOURS OF SERVICE

22.1 The following provisions shall be read in conjunction with the existing hours provisions in the relevant parent awards that apply to the parties covered by this Agreement.

22.2 Prescribed Hours of Duty to be observed by employees in this Agreement shall be seven hours thirty-six minutes per day to be worked between 7.00 am and 6.00 pm Monday to Friday, except where this is inconsistent with clause 21, Direct Care Workers' Commuted Allowance, and clause 25, Family Resource Workers And Parent Helpers, of this Agreement.

23.—FLEXI-TIME

23.1 The following provisions shall be read in conjunction with the existing flexitime provisions in awards and agreements that apply to the parties covered by this agreement. The provisions detailed in sub-clause 23.2 of this Agreement replace Clause 16 (3)(h)(i) and (ii), Hours, of the Public Service Award 1992 and Clause 16 (7)(I)(i) and (ii), Hours, of the Government Officer's Salaries Allowances and Conditions Award 1989.

23.2 Credit Hours—

- a) Credit hours in excess of the required 152 hours to a maximum of 15 hours and twelve minutes are permitted at the end of each settlement period. Such credit hours shall be carried forward to the next settlement period.
- b) Credit hours in excess of 15 hours and twelve minutes at the end of a settlement period shall be lost.

24.—PART-TIME WORK

24.1 The following provisions shall be read in conjunction with the existing part time provisions in the relevant parent awards that apply to the parties covered by this agreement.

24.2 Definitions—

- a) Part time work is defined as work that is regularly undertaken for less than designated full time hours and is between 15 hours 12 minutes and 30 hours 24 minutes (that is between 2 and 4 working days) per week and does not attract a casual loading. This provision does not apply to Family Resource Workers and Parent Helpers, see Clause 25 of this Agreement.

24.3 Part Time Agreement—

- a) Where a right of reversion exists in the parent award but part-time work within an employee's substantive position is not feasible, the employer may facilitate a temporary transfer of the employee to a part-time position of similar duties and classification.
- b) Preference will be given in allocating part time work to those employees returning to work from periods of leave who seek to convert from full time to part time employment based on their circumstances, which may include parental leave, extended sick leave or carers leave.
- c) A part time employee (whether engaged directly as a part time employee or who has converted from a full time position to a permanent part time position) who wishes to become a full time employee will be required to seek promotion or transfer to a full time position by application for advertised vacancies and/or by notification in writing to the employer of the desire to convert to full time employment. The employer will facilitate that conversion as and when the opportunity to do so arises.

24.4 Hours of Duty—

- a) If agreement is reached in writing to a variation of an employee's working hours Time worked up to 7.6 hours on any day is not to be regarded as overtime but as an extension of the contract hours for

that day and should be paid at the normal rate of pay.

24.5 Salary and Related Matters—

- a) An employee employed on a part time basis shall be paid a proportion of the appropriate full time salary dependent on time worked. The salary shall be calculated in the following manner—

<u>Hours worked per fortnight</u>	X	<u>Full time fortnightly salary</u>
76		1

- b) A part time employee will be entitled to the same leave and conditions prescribed in the relevant Award for full time employees with the following variations:

- i) Part time employees are entitled to Special Leave, on a pro rata basis calculated as follows—

<u>Hours worked per fortnight</u>	X	<u>22.8 Hours</u>
76		1

- ii) Part time employees are entitled to District Allowance on a pro rata basis calculated as follows—

<u>Hours worked per fortnight</u>	X	<u>Appropriate District Allowance</u>
76		1

24.6 Training—

- a) Part time employees will have the same access to training, promotion and staff development opportunities as full time employees.

24.7 Communication and Consultation—

- a) Communication and consultation mechanisms will be examined to ensure that part time employees are fully informed and involved in decision making and the general operation of the section and department.

25. FAMILY RESOURCE WORKERS AND PARENT HELPERS

25.1 From the date of registration of this Agreement the provisions of the Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990, will continue to apply except to the extent that they are inconsistent with the following provisions—

25.2 Hours—

- a) The ordinary working hours for employees shall be sixty hours per four week cycle except where agreement in writing is reached between the employee and the manager to vary the hours worked and shall be worked as determined by the employer between the hours of 7.00 am and 6.00 pm on any days per week Monday to Friday.
- b) The employer shall give an employee one (1) month's notice of any proposed variation to that employee's ordinary working hours, provided that the employer shall not vary the employee's total weekly hours of duty without the employee's prior written consent, a copy of which shall be forwarded to the Union.
- c) Notwithstanding paragraph (b) of this sub-clause whenever agreement in writing is reached for a temporary variation to an employee's ordinary working hours—
 - i) Time worked up to 7.6 hours on any day, within ordinary working hours, is not to be regarded as overtime but an extension of the contract hours for that day and should be paid at the normal rate of pay.
 - ii) Additional days worked, up to a total of five (5) days per week, within ordinary working hours, are also regarded as an extension of the contract and should be paid at the normal rate of pay.
- d) The provisions of Clause 18, Overtime, of the GOSAC Award shall apply to all time worked outside the ordinary working hours prescribed by paragraph (a) of this subclause unless an arrangement pursuant to paragraph (c) of this sub-clause is in place.

- e) The provisions of Clause 17, Shiftwork, of the GOSAC Award shall apply.

26.—SPECIAL LEAVE

26.1 The Special Leave provision of this Agreement shall replace Short Leave provisions in the relevant Parent Awards.

26.2 An employee shall be entitled to up to six (6) days paid Special Leave every two (2) years.

26.3 Special Leave shall be available on an hourly basis.

26.4 The leave may be used in the following circumstances—

- a) To care for a sick member of their family or otherwise attend to urgent family responsibilities.
- b) To meet the employee's customs, traditional law and to participate in cultural or ceremonial activities.
- c) To attend to other urgent business when sufficient cause can be shown.

26.5 The employer may request reasonable evidence of the legitimate need for the employee to be allowed time off to take Special Leave.

26.6 The employee shall, wherever practical, give the employer notice of the intention to take special 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.

26.7 Part-time and fixed term employees will be eligible for leave on a pro rata basis.

27.—CULTURAL LEAVE

27.1 Upon application, an employee is entitled to time off without loss of pay to meet the employee's cultural needs that may occasionally require them to be absent from work, unless time off without pay is granted in accordance with sub-clause 27.5.

27.2 Such leave shall include leave to meet the employee's customs, traditional law and to participate in cultural or ceremonial activities.

27.3 Cultural Leave may be taken as single day absences or part of a single day. Each day or part thereof, shall be deducted from Special Leave, Annual Leave or, where such absence is 5 days or more on any one occasion, the period of absence may be deducted from accrued Long Service Leave entitlements.

27.4 The employer may request reasonable evidence of the legitimate need for the employee to be allowed time off to take Cultural Leave.

27.5 Time off without pay may be granted by agreement between the employer and employee.

27.6 Cultural Leave is available, but not limited to, Aboriginal and Torres Strait Islanders.

28.—BEREAVEMENT LEAVE

28.1 An employee, other than a casual worker, is entitled to paid Bereavement Leave for up to two (2) days on the death of a family member.

28.2 The two (2) days need not be consecutive.

28.3 Bereavement Leave is not to be taken during a period of any other kind of leave.

28.4 An employee may request a period of Special Leave, or a period of an accrued leave entitlement, to be taken in addition to, or in conjunction with, Bereavement Leave, for the same absence reason, and approval of this leave shall not be unreasonably withheld by the employer.

28.5 If requested, the employee shall provide reasonable proof of the death and the relationship between the employee and the deceased.

29.—EMERGENCY SERVICES LEAVE

29.1 An employee who is an active volunteer member of an emergency service organisation registered with either the—

- Fire and Emergency Services Authority;
- Red Cross; or,
- St John Ambulance Brigade;

should notify the employer of such membership, and may be granted paid leave in the form of Emergency Services Leave to attend emergencies as declared by the recognised Authority.

29.2 The employee shall advise the department as soon as possible of the intended absence and the expected duration. On return to work the employee shall provide written proof of attendance.

29.3 Requests for paid leave shall be considered on the basis that the employee is not required for the department's own essential operations and/or emergency services.

29.4 Requests for paid leave to cover a period of absence for pre-incident response preparations and/or a post-incident trauma debriefing shall be considered on their merits.

30.—HOME BASED WORK

30.1 Terms and Conditions—

- a) Terms and conditions contained in this clause will apply to an employee who is approved to perform his/her ordinary hours of duties or part thereof at a home based site.
- b) The employee's home based site will be deemed to be his/her headquarters for the purposes of payment of allowances and other arrangements.
- c) The entitlements and conditions of service of an employee working at the home based site will be identical to that of an office based employee. All relevant agreements, policies and legislation shall apply.
- d) The employee agrees to maintain an accurate record of hours worked including work carried out at the home based work site. The employee is to be contactable during periods in which home based work is carried out and available for communication with the employer.
- e) The home based work site may be used for overtime provided that separate written agreement is reached prior to the commencement of overtime. Overtime hours of work will be agreed in writing and paid in accordance with the overtime provisions of the relevant Parent Awards. A copy of the written agreement will be held by both the employee and the employer for the period during which the overtime is carried out at the home based site.
- f) Home based work will be on the basis that the employee spends a designated period of time of his/her usual weekly hours of duty agreed between the employer and the employee, at the office based site.
- g) The Employer will be responsible for the provision and maintenance of Family and Children Services equipment in a condition that complies with the Occupational Safety and Health Act 1984 and the provision of supplies as set out in sub-clause 30.3 provided that the Employer and the employee may agree on any alternative arrangements if appropriate. Such alternative arrangements must be recorded.
- h) An employee in a home based work arrangement is prohibited from contracting out his/her work.
- i) The Employer shall ensure home based employees have the same opportunities for career development and training as office based employees. In particular an employee working at the home based site—
 - I. will carry out such duties as are within the limits of the employee's skill, competence and training and job description; and
 - II. will be expected to undertake appropriate work-related training, occupational safety and health training and staff development and shall receive notification of career and training opportunities available.

Such training may include change to work design, work organisation and technical developments in his/her field of employment: and

Such training should occur in work time, at either the office based site or in a recognised training centre.

30.2 Initiation of and Approval for Home Based Work

- a) A home based working arrangement will only be entered into on a voluntary basis which may be initiated by the employer or employee. An employee

may only initiate a proposal for home based work in respect of—

- I. that employee's substantive position, or
 - II. a position in which the employee is temporarily performing duties.
- b) Each application for a home based work arrangement is to be considered on a case by case basis.
 - c) The Employer shall provide the unions with a quarterly report of home based work arrangements.
 - d) The parties acknowledge that a home based work arrangement will not be appropriate when an employee is on a return to work program, particularly a graduated return to work program following an injury as a result of work. Should it be considered appropriate to initiate a home based work arrangement in these circumstances the Employer and employee must consult the employee's approved rehabilitation provider prior to commencing such an arrangement.
 - e) A home based work arrangement is not a substitute for dependant care. The employer has the responsibility to ensure the home based work arrangement is appropriate to the employee's domestic circumstances.
 - f) The employer agrees to advise the employee that it is his/her responsibility to assess the personal implications of commencing home based work with respect to taxation, insurances, leasing or mortgage arrangements.

30.3 Requirements for approval

- a) Before approval can be given for a home based work arrangement to commence, the Employer and the employee must agree to the following matters:
 - I. The address, telephone number, facsimile number and E-mail address of the home based site.
 - II. The duties to be performed.
 - III. The days and hours of duty at the office based site and at the home based site.
 - IV. Duration of the arrangement and agreed period of notice for purposes of terminating the arrangement.
 - V. The specific facilities to be used at the home based site.
 - VI. The method of disseminating departmental communication bulletins to the home based employee where access to that information may be reduced.
 - VII. Methods of measuring work performance, provided that systems-based automated work measurements will not be used as the sole means for determining or monitoring individual work performance.
 - VIII. Details of Family and Children's Services assets and supplies to be used at the home based site, including maintenance arrangements.
 - IX. Details of employee's assets and supplies to be used at the home based site for official use, including maintenance and insurance coverage.
 - X. Details of workspace and facilities to be provided when the employee attends the office based site.
 - XI. Any alterations to the workplace and facilities that may be required resulting from occupational safety and health and legislation.
- b) All matters listed in paragraph (a) above and the matters listed hereunder shall be recorded—
 - I. The employee's name.
 - II. The employee's position indicating whether it is the employee's substantive position.
 - III. The name and position of the employee's supervisor.
 - IV. The employee's division/branch/department/area/centre.

V. Agreed security measures and occupational safety and health requirements.

30.4 Job Characteristics Not Considered Appropriate for Home Based Work

- a) Employees performing the duties of a position where the position could be described as having at least one of the following characteristics will not be considered for home based work—
 - I. The position requires a high degree of supervision or close scrutiny;
 - II. The position requires a direct client face to face contact on a frequent basis without the option of easily rescheduling;
 - III. The position does not lend itself to objective performance monitoring of outcomes;
 - IV. The position requires the occupant to be a member of a team and that regular direct face to face contact on a daily basis with other team members at the office based site is an integral part of the job's responsibilities; or
 - V. The position has other characteristics which the relevant Union and the Employer have agreed are unsuitable for home based work.

30.5 Access Arrangements

- a) The parties acknowledge that management or management representatives will from time to time need to obtain access to a home based site and that the relevant Union may also wish to visit a member while he or she is working from a home based site. The parties also acknowledge that only management will require urgent access which will only be granted under terms of this clause.
- b) The parties also acknowledge that the consent of the home based employee is required before access can be obtained to a home based work site.
- c) Unless urgent access is required to a home based work site, or the home based work employee agrees otherwise, on a case by case basis home based work employee must be given at least two clear days notice of any persons' intention to physically enter to the home based work site. Neither management nor Unions will apply pressure to reduce this notice period.
- d) The purposes for which management may require urgent access to a home based work site are—
 - I. maintenance of faulty equipment;
 - II. occupational safety and health purposes;
 - III. urgent security and audit purposes; and
 - IV. other purposes as agreed between the Employer and the employee.
- e) The purposes for which non-urgent access may be sought include but are not limited to—
 - I. routine maintenance of equipment and supplies;
 - II. assessing and monitoring security arrangements of equipment and documents;
 - III. routine occupational health and safety assessments;
 - IV. access by Union to member where office based site access would not be adequate; and
 - V. supervision where office based supervision would not be adequate.

30.6 Termination and Renegotiation

- a) In the event of renegotiation as a result of the commencement of a return to work program the employee's approved rehabilitation provider must be consulted.
- b) A home based working agreement may be—
 - I. altered or discontinued by agreement at the request of the Employer or the employee, provided that neither party will unreasonably withhold agreement to alter or discontinue the arrangement;

- II. terminated by the Employer due to operational requirements after the period of four (4) weeks notice including where the employee unreasonably withholds consent with respect to access by management or management representative in accordance with sub-clause 30.5;
 - III. terminated by the Employer on grounds of inefficiency of the arrangements after four (4) weeks notice;
 - IV. terminated by the Employer in the event of failure to comply with occupational safety and health or security arrangements as outlined in subclause 30.3.
- c) Where an arrangement is terminated in accordance with this sub-clause the employee will be provided with written reasons at the time when the notice is given. In accordance with the principles of natural justice, the employee shall be given one (1) week to reply to the written reasons and the employer will give due consideration to any response provided. The employer's consideration of this response will occur prior to the expiry of the notice period.

31.—ANNUAL LEAVE LOADING

31.1 Leave Loading provisions in the relevant Parent Awards will not apply during the life of this Agreement. Leave loading has been included in the rates of pay detailed at Schedule B – Salaries/Wages.

31.2 Leave Loading will continue to be paid when annual leave, which has accrued prior to the 1st of January 1996 is cleared. However payment for leave loading on annual leave accrued prior to the Family and Children's Services Enterprise Bargaining Agreement dated 1st of January 1996 will be made at the employee's salary rate prior to the commencement of that Agreement.

31.3 By mutual agreement between the employer and employee, an employee may be paid-out for leave loading on annual leave accrued prior to the 1st of January 1996.

32.—PAYOUT OF LEAVE

32.1 This clause only applies to employees employed in Civil Service Association industrially covered positions.

32.2 By mutual agreement between the employer and employee, an employee may be paid for—

- a) all or a portion of accrued Long Service Leave, as agreed by the employer;
- b) all accrued Annual Leave, or a portion of accrued annual leave, including leave loading on credits prior to 1 January 1996, conditional on four (4) weeks annual leave being available to the employees each calendar year.

32.3 The leave will be payable at the substantive salary rate applicable had the leave been taken, exclusive of higher duties allowances, commuted allowances and penalty rate.

32.4 In order to qualify for the payout of leave in any calendar year, an employee must clear four weeks leave in that calendar year, or must retain a credit to clear a total of 20 days in that calendar year.

32.5 This provision does not provide for leave entitlements calculated on a pro rata basis and not yet accrued.

SECTION FIVE: WORK & FAMILY PROVISIONS

33.—OBJECTIVES & PRINCIPLES—WORK & FAMILY PROVISIONS

33.1 The Department recognises the needs of employees with family responsibilities and the right to address those responsibilities without conflict between work and home.

33.2 The parties are committed to identifying and introducing by mutual agreement, conditions of work that assist employees with family responsibilities to effectively discharge both work and family responsibilities.

34.—PAID PARENTAL LEAVE

34.1 An employee who has completed 12 months continuous service with the employer will be entitled to six (6) weeks

paid parental leave in respect of the birth of their child or the adoption of a child under the age of five years.

34.2 This leave must be taken within 12 months of the date of the birth or adoption.

34.3 Paid leave will only be available to the primary care giver. The employer may request evidence of primary care giver status.

34.4 Only one period of paid leave is available for each birth or adoption. Paid leave is able to be split between partners.

34.5 Should the birth or adoption result in other than the arrival of a living child, and the employee concerned has commenced paid parental leave under this clause, the entitlement to paid leave remains intact.

34.6 Paid parental leave will form part of the 52 weeks parental leave entitlement referred to in clause 35, Parental Leave. Absence on paid parental leave will not count as service for the purpose of accruing entitlement to sick leave, annual leave or long service leave.

34.7 All other conditions and definitions relating to parental leave apply as per this Agreement.

35.—PARENTAL LEAVE

35.1 Definitions

- a) "Employee" includes full time, part time, permanent and fixed term contract employees.
- b) "Replacement Employee" is an employee specifically engaged to replace an employee proceeding on parental leave.
- c) "Primary Care Giver" means the person having the major responsibility for the caring of the child. This person shall not necessarily be the mother of the child, nor need this person be the same person for the total period of parental leave.
- d) "Spouse" or "Partner" includes defacto relationships.

35.2 Eligibility for Parental Leave

- a) The maximum period of absence on parental leave, inclusive of any period of paid parental leave is 52 weeks parental leave in respect of the birth of a child to the employee or the employee's spouse/partner. The employee must be the primary care giver of the child.
- b) Where the employee applying for the leave is the partner of a pregnant spouse one (1) week parental leave may be taken at the birth of the child concurrently with parental leave taken by the pregnant employee.
- c) An employee adopting a child under the age of five (5) 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.
- d) An employee seeking to adopt a child shall be entitled to two (2) 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 day's leave. The employee may take any paid leave from Family and Children's Services, and the three (3) day period may be taken concurrently.
- e) Subject to paragraph (b) of this sub-clause where both partners are employed by Family and Children's Services the leave shall not be taken concurrently except under exceptional circumstances and with the approval of the employer.

35.3 Other Leave Entitlements

- a) An employee proceeding on parental leave may elect to utilise any accrued annual leave or accrued long service leave for the whole or part of the period of parental leave.
- b) An employee may extend the maximum period of parental leave with a period of annual leave, long

service leave or leave without pay subject to the employer's approval.

- c) An employee on parental leave is not entitled to paid sick leave and other paid award absences excluding Annual Leave and Long Service Leave.
- d) Where the pregnancy of an employee terminates other than by the birth of a living child then the employee shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner.
- e) Where a pregnant employee not on parental leave suffers illness related to the employee's 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 such further unpaid leave for a period certified as necessary by a registered medical practitioner.

35.4 Notice and Variation

- a) The employee shall give not less than ten weeks' notice in writing to the employer of the date the employee proposes to commence paternity leave stating the period of leave to be taken.
- b) An employee proceeding on parental leave may elect to take a shorter period of paternity 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 (4) weeks written notice is provided.
- c) An employee seeking to adopt a child shall not be in breach of paragraph (a) of this sub-clause 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.

35.5 Transfer to Safer Job

- a) 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 by mutual agreement between the employee and the employer, to a safer position of the same classification until the commencement of paternity leave.
- b) If the transfer to a safer position is not practicable, the employee may take leave for such a period as is certified necessary by a registered medical practitioner.

35.6 Replacement Employee

- a) Prior to engaging a replacement employee Family and Children's Services shall inform the person of the temporary nature of the employment and the entitlements relating to return to work of the employee on parental leave.

35.7 Return to Work

- a) An employee shall confirm the intention to return to work by notice in writing to employer not less than four (4) weeks prior to the expiration of the period of parental leave.
- b) An employee on return from parental leave shall be entitled to the position which the employee occupied immediately prior to proceeding on parental leave. Where an employee was transferred to a safer job pursuant to sub-clause 35.5 hereof the employee is entitled to return to the position occupied immediately prior to the transfer.
- c) An employee may return on a part-time basis to the same position occupied prior to the commencement of leave or to a different position at the same classification level on a part-time basis in accordance with the Part-Time provisions of the relevant award.
- d) Where the position occupied by the employee no longer exists the employee shall be entitled to a position of the same classification level with duties similar to that of the abolished position.

- e) 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.

35.8 Effect of Leave on Employment Contract

- a) Fixed Term Contract

An employee for a fixed term contract shall have the same entitlement to parental leave, however the period of leave granted shall not extend beyond the term of that contract.

- b) Continuous Service

Absence on parental leave shall not be taken into account in calculating the period of service for any purpose under the relevant award or this agreement.

- c) Termination of Employment

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.

35.9 Additional unpaid leave

- a) Subject to all other leave entitlements being exhausted employees will be entitled to apply for leave without pay following parental leave to extend their leave by a further two years beyond the end of their parental leave. Approval will be at the discretion of the employer.
- b) Upon return to work employees will be entitled to 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.
- c) 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 combined total period of leave without pay following parental leave will not exceed two (2) years without the employer's approval.

36.—EMPLOYEE FUNDED EXTRA LEAVE

36.1 This clause can be adopted by mutual agreement between an individual employee and the employer.

36.2 Upon application by an employee covered by this Agreement, the employee shall be entitled to receive 48 weeks' pay spread over the full 52 weeks of the year. The employee will be entitled to take four (4) weeks extra leave in addition to their normal leave entitlements. The minimum duration of the 48/52 arrangement is 12 months.

36.3 The additional four (4) weeks per year will not be able to be accrued. In the event that the employee cannot take 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.

36.4 The additional four (4) weeks per year will not attract leave loading.

36.5 The employer's obligation extends only to ensuring that employees certify that they have checked with superannuation and taxation agencies and are fully informed regarding personal financial circumstances.

36.6 Where an employee leaves the department and has taken Employee Funded Extra Leave time prior to accrual of the full amount over a 48 week period then the amount owing by the employee must be re-imbursed to the department.

37.—DEFERRED SALARY SCHEME

37.1 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.

37.2 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.

37.3 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, except Long Service Leave.

37.4 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 foregone to that time but will not be entitled to equivalent absence from duty.

37.5 The employer's obligation is to ensure that employees have the opportunity to seek advice on superannuation and taxation matters and to ensure that employees certify that they have checked with superannuation and taxation agencies and are fully informed regarding personal financial circumstances.

37.6 The continuation of this scheme will be reviewed for employees undertaking secondments or who attain a promotion or transfer within Family and Children's Services. This will include employees injured in the course of their work and who become eligible for workers' compensation payments.

38.—CAREER BREAKS

38.1 Upon application by an employee covered by this Agreement, an employee may be, at the employer's discretion, entitled to take leave to a maximum of five (5) consecutive years to pursue personal development or family commitments.

38.2 Employees must have completed a minimum of two years continuous service to be eligible for a career break. Where this criterion is not met, special consideration may be taken into account when career breaks are sought as extensions to parental/adoption leave.

38.3 The following conditions will apply to career breaks—

- a) A career break may be unpaid or financed by setting aside a percentage of salary, to a maximum of 50%, over a defined period.
- b) The career break may be split into a maximum of two periods over a total of ten years, subject to a minimum of one years service between the two career breaks.
- c) The employer's obligation is to ensure that employees have the opportunity to seek advice on superannuation and taxation matters and to ensure that employees certify that they have checked with superannuation and taxation agencies and are fully informed regarding personal financial circumstances.
- d) All accrued leave is to be taken prior to the employee commencing, or form part of a career break
- e) With the exception of accrued leave taken prior to or as part of a career break, the duration of the career break will not be counted as continuous service for the purposes of calculation of entitlements under existing awards or agreements.
- f) To allow time to fill position vacancies, six (6) months notice of intention to take a career break will normally be required and one (1) months notice of resumption of work should also be provided by the employee. Shorter periods of notice may be agreed between the parties.
- g) Employees on career breaks will be provided with any specifically requested information in terms of newsletters, circulars and updates on industrial issues and training courses.
- h) Where there are any changes to the employee's position, the employee on a career break shall be advised in writing.
- i) Employees on career breaks may be required to attend the workplace for two weeks per year for training and development purposes, on a rate of pay reflecting the substantive pre break classification

level. This period of work will count as service for the calculation of all leave entitlements under existing awards and agreements.

- j) An employee on a career break may return to work on a part time or casual basis during the career break to cover peak work periods or special projects at the rate the employee was receiving prior to the break, or by mutual agreement, but including any salary or wage increase provided for under this Agreement or any State/National wage decisions. Periods of work that do not attract a casual loading will be counted as service for the calculation of entitlements under existing awards and agreements.
- k) At the expiration of the career break the employee is entitled to return to the workplace in the position they occupied when they left. If the position no longer exists the employee is entitled to a similar position comparable in status, pay and conditions to the one previously occupied.
- l) At the employee's request, the employer may provide for phase in/out periods involving part time work for those returning or leaving on a career break.
- m) The Department will provide any necessary retraining for employees returning from a career break.
- n) Absence on career break 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 this agreement.

39.—FAMILY/CARER'S LEAVE

39.1 An employee who has more than 10 days accumulated Sick Leave credits, shall be entitled to use up to a maximum of five (5) days accrued Sick Leave credits in any calendar year to attend to sickness within the family.

39.2 Family/Carer's leave is not cumulative from year to year.

39.3 Family/Carer's leave may be taken as single day absences or part of a single day.

39.4 The employee shall provide, wherever practical, prior notice of intention to take Family/Carer's leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee shall notify the department as soon as possible on the day of absence.

39.5 Sick Leave used for this purpose in excess of two (2) consecutive days will require confirmation of the circumstances by a medical practitioner.

40.—DEPENDANT CARE ARRANGEMENTS

40.1 The parties are committed to the introduction of conditions of work that assist employees with family responsibilities effectively discharge both responsibilities. To this end, the parties will, during the term of this Agreement, review the dependant care requirements of employees and examine, on a without prejudice basis, ways the department can assist employees access appropriate dependant care services.

40.2 For the purposes of the review referred to in sub-clause 40.1, dependant care includes the care of dependant children, immediate family members, elderly family members or relatives with disabilities or illnesses.

40.3 The review shall be commenced by the parties to this Agreement 12 months following registration of this Agreement. At the conclusion of the review the parties to the joint forum will identify and implement mutually agreed actions during the life of this Agreement. The remainder of matters will form the basis of future negotiations.

SECTION SIX: COUNTRY PROVISIONS

41.—OBJECTIVES & PRINCIPLES—COUNTRY PROVISIONS

41.1 The Department recognises the value and contribution of country based employees to the ongoing productivity and efficiency of the department.

41.2 The parties are committed to identifying and introducing by mutual agreement, conditions of work that assist encourage employees and potential new employees to apply for and remain in country locations.

42.—COUNTRY TRAVEL CONCESSIONS

42.1 The following provision shall be read in conjunction with the existing annual leave travel concession provisions in awards and agreements that apply to the parties bound to this agreement.

42.2 A travel concession up to the value of a return economy airfare from his or her headquarters to Perth, will be available to employees. An employee may elect to use the concession to purchase return economy airfare to any destination of his or her choice. Should the cost of the chosen return economy airfare be less than the value of the return economy airfare to Perth the lesser amount shall be paid. An employee must undertake the travel to gain the benefit.

42.3 The employee may elect to receive up to 100% of the travel concession in advance of the travel being undertaken.

43.—STUDY LEAVE (REMOTE LOCATION)

43.1 Subject to organisational convenience and management approval, employees located in remote locations may be eligible for a total of five (5) days paid leave per year for the purposes of professional (and/or personal) development.

43.2 This provision is only available to those employees studying by correspondence who are unable to access entitlements to paid study leave in the relevant parent Award.

43.3 Employees required to travel for the aforementioned purpose will be granted reasonable travelling time to complete the return journey, but at no additional expense to the department.

43.4 Study Leave is not cumulative. There can be no carry-over of unused Study Leave days from one calendar year to the next year.

44.—REMOVAL ALLOWANCE

44.1 This clause shall be read in conjunction with Clause 39, Removal Allowance, of the Public Service Award of 1992.

44.2 Where an employee or his/her dependants regularly use more than one vehicle, and all the vehicles regularly used by the employee or dependants are to be relocated to the new residence, the cost of transporting or driving more than one vehicle (with a limit of two) shall be deemed to be part of the removal costs.

44.3 Where only one vehicle is to be relocated to the new residence, the employee may choose to transport either a trailer, boat or caravan in lieu of the second vehicle. The employee may be required to show evidence of ownership of the trailer, boat or caravan to be transported.

44.4 If the employee tows the caravan, trailer or boat to the new residence, the additional rate per kilometre is to be three cents per kilometre for a caravan or boat and two cents per kilometre for a trailer.

44.5 When an employee is transferred in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, the employee shall be reimbursed the actual cost (including insurance) of the conveyance of an employee's household furniture, effects and appliances up to a maximum volume of 45 cubic metres, provided that a larger volume may be approved by the employer in special cases.

44.6 The employee shall, before removal is undertaken obtain quotes from at least two carriers which shall be submitted to the employer, who may authorise the acceptance of the more suitable: Provided that payment for a volume amount beyond 45 cubic metres shall not occur without the approval of the employer.

44.7 The employer may, in lieu of conveyance, authorise payment to compensate for any loss in any case where an employee, with prior approval of the employer, disposes of his or her household furniture, effects and appliances instead

of removing them to the new headquarters: Provided that such payments shall not exceed the sum which would have been paid if the employee's household furniture, effects and appliances had been removed by the cheapest method of transport available and the volume was 45 cubic metres.

45.—REVIEW OF COUNTRY PROVISIONS

45.1 The parties are committed to identifying and introducing by mutual agreement, conditions of work that assist encourage employees and potential new employees to apply for and remain in country locations. To this end, within one (1) month of the registration of this Agreement, the parties will establish a working group to review work and lifestyle issues for country based employees, on a without prejudice basis. This will include a review of the operation of the air conditioning subsidy.

45.2 At the expiration of 12 months following registration of this Agreement the working group will refer matters identified from the review to the joint forum described in clause 17.—Implementation of EBA Initiatives, of this Agreement, for consideration. The joint forum will subsequently refer its recommendations for consideration by the department's executive management.

45.3 The terms of reference of the joint review will include, but not be limited to, the identification of initiatives that are recommended for implementation during the life of this Agreement.

SECTION SEVEN: SIGNATURES

46.—SIGNATURES OF PARTIES TO THE AGREEMENT

Signatories
...(signed).....
June van de Klashorst
MINISTER FOR FAMILY AND CHILDREN'S SERVICES
Signed on behalf of Family and Children's Services;
Date...14../...6../2000
...(signed).....
Robert Fisher
DIRECTOR GENERAL
Signed on behalf of Family and Children's Services;
Date...13../...6../00
...(signed).....(Common Seal).....
David Robinson
GENERAL SECRETARY
Signed on behalf of the Civil Service Association WA (INC.)
Date...16../...06../00
...(signed).....
Helen Creed
SECRETARY
Signed on behalf of the Australian Liquor, Hospitality and Miscellaneous Workers Union (WA Branch)
Date...15../...6../00

SCHEDULE A

PRODUCTIVITY

- The following measures are to be used as indicators of organisational performance for salary/pay related purposes only, refer Clause 18, Salary Increase Quantum, recognising the direct and in-direct contribution of all areas within Family and Children's Services, including portfolio agencies.

Outcomes	Output and Description	Performance Measures	Required Performance
Families and individuals achieve self reliance and are skilled to care for their children.	<p>Output 1: Family and Individual Support</p> <p>Services in this output assist community members, including disadvantaged and socially isolated families and individuals to achieve self-reliance and to develop knowledge and skills about parenting. Services include support services for disadvantaged families, assessments of "child concern" reports, relationship counselling, and the provision of information about families of origin for Aboriginal people, adoptees or children who are unable to live with their birth parents. In addition, services assist young people to increase their knowledge and skills in order to reduce risk-taking behaviour and effectively manage their lives. Services include drop-in centres, mentoring and recreational activities which develop life skills. Services for parents include parenting courses, in-home parenting advice, support to Aboriginal communities, parenting information centres and telephone help lines.</p>	<p>The number of Child Concern Reports.</p> <p>.....</p> <p>The percentage of Child Concern Report assessments completed within 30 days.</p>	<p>Between 4320 & 5540 (NCI: 5800)</p> <p>.....</p> <p>Between 66.5% & 73.5% (NCI: 63%)</p>
Individuals and children are protected from abuse in families, supported through crisis and where possible children remain with their families.	<p>Output 2: Child and Family Safety</p> <p>Services in this output support families and individuals in crisis and help reduce the occurrence, or the effects of, abuse within families. For families and individuals in crisis, services include accommodation for homeless people and victims of domestic violence; financial assistance and counselling; and assistance to communities and their members to cope with the aftermath of natural or human-made disasters. Where abuse occurs in families, services include intensive family support for parents; plus counselling and treatment to alleviate the effects of abuse within the family. Services also aim to ensure the safety of children in the family through investigation of child maltreatment allegations, assessment of the ability of families to care for children's safety plus the lodging and pursuing of Care and Protection applications in the Children's Court.</p>	<p>The percentage of children who are not the subject of re-substantiated maltreatment in 12 months.</p> <p>.....</p> <p>The percentage of Child Maltreatment Allegations which are investigated within set time frames.</p>	<p>Between 89.6% & 90.4% (NCI: 86%)</p> <p>.....</p> <p>Between 85% & 92.25% (NCI 80%)</p>
Children whose placement has been approved by the department, or who are under the guardianship of the Director General, or who are in child care, receive quality care.	<p>Output 3: Care for Children</p> <p>Services in this output provide quality care for children placed in care by Family and Children's Services. These include the recruitment, assessment and support of carers, the provision of foster care or group care for children unable to live at home and associated services which maintain children's relationships with their families and prepare children to leave care. Services also aim to ensure safe and good quality child care through regulations which set out standards for operating child care services and through advice, support and funding to service providers.</p>	<p>The percentage of children placed in care with three or fewer placements within the following 12 months.</p> <p>.....</p> <p>The percentage of children not abused by carers.</p>	<p>Between 91% & 95% (NCI: 87%)</p> <p>.....</p> <p>Between 99.52% & 99.66% (NCI: 99%)</p>

SCHEDULE B
SALARIES/WAGES

Public Service Award 1992

		Class Step	Annual Rate Prior to Registration	Annual Rate First increase (3%) at Registration	Annual Rate Second increase (3%) to be approved refer clause 18	Class Step	Annual Rate Prior to Registration	Annual Rate First increase (3%) at Registration	Annual Rate Second increase (3%) to be approved refer clause 18		
LEVEL 1											
Under 17 Years	psal1	01	13,555	13,962	14,380	LEVEL 2/4 Clause 11, Salaries Specified Callings, Public Service Award					
17 Years	psal1	02	15,691	16,163	16,648	1st Year	psal2411	01	32,761	33,744	34,756
18 Years	psal1	03	18,153	18,698	19,259	2nd Year	psal2411	02	34,440	35,473	36,537
19 Years	psal1	04	20,872	21,498	22,143	3rd Year	psal2411	03	36,301	37,390	38,512
20 Years	psal1	05	23,329	24,029	24,750	4th Year	psal2411	04	38,627	39,786	40,979
1st Year	psal1	08	27,057	27,869	28,705	5th Year	psal2411	05	42,235	43,502	44,807
2nd Year	psal1	09	27,810	28,644	29,504	6th Year	psal2411	06	44,587	45,925	47,302
3rd Year	psal1	10	28,567	29,424	30,307	LEVEL 5 Clause 11, Salaries Specified Callings, Public Service Award					
4th Year	psal1	11	29,326	30,206	31,112	1st Year	psal511	01	46,882	48,288	49,737
5th Year	psal1	12	30,198	31,104	32,037	2nd Year	psal511	02	48,434	49,887	51,384
6th Year	psal1	13	30,801	31,725	32,677	3rd Year	psal511	03	50,047	51,547	53,094
7th Year	psal1	14	31,693	32,645	33,624	4th Year	psal511	04	51,721	53,273	54,871
LEVEL 2											
1st Year	psal2	01	32,761	33,744	34,756	LEVEL 6 Clause 11, Salaries Specified Callings, Public Service Award					
2nd Year	psal2	02	33,580	34,587	35,625	1st Year	psal611	01	54,411	56,043	57,725
3rd Year	psal2	03	34,440	35,473	36,537	2nd Year	psal611	02	56,240	57,928	59,666
4th Year	psal2	04	35,349	36,409	37,502	3rd Year	psal611	03	58,133	59,877	61,673
5th Year	psal2	05	36,301	37,390	38,512	4th Year	psal611	04	60,155	61,959	63,817
LEVEL 2/3											
1st Year	psal23	01	32,761	33,744	34,756	LEVEL 6/7 Clause 11, Salaries Specified Callings, Public Service Award					
2nd Year	psal23	02	33,580	34,587	35,625	1st Year	psal6711	01	54,411	56,043	57,725
3rd Year	psal23	03	34,440	35,473	36,537	2nd Year	psal6711	02	56,240	57,928	59,666
4th Year	psal23	04	35,349	36,409	37,502	3rd Year	psal6711	03	58,133	59,877	61,673
5th Year	psal23	05	36,301	37,390	38,512	4th Year	psal6711	04	60,155	61,959	63,817
6th Year	psal23	06	37,609	38,737	39,899	5th Year	psal6711	05	63,255	65,153	67,107
7th Year	psal23	07	38,627	39,786	40,979	6th Year	psal6711	06	65,400	67,363	69,384
8th Year	psal23	08	39,678	40,868	42,094	7th Year	psal6711	07	67,734	69,766	71,859
9th Year	psal23	09	40,756	41,979	43,238	LEVEL 7/8 Clause 11, Salaries Specified Callings, Public Service Award					
LEVEL 3											
1st Year	psal3	01	37,609	38,737	39,899	1st Year	psal7811	01	63,255	65,153	67,107
2nd Year	psal3	02	38,627	39,786	40,979	2nd Year	psal7811	02	65,400	67,363	69,384
3rd Year	psal3	03	39,678	40,868	42,094	3rd Year	psal7811	03	67,734	69,766	71,859
4th Year	psal3	04	40,756	41,979	43,238	4th Year	psal7811	04	71,526	73,672	75,882
LEVEL 2/4											
1st Year	psal2410	01	32,761	33,744	34,756	5th Year	psal7811	05	74,242	76,470	78,764
2nd Year	psal2410	02	33,580	34,587	35,625	6th Year	psal7811	06	77,611	79,940	82,339
3rd Year	psal2410	03	34,440	35,473	36,537	Government Officers Salaries, Allowances and Conditions Award of 1989					
4th Year	psal2410	04	35,349	36,409	37,502						
5th Year	psal2410	05	36,301	37,390	38,512						
6th Year	psal2410	06	37,609	38,737	39,899						
7th Year	psal2410	07	38,627	39,786	40,979						
8th Year	psal2410	08	39,678	40,868	42,094						
9th Year	psal2410	09	40,756	41,979	43,238						
10th Year	psal2410	10	42,235	43,502	44,807						
11th Year	psal2410	11	43,393	44,695	46,036						
12th Year	psal2410	12	44,587	45,925	47,302						
LEVEL 4											
1st Year	psal4	01	42,235	43,502	44,807						
2nd Year	psal4	02	43,393	44,695	46,036						
3rd Year	psal4	03	44,587	45,925	47,302						
LEVEL 5											
1st Year	psal5	01	46,882	48,288	49,737						
2nd Year	psal5	02	48,434	49,887	51,384						
3rd Year	psal5	03	50,047	51,547	53,094						
4th Year	psal5	04	51,721	53,273	54,871						
LEVEL 6											
1st Year	psal6	01	54,411	56,043	57,725						
2nd Year	psal6	02	56,240	57,928	59,666						
3rd Year	psal6	03	58,133	59,877	61,673						
4th Year	psal6	04	60,155	61,959	63,817						
LEVEL 7											
1st Year	psal7	01	63,255	65,153	67,107						
2nd Year	psal7	02	65,400	67,363	69,384						
3rd Year	psal7	03	67,734	69,766	71,859						
LEVEL 8											
1st Year	psal8	01	71,526	73,672	75,882						
2nd Year	psal8	02	74,242	76,470	78,764						
3rd Year	psal8	03	77,611	79,940	82,339						
LEVEL 9											
1st Year	psal9	01	81,818	84,273	86,801						
2nd Year	psal9	02	84,661	87,201	89,817						
3rd Year	psal9	03	87,903	90,540	93,256						
CLASS 1											
	psac1	01	92,805	95,588	98,456						
CLASS 2											
	psac2	01	97,706	100,637	103,656						
CLASS 3											
	psac3	01	102,606	105,684	108,855						
CLASS 4											
	psac4	01	107,508	110,734	114,056						

	Class Step	Annual Rate Prior to Registration	Annual Rate First increase (3%) at Registration	Annual Rate Second increase (3%) to be approved refer clause 18
LEVEL 6				
1st Year	gos16 01	54,411	56,043	57,725
2nd Year	gos16 02	56,240	57,928	59,666
3rd Year	gos16 03	58,133	59,877	61,673
4th Year	gos16 04	60,155	61,959	63,817
LEVEL 7				
1st Year	gos17 01	63,255	65,153	67,107
2nd Year	gos17 02	65,400	67,363	69,384
3rd Year	gos17 03	67,734	69,766	71,859
LEVEL 8				
1st Year	gos18 01	71,526	73,672	75,882
2nd Year	gos18 02	74,242	76,470	78,764
3rd Year	gos18 03	77,611	79,940	82,339
LEVEL 9				
1st Year	gos19 01	81,818	84,273	86,801
2nd Year	gos19 02	84,661	87,201	89,817
3rd Year	gos19 03	87,903	90,540	93,256
CLASS 1				
	gosc1 01	92,805	95,588	98,456
CLASS 2				
	gosc2 01	97,706	100,637	103,656
CLASS 3				
	gosc3 01	102,606	105,684	108,855
CLASS 4				
	gosc4 01	107,508	110,734	114,056
LEVEL 2/4 Clause 11, Salaries Specified Callings, OSAC				
1st Year	gos12411 01	32,761	33,744	34,756
2nd Year	gos12411 02	34,440	35,473	36,537
3rd Year	gos12411 03	36,301	37,390	38,512
4th Year	gos12411 04	38,627	39,786	40,979
5th Year	gos12411 05	42,235	43,502	44,807
6th Year	gos12411 06	44,587	45,925	47,302

Cleaners & Caretakers (Government) Award 1975

	Class Step	Weekly Rate Prior to Registration	Weekly Rate First increase (3%) at Registration	Weekly Rate Second increase (3%) to be approved refer clause 18
Cleaners				
1st Year	ccgclean 01	466.73	480.73	495.15
2nd Year	ccgclean 02	471.39	485.53	500.10
3rd Year	ccgclean 03	476.28	490.57	505.29
Caretakers				
1st Year	ccgcare 01	487.70	502.33	517.40
2nd Year	ccgcare 02	492.11	506.87	522.08
3rd Year	ccgcare 03	496.65	511.55	526.90

Note: 20% Casual loading applicable to employees working for 4 weeks or less

Gardeners (Government) Award 1986

	Class Step	Weekly Rate Prior to Registration	Weekly Rate First increase (3%) at Registration	Weekly Rate Second increase (3%) to be approved refer clause 18
Gardener/Ground Attendant				
1st Year	ggag2 01	469.75	483.84	498.36
2nd Year	ggag2 02	474.18	488.41	503.06
3rd Year	ggag2 03	478.96	493.33	508.13

Note: 20% Casual loading applicable to employees working for 4 weeks or less

Community Welfare Department Hostels Award 1983

	Class Step	Weekly Rate Prior to Registration	Weekly Rate First increase (3%) at Registration	Weekly Rate Second increase (3%) to be approved refer clause 18
Cook				
1st Year	cwdhcook 01	498.87	513.84	529.25
2nd Year	cwdhcook 02	503.87	518.99	534.56
3rd Year	cwdhcook 03	508.66	523.92	539.64
Groundsman/Gardener				
1st Year	cwdhgard 01	482.46	496.93	511.84
2nd Year	cwdhgard 02	484.19	498.72	513.68
3rd Year	cwdhgard 03	492.58	507.36	522.58
Domestic				
1st Year	cwdhdom 01	466.26	480.25	494.66
2nd Year	cwdhdom 02	471.63	485.78	500.35
3rd Year	cwdhdom 03	476.40	490.69	505.41

Juniors

Under 16 Years—60% of 1st Yr
Under 17 Years—70% of 1st Yr
Under 18 Years—80% of 1st Yr

Board & Lodging \$10.30pw (Adult)

1 day 4 units (3 meals and 1 bed)
1 unit 0.37 cents (Adult)
0.17 cents (Child 12 yrs—16 yrs)
0.08 cents (Child 1 yr—12 yrs)
1 week 28 units

Catering and Tea Attendants (Government) Award 1982

	Class Step	Prior to Registration	First increase (3%) at Registration	Second increase (3%) to be approved refer clause 18
1st Year ctagtea 01				
3 hours and above per day	Wage	363.21	374.11	385.33
	+ Svc Pay	56.70	56.70	56.70
		419.91	\$430.81	\$442.03
	+ 15% Loading	62.99	64.62	66.30
	TOTAL	482.90	495.43	508.33
Hourly Rate (weekly rate divided by 38)				
		12.71	13.04	13.38
2nd Year ctagtea 02				
3 hours and above per day	Wage	363.21	374.11	385.33
	+ Svc Pay	61.90	61.90	61.90
		425.11	436.01	447.23
	+ 15% Loading	63.77	65.40	67.08
	TOTAL	488.88	501.41	514.31
Hourly Rate (weekly rate divided by 38)				
		12.87	13.19	13.53
3rd Year ctagtea 03				
3 hours and above per day	Wage	363.21	374.11	385.33
	+ Svc Pay	66.50	66.50	66.50
		429.71	440.61	451.83
	+ 15% Loading	64.46	66.09	67.77
	TOTAL	494.17	506.70	519.60
Hourly Rate (weekly rate divided by 38)				
		13.00	13.33	13.60

Family Resource Workers, Welfare Assistants and Parent Helpers Award 1990

	Class Step	Annual Rate Prior to Registration	Annual Rate First increase (3%) at Registration	Annual Rate Second increase (3%) to be approved refer clause 18
LEVEL 1				
Under 17 Years	frwl1 01	13,555	13,962	14,380
17 Years	frwl1 02	15,691	16,163	16,648
18 Years	frwl1 03	18,153	18,698	19,259
19 Years	frwl1 04	20,872	21,498	22,143
20 Years	frwl1 05	23,329	24,029	24,750
1st Year	frwl1 08	27,057	27,869	28,705
2nd Year	frwl1 09	27,810	28,644	29,504
3rd Year	frwl1 10	28,567	29,424	30,307
4th Year	frwl1 11	29,326	30,206	31,112
5th Year	frwl1 12	30,198	31,104	32,037
6th Year	frwl1 13	30,801	31,725	32,677
7th Year	frwl1 14	31,693	32,645	33,624
LEVEL 2				
1st Year	frwl2 01	32,761	33,744	34,756
2nd Year	frwl2 02	33,580	34,587	35,625
3rd Year	frwl2 03	34,440	35,473	36,537
4th Year	frwl2 04	35,349	36,409	37,502
5th Year	frwl2 05	36,301	37,390	38,512

Award Free Hostels (Hostel Salaried Employees)

	Class Step	Annual Rate Prior to Registration	Annual Rate Plus 18% Commuted Allowance	Annual Rate First increase (3%) at Registration	Annual Rate Plus 18% Commuted Allowance	Annual Rate Second increase (3%) to be approved refer clause 18	Annual Rate Plus 18% Commuted Allowance
LEVEL 1							
Under 17 Years	afh11 01	13,555	15,995	13,962	16,475	14,380	19,440
	afh11 02	15,691	18,516	16,163	19,072	16,648	22,505
	afh11 03	18,153	21,421	18,698	22,063	19,259	26,035
	afh11 04	20,872	24,629	21,498	25,368	22,143	29,934
	afh11 05	23,329	27,528	24,029	28,354	24,750	33,458
1st Year	afh11 08	27,057	31,927	27,869	32,885	28,705	38,804
	afh11 09	27,810	32,816	28,644	33,800	29,504	39,884
	afh11 10	28,567	33,710	29,424	34,720	30,307	40,970
	afh11 11	29,326	34,605	30,206	35,643	31,112	42,059
	afh11 12	30,198	35,633	31,104	36,703	32,037	43,309
	afh11 13	30,801	36,345	31,725	37,436	32,677	44,174
	afh11 14	31,693	37,398	32,645	38,521	33,624	45,455
LEVEL 2							
1st Year	afh2 01	32,761	38,658	33,744	39,818	34,756	46,985
2nd Year	afh2 02	33,580	39,624	34,587	40,813	35,625	48,159
3rd Year	afh2 03	34,440	40,639	35,473	41,858	36,537	49,393
4th Year	afh2 04	35,349	41,712	36,409	42,963	37,502	50,697
5th Year	afh2 05	36,301	42,835	37,390	44,120	38,512	52,062

Class Step	Annual Rate Prior to Registration	Annual Rate Plus 18% Commuted Allowance	Annual Rate First increase (3%) at Registration	Annual Rate Plus 18% Commuted Allowance	Annual Rate Second increase (3%) to be approved refer clause 18	Annual Rate Plus 18% Commuted Allowance
LEVEL 3						
1st Year	afh3 01 37,609	44,378	38,737	45,710	39,899	53,938
2nd Year	afh3 02 38,627	45,580	39,786	46,947	40,979	55,398
3rd Year	afh3 03 39,678	46,820	40,868	48,225	42,094	56,905
4th Year	afh3 04 40,756	48,092	41,979	49,535	43,238	58,451

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FOWCON DUCT INSTALLATION SERVICES PTY LTD/BLPPU AND THE CMETU COLLECTIVE AGREEMENT 2000.

No. AG 139 of 2000.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

Fowcon Duct Installation Services Pty Ltd.

AG 139 of 2000.

Fowcon Duct Ins Services Pty Ltd/BLPPU and the CMETU Collective Agreement 2000.

COMMISSIONER S J KENNER.

19 June 2000.

Order.

HAVING heard Ms J Harrison on behalf of the applicant and there being no appearance on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Fowcon Duct Ins Services Pty Ltd/BLPP and the CMETU Collective Agreement 2000 filed in the Commission on 18 May 2000 in the terms of the following schedule be and is hereby registered as an industrial agreement.

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

1.—TITLE

This agreement shall be known as the Fowcon Duct Installation Services Pty Ltd/BLPPU and the CMETU Collective Agreement 2000.

2.—ARRANGEMENT

Title	Clause No.
Title	1
Arrangement	2
Parties and Persons Bound	3
Application	4
Relationship to Parent Award	5
Period of Operation	6
Classification Structures & Rates of Pay	7
Industry Standards	8
Sick Leave	9
Negotiation of a Subsequent Agreement	10
Application of Project Agreements	11
Fares and Travelling Allowance	12
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Pyramid Sub-Contracting	15
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Safety Dispute Resolution	17
Amenities	18
Training and Related Matters	19
Drug & Alcohol, Safety & Rehabilitation Program	20
Clothing & Safety Footwear	21
Income Protection	22

3.—PARTIES AND PERSONS BOUND

This agreement shall be binding on Fowcon Duct Installation Services Pty Ltd (hereinafter referred to as "the company"), the Western Australian Builders' Labourers, Painters and Plasterers Union of Workers and the Construction Mining Energy Timberyards Sawmills and Woodworkers Union of Australia—WA Branch (hereinafter referred to as "the unions") and all employees of the company eligible to be members of the unions.

4.—APPLICATION

This agreement shall apply to all employees of the company engaged on work in or in connection with construction, alteration, maintenance, repair or demolition of buildings or other structures of any kind whatsoever.

This agreement shall apply in Western Australia only. There are approximately 2 employees covered by this agreement.

5.—RELATIONSHIP TO PARENT AWARD

1. This agreement is supplementary to, and shall be read and interpreted wholly in conjunction with, the Building Trades (Construction) Award 1987, Award No. R14 of 1978 (hereinafter referred to as "the award").

2. In the event of any inconsistency between the award and an express provision of this agreement, the terms of this agreement shall prevail to the extent of such inconsistency, unless the express provision of the agreement provides otherwise.

6.—PERIOD OF OPERATION

This agreement shall come into force from the first pay period commencing on or after November 1st 1999 and shall remain in force until the 1st of November, 2002.

7.—CLASSIFICATION STRUCTURE & RATES OF PAY

1. All employees working under this agreement shall be paid according to the wage rates set out below.

2. Wage Rates (per hour at ordinary time)

	Previous EBA Rate	1st November 1999	1st November 2000	1st November 2001
	Hourly Rate	Hourly Rate	Hourly Rate	Hourly Rate
	\$	\$	\$	\$
Labourer Group 1	17.15	18.01	18.91	19.86
Labourer Group 2	16.56	17.39	18.26	19.17
Labourer Group 3	16.12	16.93	17.78	18.67
Plaster, Fixer	17.82	18.71	19.65	20.63
Painter, Glazier	17.42	18.29	19.20	20.16
Signwriter	17.80	18.69	19.62	20.63
Carpenter/Roofer	17.93	18.85	19.79	20.78
Bricklayer	17.75	18.63	19.61	20.59
Refractory Bricklayer	20.38	21.40	22.47	25.59
Stonemason	17.93	18.82	19.76	20.75
Rooftiler	17.62	18.50	19.43	20.40
Marker/Setter Out	18.46	19.38	20.35	21.37
Special Class T	18.69	19.62	20.61	21.64

APPRENTICE RATES

	Previous EBA Rate	1st November 1999	1st November 2000	1st November 2001
	Hourly Rate	Hourly Rate	Hourly Rate	Hourly Rate
	\$	\$	\$	\$
Plasterer, Fixer				
Year 1	7.48	7.86	8.25	8.66
Year 2 (1/3)	9.81	10.29	10.81	11.35
Year 3 (2/3)	13.37	14.03	14.74	15.47
Year 4 (3/3)	15.69	16.46	17.29	18.15
Painter, Glazier				
Year 1 (.5/3/5)	7.32	7.68	8.06	8.47
Year 2 (1/3), (1.5/3.5)	9.58	10.06	10.56	11.09
Year 3 (2/3), (2.5/3.5)	13.06	13.72	14.40	15.12
Year 4 (3/3), (3.5/3.5)	15.33	16.10	16.90	17.74

	Previous EBA Rate Hourly Rate \$	1st November 1999 Hourly Rate \$	1st November 2000 Hourly Rate \$	1st November 2001 Hourly Rate \$
Signwriter				
Year 1 (.5/3.5)	7.48	7.85	8.24	8.66
Year 2 (1/3, 1.5/3.5)	9.78	10.28	10.79	11.35
Year 3 (2/3, 2.5/3.5)	13.35	14.02	14.72	15.47
Year 4 (3/3, 3/5/3.5)	15.66	16.45	17.27	18.15
Carpenter/Roofeer				
Year 1	7.54	7.92	8.31	8.73
Year 2 (1/3)	9.86	10.37	10.88	11.43
Year 3 (2/3)	13.45	14.14	14.84	15.59
Year 4 (3/3)	15.78	16.59	17.42	18.29
Bricklayer				
Year 1	7.46	7.82	8.24	8.65
Year 2 (1/3)	9.76	10.25	10.79	11.32
Year 3 (2/3)	13.31	13.97	14.71	15.44
Year 4 (3/3)	15.62	16.39	17.26	18.12
Stonemason				
Year 1	7.54	7.92	8.31	8.73
Year 2 (1/3)	9.86	10.37	10.88	11.43
Year 3 (2/3)	13.45	14.14	14.84	15.59
Year 4 (3/3)	15.78	16.59	17.42	18.29
Rooftiler				
6 months	10.04	10.54	11.07	11.62
2nd 6 months	11.04	11.59	12.17	12.78
Year 2	12.90	13.55	14.23	14.94
Year 3	15.14	15.90	16.70	17.54

3. All expense related allowances not specifically mentioned in this agreement will be paid as per the award as varied from time to time.

4. Site allowances relating to particular sites shall be paid in accordance with Appendix B of this Agreement.

5. An additional payment will be made to compensate for the impact of the Goods and Services Tax on the Consumer Price Index. In the circumstance that the CPI limit below is exceeded the appropriate additional payment will be made to the wage rates. The CPI figure for the applicable dates will be the official figure released by the ABS for the preceding year.

Date	CPI Limit	Additional Payment
June 2001	5%	1% (paid 1/9/2001)
June 2001	6%	2% (paid 1/9/2001)
June 2002	5%	1% (paid 1/9/2002)
June 2002	6%	2% (paid 1/9/2002)

8. INDUSTRY STANDARDS

Redundancy

In addition to the current payment, the company shall increase the contributions on behalf of each employee into the Western Australian Construction Industry Redundancy Fund by the following sums on a weekly basis—

Rate on signing	\$50
Rate as of 1/05/2001	\$60

Superannuation

(i) The Company will make a payment of \$60 per week per employee or the percentage rate that is prescribed under the Superannuation Guarantee Charge, whichever is the greater.

The Company will advise all employees subject to the Agreement of their right to have payments made to a complying superannuation fund of their choice. The Company is bound by the employee's election. The aforementioned payment will then be made to that fund.

Until each employee nominates the fund of their choice the Company will make payments into the Construction + Building Unions Superannuation Scheme (the "C+BUSS").

In the event that any employee chooses a fund other than the C+BUSS the company will, within seven days of the employee advising the Company of the fund of their choice, advise the Union in writing of the employee's decision.

In the event that the employee and the Company reach an agreement pursuant to section 49C(2)(d) of the Act to change the complying superannuation fund or scheme the Company will, within seven days of the employee and the Company

reaching such an agreement, advise the Union in writing of the agreement. The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by the employee.

(ii) "Ordinary Time Earnings" (which for the purposes of the Superannuation Guarantee (Administration) Act 1992 will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, industry allowance, trade allowances, shift loading, special rates, qualification allowances (eg. first aid, laser safety officer), multi-storey allowance, site allowance, asbestos eradication allowance, leading hand allowances, in charge of plant allowance and supervisory allowances where applicable. The term includes any regular over-award pay as well as casual rates received and any additional rates and allowances paid for work undertaken during ordinary hours of work, including fares and travel.

9.—SICK LEAVE

For sick leave accrued after the date of signing this agreement the following will apply—

- The Company's employees shall have the option of converting 100% of accrued sick leave entitlement to a cash payment on termination
- If an employee who has been terminated by the Company without exercising the above option is re-engaged within a period of six months, the unpaid balance of sick leave shall continue from the date of re-engagement.
- Where the Company has signed a previous Agreement with the Union that also allowed for the conversion to cash payment on termination for accrued sick leave, that accrued sick leave will be treated as if is accrued under this agreement.
- Sick leave shall accrue, for the purposes of this clause, at the rate of one day at the beginning of each of the first ten calendar months of each year.
- Employees shall have the option of converting to a cash payment all sick leave entitlements over 5 days. Payment shall be made on the last pay period prior to the Christmas closedown.

10.—NEGOTIATION OF A SUBSEQUENT AGREEMENT

The parties agree to commence negotiations for a new collective agreement to succeed this agreement at least 3 months before the nominal expiry date. The parties intend to conclude these negotiations prior to the nominal expiry date. These negotiations shall be conducted on a collective basis between all of the parties with the negotiated outcome being subject to approval of a vote of the employees collectively.

11.—APPLICATION OF PROJECT AGREEMENTS

1. This agreement shall apply to all persons employed in the employer's business and every part thereof throughout Western Australia until 1st November 2002 except where the company commences work on a project where a site agreement to which the union is a party exists that provides for higher rates of pay and conditions.

2. The conditions contained in any such site agreement will take precedence over this agreement for the duration of the project.

12.—FARES AND TRAVELLING ALLOWANCE

In addition to Clause 12A of the award a travel payment shall be made in the form of a daily payment (on days worked) of \$6.15 per day per employee.

13.—SENIORITY

1. The parties agree the continuity of employment is desirable wherever possible, and that where it is not possible, employees will be retrenched in order of seniority.

2. When applying the "first on last off" principle it is agreed subject to the caveat of "all things being equal", it is intended to apply on a Company basis rather than a site by site basis.

3. It is recognised that from time to time instances may arise where the employee's individual skills may be subject to this caveat. Where there is any disagreement as to the application

of this the matter will be processed in accordance with Clause 16—Dispute Settlement Procedure.

4. An employee who has been retrenched by the Company shall have absolute preference and priority for re-employment/re-engagement by the Company. Where an employee is re-engaged within a period of six months the employee shall maintain continuity of service and all accrued entitlements with the Company.

14.—ALL IN PAYMENTS

1. All-in payments to employees will not be made. All-in payments are defined as an hourly rate or piece work rate which is meant to cover wages and all allowances, such as annual leave, sick leave, etc., on which tax is being paid using the Prescribed Payments System.

2. It is agreed that where a breach of this clause is discovered, the employer shall continue paying the “all-in” rate as the employees hourly rate, but shall pay all award and other entitlements on top of this amount, back-dated to the commencement of the all-in rate arrangement. The company shall not be entitled to offset any amount in excess of the ordinary hourly rate against any other entitlement in this agreement.

3. This clause shall not be applied to prevent the employer subletting specialised work outside of the normal scope of work which the employer performs. The union shall be notified when specialist sub-contractors are to be engaged.

15.—PYRAMID SUB-CONTRACTING

1. “Pyramid Sub-Contracting” is defined as the practice of a sub-contractor, to whom a sub-contract is originally awarded, sub-letting that contract or part thereof to another sub-contractor.

2. Provided that where a sub-contractor does not have the technical capacity to handle a specialist section of the contract and intends to engage a specialist sub-contractor to perform that work, that section may be re-let to a specialist sub-contractor.

3. Further provided that when a sub-contract is let for labour and material, a labour-only sub-contract may be let by the sub-contractor, but it is unacceptable as a principle for further labour-only sub-contracts to be re-let.

4. A bona fide sub-contractor is generally an employer of labour, save for a machine owner-operator.

5. Where a disagreement arises in relation to the definition or application of the term “Pyramid Sub-Contracting” the parties shall discuss and determine the issue in accordance with the agreement dispute resolution procedure. In any event of a disagreement, the matter shall be negotiated further between the parties or referred to the Western Australian Industrial Relations Commission. Whilst these procedures are undertaken no industrial action shall occur.

16.—DISPUTE SETTLEMENT PROCEDURE

1. Disputes over any work related or industrial matter should be dealt with as close to its source as possible.

2. An employee or the union delegate should initially submit any work related grievance and/or industrial matter to the site foreperson, supervisor or other appropriate site representative of the company.

3. If the matter remains unresolved the union delegate may then submit the matter to the appropriate senior management person.

4. If still not resolved the delegate shall refer the matter to an appropriate official of the union, who shall discuss the matter with the nominated representative of the employer.

5. Whilst the above procedures are being followed work should continue as normal.

6. This procedure is to be followed in good faith and without unreasonable delay by any party.

7. Should the matter remain unresolved it shall be dealt with in one of the following ways as agreed to between the parties—

- referred to the Western Australian Industrial Relations Commission for conciliation and if required arbitration. The Commission's decision will be accepted by all parties subject to legal rights of appeal; or

- referred to a disputes board for determination; or
- referred to a private arbitrator agreed to between the parties, for determination.

8. This dispute settlement procedure does not apply to health and safety issues.

17.—SAFETY DISPUTE RESOLUTION

1. The parties to this agreement are committed to the safe operation of plant and equipment, to the observance of safe working practices, and the provision by the employer and correct use of all personal protective equipment. The company recognises its responsibilities to provide a safe and healthy workplace.

2. In the event of any disagreements on the necessity to carry out any safety measure or modify, reinforce or reinstate any safety device whatsoever, the procedures set out in this clause will be adopted.

3. No person shall dismiss a safety complaint. Any complaint should be referred to the company safety officer or workers' safety representative to be dealt with in accordance with the following procedures—

- (i) Where any employee becomes aware of an unsafe situation, that employee will immediately notify the company safety officer or the workers' safety representative.
- (ii) The company safety officer and the workers' safety representative will take immediate action to have the unsafe situation rectified.
- (iii) Should the company safety officer consider that no safety precautions are necessary, he/she will notify the workers' safety representative accordingly as soon as possible.
- (iv) While there is disagreement on the ruling of the company safety officer, the company safety officer will arrange for the immediate transfer of all employees from the disputed area.
- (v) Should the company safety officer be of the opinion that no action is necessary and the worker's safety representative disagrees, an appropriate inspector from Worksafe/Workcover will be requested to undertake an inspection of the disputed area for the purpose of resolving any such matter.
- (vi) If disagreement still exists the chief inspector or his/her nominee will be called in to assist in the resolution of the dispute.
- (vii) If no agreement can be reached between the parties the matter will be dealt with in accordance with the dispute resolution procedure of this agreement.
- (viii) Whilst the above procedure is being followed there will be no stoppage of work in respect of the matter being considered, except in the area alleged to be unsafe.
- (ix) It is accepted that safety considerations override normal work practices and depending on the degree of potential risk to persons on the job, or the general public, can override normal demarcation practices.

18.—AMENITIES

1. The parties agree that it is the responsibility of the company to ensure that the amenities prescribed by the Award are provided as a minimum. Where, however, that standard is not maintained due to an action or event beyond the control of the company, the union agrees that the company should be allowed reasonable time in which to rectify the problem. If the company acts promptly to rectify the problem, there should be no interruption to work from industrial stoppages, bans and limitations.

2. In all instances, the following procedure shall be observed.

3. A uniformly high standard of amenities and facilities such as ablution blocks, change rooms, crib sheds, etc. shall be provided.

4. All Sheds shall be weatherproof and soundly constructed to an approved standard with sufficient windows and doors, adequate ventilation and lighting. They must have a floor above ground level and be lined on ceilings and walls.

5. Mess Shed/s fitted with fly screens are provided for exclusive use of workers and not for the storage of employers' equipment, tools and materials.

6. Shed/s shall provide not less than 0.75 square metres of floor space per person employed at any one time, provided that the area be not less than 4.65 square metres. Fixtures, other than tables and chairs, shall not be included when calculating floor space.

7. Where 5 or more persons are employed at one time, the floor area shall not be less than 9 square metres.

8. Adequate facilities are to be provided for warmth and for drying clothes eg. strip heaters.

9. Provided that 20 or more persons are employed on the site at any one time, the employer shall provide a separate shed or sheds for messing, which shall be of such dimension as to provide not less than 0.75 square metres of floor space per person.

10. Where less than 20 persons are employed on site, Regulation 3.20—Workplace Facilities of the Occupational Safety and Health Regulations 1996 shall apply to provisions of messing and changing facilities.

11. In the changing facilities, separate clothes-hanging facilities for each person employed are to be provided (coat hooks only to be used).

12. In the changing facilities, sufficient seating accommodation for the changing of work apparel is to be provided.

13. In the messing facilities, sufficient tables with fixed washable laminated or vinyl surface, and seating for the taking of meals, are to be provided.

14. Food warming facilities to be supplied, together with a supply of cool, clean water conveniently accessible, as well as boiling water at meal/rest breaks.

15. Receptacle for garbage with bin liner and rat and fly proof is to be supplied in mess area, and emptied regularly.

16. A washable vinyl floor surface in all facilities is to be provided.

17. Shelving is to be supplied in the mess shed for storage (cups, lunch bags, etc).

18. All facilities are to be cleaned and disinfected on a regular basis.

19. All mess sheds shall be supplied with reverse cycle air-conditioning.

20. Toilet blocks shall be soundly constructed and roofed with weatherproof material. The floor of each toilet shall be well-drained and constructed of concrete, bricks and cement, or other approved materials which shall be impervious to water. Every toilet shall be well lighted by natural or artificial light and shall be ventilated. Each toilet shall have a hinged door, capable of being fastened on the inside, lift seats/flaps and toilet paper.

21. Where practicable, toilets to be connected to sewerage before commencement of the job.

22. Toilet/urinal location to be conveniently accessible to employees, but not so close as to cause a nuisance to those persons.

23. Where necessary, portable water seal toilets of an approved standard are to be provided and regularly serviced.

24. Conveniently accessible toilets and urinals are to be distributed every 5th floor on multi-storey constructions.

25. Toilets and urinals are to be washed daily with disinfectant and kept in clean, hygienic condition.

26. Adequate washing facilities, suitably drained, and was basins/troughs are to be supplied with running water.

27. Soap and towels are to be supplied.

28. The following toilet/urinal ratio shall be applied in respect to all employees—

Employees	Toilets	Urinals
1—5	1	Nil
6—10	1	1
11—20	2	2
21—35	3	4
36—50	4	6
51—75	5	7
76—100	6	8

NB. For each additional 20 persons or part thereof up to 200 persons or part thereof up to 200 persons, one additional urinal and one additional toilet is required. For each additional 35 persons or part thereof in excess of 200 persons, one additional urinal and one additional toilet is required. If a slab urinal is provided, each 600mm shall be regarded as one urinal.

19.—TRAINING AND RELATED MATTERS

1. A training allowance of \$13.00 per week per worker shall be paid by the employer to the Union Education and Training Fund. This shall increase to \$14.00 per week on 1 November 2000 and a further increase to \$15.00 per week on 1 November 2001.

2. Subject to all qualifications in this clause, an employee shall, upon application in writing to and with approval of the employer, be granted leave with pay each calendar year prorate to attend courses conducted or approved by the NBCITC. The employers approval shall not be unreasonably withheld.

The application for leave shall be given to the employer at least two weeks in advance of the date of commencement of the course.

The time of taking leave shall be arranged so as to minimise any adverse effect on the employer's operations. The onus shall rest with the employer to demonstrate an inability to grant leave where an employee is otherwise entitled.

An employer shall not be liable for any additional expenses associated with an employee's attendance at a course other than payment of ordinary time earnings for such absence.

For the purpose of this clause ordinary time earnings shall be defined as the agreement classification rate.

Leave of absence granted pursuant to this clause shall count as service for all purposes of this agreement.

3. The employer will actively encourage employees to seek formal recognition of their skills (recognition of prior learning), and will allow leave as per (2) above for such purposes including but not limited to securing Tradesmen's Rights Certificates.

20.—DRUG & ALCOHOL, SAFETY & REHABILITATION PROGRAM

The parties are committed to the Drug and Alcohol, Safety and Rehabilitation program as outlined in Appendix A—Drug and Alcohol, Safety and Rehabilitation Program.

21.—CLOTHING AND SAFETY FOOTWEAR

1. The following items will be supplied to each employee by the Company, upon the completion of five working days.

- 1 pair safety boots, and will be replaced on a fair wear and tear basis.
- 2 T-shirts with collars, and will be replaced on a fair wear and tear basis.
- 1 bluey jacket for each employee employed during the period 1 April to 31 October. (One issued per year)

2. The Company will also make available to each employee, when requested by them, sun screen lotion and sun brims to fit over safety helmets.

22.—INCOME PROTECTION

The Company agrees to insure employees covered by this Agreement for injury and sickness. The scheme is to be negotiated between the parties.

23.—ACCIDENT PAY

1. The Company agrees to pay each employee accident pay where the employee receives an injury for which weekly payments or compensation are payable by or on behalf of the Company pursuant to the provisions of the Workers' Compensation and Rehabilitation Act 1981, as amended.

2. "Accident Pay" means a weekly payment of an amount being the difference between the weekly amount of compensation paid to the employee pursuant to the Workers' Compensation and Rehabilitation Act and the employee's ordinary wage under this Agreement.

3. The Company shall pay accident pay during the incapacity of the employee arising from any one injury for a total of 39 weeks whether the incapacity is in one continuous period or not.

24.—UNION MEMBERSHIP

The employer will encourage, as far as possible, all employees covered by the agreement, to be financial members of the Unions.

25.—Y2K

On the following key dates the Company will issue written records of accrued entitlements to each employee. The accrued entitlements will include annual leave, sick leave, any accruing productivity bonuses, redundancy payments and Superannuation payments and also on each employees anniversary date—

- 31 December 1999
- 28 February 2000
- 31 December 2000
- 28 February 2001

26.—SIGNATORIES

BLPPU

.....Signed..... Date: 18/5/2000.

The Company:

.....Signed..... Date: 15/5/2000.

Signature

..... *The Common Seal*

Print Name

APPENDIX A—DRUG AND ALCOHOL, SAFETY AND REHABILITATION PROGRAM

1. PRINCIPLE

People dangerously affected by alcohol, and/or drugs are a safety hazard to themselves and all other persons in the workplace.

2. FOCUS

- Site safety and the involvement of the site safety committee
- Peer intervention and support
- Rehabilitation

3. WORKPLACE POLICY

(a) A person who is dangerously affected by drugs or alcohol will not be allowed to work until that person can work in a safe manner.

(b) The decision on a persons ability to work in a safe manner will be made by the safety committee, or on projects with no safety committee, by a body of at least equal numbers of employee/employer representatives.

(c) There will be no payment of lost time to a person unable to work in a safe manner.

(d) If this happens 3 times the worker shall be given a written warning and made aware of the availability of treatment/counselling. If the worker refuses help he/she may be transferred/dismissed the next time he/she is dangerously affected.

(e) For the purposes of disciplinary action a warning shall be effective for a period of 12 months from the date of issue.

(f) A worker having problems with alcohol and or other drugs—

- Will not be sacked if he/she is willing to get help.
- Must undertake and continue with the recommended treatment to maintain the protection of this program.
- Will be entitled to sick leave or leave without pay while attending treatment.

4. IMPLEMENTATION

To assist with the adoption and implementation with this policy the company will—

- (a) Clearly state its endorsement of the BTG Drug and Alcohol program and comply with it.
- (b) Provide access at an agreed time and venue for a representative of the BTG Drug and Alcohol Program to address a meeting of employees to discuss and endorse the program.
- (c) Authorise the attendance of appropriate company personnel eg. Safety delegate/officer, safety committee members, union delegate, consultative committee members(s) at the two hour BTG Drug and Safety in the Workplace training course.

APPENDIX B—SITE ALLOWANCE

1. This agreement is between the parties to this agreement and shall apply to construction work undertaken by principal contractors who are engaged in the commercial/industrial sector of the building industry in the state of Western Australia within a 50km radius of the Perth General Post Office.

2. This agreement provides for a site allowance to be paid to employees engaged on particular building projects, and for such site allowance to be paid in addition to the wage rates and allowances prescribed by the award as well as any industrial or certified agreements made in conjunction with the award which does not prescribe a site allowance.

3. The site allowance payable under this agreement is to be paid at a flat rate per hour for all hours worked to compensate for all special factors/disabilities on the project and in lieu of all award special rates, with the exception of rates relating to the lifting of heavy blocks, cleaning down brickwork and the use of explosive powered tools which will be payable to an employee when he/she encounters that particular disability.

4. Site Allowance Formula

At the commencement of a project the particular site allowance to apply shall be determined in accordance with the following formula—

4.1 Projects Located Within Perth C.B.D. (as defined)

New Work

Project Contractual Value	Site Allowance
Up to \$520,000	NIL
Above \$520,000 to \$2.17m	\$1.90
Above \$2.17m to \$4.55m	\$2.25
Over \$4.55m	\$2.85

Renovations, Restorations and/or Refurbishment Work

Project Contractual Value	Site Allowance
Up to \$520,000	NIL
Above \$520,000 to \$2.17m	\$1.70
Above \$2.17m to \$4.55m	\$1.90
Over \$4.55m	\$2.45

4.2 Projects Located Within West Perth (as defined)

New Work

Project Contractual Value	Site Allowance
Up to \$520,000	NIL
Above \$520,000 to \$2.17m	\$1.70
Above \$2.17m to \$4.55m	\$1.90
Over \$4.55m	\$2.45

Renovations, Restorations and/or Refurbishment Work

Project Contractual Value	Site Allowance
Up to \$520,000	NIL
Above \$520,000 to \$2.17m	\$1.60
Above \$2.17m to \$4.55m	\$1.80
Over \$4.55m	\$2.05

The site allowance on projects which are a combination of new and renovation work shall be governed by the majority of work involved. For example, where the majority of work is new work, then the site allowance appropriate to new work shall be paid for all employees on the project.

4.3 Projects within 50 km radius of Perth G.P.O. but not including the C.B.D. or West Perth (as defined)

Project Contractual Value	Site Allowance
Up to \$1m	NIL
Above \$1m to \$2.17m	\$1.30
Above \$2.17m to 6m	\$1.60
Above \$6m to \$11.98m	\$1.85
Above \$11.98m to \$24.43m	\$2.05
Above \$24.43m to \$60.5m	\$2.35
Over \$60.5m	\$2.55

“C.B.D.”—Central Business District shall mean the area bounded by the Swan River South, Swan River East to Nile Street running into Wittenoom Street, Hill Street to Royal Street, Royal Street to Lord Street, Lord Street to Newcastle Street, along Newcastle Street to the Freeway, the Freeway

South to the Perth-Fremantle railway line, along the Perth-Fremantle railway line to Dyer Street, Dyer Street through to Havelock Street, Havelock Street to Kings Park Road, Kings Park Road to Fraser Avenue, Fraser Avenue projected through to the Swan River.

“West Perth”—shall mean the area contained within the boundaries formed by Thomas Street, Kings Park Road, Havelock Street, Dyer Street and the Perth-Fremantle railway line back to Thomas Street.

Boundary roads: If a road borders between two regions in which site allowances are to be paid as per this agreement, the parties confirm that one side of such a boundary road will be deemed to fall in one region and the other side of the boundary road will be deemed to fall in the other region. For example, the eastern side of Havelock Street will be in the “CBD” and the western side of Havelock Street shall be in “West Perth”.

“Project Contractual Value”—shall be deemed to mean the value of all tendered work which falls under the scope of the principal contractor’s contract.

5. The site/project allowance and project contractual value detailed in this agreement shall be adjusted on 1 October each year by the total C.P.I. movements for Perth during the preceding four quarters ending 30 June and accordingly, the site allowance amounts shall be adjusted up or down to the nearest five cents.

6. Project contractual values shall be subject to review at any renewal of this agreement, but in any event shall not be adjusted by a percentage less than the total CPI movements for Perth during the preceding four quarters ending 30 June. Such adjustment being to the nearest \$10,000.

7. The agreed site allowance once set pursuant to this agreement shall be recorded in a site agreement to which the applicable principal contractor and the Union will be signatories. The level of allowance once nominated at the commencement of the project will continue without change until completion of the project.

8. It is acknowledged that on certain projects a site agreement may be entered into between the principal contractor and the building trades group of unions for that project that may include matters regularly addressed within the industry, such as, but not limited to, the following—

- Disputes Procedures
- Occupational Health and Safety Procedures
- Demarcation Procedures
- First Aid Provisions and On-Site Amenities

and the union will not unreasonably refuse to continue to discuss such matters if raised by the principal contractor.

9. This agreement does not apply to resource development projects or civil and engineering projects.

10. Where a dispute arises as to the application of the terms of this agreement, if the issue cannot be resolved in discussions between the parties, it is agreed that the matter will be referred to the appropriate industrial tribunal for resolution without recourse to industrial action.

11. It is a term of this agreement that all site allowance agreements entered into prior to this date will be honored by all parties and will continue to apply for the life of the particular project.

12. Where because of a condition of contract the principal contractor is required not to allow for a site allowance, before final application of this agreement, discussions will be held between the parties with a view to resolving any problems that may arise as a result of this situation.

13. Productivity Allowance

In return to increase productivity and/or timely completion of projects it is agreed that a productivity allowance of \$1.00 per hour worked shall be paid to employees engaged upon projects in excess of \$10 million, or such other sum as agreed. The productivity allowance may be accumulated and paid at the end of the project.

14. Structural Frame Allowance

It is agreed that a structural frame allowance of \$1.00 per hour all purpose shall be paid to all employees engaged upon projects (new construction only) which exceed two stories in height or building where the structure exceeds 10 metres in height (excluding spires, flagpoles and the like).

15. Provision of Canteen

It is agreed that canteen accommodation shall be provided where a project exceeds \$35 million in values and where the operation of the canteen is financially self supporting in respect of consumables. Canteen to come into operation when on site manning levels exceed 50 and to cease when manning levels reduce to below 50.

16. Provision of Nurse

It is agreed that a qualified nurse shall be engaged where the forecast long term staffing levels for a project exceed 100 (one hundred) or when actual numbers exceed 100 notwithstanding that forecasts may have been below that level. The nurse shall commence duties when staffing levels reach (fifty) and shall terminate when levels reduce to 50 (fifty). The requirement for a provision of a nurse shall be waived if the project is adjacent to a hospital with a public emergency department.

17. This agreement shall only apply to building contracts entered into on or tendered for on or after 1 January 1999.

18. Application to Apprentices

The rates prescribed in this agreement shall apply to all apprentices commencing employment after 31 December 1997 in the same proportion as the percentage of a tradesperson’s wage rate as prescribed by the appropriate award or Enterprise Bargaining Agreement, being—

1st year	42%
2nd year	55%
3rd year	75%
4th year	88%

JOHN HOLLAND BUILDING OPERATIONS AGREEMENT 2000.

No. AG 142 of 2000.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John Holland Pty Ltd

and

The Western Australian Builders’ Labourers, Painters and Plasterers Union of Workers & Another

AG 142 of 2000.

John Holland Building Operations Agreement 2000.

COMMISSIONER S J KENNER.

30 June 2000.

Order.

HAVING heard Mr N Rowden on behalf of the applicant and Mr P Joyce on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

- (1) THAT the John Holland Building Operations Agreement 2000 as filed in the Commission on 22 May 2000 in the terms of the following schedule be and is hereby registered as an industrial agreement.
- (2) THAT the John Holland Building Operations Agreement No. AG 73 of 1998 be and is hereby cancelled.

(Sgd.) S. J. KENNER,

[L.S.] Commissioner.

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21. Electronic Funds Transfer
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INTRODUCTION

1.—AIM

The aim and intent of this Agreement is to develop and support a flexible workforce and management structure committed to the continued improvement and success of the Company and to develop and encourage a cooperative workplace whereby the desire to embrace measures aimed at achieving improved productivity will ultimately lead to the success of the Company in the marketplace and therefore offer to employees, a sustainable level of employment continuity and personal income.

2.—OBJECTIVES

- To promote a team approach to achieving a safe workplace. Safety is of prime importance.
- To encourage a participative and consultative environment for the parties.
- To encourage and develop a level of skill, innovation and excellence which stamps the enterprise as a leader in the industry.
- To develop a high degree of teamwork, trust and shared commitment to the goals and policies of the enterprise and our Clients.
- To continually promote measures to eliminate lost time due to industrial disputation and to resolve disputes without recourse to industrial action.
- To ensure adherence to the Awards, this Agreement and all Statutory Provisions.

3.—DEFINITIONS

For the purpose of this agreement—

“Company” means John Holland Construction & Engineering Pty Ltd (Western Australian Region).

“Union” means the Unions party to this Agreement.

“Project” means any project for which the Company has a building contract.

“Employee” means a direct employee of the Company who performs work covered by the scope of this Agreement.

“Agreement” means this Agreement.

“Award” means the Building Trades (Construction) Award 1987.

4.—DURATION

This Agreement shall commence from the first pay period commencing on or after the 31st October 1999 and shall continue in effect until 31st October 2002.

On or before 31st October 2002, the parties shall meet to discuss the terms of a new Agreement.

The Agreement shall remain in effect after that date if no agreement has been reached on any future agreement.

5.—APPLICATION

This Agreement covers approximately 60 employees and shall be read and interpreted in conjunction with the Awards provided that—

- (i) in the event of any inconsistency or conflict in respect of rates of pay, conditions, allowances or other matters between the Award and this Agreement the higher standard shall apply.

- (ii) this Agreement shall provide the only means by which Employees covered by this Agreement will receive wage adjustments during the life of the Agreement. Any changes to Award provisions granted by the Federal or State Industrial Commission (as applicable) shall be discounted from the over Award wage increases available through this Agreement. There shall be no extra claims in relation to wages and conditions.

- (iii) Award increases in allowances which are not included in any project site allowances, shall be allowed and paid. There will be no “double dipping”.

6.—PARTIES BOUND

This Agreement shall be binding upon—

- (i) the Company in respect of the employment by it of employees who are covered by the Award referenced above.
- (ii) the Union signatory to this Agreement and persons eligible to be members thereof in the direct employ of the Company on building projects.

7.—PRECEDENCE

This Agreement shall not be used in any manner whatsoever to obtain similar arrangements or benefits in any other division, company, plant or enterprise.

This Agreement does not apply to John Holland’s Precast Yard in Kwinana, which operates under its own enterprise agreement.

This Agreement does not apply to building and construction contracts in resource development and civil engineering projects where a site agreement is already in place or where the Company is required to comply with the client’s requirements for the resolution of a Project Agreement.

8.—OCCUPATIONAL HEALTH AND SAFETY

The Company and the Union shall give full cooperation to achieve the highest standards of Occupational Health and Safety.

The parties recognise safety education and programmes are fundamental in achieving this objective.

The Company shall contract subcontractors to work and conduct themselves on projects in accordance with Company policies and procedures and all Acts and Regulations and Industry Health and Safety Codes of Practice.

The Union shall wherever and whenever possible or requested assist the Company with the education and training of employees, subcontractors and their employees.

The parties agree to support the role and function of Project/Worker Safety Committees.

9.—ROSTERED DAYS OFF/SUNDAY WORK

The Company agrees to request the Union if it is the intention of the Company to request their employees to work on a Rostered Day Off or on a Sunday.

Such request shall be in writing and served to the Union by 12:00 noon on the Thursday prior to the Rostered Day off or Sunday to be worked.

10.—HOURS OF WORK

The parties agree to amend the spread of Award normal work hours to be between 6:00am and 6:00pm Monday to Friday.

11.—INCLEMENT WEATHER

The parties shall implement procedures to limit the amount of lost time due to inclement weather. The parties agree to act reasonably with regard to agreement on the interpretation of inclement weather and its effect on health and safety.

The parties agree to adopt the following principles for the management of employees and in providing advice to subcontractors employed on the Company’s projects.

- (i) Wet Weather

Employees shall accept transfer to an area or other project site not affected by inclement weather if in the opinion of the Company useful work is available in that area or site.

(ii) Hot Weather

The parties recognise that working in extreme hot weather may be adverse to the health and safety of the workers.

Agreement on inclement weather (heat) will address such issues as earlier starting times and working in cooler areas not affected by heat.

12.—WAGE RATES

The Company's employees shall be paid in accordance with the rates of pay and effective dates as outlined in Appendix 1.

13.—W.A.C.I.R.F.

The Contractor shall pay contributions to the WA Construction Industry Redundancy Fund (WACIRF) for its employees as follows and in lieu of any Award redundancy entitlements—

From 31/10/99 to 30/04/2001	\$50.00
Rate as of 1/05/2001	\$60.00

14.—SUPERANNUATION

The Company will pay \$60.00 per week per employee or the percentage rate that is prescribed by the SGC, whichever is the greater.

Contributions shall be paid into a complying superannuation fund or scheme nominated by the employee in accordance with the Superannuation Guarantee (Administration) Act 1992.

The Company shall notify the employee that they may nominate a superannuation fund or scheme. If the employee does not nominate a fund or scheme, or until they do nominate a fund or scheme, superannuation contributions shall be paid into C+Bus Superannuation fund.

The Company and the employee are bound by the employee's choice of fund unless there is agreement between them for a change of fund.

15.—FARES AND TRAVELLING

Due to the Australian Taxation office ruling on taxation of the Award Transport Payments, the Company will make a daily payment (on days worked) of \$6.15.

Payment of a pro rata amount of the above make-up daily payment (as per current Award percentages) will apply to apprentices.

Where the fares and travelling provision does not ordinarily apply, the additional daily payments will not be made.

The Clause is rendered void by any Award variation in relation to this matter or by any successful appeal/review which establishes building and construction workers being classed as itinerant for the purposes of Taxation Ruling TR 95/34.

The Union acknowledges there should be no "double-dipping". A worker who claims and receives a tax deduction on fares and travel is ineligible to receive this daily make-up payment.

Neither the Union nor its members shall make any claim against the Company for an increase in rates of remuneration or make any claim at all (related to taxation or otherwise) in the life of this Agreement.

Any Award increases will be allowed and paid, except that there will be no "double dipping".

16.—SETTLEMENT OF DISPUTES

The parties agree that adherence to the disputes resolution procedure shall be absolute.

The Unions agree that demarcation disputes shall be settled in accordance with the following Demarcation Settlement Procedures—

Demarcation Settlement Procedure—

Where a demarcation dispute occurs between Unions, the work shall continue on the project on a status quo basis whilst the dispute is resolved within the Trade Union Movement, or with the assistance of the relevant Commission or Tribunal.

Demarcation disputes shall be resolved in one of three ways—

- by agreement between the Unions directly involved; or
- by private arbitration; or

- by decision of the Western Australian Industrial Relations Commission.

The parties agree that all demarcation disputes shall be resolved in accordance with the following procedure, and without recourse to any form of industrial action.

Upon becoming aware of any actual or potential demarcation dispute, Officials of the Unions directly involved will discuss the issue to see if the dispute can be resolved by agreement.

The work in dispute will continue normally while these discussions take place. If there is a dispute about the basis on which work shall continue, it shall be referred to an agreed, independent person. This person shall determine the basis upon which work shall proceed, after considering the practice that existed prior to the dispute on the particular job.

Until that person can determine the basis upon which work is to proceed, work shall continue in the manner decided by the employer.

If it is not possible for the Unions directly involved to resolve a demarcation dispute by agreement, they may jointly elect to ask an independent person to determine it. Once the Unions have elected to accept that process, one of them cannot subsequently decide not to be bound by the decision. Even if one Union subsequently ceases to cooperate in that process, the independent person will proceed to issue a decision and all affected parties will act in accordance with it.

If the Unions elect not to use an independent person, or if they are unable to agree whether or not to do so, the dispute shall be referred to the relevant Commission or Tribunal. Provided that before doing so, the parties shall make all reasonable attempts to resolve the dispute.

Whether a dispute is referred to private or formal arbitration, work shall continue on the basis agreed or determined by the independent person, without bans or limitations. The final decision of that independent person shall be accepted by all parties, and implemented as soon as practicable.

Demarcation disputes between Unions signatory to this Agreement and other unions shall be resolved in accordance with the relative state demarcation procedure provided that no industrial action shall be taken.

If a union not signatory to the Agreement takes industrial action in support of their claim(s) the signatory Union(s) reserve their rights as to their response.

All other disputes shall be resolved in accordance with Clause 46 of the Building Trades Construction Award 1987 as quoted below and the Appendix – Resolution of Dispute Requirements of that award.

46.—SETTLEMENT OF DISPUTES

(1) Where an employee or the job steward has submitted a request concerning any matter directly connected with employment to a foreman or a more senior representative of management and that request has been refused, the employee may, if he/she so desires, ask the job steward to submit the matter to management and the matter shall then be submitted by the job steward to the appropriate executive of the employer concerned.

(2) If not settled at this stage, the matter shall be formally submitted by the State Secretary of the Union to the employer.

(3) If not settled at this stage, the matter shall then be discussed between such representatives of the Union as the Union may desire and the employer, who may be accompanied by or represented by such officers or representatives of an association of employers as the employer may desire, including, where agreed, processing the dispute through locally organised boards or committees set up by the parties for this purpose.

(4) If the matter is still not settled, it shall be submitted to the Commission.

(5) Where the above procedures are being followed, work shall continue normally, no party shall be prejudiced as to final settlement by the continuance of work in accordance with this subclause.

(6) Notwithstanding anything contained herein the respondents shall be free to exercise their rights if the dispute is not finalised within 7 days of notification.

(7) This clause shall not apply to any dispute as to a bona fide safety issue.

(8) In connection with any dispute concerning a job steward this clause shall be subject to the provisions of subclause (2) of clause 37.—Job Stewards.

17.—TRAINING

A training allowance (as below) per week per worker shall be paid by the employer to the unions' education and training fund. The allowances do not apply to casual labour.

Up to 31/10/2000	\$13.00
From 1/11/2000	\$14.00
From 1/11/2001	\$15.00

The Company agrees to offer employees training as follows—

- (i) For all employees, four days paid leave will be allowed every twelve months for formal safety training by a provider approved by both the Company and the Union.
- (ii) For employees who have been continuously employed with the Company for at least 12 months and are likely to continue this employment for at least 6 months, the Company will allow a further five days paid leave every 12 months for skills training for the development of the individual and by a provider approved by the Company.
- (iii) The Company may make other training arrangements in addition to the above at its sole discretion.

Courses must be approved by the Company and formal written approval must be given by the Company prior to course enrolment.

All courses must be funded through the Construction Industry Training Fund and if this Fund is dismantled, the Company shall pay for the employees' training cost. No other payments for training provision will be made by the Company.

18.—NO EXTRA CLAIMS

The parties agree not to pursue any extra claims for the duration of this Agreement.

19.—ABSENTEEISM AND SICK LEAVE

Further to the previous Building Operations Agreement the following payment of sick leave on redundancy, resignation or retirement for the period up to 31st October, 2002 will apply—

TERMS OF EMPLOYMENT	PAYOUT
Less than 2 years	Nil
2 years but less than 5 years	15%
5 years but less than 10 years	20%
10 years and over	30%
For the period 1 August 1997 to 31 October 1999	100%
For the period 31st October 1999 to 31st October 2002	100%

Percentages indicated are to be applied to unclaimed sick leave at the time of redundancy, resignation or retirement.

20.—CLOTHING AND FOOTWEAR

The following items will be supplied to each employee by the Company upon completion of five working days—

- (a) 1 pair safety boots, replaced on a fair wear and tear basis
- (b) 2 T-shirts with collars, replaced on a fair wear and tear basis.
- (c) 1 bluey jacket per employee employed between 1 April and 31 October. (One issue per year.)

The Company will also make available to each employee, when requested, sunscreen lotion and sun brims to fit over safety helmets.

21.—ELECTRONIC FUNDS TRANSFER

In order to increase efficiencies, overcome administrative difficulties and for security purposes, the wages of all employees will be paid by Electronic Funds Transfer. Printed "pay advice slips" will be distributed. Employees are to provide the appropriate information to the Paymaster.

22.—SENIORITY

The parties agree that continuity of employment is desirable wherever possible, and that where it is not possible, employees will be retrenched in order of seniority and with due regard to skills classification.

Where there is any disagreement as to the application of this clause, the matter will be resolved following the Dispute Resolution Procedure of clause 16.

23.—SITE ALLOWANCE

Site allowances to be in accordance with CCA/BTA Site Allowance Agreement as amended from time to time with agreement by all parties.

APPENDIX 1

WAGE RATES

	From 31st Oct 1999 to 31st Oct 2000	From 31st Oct 2000 to 31st Oct 2001	From 31st Oct 2001 to 31st Oct 2002
Labourer Group 1	18.00	18.90	19.85
Labourer Group 2	17.40	18.27	19.18
Labourer Group 3	16.94	17.79	18.68
Carpenter	18.82	19.76	20.75

SIGNATORY PAGE

Signed for and on behalf of The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers (Western Australian Branch)

Common Seal

Signature: Kevin Reynolds

Date: 14/3/2000

Signed for and on behalf of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch.

Common Seal

Signature: Joe McDonald

Date: 14/3/2000

Signed for and on behalf of John Holland Construction & Engineering Pty Ltd (Building Operations) Western Australia Branch

Signature: Richard Sterling Mickle

Date: 18/3/2000

Signed for and on behalf of John Holland Construction & Engineering Pty Ltd (Building Operations) Western Australia

Common Seal

Signature: Jeffrey Craig Horsley

Date:

JOHN HOLLAND PRECAST AGREEMENT 2000.**No. AG 141 of 2000.**WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John Holland Pty Ltd

and

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

AG 141 of 2000.

John Holland Precast Agreement 2000.

COMMISSIONER S J KENNER.

30 June 2000.

Order.

HAVING heard Mr N Rowden on behalf of the applicant and Mr P Joyce on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

- (1) THAT the John Holland Precast Agreement 2000 as filed in the Commission on 22 May 2000 in the terms of the following schedule be and is hereby registered as an industrial agreement.
- (2) THAT the John Holland Precast Agreement No. AG 74 of 1998 be and is hereby cancelled.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

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22.	Redundancy and Termination Criteria
23.	Site Allowance

INTRODUCTION

1.—AIM

The aid and intent of this Agreement is to develop and support a flexible workforce and management structure committed to the continued improvement and success of the Company and to develop and encourage a cooperative workplace whereby the desire to embrace measures aimed at achieving improved productivity will ultimately lead to the success of the Company in the marketplace and therefore offer to employees, a sustainable level of employment continuity and personal income.

2.—OBJECTIVES

- To promote a team approach to achieving a safe workplace. Safety is of prime importance.
- To encourage a participative and consultative environment for the parties.

- To encourage and develop a level of skill, innovation and excellence which stamps the enterprise as a leader in the industry.
- To develop a high degree of teamwork, trust and shared commitment to the goals and policies of the enterprise and our Clients.
- To continually promote measures to eliminate lost time due to industrial disputation and to resolve disputes without recourse to industrial action.
- To ensure adherence to the Awards, this Agreement and all Statutory Provisions.

3.—DEFINITIONS

For the purpose of this agreement—

“Company” means John Holland Construction & Engineering Pty Ltd (Western Australian Region).

”Union” means the Unions party to this Agreement.

“Project” means any project for which the Company has a building contract.

“Employee” means a direct employee of the Company who performs work covered by the scope of this Agreement.

“Agreement: means this Agreement.

“Award” means the Building Trades (Construction) Award 1987.

4.—DURATION

This Agreement shall commence from the first pay period commencing on or after the 31st October 1999 and shall continue in effect until 31st October 2002.

On or before 31st October 2002, the parties shall meet to discuss the terms of a new Agreement.

The Agreement shall remain in effect after that date if no agreement has been reached on any future agreement.

5.—APPLICATION

This Agreement covers approximately 30 employees and shall be read and interpreted in conjunction with the Awards provided that—

- (i) in the event of any inconsistency or conflict in respect of rates of pay, conditions, allowances or other matters between the Award and this Agreement the higher standard shall apply.
- (ii) this Agreement shall provide the only means by which Employees covered by this Agreement will receive wage adjustments during the life of the Agreement. Any changes to Award provisions granted by the Federal or State Industrial Commission (as applicable) shall be discounted from the over Award wage increases available through this Agreement. There shall be no extra claims in relation to wages and conditions.
- (iii) Award increases in allowances which are not included in any project site allowances, shall be allowed and paid. There will be no “double dipping”.

6.—PARTIES BOUND

This Agreement shall be binding upon—

- (i) the Company in respect of the employment by it of employees who are covered by the Award referenced above.
- (ii) the Union signatory to this Agreement and persons eligible to be members thereof in the direct employ of the Company on building projects.

7.—PRECEDENCE

This Agreement shall not be used in any manner whatsoever to obtain similar arrangements or benefits in any other division, company, plant or enterprise.

This Agreement applies only to the Company's Precast Concrete operations at the John Holland Precast Yard in Kwinana.

This Agreement does not apply to building and construction contracts in resource development and civil engineering projects.

8.—OCCUPATIONAL HEALTH AND SAFETY

The Company and the Union shall give full cooperation to achieve the highest standards of Occupational Health and Safety.

The parties recognise safety education and programmes are fundamental in achieving this objective.

The Company shall contract subcontractors to work and conduct themselves on projects in accordance with Company policies and procedures and all Acts and Regulations and Industry Health and Safety Codes of Practice.

The Union shall wherever and whenever possible or requested assist the Company with the education and training of employees, subcontractors and their employees.

The parties agree to support the role and function of Workplace Safety Committees.

9.—ROSTERED DAYS OFF/SUNDAY WORK

The Company agrees to request the Union if it is the intention of the Company to request their employees to work on a Rostered Day Off or on a Sunday.

Such request shall be in writing and served to the Union by 12:00 noon on the Thursday prior to the Rostered Day off or Sunday to be worked.

10.—HOURS OF WORK

The parties agree to amend the spread of Award normal work hours to be between 6:00am and 6:00pm Monday to Friday.

11.—INCLEMENT WEATHER

The parties shall implement procedures to limit the amount of lost time due to inclement weather. The parties agree to act reasonably with regard to agreement on the interpretation of inclement weather and its effect on health and safety.

The parties agree to adopt the following principles for the management of employees and in providing advice to subcontractors employed on the Company's projects.

(i) Wet Weather

Employees shall accept transfer to an area or other project site not affected by inclement weather if in the opinion of the Company useful work is available in that area or site.

(ii) Hot Weather

The parties recognise that working in extreme hot weather may be adverse to the health and safety of the workers.

Agreement on inclement weather (heat) will address such issues as earlier starting times and working in cooler areas not affected by heat.

12.—WAGE RATES

The Company's employees shall be paid in accordance with the rates of pay and effective dates as outlined in Appendix 1.

13.—W.A.C.I.R.F.

The Contractor shall pay contributions to the WA Construction Industry Redundancy Fund (WACIRF) for its employees as follows and in lieu of any Award redundancy entitlements—

From 31/10/99 to 30/04/01	\$50.00
Rate as of 1/05/01	\$60.00

14.—SUPERANNUATION

The Company will pay \$60.00 per week per employee or Super Guarantee Levy, whichever is the greater.

Contributions shall be paid into a complying superannuation fund or scheme nominated by the employee in accordance with the Superannuation Guarantee (Administration) Act 1992.

The Company shall notify the employee that they may nominate a superannuation fund or scheme. If the employee does not nominate a fund or scheme, or until they do nominate a fund or scheme, superannuation contributions shall be paid into C+Bus Superannuation fund.

The Company and the employee are bound by the employee's choice of fund unless there is agreement between them for a change of fund. The Company shall not unreasonably refuse to a request by the employee for a change of fund.

15.—FARES AND TRAVELLING

Due to the Australian Taxation office ruling on taxation of the Award Transport Payments, the Company will make a daily payment (on days worked) of \$6.15.

Payment of a pro rata amount of the above make-up daily payment (as per current Award percentages) will apply to apprentices.

Where the fares and travelling provision does not ordinarily apply, the additional daily payments will not be made.

The Clause is rendered void by any Award variation in relation to this matter or by any successful appeal/review which establishes building and construction workers being classed as itinerant for the purposes of Taxation Ruling TR 95/34.

The Union acknowledges there should be no "double-dipping". A worker who claims and receives a tax deduction on fares and travel is ineligible to receive this daily make-up payment.

Neither the Union nor its members shall make any claim against the Company for an increase in rates of remuneration or make any claim at all (related to taxation or otherwise) in the life of this Agreement.

Any Award increases will be allowed and paid, except that there will be no "double dipping".

16.—SETTLEMENT OF DISPUTES

The parties agree that adherence to the disputes resolution procedure shall be absolute.

The Unions agree that demarcation disputes shall be settled in accordance with the following Demarcation Settlement Procedures—

Demarcation Settlement Procedure—

Where a demarcation dispute occurs between Unions, the work shall continue on the project on a status quo basis whilst the dispute is resolved within the Trade Union Movement, or with the assistance of the relevant Commission or Tribunal.

Demarcation disputes shall be resolved in one of three ways—

- by agreement between the Unions directly involved; or
- by private arbitration; or
- by decision of the Western Australian Industrial Relations Commission.

The parties agree that all demarcation disputes shall be resolved in accordance with the following procedure, and without recourse to any form of industrial action.

Upon becoming aware of any actual or potential demarcation dispute, Officials of the Unions directly involved will discuss the issue to see if the dispute can be resolved by agreement.

The work in dispute will continue normally while these discussions take place. If there is a dispute about the basis on which work shall continue, it shall be referred to an agreed, independent person. This person shall determine the basis upon which work shall proceed, after considering the practice that existed prior to the dispute on the particular job.

Until that person can determine the basis upon which work is to proceed, work shall continue in the manner decided by the employer.

If it is not possible for the Unions directly involved to resolve a demarcation dispute by agreement, they may jointly elect to ask an independent person to determine it. Once the Unions have elected to accept that process, one of them cannot subsequently decide not to be bound by the decision. Even if one Union subsequently ceases to cooperate in that process, the independent person will proceed to issue a decision and all affected parties will act in accordance with it.

If the Unions elect not to use an independent person, or if they are unable to agree whether or not to do so, the dispute shall be referred to the relevant Commission or Tribunal. Provided that before

doing so, the parties shall make all reasonable attempts to resolve the dispute.

Whether a dispute is referred to private or formal arbitration, work shall continue on the basis agreed or determined by the independent person, without bans or limitations. The final decision of that independent person shall be accepted by all parties, and implemented as soon as practicable.

Demarcation disputes between Unions signatory to this Agreement and other unions shall be resolved in accordance with the relative state demarcation procedure provided that no industrial action shall be taken.

If a union not signatory to the Agreement takes industrial action in support of their claim(s) the signatory Union(s) reserve their rights as to their response.

All other disputes shall be resolved in accordance with Clause 46 of the Building Trades Construction Award 1987 as quoted below and the Appendix – Resolution of Dispute Requirements of that award.

46.—SETTLEMENT OF DISPUTES

(1) Where an employee or the job steward has submitted a request concerning any matter directly connected with employment to a foreman or a more senior representative of management and that request has been refused, the employee may, if he/she so desires, ask the job steward to submit the matter to management and the matter shall then be submitted by the job steward to the appropriate executive of the employer concerned.

(2) If not settled at this stage, the matter shall be formally submitted by the State Secretary of the Union to the employer.

(3) If not settled at this stage, the matter shall then be discussed between such representatives of the Union as the Union may desire and the employer, who may be accompanied by or represented by such officers or representatives of an association of employers as the employer may desire, including, where agreed, processing the dispute through locally organised boards or committees set up by the parties for this purpose.

(4) If the matter is still not settled, it shall be submitted to the Commission.

(5) Where the above procedures are being followed, work shall continue normally, no party shall be prejudiced as to final settlement by the continuance of work in accordance with this subclause.

(6) Notwithstanding anything contained herein the respondents shall be free to exercise their rights if the dispute is not finalised within 7 days of notification.

(7) This clause shall not apply to any dispute as to a bona fide safety issue.

(8) In connection with any dispute concerning a job steward this clause shall be subject to the provisions of subclause (2) of clause 37.—Job Stewards.

17.—TRAINING

A training allowance (as below) per week per worker shall be paid by the employer to the unions' education and training fund. The allowances do not apply to casual labour.

\$13 up to 31 October 2000

\$14 from 1st November 2000

\$15 from 1st November 2001

The Company agrees to offer employees training as follows—

- (i) For all employees, four days paid leave will be allowed every twelve months for formal safety training by a provider approved by both the Company and the Union.
- (ii) For employees who have been continuously employed with the Company for at least 12 months and are likely to continue this employment for at least 6 months, the Company will allow a further five days paid leave every 12 months for skills training for the development of the individual and by a provider approved by the Company.

- (iii) The Company may make other training arrangements in addition to the above at its sole discretion.

Courses must be approved by the Company and formal written approval must be given by the Company prior to course enrolment.

All courses must be funded through the Construction Industry Training Fund and if this Fund is dismantled, the Company shall pay for the employees' training cost. No other payments for training provision will be made by the Company.

18.—NO EXTRA CLAIMS

The parties agree not to pursue any extra claims for the duration of this Agreement.

19.—ABSENTEEISM AND SICK LEAVE

Further to the previous Building Operations Agreement the following payment of sick leave on redundancy, resignation or retirement for the period up to 31st October, 2002 will apply—

TERMS OF EMPLOYMENT	PAYOUT
Less than 2 years	Nil
2 years but less than 5 years	15%
5 years but less than 10 years	20%
10 years and over	30%
For the period 1 August 1997 to 31 October 1999	100%
For the period 31st October 1999 to 31st October 2002	100%

Percentages indicated are to be applied to unclaimed sick leave at the time of redundancy, resignation or retirement.

20.—CLOTHING AND FOOTWEAR

The following items will be supplied to each employee by the Company upon completion of five working days—

- (a) 1 pair safety boots, replaced on a fair wear and tear basis
- (b) 2 T-shirts with collars, replaced on a fair wear and tear basis.
- (c) 1 bluey jacket per employee employed between 1 April and 31 October. (One issue per year.)

The Company will also make available to each employee, when requested, sunscreen lotion and sun brims to fit over safety helmets.

21.—ELECTRONIC FUNDS TRANSFER

In order to increase efficiencies, overcome administrative difficulties and for security purposes, the wages of all employees will be paid by Electronic Funds Transfer. Printed "pay advice slips" will be distributed. Employees are to provide the appropriate information to the Paymaster.

22.—REDUNDANCY AND TERMINATION CRITERIA

22.1 The Company will continue to make all reasonable efforts to maintain continuity of work in the Precast Operations. The Company shall continue to inform the employees of the status of work in hand and the status of targeted contracts.

Should however a downturn in the work within the Precast Yard eventuate the Company will endeavour to—

- (1) find temporary work on other John Holland projects subject to there being a requirement for the skills of the employee.
- (2) by consultation and agreement of the employee, ask him or her to take unused annual leave in lieu of taking redundancy. The structuring of "annual leave utilisation" will be based upon the best forecast of future work and be taken in such a way as to maximise the benefit to all employees as far as is practicable.

22.1 If redundancy still becomes necessary, all employees, including those on leave, will be subject to the following criteria—

- Voluntary redundancy within classification to be offered.
- Skills required by the Company dependent upon the immediate and known scope of works in the near future.

Where all of the above criteria are equal then the following shall be considered—

- Service with John Holland.

22.2 Re-employment—

Employees terminated, for reasons other than misconduct, and those made redundant shall have preference on re-hiring dependent on skills needs by the Company at time of re-hiring.

23.—SITE ALLOWANCE

A site allowance of \$2.30 flat will be paid per hour for hours worked in return for improved productivity and flexibility.

APPENDIX 1
WAGE RATES

	From 31st Oct 1999 to 31st Oct 2000	From 31st Oct 2000 to 31st Oct 2001	From 31st Oct 2001 to 31st Oct 2002
Labourer Group 1	18.00	18.90	19.85
Labourer Group 2	17.40	18.27	19.18
Labourer Group 3	16.94	17.79	18.68
Carpenter	18.82	19.76	20.75
Carpenter (P)	19.69	20.67	21.70

Carpenter (P) Carpenter holding a Trade Certificate or equivalent and having six months experience in Precast.

SIGNATORY PAGE

Signed for and on behalf of The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers (Western Australian Branch)

Common Seal

Signature: Kevin Reynolds
Date: 14/3/2000

Signed for and on behalf of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch.

Common Seal

Signature: Joe McDonald
Date: 14/3/2000

Signed for and on behalf of John Holland Construction & Engineering Pty Ltd (Building Operations) Western Australia Branch

Signature: Richard Sterling Mickle
Date: 18/3/2000

Signed for and on behalf of John Holland Construction & Engineering Pty Ltd (Building Operations) Western Australia

Common Seal

Signature: Jeffrey Craig Horsley
Date:

LEIGHTON CONTRACTORS MAINTENANCE
PERSONNEL AGREEMENT 2000.

No. AG 116 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Leighton Contractors Pty Ltd

and

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

AG 116 of 2000.

Leighton Contractors Maintenance Personnel
Agreement 2000.

COMMISSIONER S J KENNER.

29 June 2000.

Order.

HAVING heard Mr P Connell on behalf of the applicant and Mr G Sturman on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch and Mr J Murie on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

- (1) THAT the Leighton Contractors Maintenance Personnel Agreement 2000 as filed in the Commission on 20 April 2000 in the terms of the following schedule be and is hereby registered as an industrial agreement.
- (2) THAT the Leighton Contractors Maintenance Personnel Agreement 1998 No. AG 235 of 1998 be and is hereby cancelled.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

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Part I—Application and Operation of Enterprise Agreement

1.—TITLE

This Agreement will be known as the Leighton Contractors Maintenance Personnel Agreement 2000, No AG 116 of 2000.

2.—DEFINITIONS

2.1 Agreement

Agreement means the Leighton Contractors Maintenance Personnel Agreement 2000.

2.2 Company

Company means Leighton Contractors Pty Limited.

2.3 Employee

Employee means for the purposes of this Agreement someone who is referred to in Clause 5—Coverage of Agreement.

2.4 Unions

Union means the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch.

2.5 Parties

Parties means the Company, Employees and Unions when referred to jointly in these terms and conditions.

3.—CONTRACT OF EMPLOYMENT

3.1 Except as provided elsewhere in this Agreement, employment shall be by the week.

3.2 Employment may be terminated by the employee or the Company giving the following period of notice—

Period of Continuous Service	Period of Notice
Less than one year	1 week
More than 1 year but less than 3 years	2 weeks
More than 3 years but less than 5 years	3 weeks
More than 5 years	4 weeks

3.3 The period of notice to be given by the Company shall increase by one week if the employee is over 45 years old and has completed at least 2 years continuous service with the Company.

3.4 Payment in lieu of the notice prescribed above 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.

3.5 In calculating any payment in lieu of notice, the company shall pay the employee the ordinary time wages only for the period of notice had the employment not been terminated.

3.6 The notice of termination required to be given by an employee shall be the same as that required of the Company, save and except that there shall be no additional notice based on the age of the employee concerned.

3.7 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 wages for the required period of notice.

3.8 The Company may dismiss an employee without notice for misconduct and in such cases, wages shall be paid up to the time of dismissal only.

3.9 Notwithstanding the notice periods in this subclause, the parties may, by agreement, shorten the notice period. This subclause shall not infer that either party is obligated to shorten the notice periods.

3.10 It is a condition of employment that the employee perform such work as the Company requires from time to time on the days and during the hours usually worked by the employee and subject to the following conditions.

3.10.1 The employee will perform such work within the employee's skill, competence, and training, according to the roster as the Company may from time to time require.

3.10.2 The employee will transfer between day work and shift work rosters when required by the Company, subject to 24 hours notice by the Company.

3.10.3 The employee will work such reasonable overtime as required by the Company in addition to the rostered hours of duty. Where an employee's travel time to work exceeds 50 minutes in one direction, the employee cannot be required to work more than 2 hours overtime in addition to the normally rostered hours of work.

3.10.4 In the event of the non-arrival of transport bringing relieving crews, the employee will continue working the regular rostered shift arrangement until the relieving crews arrive at the workplace.

3.10.5 An employee not relieved as scheduled at the end of a shift will continue to work until relieved or otherwise authorised by the Company to finish work provided that the employee will not be required to work unreasonable overtime.

3.10.6 The Company will ensure that employees have at least 10 hours break between rostered shifts. If such a break cannot be achieved prior to the next rostered start time for the employee, the employee will not be required to report to work until he/she has had a 10-hour break. However, the employee will be paid as if they had commenced work at the normal rostered time, provided they report to work after the 10-hour break. If the employee does not report to work after the 10 hour break then the company will only be obliged to pay for the actual hours an employee has worked.

3.10.7 Should the Company require an employee to report for work without a 10 hour break since completing their previous shift then the employee will be paid at double time rates until they have had a 10 hour break.

3.10.8 The employee and the Company will at all times comply with the provisions of the Grievance Resolution Procedure in the case of disputes.

3.11 The period of notice in this agreement shall not apply in the case of apprentices or employees engaged for a specific period of time or for a specific task or tasks.

3.12 For the purposes of this agreement continuity of service shall not be broken on account of any absence from work on account of personal sickness or accident for which an employee is entitled to claim Public Holidays, Sick Leave, Annual Leave, Long Service Leave, Pressing Domestic Need/Carer's Leave or Rest and Recreation Leave.

3.13 The Company may deduct payment for any day an employee cannot be usefully employed arising out of any cessation of operations, either wholly or partially due to industrial disputes, including any strike, bans or limitations, or arising out of any cause for which the Company is not responsible. Provided that if standowns are to occur, the Company will give the employees and Unions 24 hours notice of such standowns.

3.14 Employees may be employed as—

- 3.14.1 Part time: to work on a regular rostered basis, for less than 38 hours per week, on an average in each work cycle.

- 3.14.2 Full time: to work on a regular rostered basis for an average of 38 hours per week (excluding overtime) in each work cycle.
- 3.14.3 Temporary: to work on a full time or part time basis, for a limited or specified period of employment.

4.—COMMENCEMENT DATE AND PERIOD OF OPERATION

4.1 This Agreement will operate from the date of registration for a period of two years.

4.2 This Agreement will continue to operate after its expiry unless another agreement has been negotiated and registered to take its place.

4.3 There will be no formal review for the duration of this agreement. The Company will ensure that Workforce representatives are elected for the duration of this agreement, and that these representatives have access to senior management to highlight and resolve issues that concern the application and implementation of this agreement. Such representatives shall be elected according to clause 8 of this Agreement.

4.4 Negotiations for a replacement to this Agreement will commence six (6) months prior to the expiry of this Agreement.

4.5 The Company undertakes to implement a consultative process in the development of a subsequent Agreement.

4.6 No further claims for increases in wages or conditions will be made during the period of this Agreement except where provided for in this Agreement.

5.—COVERAGE OF AGREEMENT

5.1 This Agreement will apply to employees of Leighton Contractors Pty Limited engaged at mine sites and who are involved in the maintenance of the Company's plant and equipment throughout the State of Western Australia excluding those employees engaged at the Welshpool Workshop and metropolitan workshops.

5.2 This Agreement will only cover employees who are not required to work underground.

5.3 This Agreement will apply to approximately 40 employees at the date of registration.

6.—RELATIONSHIP WITH OTHER AWARDS

For the duration of this Agreement, every other award, determination or industrial agreement shall be excluded from applying to employees covered by this Agreement.

7.—PARTIES BOUND

7.1 The Company

Leighton Contractors Pty Limited.

7.2 The Unions

The Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch.

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

8.—ELECTION PROCEDURE FOR EMPLOYEE REPRESENTATIVES

8.1 This procedure will be used to elect Employee Representatives to consult with management when required during the term of this Agreement.

8.2 There will be a maximum of three (3) Employee Representatives in office at any time, from the Maintenance Employees workforce of the Company, in Western Australia.

8.3 The representatives elected to negotiate this Agreement will remain in place until the commencement of negotiations for an Agreement to replace this Agreement.

8.4 At the Commencement of negotiations for a new Agreement to replace this Agreement, a new election will be conducted to select the Employee Representatives to negotiate the new Agreement.

8.5 The company shall divide the workforce into three separate electorates ensuring firstly that the principle geographic areas of the company's operations are addressed, and secondly that due regard has been paid to the number of employees in each elector-

ate. It is recognised that the numbers of employees in each electorate will not be equal and such inequality will not invalidate the election of any Employee Representative.

8.6 All employees in each electorate will be automatically nominated for election as an Employee Representative and have their names included on the ballot paper.

8.7 The election will be conducted by secret ballot.

8.8 The votes after any ballot will be opened on site and counting will be supervised by a representative of the company and of the employees.

8.9 The employee who receives the most votes will be declared elected.

8.10 Should this employee not wish to accept the position then the ballot will be conducted again with this employee's name removed.

8.11 This process will be carried out until one employee accepts the position of Employee Representative.

8.12 The results of the election and the completed ballot papers then will be returned to the Recruitment Officer at Welshpool.

8.13 If an elected Employee Representative resigns or otherwise leaves office then a new ballot will take place to elect another Employee Representative.

8.14 Only direct employees of the Company will be eligible for election.

Part II—Enterprise Agreement Overview

9.—THE AIMS OF THIS ENTERPRISE AGREEMENT ARE AS FOLLOWS

9.1 To restructure the competency assessment system and base it upon documented standards.

9.2 To as far as possible, assess the competency of employees using recognised nationally accredited assessors.

9.3 Introduce Plant Performance Reports that show the employees how they are performing on several Key Performance Indicators.

9.4 Improve the productivity and efficiency of the Company to ensure the profitability of existing work and increase the possibilities of securing more work. Hence, the Company will be in a better position to offer its employees longer and more stable career paths.

10.—OBJECTIVES

The company will put in place strategies that achieve the following Objectives—

10.1 Gain the Parties endorsement and commitment to the implementation of measures which will improve the effectiveness, productivity, and efficiency of the Company's operations and maintenance.

10.2 Employees will implement productivity improvements, as proposed by the Company, which aim to reduce staff turnover and increase efficiency.

10.3 Identify and implement measures which will reduce the Company's operating and maintenance costs.

10.4 Employees will implement controls and reporting as required by the Company to measure costs.

Part III—Conditions of Employment

11.—WAGE RATES

11.1 On commencement of the first full pay week, after the registration of this Agreement, employees will receive wages as per Schedule 1 attached.

11.2 Additions to wages based upon certified competency assessments will be determined in accordance with Leighton Contractors Maintenance Employee Assessment System as per Schedule 2 attached.

11.3 All allowances otherwise payable under any Award for work carried out in accordance with clause 5 of this agreement are replaced by the wages and allowances shown in Schedule 1 of this Agreement.

12.—HOURS OF WORK

12.1 Day Workers

Ordinary hours of work for day workers will be 38 hours per week on average over each work cycle. To be worked between 6.00 am and 6.00 pm Monday to Friday inclusive.

12.2 Shift Workers

Shift workers will work according to the roster, which will specify the—

- day shifts; or
- night shifts; or

combination of day and night shifts (provided that an employee has 24 hours absence from duty between shifts of different types) that the employee is required to work providing for an average 38 hours of duty per week over each consecutive work cycle.

12.3 Employees shall be entitled to 12 leisure days off per annum, without deduction of pay. Such days will accrue during each work cycle and be taken and paid to the employee when the employee is on Rest and Recreation leave.

Leisure day accrual shall be calculated as follows—

Dayworker—For each eight ordinary hours worked 0.4 of an ordinary hour will be accrued to the leisure day account for an employee, to a maximum accrual of 2 hours per week.

Shift worker—For each 8 hours of duty worked 0.4 of an ordinary hour will be accrued to the leisure day account for an employee, to a maximum accrual of 2 hours per week.

12.4 Employees will not be permitted to accumulate leisure days and must take them in conjunction with Rest and Recreation leave.

12.5 Employees rostered hours of work will be as agreed between the Company and the majority of employees affected.

12.6 Employees will only be paid for actual hours of work authorised by the Company.

13.—OVERTIME

13.1 All time worked outside, or in excess of the ordinary working prescribed in clause 12 of this Agreement is overtime and will be paid for at the employee's ordinary hourly rate multiplied by the factor indicated below as follows:

Dayworkers

Overtime worked Monday to Friday, inclusive, and prior to 12.00 noon on Saturdays: - first 2 hours multiply by 1.5
- all time thereafter multiply by 2.0

Overtime worked on Saturdays after 12.00 noon, or on Sundays: - all time multiply by 2.0

Shift Workers

Monday to Sunday, inclusive: - all time multiply by 2.0

13.2 In computing overtime each day shall stand alone but when an employee works overtime which continues beyond midnight on any day, the time worked after midnight shall be deemed to be part of the previous day's work for the purpose of this subclause.

13.3 When an employee is recalled to work after leaving the job—

the employee shall be paid for at least three hours at overtime rates;
time reasonably spent in getting to and from work shall be counted as time worked.

14.—SHIFT ALLOWANCES

Shift workers will be paid for ordinary hours worked on night shifts Monday to Friday at the rates specified in Schedule 1 of this Agreement multiplied by 1.25.

15.—PUBLIC HOLIDAYS

15.1 Time worked on public holidays will be paid at 2.5 times the ordinary rate.

15.2 The following Public Holidays or the days observed in lieu shall, subject to subclause 15.1, 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 clause.

16.—TRANSPORT

16.1 The Company may provide transport for employees to and from their workplace.

16.2 The Company will determine at the commencement of a contract for the duration of the contract whether or not it will provide transport for employees.

16.3 If the Company does not provide transport a travelling allowance of—

\$5.20 per day (1st year of Agreement)

\$5.35 per day (2nd year of Agreement)

shall be paid where an employee's usual place of residence is more than 30 kilometres from the job.

16.4 Where an employee is directed by the Company to drive a Company vehicle outside ordinary hours, for the purpose of carrying personnel or equipment the employee will be paid as if working.

17.—REST BREAKS

17.1 Rest breaks will be of a 15-minute duration and shall count as time worked.

17.2 Employees will be entitled to two rest breaks per shift.

17.3 Rest breaks will be taken in the closest, safest and most convenient place.

17.4 Rest breaks will be taken as is appropriate to the production and maintenance requirements of the Company. The scheduling of these breaks shall be by agreement with the site management and the employee concerned.

17.5 There is no requirement for all maintenance employees to take their rest breaks simultaneously.

17.6 Hot water, tea, coffee, milk, and sugar will be supplied and coordinated within each site.

17.7 An adequate supply of cool drinking water will be provided by the Company on each site.

18.—MEAL BREAKS

18.1 Meal breaks will be of 30 minutes duration. Meal breaks will generally be taken between the fifth and eighth hour of the shift, the timing of meal breaks can be varied outside of these hours as provided for in subclause 18.2.

18.2 Meal breaks will be taken as is appropriate to the production and maintenance requirements of the Company. The scheduling of these breaks shall be by agreement with the site management and the employee concerned.

18.3 There is no requirement for all maintenance employees to take their meal breaks simultaneously.

18.4 Meal breaks will be paid for all shift employees but not for other employees.

18.5 Where day employees are required by the Company to work from time to time without their meal break, they will be entitled to be paid for that meal break.

19.—LEAVE ENTITLEMENTS

19.1 Employees will accrue the following leave entitlements at the ordinary rate of pay over the period of 12 month's continuous service with the Company—

(a) Annual Leave 4 weeks

(b) Public Holidays As per subclause 15.2

(c) Leisure Days As per subclause 12.3 & 12.4

An employee before going on leave, shall be paid the wages the employee would have received in respect of the ordinary time the employee would have worked had the employee not been on leave during the period of leave.

19.3 In the event that employment terminates, the employee shall be entitled to be paid for all accumulated leave days as shown above, which have not yet been taken by the employee.

19.4 During a period of leave, the employee will be paid the appropriate rate of pay and allowances as applicable.

19.5—

(a) Paid leave taken will be limited to the total number of days accrued as above. Any days taken in excess of the accrued days will be considered as leave without pay.

(b) Leave without pay may be taken by an employee by agreement with the Supervisor/Project Manager

where the employee does not have sufficient accrued leave entitlements to cover the leave requested. Approval of applications for leave without pay will not unreasonably be withheld by the Supervisor/Project Manager.

- (c) On remote sites the first rest and recreation break to which an employee is entitled may be taken as leave without pay irrespective of the employee's accrued leave entitlements.

19.6—

- (a) Any unused portion of the above leave entitlement in any year will accumulate from year to year.
- (b) Leave without pay cannot be granted by the Supervisor/Project Manager unless all accrued leave entitlements have been used.
- (c) Employees may be required to take leave if it accumulates beyond the amounts shown below.

<u>Leave Type</u>	<u>Maximum Accrual</u>
Annual Leave	4 weeks
Leisure Days	2 days
Public Holidays	0 days

- (d) During Rest and Recreation breaks employees will automatically be granted leave without pay for the duration of the break once all the Leisure Day leave has been used up in accordance with subclauses 12.3 and 12.4. Employees will not be required to use Annual Leave during Rest and Recreation breaks. This clause does not infer that employees cannot use Annual Leave during Rest and Recreation breaks if they request to do so.

19.7 Notification of leave will be made using the proforma "Employee Leave application form".

20.—ANNUAL LEAVE LOADING

A loading of 17.5% of the ordinary hours of work will be paid to employees whilst on Annual Leave. This loading will not be paid for Rest and Recreation Leave or Public Holiday Leave.

21.—SICK LEAVE

21.1 An employee absent from work through personal illness or injury by accident, is entitled to leave of absence without deduction of pay on the following conditions and limitations—

- 21.1.1 Payment for absence through sickness or injury will be for—
- (a) full time employees (whether temporary or not) 8 hours per day.
- (b) part time employees (whether temporary or not) ordinary rostered hours per day.

At the employee's ordinary hourly rate.

- 21.1.2 The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the Workers' Compensation and Rehabilitation Act nor to employees whose injury or illness is the result of the employee's own misconduct.
- 21.1.3 An employee is not entitled to be paid leave of absence under this subclause for any period in excess of the employee's accumulated sick leave entitlement.
- 21.1.4 An employee will not be entitled to payment for sick leave, if they fail to produce a certificate from a medical practitioner dated at the time of the absence, or fail to supply such other proof of the illness or injury as the Company may reasonably require. Notwithstanding this requirement, an employee will be entitled to two periods of sickness of up to two days each per annum without being required to produce a medical certificate or other appropriate proof of sickness or injury.
- 21.1.5 Sick Leave benefits will accumulate at the rate of 10 days per year of continuous service.

21.2 The employee will make every effort to inform the Company of the employee's inability to attend for duty, the nature of injury or illness and estimated duration of absence prior to the commencement of the rostered shift or at least within 4 hours after the commencement of the rostered shift.

21.3 Notification of sick leave will be made using the proforma "Employee Leave Application Form".

21.4 Should a medical condition occur to an employee the Company may require, in consultation with the employee, the employee to be medically examined to ensure the employee's well being and that appropriate actions such as evacuation from site can take place.

The employee may seek treatment from his/her physician where practicable.

22.—LONG SERVICE LEAVE

22.1 An employee shall be entitled to 13 weeks long service leave after completion of 15 years continuous service.

22.2 An employee shall be entitled to be paid pro-rata Long Service Leave after completion of 10 years continuous service where employment is terminated—

- (a) by the Company for any reason other than serious misconduct.
- (b) by the death of the employee.

22.3 After completion of each subsequent 10-year period of continuous service an employee will be entitled to 8 and 2/3rds weeks long service leave.

23.—PRESSING DOMESTIC NEED/CARER'S LEAVE

23.1 Subject to the agreement of the Supervisor/Project Manager an employee may be absent from work because of pressing domestic need and be entitled to leave of up to 5 days in any one year for this purpose. Any additional required leave is to be at the discretion of the Supervisor/Project manager. Accrued entitlements in either Annual Leave or Sick Leave may be used for this purpose. Otherwise, the leave will be leave without pay.

23.2 The interpretation of "Pressing Domestic Need" is an unscheduled event and not an event that occurs at scheduled or frequent intervals. The event must be one that is of a serious urgent domestic nature that cannot be resolved by anyone other than the employee.

24.—PAYMENT OF WAGES

24.1 Employees at all sites will be paid on a weekly basis.

24.2 Employees will be paid directly into a nominated bank account.

25.—SUPERVISION AND TRAINING

25.1 Employees will assist in the training of other employees as required by the Company, provided that the employee is in the opinion of the Company passed as competent to do so.

25.2 All employees will be ready, willing and able as required by the Company to participate in agreed training programs applicable to the Company's operations.

26.—MULTI-SKILLING

26.1 Employees will perform all work within in their skill, competence, and training as required by the Company.

26.2 The parties to this Agreement recognise the need for the co-operative use of skills and competencies held by the workforce across the Company's operations.

27.—EMPLOYEE TRANSFERS

27.1 Employees transferred from one site to another will be paid at up to eight ordinary hours for the day of transfer and will remain at their current classification except employees who request and accept a position at a lower classification.

27.2 Notwithstanding the above, Leading Hand allowances will cease to be paid on commencement at the new site unless the employee is required to work in the capacity of Leading Hand or Team Leader in which case the allowance will be paid.

27.3 The Company may commence any new employee on a pay classification as determined by the Company notwithstanding any prior service the employee may have had.

27.4 Employees transferred from one site to another will be reimbursed at a rate of—

\$0.56 per kilometre (1st year of Agreement)

\$0.57 per kilometre (2nd year of Agreement)

by the shortest route. Payment will only be made to the owner or driver of the vehicle. Payment will be up to a maximum of the Company's cost of an equivalent economy airfare. This will only apply to travel approved by the Company.

27.5 Where an employee travels to and from home each day, they are to be offered alternative employment, within a reasonable commuting distance, if available.

28.—ABANDONMENT OF EMPLOYMENT

Where an employee who is rostered on fails to report for work, the employee will be required to advise the Company of this absence from work within 24 hours where practicable to do so. Where an employee fails to report for work for a period of 3 consecutive days without notifying the Company, and there are no other extenuating circumstances that prevented the employee from notifying the Company, the Company will deem that the employee has abandoned their employment and their services will be terminated.

29.—OTHER DUTIES

An employee who cannot be utilised in their normal duties must be prepared to perform other duties for which they are competent, eg. cleaning of workshop or crib hut. An employee will not be required to perform work outside his/her classification of employment during an industrial dispute against their stated will.

30.—CLOTHING AND PERSONAL PROTECTIVE EQUIPMENT

30.1 If an employee of their own volition decides to terminate their services within 3 months of employment, the Company will be entitled to deduct 50% of the cost of any personal items issued to them (such as clothing and boots) from their termination pay.

30.2 The Company will provide upon request protective work clothing for all employees on the following basis—

- (a) An issue of 3 sets of clothing per annum, which will consist of either overalls, or alternatively short or long sleeve shirts and short or long pants.
- (b) Steel-capped lace up Safety Boots will be issued upon initial employment.
- (c) Protective work clothing will be replaced annually, or on a fair wear and tear basis subject to the conditions of subclause 30.3.
- (d) Employees will be responsible for the cleaning of their clothing at their own cost.
- (e) The clothing issued will be according to the company standard to ensure uniformity and safety.

30.3 The Company will replace employees unserviceable protective work clothing subject to meeting all of the following conditions—

- (a) The Workshop Supervisor/Nominee deems the protective clothing unserviceable.
- (b) The unserviceable protective clothing is from the employee's last issued set.
- (c) The Workshop Supervisor/Nominee, upon issuing the employee with the replacement protective clothing, is to destroy the unserviceable item(s) handed in for replacement.

30.4 In the event of any grievances or disputes, questions or difficulties arising in relation to clothing issues or replacement, the Grievance Resolution Procedure (clause 36) will be adhered to.

31.—EMPLOYEE COUNSELLING AND DISCIPLINE PROCEDURE

31.1 Counselling Procedure

If in the opinion of the immediate Supervisor an employee's performance has deteriorated for whatever reason, the Supervisor may utilise the procedure as outlined below—

- (1) Arrange a meeting between the Supervisor and the employee and his/her representative. Notice must be

given to the employee of the meeting and its purpose in sufficient time for the employee to obtain satisfactory representation.

- (2) The concerns of the Supervisor will then be detailed to the employee.
- (3) The employee may respond to the concerns expressed. This response is to be recorded and duly considered by the Supervisor.
- (4) The Supervisor will then consider possible courses of action which may include but not be limited to—
 - Additional training or re-training required for the employee.
 - Reference to internal or external counselling services that may be available.
 - Issuing warnings.
- (5) Once the Supervisor has collected and considered all the information, he/she will then make a determination as to the most appropriate action to pursue. This action will be conveyed to the employee and recorded on the employee's personal file.

31.2 Disciplinary Procedure

Should the Supervisor decide to issue a warning to the employee, the following procedure will be followed—

- (1) First a verbal warning will be issued and note made on the employee's file.
- (2) A second warning in writing will be issued and this will be recorded on the employee's personal file including any response the employee wishes to make.
- (3) Should the employee give cause for further disciplinary action to take place after being issued with a written warning, the employee may be dismissed.
- (4) Any appeal against the actions of the Supervisor must follow the Grievance Resolution Procedure—see clause 36.
- (5) Warnings will remain current on the employee's file for one year, after this period the warning will be expunged from the employee's file. This will not apply to safety related warnings which will not be expunged.

31.3 Misconduct

Where an employee is found guilty of misconduct, the employee may be dismissed without notice. Misconduct may include the following breaches—

- Major breaches of safety provisions.
- Fighting.
- Affected by intoxicating liquor or drugs in the workplace.
- Failure to comply with lawful instruction of a Company Officer.
- Physical violence.
- Stealing, theft or fraud.
- Conduct which involves dishonesty or harm or real possibility of injury to others.
- Obscenity/indecency.
- Breach of the duty of fidelity causing damage to the Company's business.
- Sexual harassment.

31.4 Personal Files

(a) Access to personal files is to be restricted to authorised officers of the Company. Eg. Managers/Site Supervisors/Payroll clerk and the individual employee.

(b) Employees will be given access to their personal file, provided their request is made through their Supervisor, who will arrange an appropriate and convenient time.

32.—JURY SERVICE

An employee required for jury service during the employee's ordinary working hours shall be granted leave for all periods of time so required for jury service. The employee shall provide proof of attendance at jury service and proof of monies paid by the Court, at which time the Company shall pay to the employee the difference between what the employee

would normally have been paid for an eight (8) hour day and what was actually paid by the Court.

33.—AIRFARES AND TRAVEL COSTS

33.1 The point of engagement for those employees who return to Kalgoorlie after each shift shall be deemed to be Kalgoorlie. For all sites whose employees do not return to Kalgoorlie after each shift, the point of engagement shall be deemed to be Perth.

33.2—

- (a) Airfares or reimbursement of travel costs will only be provided to those employees whose point of engagement is deemed to be Perth. An employee need not travel to Perth to be eligible for reimbursement of travel costs. Eg. If an employee's home was say 200km from the remote site where they are working, those employees would be entitled to travel costs under this clause.
- (b) Employees other than those employed locally to a contract and those employed from Kalgoorlie for work at a Kalgoorlie site shall be entitled to transportation costs/airfares on engagement and termination except for termination for misconduct and as shown in subclause 33.3.

33.3—

- (a) An employee who terminates employment prior to the completion of three months service will have the commencement return airfare deducted from their termination pay. This deduction will be based on a pro-rata basis (eg. one-third of the airfare deducted after two months service).
- (b) Remote Site Employees who terminate after 3 months service and give the required period of notice will receive reimbursement of transportation costs or the return flight paid for by the Company.

33.4 An employee who wishes to make travel arrangements other than flying will be reimbursed at a rate of—

\$0.56 per kilometre (1st year of Agreement)

\$0.57 per kilometre (2nd year of Agreement)

by the shortest route, up to the value equal to the Company's cost of an equivalent economy airfare. Payment will be made only to the owner or driver of the vehicle who must provide receipts to the Company as proof of costs incurred. This will only apply to travel approved by the Company.

33.5 Airfares and travel costs will only be paid for rest and recreation breaks and travel approved by the Company.

Employees who's point of engagement is deemed to be Perth are entitled to return to Perth for rest and recreation leave after completion of a continuous period of service at site. The service requirements may vary between sites.

An employee who waives this entitlement to a rest and recreation break will be required to take the next rest and recreation break due after completion of a further period of continuous service.

Employees can only waive the right to a rest and recreation break with the agreement of their Supervisor.

33.6 Where practical a Supervisor may allow an employee to finish work before the end of a shift to enable the employee to catch a flight that same day.

The Company will not allow an employee to finish work early if the Company will be disadvantaged in doing so.

Employees are required to return to site from leave to recommence work at the start of their first rostered shift.

33.7 Any entitlement to airfares and payment of travel costs will not accrue.

33.8 The Company shall provide an airfare or reimburse travel costs in the event of the employee's services being terminated during a probationary period of employment.

33.9 Notwithstanding anything contained in the preceding clauses travel costs will not be reimbursed to employees working on sites where air travel is provided to the Company and its employees free of charge.

33.10 Employees shall travel to and from site in their own time.

34—CAMP FACILITIES.

Board and lodging when provided by the Company to an employee will be at the Company's expense.

35.—REDUNDANCY

35.1 An employee will be deemed to have been made redundant if the employee's services are no longer required by the Company because the employee has become surplus to requirements on account of technological change, or reorganisation of work, or a down turn in the industry.

35.2 In addition to the period of notice prescribed in Clause 3 of this Agreement, an employee whose employment is terminated by the Company for reasons set out in subclause 35.1 shall be entitled to the following amount of severance pay, at the employee's ordinary rate of pay, in respect of their continuous period of service with the Company.

Period of Continuous Service	Severance Pay
Less than 1 year	Nil
More than 1 year but less than 2 years	4 weeks
More than 2 years but less than 3 years	6 weeks
More than 3 years but less than 4 years	7 weeks
More than 4 years	8 weeks

35.3 When selecting employee's to be made redundant the Company will take into account the following—

- the level of skill, qualifications and experience required by the Company
- the Company's present and future skill needs
- the employee's attendance record
- the employee's past work performance
- the employee's length of employment

35.4 Where the number of employees to be made redundant is fifteen or more, the Company will as soon as practicable after a decision is made, notify the Centrelink Agency of the intended redundancies.

35.5 Where a redundancy of fifteen or more employees is intended the Company shall confer with the Union concerned with respect to the conditions to apply to an employee whose services are to be so terminated with respect to the following—

- (a) the reasons for the terminations;
- (b) the number and categories of employees likely to be affected;
- (c) the time when, or the period over which, the Company intends to carry out terminations;
- (d) measures to avert or minimise the terminations; and
- (e) measures (such as finding alternative employment) to mitigate the adverse effects of the termination or terminations.

35.6 If no agreement is reached regarding the redundancy arrangements, the matter will be referred to the Western Australian Industrial Relations Commission for determination.

35.7 Where an agreement is reached or these conditions are otherwise determined, the services of an employee may be terminated.

35.8 During the period of notice of termination of employment given by the Company, for reasons set out in subclause 35.1, an employee shall for the purpose of seeking other employment be entitled to be absent from work during each week of the notice period up to a maximum of eight ordinary hours without deduction of pay. If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the Company be required to produce proof of attendance at an interview or the employee shall not receive payment for the time absent. For this purpose, a statutory declaration will be sufficient.

35.9 Should an employee who would otherwise be made redundant in accordance with subclause 35.1, be offered alternative employment with the Company and refuse that alternative employment they then cannot be considered for employment at another Company site within 3 months of being made redundant. If an employee wishes to become re-employed by the Company during this 3-month period, they must repay the redundancy payment from the previous site upon recommencing employment.

36.—GRIEVANCE RESOLUTION PROCEDURE

To resolve any grievances or disputes, questions or difficulties arising under this Agreement, the following procedure will be adhered to—

- (a) There will be a commitment by the parties to achieve adherence to this procedure. This should be facilitated by the earliest possible advice by one party to the other of any issue or problem that may give rise to a grievance or dispute.
- (b) At all stages in the dispute resolution procedure, and to allow for the peaceful resolution of issues, the parties will commit to avoiding industrial action in any form, and will continue to work as directed by the Company after due consultation with the employees whilst the parties follow the grievance resolution procedure.
- (c) At any stage during the grievance resolution procedure an employee is entitled to seek either an employee representative or Union representative nominated by the employee.
- (d) The following five stage procedure will be used to resolve any disputes or grievances—
 - (i) Should any matter arise which gives cause for concern to the employee, the matter will be brought to the attention of the immediate supervisor.
 - (ii) Should any matter arise which gives cause for concern to the Company, the matter will be brought to the attention of the employee.
 - (iii) Should the matter not be resolved by the parties within an agreed time frame it may be brought to the attention of the Supervisor or Project Manager by either party.
 - (iv) If the Supervisor or Project Manager is unable to resolve the matter within an agreed time frame, either party may bring the matter to the attention of the Plant Manager or Contracts Manager.
 - (v) Should there be no resolution of the matter within a further agreed time frame, either party will have the right to have the matter referred to the Western Australian Industrial Relations Commission for resolution in accordance with the Industrial Relations Act 1979.
- (e) All relevant facts will be documented when requested by the employee/s or the Company.

37.—REPRESENTATIVES INTERVIEWING EMPLOYEES

A duly accredited official of the Union shall have the right to enter the Company's premises provided that the Company has been notified in advance, but shall not without the permission of the Company interview employees during their working hours. A duly accredited official of the Union shall not be unreasonably denied access to the Company's premises.

38.—RECORDS

38.1 The Company shall keep a time and wages book showing the name of each employee and the nature of the work, the hours worked each day and the wages and allowances paid each week. Any system of automatic recording by means of machines shall be deemed to comply with this provision to the extent of the information recorded.

38.2 A duly accredited official of the Union shall have the power to inspect the time and wages record of an employee or former employee, provided that such power shall not be exercised for the purpose of inspecting the time and wages records of an employee or former employee who—

- (a) is not a member of the Union, unless the employee authorises the Union in writing, and;
- (b) has notified the Company in writing that the employee or former employee does not consent to a representative of an organisation of employees having access to those records.

Before exercising a power of inspection, the official shall give reasonable notice of not less than 24 hours to the Company.

39.—TRADE UNION TRAINING

The Company will allow reasonable absences from work without pay for the purposes of Trade Union Training. This training shall be limited to one person per site per annum. The Company will not be liable for any costs associated with the provision of this training, including transport and accommodation.

40.—SERVICE RECOGNITION

Upon achievement of five (5) years of continuous service, the Company will recognise the employee with a Certificate of Service and a Jacket embroidered with the Company emblem. This will be presented at an appropriate time and location by a Senior Officer of the Company.

Part IV—Plant Performance Reports

41.—KEY PERFORMANCE INDICATORS

41.1 During the term of this agreement a monthly Plant Performance Report will be introduced to enable employees to monitor the progress of several Key Performance Indicators (KPI's) in their Workshop.

41.2 This report will then be considered by the Company to provide the basis for a possible future incentive scheme for employees. The introduction of such a scheme would be at the absolute discretion of the Company, and will only be introduced if the Company can quantify the benefits in such a scheme by a reduction in the Company's overall cost of operation.

41.3 The indicators to be measured are as follows—

- 41.3.1 Workshop labour cost per hour—this is the net cost per hour of labour sold from the workshop.
- 41.3.2 Service unit dispensing cost per litre—this is the cost for dispensing each litre of fuel from the service unit.
- 41.3.3 Labour recovery percentage—this is the percentage of the total wages hours that are paid to employees in the workshop, that are then "sold" to machines or other revenue tasks.
- 41.3.4 Litres dispensed per hour—this is the number of litres dispensed by a service unit for each hour of wages cost coded to the service unit.
- 41.3.5 Consumable cost per hour—the cost of consumable items for each hour of workshop labour sold or each litre of fuel sold in a service unit.
- 41.3.6 Tooling cost per hour—the cost of providing tooling to the workshop for each hour or litre sold.
- 41.3.7 Labour hours per machine hour—the total number of workshop personnel hours (both staff and wages) divided by the total number of machine paid hours on a site (weekly charged items will be included at one hour for every week they are on site).
- 41.3.8 Safety cost per hour—the cost of all items of safety equipment provided to the workshop for each hour of labour sold or for each litre of fuel sold in the service unit.
- 41.3.9 Training cost per hour—the cost of training expenses including wages paid whilst on training for each hour of labour sold in the workshop and each litre of fuel sold in the service unit.

42.—OBJECTIVES OF PLANT PERFORMANCE REPORT

42.1 The Plant Performance Report is designed to show employees the influences on the cost of maintaining the company's plant and equipment.

42.2 Over time, it is hoped that employees will come to understand the indicators, as presented, and how they may be able to influence them.

42.3 The report is designed to show both management and employees in an objective way the results of any improvements made in maintenance practices.

43.—REVIEW OF THE PLANT PERFORMANCE REPORT

43.1 The contents of the Plant Performance Report may be a topic of toolbox talks with the workforce.

43.2 The Plant Performance Reports will be reviewed during the negotiations for the Agreement to replace this Agreement and may be the basis for a future incentive scheme as noted in subclause 41.2.

43.3 Contributions from the workforce about the Plant Performance Reports are encouraged during the life of this Agreement and should be directed to the Plant Superintendent.

43.4 Modifications may be incorporated in the Plant Performance Report during the period of this Agreement to ensure the report is easily understood by the workforce, and truly represents the maintenance performance of the Company.

43.5 An example of the Plant Performance Report is shown in Schedule 3 of this Agreement. This example is in no way binding on the Company and is intended only to illustrate how such a report may look, as such the Company reserves the right to alter and modify the example report in any way during the life of this Agreement.

Part V—Signatories

.....
Signed for and on behalf of Leighton Contractors Pty Limited

.....
Signed for and on behalf of the Automotive Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

Common Seal

.....
Signed for and on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch.

Common Seal

SCHEDULE 1—RATES OF PAY

1. Base Hourly Rates—All Sites

	1st Year of EBA	2nd Year of EBA
Tradespersons	\$15.14	\$15.59
Servicepersons	\$14.06	\$14.48
Trades Assistants and Labourers	\$12.98	\$13.37

2. Wages Increases

All persons currently employed by the Company on the implementation of this agreement will maintain their current rate of pay plus 4.0% for the first year of this Agreement plus a further 3.0% in the second year of this Agreement.

The percentage increases will also apply to applicable allowances, as detailed in this agreement. This will not apply to the disability allowance applicable at Yarrarie, however the Company will increase the Yarrarie disability allowance payable to Maintenance personnel in line with any increases to the Leighton Contractors—Yarrarie Project Enterprise Agreement.

3. Employee Competency Grading

For each competency unit completed, at each formal assessment, above the specified minimum competencies for the classification an employee is employed under the employee's hourly rate will be increased by—

\$0.065 (1st year of Agreement)

\$0.0669 (2nd year of Agreement)

For existing employees this provision will only apply once the rate of pay they would be entitled to under this Agreement exceeds their current rate of pay.

4. Leading Hand Allowance

An employee appointed as a Leading Hand will be paid at their base hourly rate plus competency component plus the following additional payment—

(a) In charge of not less than one and not more than five other employees—

\$0.68 per hour (1st year of Agreement)

\$0.70 per hour (2nd year of Agreement)

(b) In charge of more than five but less than ten other employees—

\$0.88 per hour (1st year of Agreement)

\$0.91 per hour (2nd year of Agreement)

(c) In charge of more than ten other employees—

\$1.15 per hour (1st year of Agreement)

\$1.18 per hour (2nd year of Agreement)

5. Shift Allowance

A shift employee whilst on night shift other than on a Saturday or Sunday will be paid 25% more than the employee's ordinary rate for the first 8 hours worked.

6. Location Allowance

Subject to the provisions of this Clause, in addition to the wages prescribed elsewhere in this Schedule, an employee shall be paid the following flat weekly allowances when employed in the towns described hereunder.

Location	1st year of Agreement	2nd year of Agreement
Agnew	\$15.70	\$16.17
Argyle	\$40.87	\$42.09
Balladonia	\$15.49	\$15.95
Barrow Island	\$26.62	\$27.41
Boulder	\$6.44	\$6.63
Broome	\$24.96	\$25.70
Bullfinch	\$7.48	\$7.70
Carnarvon	\$12.79	\$13.17
Cockatoo Island	\$27.45	\$28.27
Coolgardie	\$6.44	\$6.63
Cue	\$16.01	\$16.49
Dampier	\$21.63	\$22.27
Denham	\$12.79	\$13.17
Derby	\$26.00	\$26.78
Esperance	\$4.78	\$4.92
Eucla	\$17.47	\$17.99
Exmouth	\$22.46	\$23.13
Fitzroy Crossing	\$31.40	\$32.34
Goldsworthy	\$14.24	\$14.66
Halls Creek	\$35.77	\$36.84
Kalbarri	\$5.30	\$5.45
Kalgoorlie	\$6.44	\$6.63
Kambalda	\$6.44	\$6.63
Karratha	\$25.68	\$26.45
Koolan Island	\$27.45	\$28.27
Koolyanobbing	\$7.48	\$7.70
Kununurra	\$40.87	\$42.09
Laverton	\$15.91	\$16.38
Learmonth	\$22.46	\$23.13
Leinster	\$15.70	\$16.17
Leonora	\$15.91	\$16.38
Madura	\$16.53	\$17.02
Marble Bar	\$39.00	\$40.17
Meekatharra	\$13.72	\$14.13
Mt Magnet	\$17.05	\$17.56
Mundrabilla	\$17.05	\$17.56
Newman	\$15.08	\$15.53
Norseman	\$13.31	\$13.70
Nullagine	\$38.89	\$40.05
Onslow	\$26.62	\$27.41
Pannawonica	\$20.28	\$20.88
Paraburdoo	\$20.07	\$20.67
Port Headland	\$21.52	\$22.16
Ravensthorpe	\$8.42	\$8.67
Roebourne	\$29.43	\$30.31
Sandstone	\$15.70	\$16.17
Shark Bay	\$12.79	\$13.17
Shay Gap	\$14.24	\$14.66
Southern Cross	\$7.48	\$7.70
Telfer	\$36.19	\$37.27
Teutonic Bore	\$15.70	\$16.17
Tom Price	\$20.07	\$20.67
Whim Creek	\$25.48	\$26.24
Wickham	\$24.75	\$25.49
Wiluna	\$16.01	\$16.49
Wittenoom	\$34.52	\$35.55
Wyndham	\$38.58	\$39.73

(b) Except as provided in subclause (c), an employee who has—

- (i) A dependant shall be paid double the allowance prescribed in subclause (a).
 - (ii) A partial dependant shall be paid the allowance prescribed in subclause (a) plus the difference between that rate and the amount such partial dependant is receiving by way of a district or location allowance.
- (c) (i) Where an employee is provided with board and lodging by the Company, free of charge, or
- (ii) Is provided with an allowance in lieu of board and lodging. Such employee shall be paid 66 and two third percent of the allowances prescribed on subclause (a).

(d) Where an employee is on annual leave or received payment in lieu of annual leave he/she shall be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.

(e) Where an employee is on long service leave or other approved leave with pay (other than annual leave) the employee shall only be paid location allowance for the period of such leave the employee remains in the location in which the employee is employed.

7. Crane Allowance

Employees in possession of a valid Western Australian Crane Drivers ticket will be paid an allowance of—

- \$20.80 per week (1st year of Agreement)
- \$21.42 per week (2nd year of Agreement)

8. Pilbara Iron Ore Industry

When personnel are working in the Iron Ore industry in the Pilbara area of Western Australia the following allowances will be paid—

- (a) A disability allowance of \$1.64 per hour.
- (b) An allowance of—
 - \$18.38 per day (1st year of Agreement)
 - \$18.93 per day (2nd year of Agreement)
 for personnel working at Nimingarra and residing at Yarrie camp to compensate for the differing work conditions from Yarrie to Nimingarra.

9. Electrical Allowance

Where a person is required to hold an “A” or “B” class electrical licence they shall be paid an allowance of—

- \$13.72 per week (1st year of Agreement)
- \$14.13 per week (2nd year of Agreement)

This allowance will only be paid if the person is required by the Company to perform work for which the licence is required as defined in the Mines Safety and Inspection Act 1994.

SCHEDULE 2—MAINTENANCE EMPLOYEE ASSESSMENT SYSTEM

This Schedule describes how the competency of all maintenance employees is to be assessed. All assessments will use the Metals and Engineering National Competency Standards as the assessment criteria.

1. The assessment of maintenance employees (candidates) will be a two tiered process which will consist of—

- (a) hands-on learning and completion of tasks, which will be documented on Employee-Task-Performance-Profile form which will be completed by the candidates supervisor
- (b) a series of formal assessments which will be administered by an accredited workplace assessor according to the requirements of the relevant National Metals and Engineering Competency Standard Units.

2. Candidates will have a period of months preceding a formal assessment to complete the hands on component, the minimum periods for this are set out below—

	After 2 months hands-on	After 4 months hands-on	After 6 months hands-on	After 8 months hands-on	After 10 months hands-on	After 12 months hands-on
Trades person	1st Formal	2nd Formal	3rd Formal	4th Formal	5th Formal	6th Formal
Service person	1st Formal	2nd Formal	3rd Formal	4th Formal		
Labourer	1st Formal	2nd Formal				

There is no maximum period for the candidate to complete the hands on component.

(3) Each candidate will be given a job description for their job role; this will outline the duties that they may be expected to perform in that job.

(4) The individual duties from the job descriptions have been matched with the National Competency Standard Units, as outlined on the attached schedules. The schedules for each job description details all of the units relevant to that position, and which units are to be assessed at each formal assessment.

(5) To enable the formal assessor to assess the work done by the candidate during the hands on period each candidate will be given task-performance-profile forms, which are to be completed as follows—

- (a) the candidate, after completing any task relevant to any of the units they are to be assessed in, will get their immediate supervisor (leading hand/foreman) to complete and sign the task-performance-profile
 - (i) feedback is to be given to the candidate in accordance to the: WORKPLACE ASSESSMENT FEEDBACK GUIDELINES
 - (ii) for any criteria that the supervisor has marked the candidate average or lower the supervisor must outline in what areas the candidate must improve and suggest a pathway and time frame in which to achieve this
- (b) The completed profile is to be filed as follows—
 - (i) a copy to be faxed to the Recruitment Officer in Welshpool
 - (ii) original to be put into the candidates site file
 - (iii) copy to be given to the candidate

(6) When the candidate has completed the minimum period required for their hands on component, they can apply for their formal assessment, the process for this is as follows—

- (a) Candidate’s hands-on component time frame achieved
- (b) Candidate’s task performance profile records have been completed for all of the tasks to be assessed at the formal assessment
- (c) Candidate applies in writing for formal assessment
- (d) The formal assessor receives candidate’s application, and reviews all Task-Performance-Profile sheets, sent to the recruitment officer, relevant to that formal assessment, and makes a decision based on these results of whether the candidate is ready to be assessed
- (e) The formal assessor notifies candidate of decision
 - (i) If the assessor decides that the candidate is not yet ready for assessment the assessor will outline in what areas the candidate must improve and suggest a pathway and time frame in which to achieve this
 - (ii) If the assessor decides that the candidate is ready for their formal assessment then the assessor will notify all relevant parties, and schedule a time and place for it to take place
- (f) Conduct formal assessment, review results and notify candidate
 - (i) If the assessor decides that the candidate is not yet competent the assessor will outline in what areas the candidate must improve and suggest a pathway and time frame in which to achieve this
 - (ii) If the assessor decides that the candidate is competent then the assessor will notify the candidate and arrange for any increase to the candidates pay rate as required, in accordance with clause 12 of this schedule

(7) All feedback to candidates will be carried out in accordance with the WORKPLACE ASSESSMENT FEEDBACK GUIDELINES document.

(8) Employees who are unhappy with their assessment may appeal the results and request to be assessed by another assessor as soon as practical. Employees may only appeal each assessment once.

(9) If an employee is deemed not-yet-competent after sitting a formal assessment, they may re-attempt the formal assessment after a period of not less than one month.

(10) A file of the competency standards will be kept on site showing the detailed criteria for each formal assessment, this file will be available for inspection by all employees.

(11) Employees will be provided with photocopies of the units within the standards that are applicable to each of their formal assessments.

(12) Current employees will remain on their current rate of pay (plus any percentage adjustment noted in schedule 1 of this agreement) until they have completed all the formal assessments required for their current rate of pay. Once they have completed all the formal assessments required for their current rate of pay, they may then attempt further formal assessments as nominated for their employment classification and they will be paid the amount nominated in Schedule 1 of this Agreement for each additional formal assessment unit completed.

(13) Employees may attempt formal assessments designated as appropriate to a higher classification once they have completed all appropriate to their own classification. The Company will not be obliged to pay for any of the formal assessment units that are not within the employees current classification. However, should a vacancy occur in a higher classification and it be offered to the employee and the employee accept the position, any formal assessment units passed will be taken into account and the employee paid appropriately.

(14) The Company may add further formal assessment units to the attached schedules at any time and should an employee attempt these they will be paid according to Schedule 1.

Mobile Plant Fitter Competency Units

	Unit	Description
6th Formal Additional	18.29A	Tune Diesel Engine
	18.21A	Maintain and Repair Hydraulic Systems
	18.43A	Diagnose and Repair Automatic Transmissions
	18.40A	Maintain and Repair Suspension Systems
5th Formal Old Level 3	18.41A	Maintain and Repair Steering Systems
	18.42A	Diagnose and Repair Manual Transmissions
	18.44A	Diagnose and Repair Drive Line and Final Drives
	18.19A	Maintain and Repair Pneumatic Systems
	18.26A	Maintain Diesel Fuel Systems
	18.24A	Maintain and Repair Engine Cooling Systems
	18.18A	Maintain Pneumatic System Components
	18.20A	Maintain Hydraulic System Components
	2.6C	Plan a Complete Activity
	4th Formal Old Level 2	18.39A
5.4A		Perform Routine Oxy/Acetylene Welding
18.12A		Mechanical Seals—Installing and Removal
18.32A		Maintain and Repair Induction/Exhaust System
18.5A		Bearings—Fault Diagnosis/Installation and Removal
18.35A		Diagnose and Repair Braking Systems
18.6A		Dismantle/Repair/Replace/Assemble and Fit Engineering Components
	18.55A	Dismantle/Repair/Replace/and Assemble Engineering Components

	Unit	Description	
3rd Formal Base Level Units (old level 1)	18.30A	Diagnose and Repair Low Voltage Electrical Systems	
	18.38A	Maintain and Repair Wheels and Tyres	
	18.25A	Service Combustion Engines	
	18.11A	Isolate/Shutdown Machines and Equipment	
	15.4A	Perform Inspection (basic)	
	13.3A	Work Safely with Industrial Chemicals and Materials	
	12.3A	Precision Mechanical Measurement	
	12.2A	Basic Electric/Electronic Measurement	
	2nd Formal Base Level Units (old level 1)	12.1A	Use Preset Comparison Measuring Devices
		11.11A	Manual Handling
11.9A		Handle/Move Bulk Fuels/Gasses	
9.2A		Interpret Technical Drawing	
9.1A		Draw and Interpret Sketch	
5.12A		Perform Routine Manual Arc Welding	
5.1A		Manual Soldering-Desoldering Electrical/Electronic Components	
2.7C	Perform Computations		
1st Formal Base Level Units (old level 1)	2.5C	Measure with Graduated Devices	
	2.3C	Operate in a Work-Based Team Environment	
	2.2C	Organise and Analyse Information	
	2.1C	Apply Quality Systems	
	1.4F	Plan To Undertake Routine Task	
	1.3F	Apply Quality Procedures	
	1.2F	Apply Principles of OH&S in Work Environment	
	1.1F	Undertake Interactive Workplace Communication	

Fixed Plant Fitter Competency Units

	Unit	Description
6th Formal Additional	18.30A	Diagnose and Repair Low Voltage Electrical Systems
	18.38A	Maintain and Repair Wheels and Tyres
	18.25A	Service Combustion Engine
	18.44A	Diagnose and Repair Drive Line and Final Drives
5th Formal Old Level 3	18.21A	Maintain and Repair Hydraulic Systems
	18.19A	Maintain and Repair Pneumatic Systems
	7.30A	Perform metal spinning lathe operations (basic)
	18.18A	Maintain Pneumatic System Components
	18.20A	Maintain Hydraulic System Components
	5.21A	Weld Using Oxy/Acetylene Welding
	5.15A	Weld Using Manual Metal Arc Welding Process
	5.7A	Manual Heating, Thermal Cutting and Gouging
	18.12A	Mechanical Seals—Installing and Removal
	4th Formal Old Level 2	18.5A
5.6A		Perform Silver Brazing and/or Silver Soldering
18.6A		Dismantle/Repair/Replace/Assemble and Fit Engineering Components
18.55A	Dismantle/Repair/Replace/and Assemble Engineering Components	

	Unit	Description		Unit	Description
	5.4A	Perform Routine Oxy/Acetylene Welding	4th Formal Old Level 2	18.38A	Maintain and Repair Wheels and Tyres
	18.2A	Use Power Tools Hand Held Operation		2.6C	Plan a Complete Activity
	18.1A	Use Hand Tools		2.4C	Assist in the Provision of on the Job Training
	18.11A	Isolate/Shutdown Machines and Equipment		18.11A	Isolate/Shutdown Machines/ Equipment
3rd Formal Base Level Units (old level 1)	15.4A	Perform Inspection (basic)		5.10A	Undertake Fabrication Forming and Shaping
	14.1A	Schedule Material Deliveries		18.2A	Use Power Tools Hand Held Operation
	13.3A	Work Safely with Industrial Chemicals and Materials		18.1A	Use Hand Tools
	12.3A	Precision Mechanical Measurement	3rd Formal Base Level Units (old level 1)	15.4A	Perform Inspection (basic)
	12.2A	Basic Electric/Electronic Measurement		13.3A	Work Safely with Industrial Chemicals and Materials
	12.1A	Use Preset Comparison Measuring Devices		12.6A	Mark Off/Out (general engineering)
	11.11A	Manual Handling		12.3A	Precision Mechanical Measurement
	11.9A	Handle/Move Bulk Fuels/Gasses		12.2A	Basic Electric/Electronic Measurement
2nd Formal Base Level Units (old level 1)	11.8A	Package Materials (warehouse and Store)		12.1A	Use Preset Comparison Measuring Devices
	9.2A	Interpret Technical Drawing		11.11A	Manual Handling
	9.1A	Draw and Interpret Sketch		11.9A	Handle/Move Bulk Fuels/Gasses
	5.12A	Perform Routine Manual Arc Welding		9.2A	Interpret Technical Drawing
	5.1A	Manual Soldering-Desoldering Electrical/Electronic Components	2nd Formal Base Level Units (old level 1)	9.1A	Draw and Interpret Sketch
	2.7C	Perform Computations		5.23A	Weld Using Submerged Arc Process
	2.6C	Plan a Complete Activity		5.21A	Weld Using Oxy/Acetylene
	2.5C	Measure with Graduated Devices		5.15A	Weld Using Manual Metal Arc Process
1st Formal Base Level Units (old level 1)	2.4C	Assist in the Provision of on the Job Training		5.7A	Manual Heating, Thermal Cutting and Gouging
	2.3C	Operate in a Work-Based Team Environment		5.6A	Perform Silver Brazing and/or Silver Soldering
	2.2C	Organise and Analyse Information		5.4A	Perform Routine Oxy/Acetylene Welding
	2.1C	Apply Quality Systems		5.3A	Soft Soldering (basic)
	1.4F	Plan To Undertake Routine Task	1st Formal Base Level Units (old level 1)	2.7C	Perform Computations
	1.3F	Apply Quality Procedures		2.3C	Operate in a Work-Based Team Environment
	1.2F	Apply Principles of OH&S in Work Environment		2.5C	Measure with Graduated Devices
	1.1F	Undertake Interactive Workplace Communication		2.1C	Apply Quality Systems
				1.4F	Plan To Undertake Routine Task
				1.3F	Apply Quality Procedures
				1.2F	Apply Principles of OH&S in Work Environment
				1.1F	Undertake Interactive Workplace Communication

Boilermaker/Welder Competency Units

	Unit	Description
6th Formal Additional	18.25A	Service Combustion Engines
	14.1B	Schedule Material Deliveries
	5.36A	Repair/replace/modify fabrications
	11.14A	Undertake Warehouse Dispatch Process
	11.13A	Undertake Warehouse Receival Process
5th Formal Old Level 3	11.8A	Package Materials (warehouse and store)
	5.11A	Assemble fabricated components
	11.16A	Order Materials
	7.30A	Perform metal spinning lathe operations (basic)
	6.7A	Perform basic incidental heat/quenching, tempering and annealing
	18.12A	Mechanical Seals—Installing and Removal
	5.8A	Advanced Manual Thermal Cutting, Gouging, and Shaping
	18.55A	Dismantle/Replace/and Assemble Engineering Components

Auto Electrician Competency Units

	Unit	Description
6th Formal Additional	18.20A	Maintain Hydraulic System Components
	18.18A	Maintain Pneumatic System Components
	18.44A	Diagnose and Repair Drive Line and Final Drives
	18.32A	Maintain and Repair Induction/ Exhaust Systems
	5.7A	Manual Heating, Thermal Cutting and Gouging
5th Formal Old Level 3	5.12A	Perform Routine Manual Arc Welding
	18.12A	Mechanical Seals—Installing and Removal
	18.24A	Maintain and Repair Engine Cooling Systems
	18.35A	Diagnose and Repair Braking Systems
	2.2C	Organise and Analyse Information
	5.4A	Perform Routine Oxy/Acetylene Welding

#	Unit	Description
	5.7A	Manual Heating, Thermal Cutting and Gouging
	5.12A	Perform Routine Manual Arc Welding
3rd Formal Old Level 3	18.26A	Maintain Diesel Fuel Systems
	18.12A	Mechanical Seals—Installing and Removal
	18.6A	Dismantle/Repair/Replace/ Assemble and Fit Engineering Components
	18.55A	Dismantle/Replace/and Assemble Engineering Components
	18.38A	Maintain and Repair Wheels and Tyres
	18.25A	Service Combustion Engines
	18.11A	Isolate/Shutdown Machines and Equipment
	18.2A	Use Power Tools Hand Held Operation
2nd Formal Old Level 2	18.1A	Use Hand Tools
	15.4A	Perform Inspection (basic)
	13.3A	Work Safely with Industrial Chemicals and Materials
	11.11A	Manual Handling
	11.9A	Handle/Move Bulk Fuels/Gasses
	9.2A	Interpret Technical Drawing
	9.1A	Draw and Interpret Sketch
	2.7C	Perform Computations
1st Formal Old Level 1	2.5C	Measure with Graduated Devices
	2.3C	Operate in a Work-Based Team Environment
	2.2C	Organise and Analyse Information
	2.1C	Apply Quality Systems
	1.4F	Plan To Undertake Routine Task
	1.3F	Apply Quality Procedures
	1.2F	Apply Principles of OH&S in Work Environment
	1.1F	Undertake Interactive Workplace Communication

Storesperson Competency Units

	Unit	Description
4th Formal Additional	14.1B	Schedule Material Deliveries
	2.6C	Plan a Complete Activity
	2.4C	Assist in the Provision of on the Job Training
	18.11A	Isolate/Shutdown Machines and Equipment
3rd Formal Old Level 3	18.2A	Use Power Tools Hand Held Operation
	18.1A	Use Hand Tools
	11.7A	Administer Inventory Procedures
	15.4A	Perform Inspection (basic)
	2.9C	Perform Computer Operations
	13.3A	Work Safely with Industrial Chemicals and Materials
	12.1A	Use Preset Comparison Measuring Devices
	11.14A	Undertake Warehouse Dispatch Process
2nd Formal Old Level 2	11.13A	Undertake Warehouse Receiving Process
	11.11A	Manual Handling
	11.9A	Handle/Move Bulk Fuels/Gasses
	11.8A	Package Materials (warehouse and store)
	11.5A	Pick and Process Order
	9.2A	Interpret Technical Drawing
	9.1A	Draw and Interpret Sketch
	2.7C	Perform Computations
1st Formal Old Level 1	2.5C	Measure with Graduated Devices

#	Unit	Description
	2.3C	Operate in a Work-Based Team Environment
	2.2C	Organise and Analyse Information
	2.1C	Apply Quality Systems
	1.4F	Plan To Undertake Routine Task
	1.3F	Apply Quality Procedures
	1.2F	Apply Principles of OH&S in Work Environment
	1.1F	Undertake Interactive Workplace Communication

Labourer / Trades Assistant Competency Units

#	Unit	Description
2nd Formal Additional	18.38A	Maintain and Repair Wheels and Tyres
	18.11A	Isolate/Shutdown Machines/ Equipment
	18.2A	Use Power Tools Hand Held Operation
	18.1A	Use Hand Tools
	13.3A	Work Safely with Industrial Chemicals and Materials
	11.11A	Manual Handling
	11.9A	Handle/Move Bulk Fuels/Gasses
	11.8A	Package Materials (warehouse and store)
1st Formal Additional	2.7C	Perform Computations
	2.5C	Measure with Graduated Devices
	2.3C	Operate in a Work-Based Team Environment
	2.1C	Apply Quality Systems
	1.4F	Plan To Undertake Routine Task
	1.3F	Apply Quality Procedures
	1.2F	Apply Principles of OH&S in Work Environment
	1.1F	Undertake Interactive Workplace Communication

SCHEDULE 3—PLANT COST PERFORMANCE REPORT

The report shown is sample of the monthly Cost Performance Report. Employees, Foremen, and Managers are encouraged to contribute to modifications to this report that will clearly show the Company's maintenance performance.

Introduction

The purpose of this report is to detail the monthly performance of a particular site, looking at all areas that are directly associated with the Workshop. The report comprises of three sections, the first two of which detail the current cost performance of the Workshop and Service Unit, and includes a month by month analysis of the costs that contribute significantly to the daily operation.

The third section of the report is a cost analysis of the major plant items that are currently on site and aims to provide some indication of the current cost performance of these particular units. This analysis is critical in that the information presented indicates whether the maintenance constraints allowed for in the budget are sufficient for the complete maintenance of the plant items.

Like the Monthly Maintenance Report, the intention of this report is to monitor cost areas that have been identified as critical to both the Workshop and Plant Item cost schedules.

Monthly Workshop Cost Analysis

All information gathered for this report is obtained from the Plant Cost Management System (PCM) and has been tailored to reflect the true costs incurred from the Workshop.

TABLE 1: YARRIE NIMINGARRA WORKSHOP COSTS, SEPTEMBER 1999

COSTS	Codes	Value	Units Worked	3,994.00
Fuel And Oil	1	\$ —	SU/WS Ratio	0.3707
Wages	2	\$ 137,551.47	Total Wage Cost (SU Included)	\$218,576
			Cost/Unit	

				Units Worked	3,994.00					Units Worked	3,994.00
				SU/WS Ratio	0.3707					SU/WS Ratio	0.3707
				Total Wage Cost (SU Included)	\$218,576					Total Wage Cost (SU Included)	\$218,576
COSTS	Codes	Value	Cost/Unit	COSTS	Codes	Value	Cost/Unit				
Maintenance (Parts)	8	\$ —	\$ —	Insurance Repairs	39	\$ —	\$ —				
Maintenance (Labour)	9	\$ —	\$ —	Welfare	40	\$ 288.00	\$ 0.07				
Warranty Rep. Maint (Parts)	10	\$ —	\$ —	Safety	42	\$ 945.00	\$ 0.24				
Warranty Rep. Maint (Labour)	11	\$ —	\$ —	Fringe Benefits	46	\$ —	\$ —				
Tyres & Tracks (Parts)	12	\$ —	\$ —	Salaries	48	\$ 23,337.00	\$ 5.84				
Tyres & Tracks (Lab)	13	\$ —	\$ —	Advertising	49	\$ —	\$ —				
G.E.T. (Parts)	14	\$ —	\$ —	Computer Costs	51	\$ 5.00	\$ 0.00				
G.E.T. (Lab)	15	\$ —	\$ —	Stationery	52	\$ 445.00	\$ 0.11				
Workshop Tools	18	\$ 4,114.00	\$ 1.03	Training	53	\$ —	\$ —				
Plant Hire	19	\$ 5,279.00	\$ 1.32	Total Costs		\$ 178,634.47	\$ 44.73				
Vehicle Expenses	20	\$ —	\$ —	REVENUE							
Branch Asset Depreciation	22	\$ —	\$ —	G.E.T	86	\$ —	\$ —				
Travel Expenses	30	\$ —	\$ —	Internal Labour Sales	89	\$ 159,760.00	\$ 40.00				
Accommodation	31	\$ —	\$ —	Scrap Sales	92	\$ —	\$ —				
Consumables	32	\$ 6,670.00	\$ 1.67	Sundry Revenue	94	\$ —	\$ —				
Telephone And Fax	33	\$ —	\$ —	Total Revenue		\$ 159,760.00	\$ 40.00				
Building Maintenance	35	\$ —	\$ —	Profit/Loss		\$ (18,874.47)	\$ (4.73)				
Hire Charges	37	\$ —	\$ —								

TABLE 2: TOTAL LABOUR HOURS

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Recovered Labour Hours	3143	4212	3214.5	3162.5	3753	3475.5	3450	4525	3207	3374.5	4394	3265	3994

TABLE 3: TOTAL SERVICE UNIT HOURS

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Service Unit Hours	1473.5	1618.5	1553	1485.5	1878.5	1522.5	1645.5	1973	1740	1660	2010	1666	2087

From the information displayed in the above tables, monthly trends for the Workshop can be calculated and are displayed as follows—

TABLE 4: WORKSHOP LABOUR COST

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Total Site Cost (Hourly)	55.94	54.73	60.75	61.03	66.67	58.44	62.41	56.18	49.98	47.61	42.69	46.66	44.73
Cumulative Average Cost/Hr	61.64	60.49	60.53	60.59	61.27	60.98	61.11	60.70	59.88	59.00	57.91	57.21	56.48

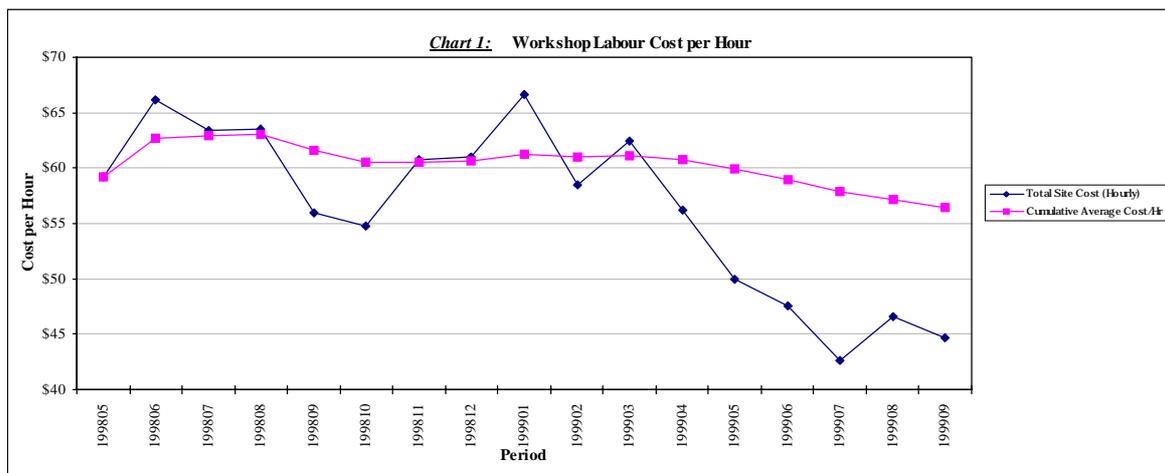


TABLE 5: LABOUR RECOVERY PERCENTAGE

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Workshop Wage Hours	4717	6495.5	5152	5031.5	6037.5	4798.5	5197.5	6429	4585	4700	5945	4555	5630
Recovered Labour Hours	3143	4212	3214.5	3162.5	3753	3475.5	3450	4525	3207	3374.5	4394	3265	3994
Site Labour Recovery (%)	66.63	64.84	62.39	62.85	62.16	72.43	66.38	70.38	69.95	71.80	73.91	71.68	70.94
Cumulative Labour Recovery (%)	64.99	64.96	64.60	64.39	64.11	64.87	65.01	65.54	65.84	66.22	66.80	67.06	67.31

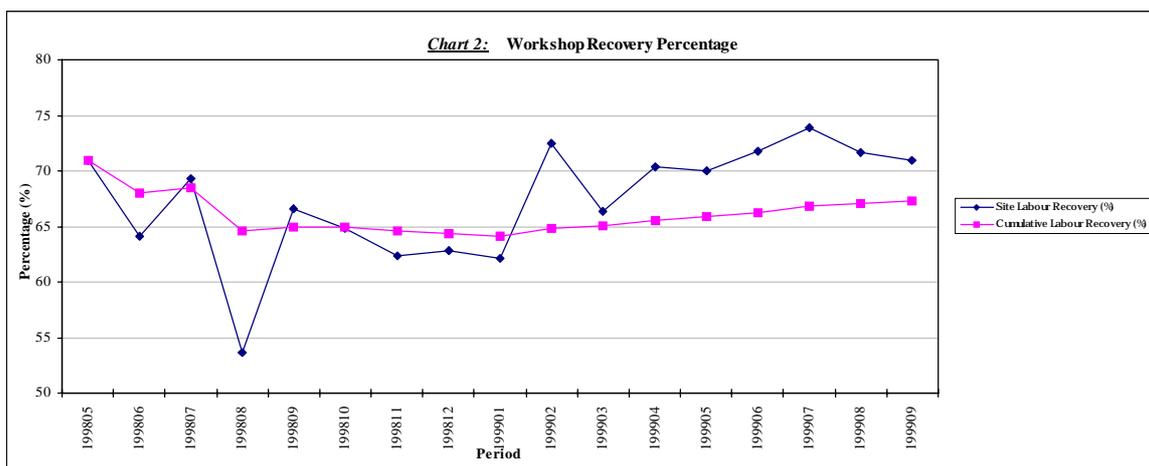


TABLE 6: SITE MANNING LEVELS (WORKSHOP PLUS SERVICE UNIT)

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Equip Work Hours	7713.6	9317	7181.5	7297	8649.5	7771	7656	9168.2	7649	7112	7299.3	6390.5	8148
Combined WS & SU Hrs	6190.5	8114	6705	6517	7916	6321	6843	8402	6325	6360	7955	6221	7717
Staff Hours	560	560	560	560	780	780	780	780	946	946	869	647	869
TOTAL HOURS	6750.5	8674	7265	7077	8696	7101	7623	9182	7271	7306	8824	6868	8586
Site Unit/Hrs	0.88	0.93	1.01	0.97	1.01	0.91	1.00	1.00	0.95	1.03	1.21	1.07	1.05
Cumulative Unit/Hrs	0.98	0.97	0.97	0.97	0.98	0.97	0.97	0.98	0.97	0.98	0.99	1.00	1.00

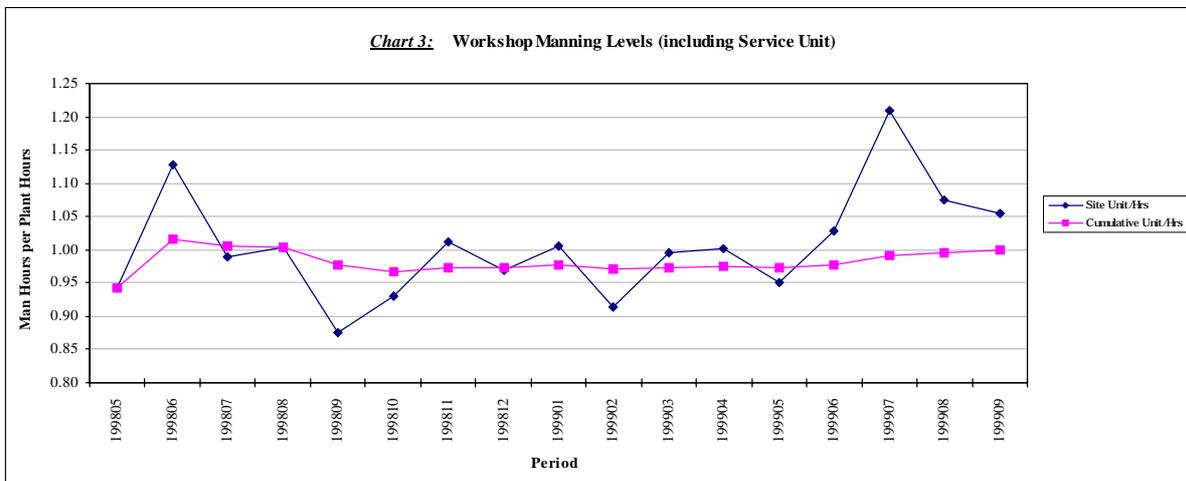


TABLE 7: WORKSHOP CONSUMABLE COST PER HOUR (\$/HR)

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Cost per Period	6920	9184	9352	4997	5867	7325	8271	7368	2895	5095	4025	5100	6670
Site Consumable Cost/Hr	2.20	2.18	2.91	1.58	1.56	2.11	2.40	1.63	0.90	1.51	0.92	1.56	1.67
Cumulative Consumable Cost/Hr	2.67	2.57	2.62	2.50	2.38	2.35	2.36	2.28	2.18	2.13	2.03	2.01	1.98

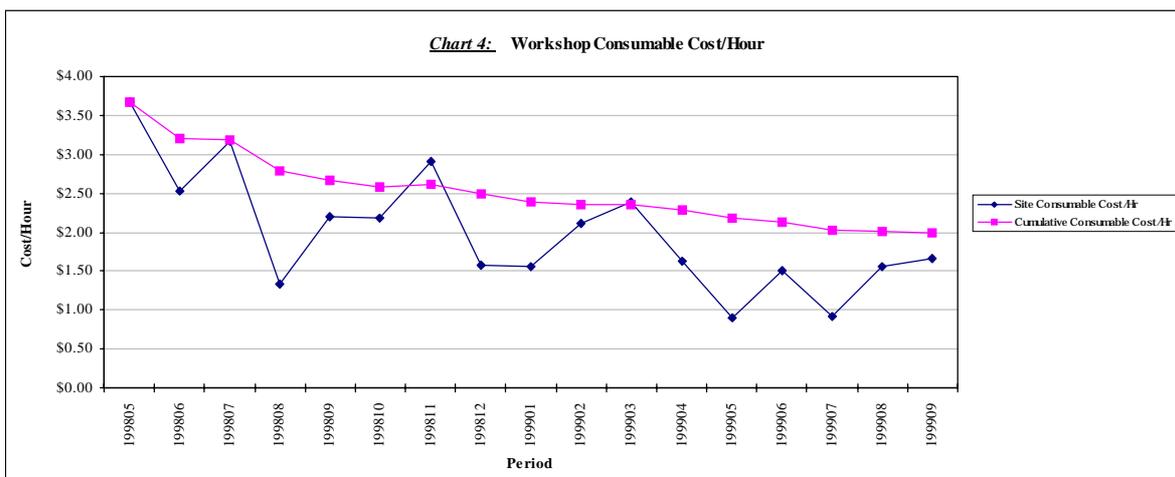


TABLE 8: WORKSHOP TOOLING COST PER HOUR (\$/HR)

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Cost per Period	1531	3278	5249	8269	4264	5488	2782	2993	3014	1106	1893	2568	4114
Site Tool Cost/Hr	0.49	0.78	1.63	2.61	1.14	1.58	0.81	0.66	0.94	0.33	0.43	0.79	1.03
Cumulative Tool Cost/Hr	2.00	1.74	1.73	1.83	1.75	1.73	1.65	1.54	1.50	1.42	1.33	1.30	1.28

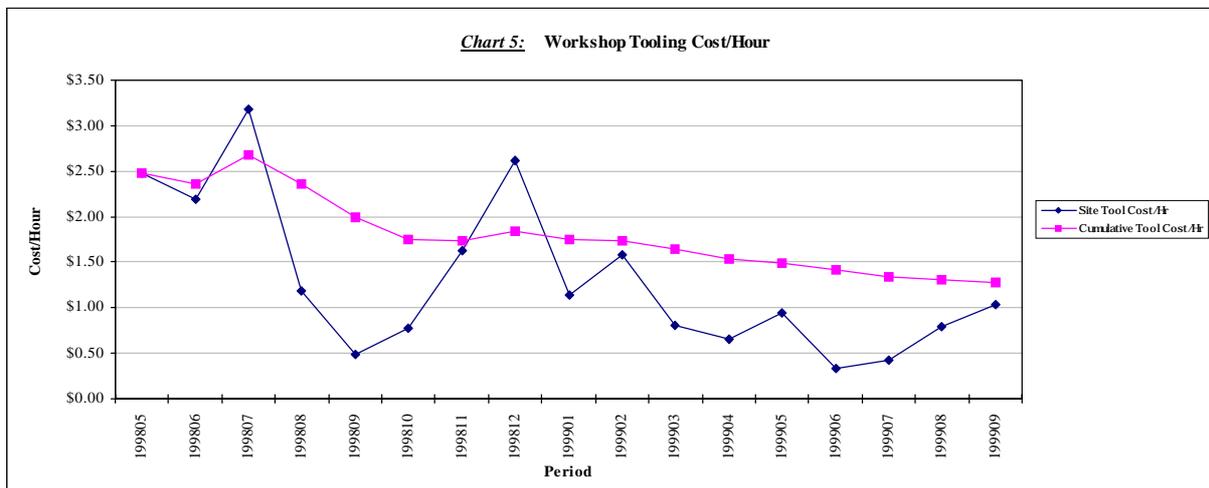


TABLE 9: WORKSHOP PLANT HIRE COST PER HOUR (\$/HR)

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Cost per Period	1045	1217	1174	-912	2852	5091	3274	6540	3270	1088	2096	1985	5279
Plant Hire Cost/Hr	0.33	0.29	0.37	-0.29	0.76	1.46	0.95	1.45	1.02	0.32	0.48	0.61	1.32
Cumulative Plant Hire Cost/Hr	0.56	0.50	0.49	0.39	0.44	0.54	0.58	0.67	0.70	0.67	0.66	0.65	0.70

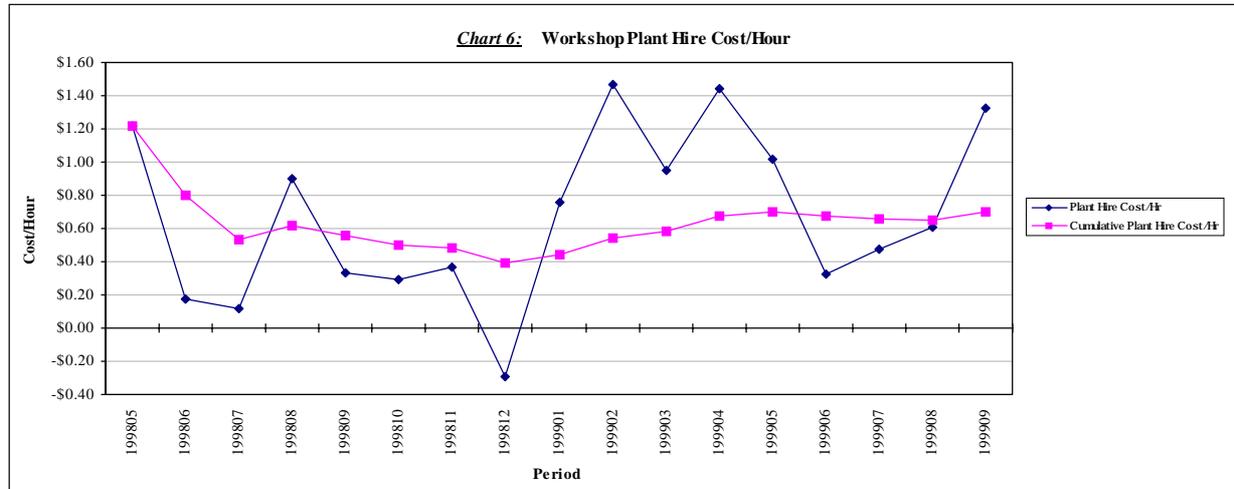


TABLE 10: WORKSHOP INSURANCE COST PER HOUR (\$/HR)

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Cost per Period	0	0	145	0	135	0	1478	450	0	0	0	0	0
Insurance Cost/Hr	0.00	0.00	0.05	0.00	0.04	0.00	0.43	0.10	0.00	0.00	0.00	0.00	0.00
Cumulative Insurance Cost/Hr	0.01	0.01	0.02	0.01	0.02	0.02	0.05	0.06	0.05	0.05	0.05	0.04	0.04

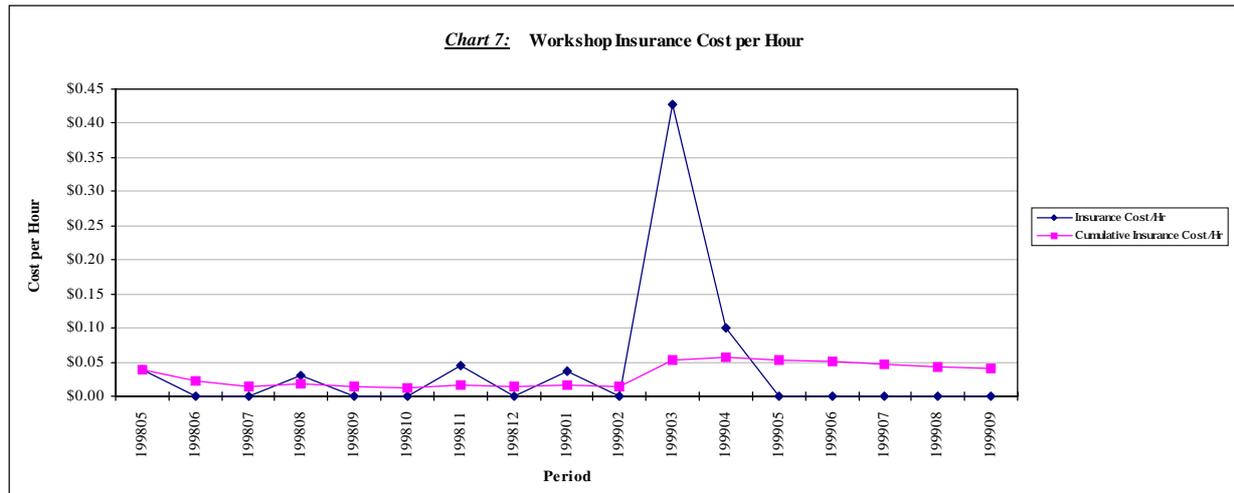


TABLE 11: WORKSHOP WELFARE COST PER HOUR (\$/HR)

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Cost per Period	461	187	342	575	447	344	172	255	215	300	150	48	288
Welfare Cost/Hr	0.15	0.04	0.11	0.18	0.12	0.10	0.05	0.06	0.07	0.09	0.03	0.01	0.07
Cumulative Welfare Cost/Hr	0.10	0.09	0.09	0.10	0.10	0.10	0.10	0.09	0.09	0.09	0.09	0.08	0.08

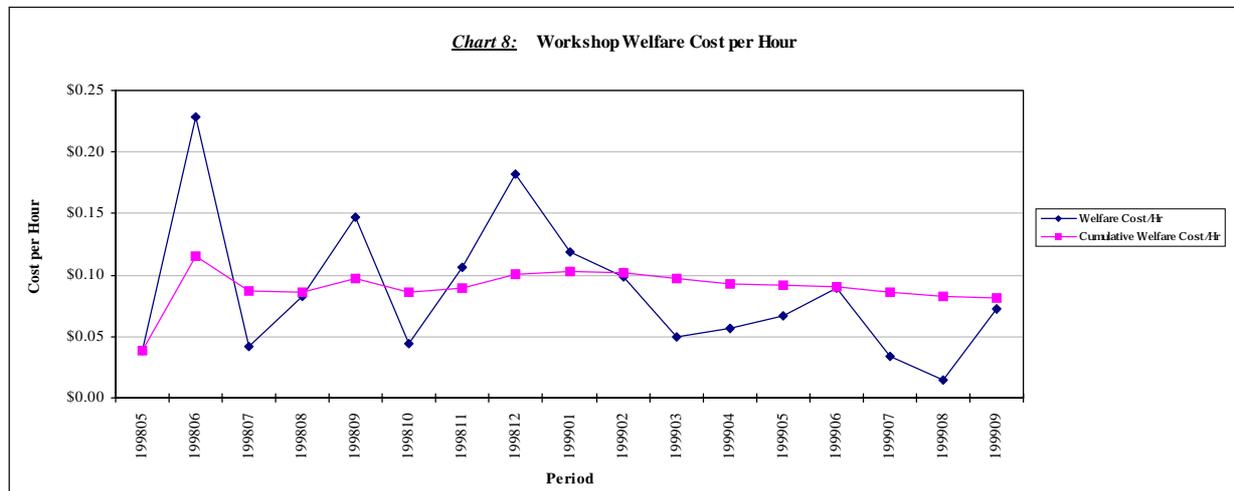


TABLE 12: WORKSHOP SAFETY COST PER HOUR (\$/HR)

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Cost per Period	2303	1269	1888	1306	2219	810	1565	2152	1816	677	971	412	945
Safety Cost/Hr	0.73	0.30	0.59	0.41	0.59	0.23	0.45	0.48	0.57	0.20	0.22	0.13	0.24
Cumulative Safety Cost/Hr	1.78	1.48	1.36	1.24	1.16	1.07	1.01	0.95	0.93	0.88	0.82	0.78	0.75

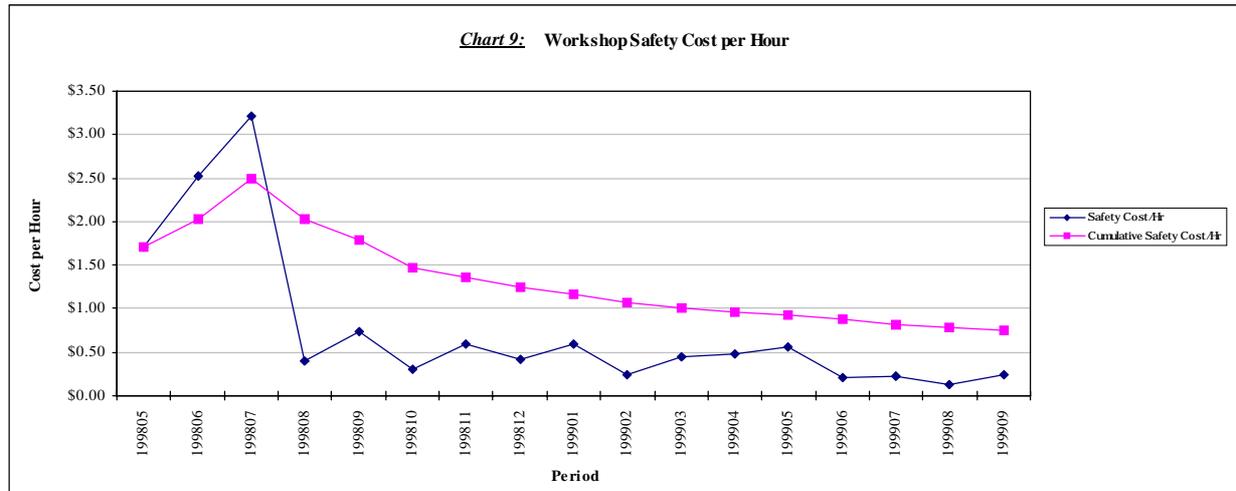


TABLE 13: WORKSHOP COMPUTER COST PER HOUR (\$/HR)

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Cost per Period	0	0	0	0	0	0	0	541	0	0	138	16	5
Computer Cost/Hr	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.12	0.00	0.00	0.03	0.00	0.00
Cumulative Computer Cost/Hr	0.15	0.12	0.10	0.09	0.08	0.07	0.06	0.07	0.06	0.06	0.06	0.05	0.05

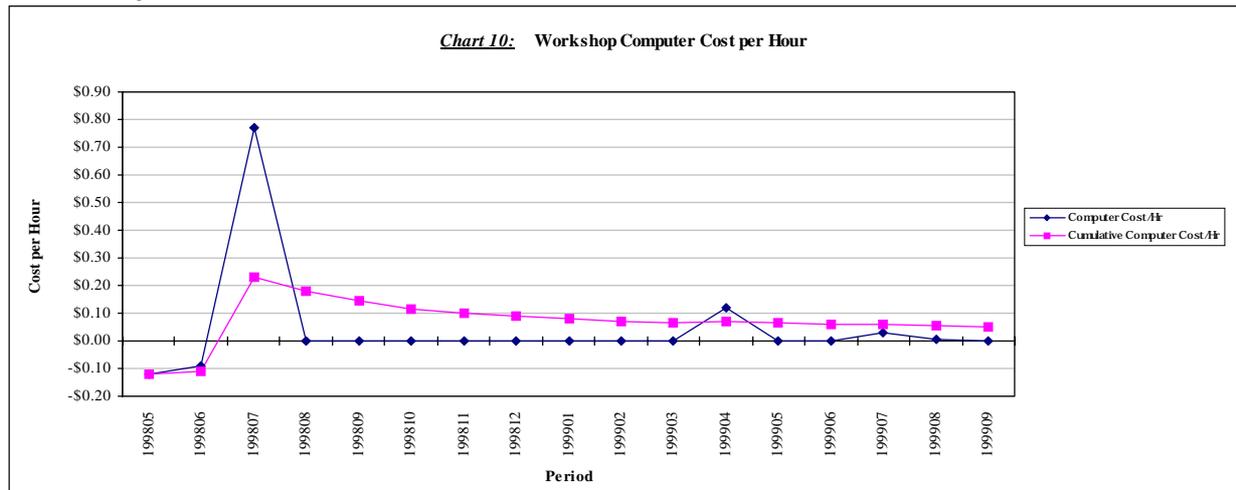


TABLE 14: WORKSHOP STATIONARY COST PER HOUR (\$/HR)

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Cost per Period	316	579	407	194	257	245	173	226	570	67	242	227	445
Stationary Cost/Hr	0.10	0.14	0.13	0.06	0.07	0.07	0.05	0.05	0.18	0.02	0.06	0.07	0.11
Cumulative Stationary Cost/Hr	0.50	0.43	0.39	0.35	0.31	0.29	0.27	0.24	0.24	0.22	0.21	0.20	0.20

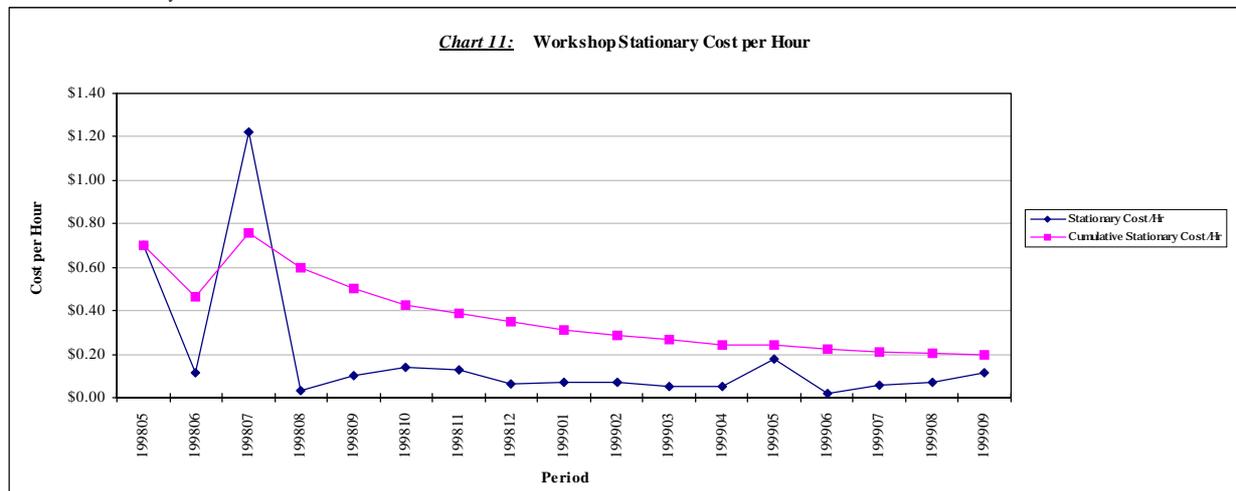
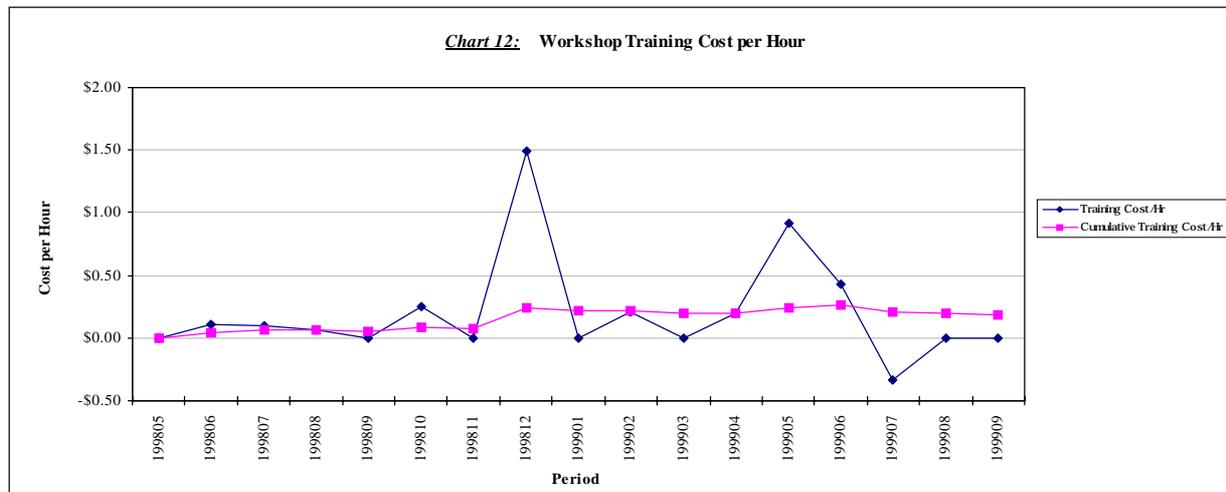


TABLE 15: WORKSHOP TRAINING COST PER HOUR (\$/HR)

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Cost per Period	0	1055	0	4727	0	728	0	891	2943	1455	-1455	0	0
Training Cost/Hr	0.00	0.25	0.00	1.49	0.00	0.21	0.00	0.20	0.92	0.43	-0.33	0.00	0.00
Cumulative Training Cost/Hr	0.05	0.09	0.08	0.25	0.22	0.21	0.20	0.20	0.25	0.26	0.21	0.20	0.19



Monthly Service Unit Cost Analysis

All information gathered for this report is obtained from the Plant Cost Management System (PCM) and has been tailored to reflect the true costs incurred from the Service Unit.

TABLE 16: YARRIE NIMINGARRA SERVICE UNIT COSTS, SEPTEMBER 1999

		Litres	852,795
		Dispensed	
		SU/WS Ratio	0.3707
		(SU Included)	
SU Wages Cost is calculated by multiplying the Total Wages Cost by the WS/SU Ratio			
COSTS	Codes	Value	Cost/Unit
Fuel And Oil	1	\$ —	\$ —
Wages	2	\$ 81,024.53	\$ 0.10
Maintenance (Labour)	9	\$ 140.00	\$ 0.00
Radio Repairs	10	\$ —	\$ —
Radio Repairs (Lab)	11	\$ —	\$ —
Tyres & Tracks (Parts)	12	\$ —	\$ —
Tyres & Tracks (Lab)	13	\$ —	\$ —
G.E.T. (Parts)	14	\$ —	\$ —
G.E.T. (Lab)	15	\$ —	\$ —
Workshop Tools	18	\$ 8,075.00	\$ 0.01
Plant Hire	19	\$ —	\$ —
Vehicle Expenses	20	\$ —	\$ —

Branch Asset Depreciation	22	\$ —	\$ —
Travel Expenses	30	\$ —	\$ —
Accommodation	31	\$ —	\$ —
Consumables	32	\$ 5,682.00	\$ 0.01
Telephone & Fax	33	\$ —	\$ —
Building Maintenance	35	\$ —	\$ —
Hire Charges	37	\$ —	\$ —
Insurance Repairs	39	\$ —	\$ —
Welfare	40	\$ —	\$ —
Safety	42	\$ —	\$ —
Fringe Benefits	46	\$ —	\$ —
Salaries	48	\$ —	\$ —
Advertising	49	\$ —	\$ —
Computer Cost	51	\$ —	\$ —
Stationary	52	\$ —	\$ —
Training	53	\$ —	\$ —
Total Costs		\$ 94,921.53	\$ 0.11
REVENUE			
G.E.T.	86	\$ —	\$ —
Internal Labour Sales	89	\$ 85,280.00	\$ 0.10
Scrap Sales	92	\$ —	\$ —
Sundry Revenue	94	\$ —	\$ —
Total Revenue		\$ 85,280.00	\$ 0.10
Profit/Loss		\$ (9,641.53)	\$ (0.01)

From the information displayed in tables 3 and 16, monthly trends for the Service Unit can be calculated and are displayed as follows—

TABLE 17: SERVICE UNIT DISPENSING COST

	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
SU Dispensing Cost	0.05	0.08	0.09	0.09	0.1	0.08	0.09	0.07	0.09	0.1	0.11	0.13	0.11

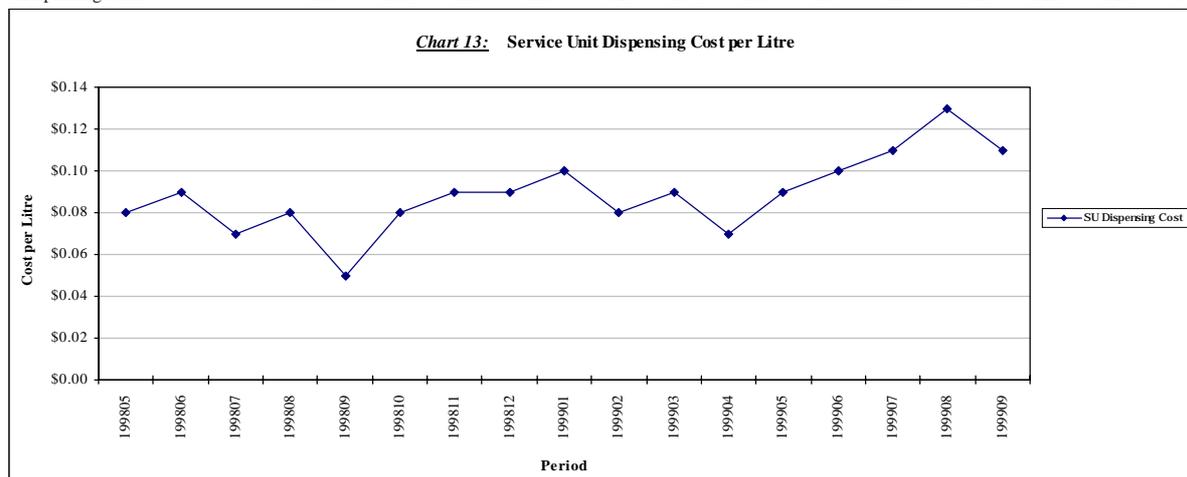
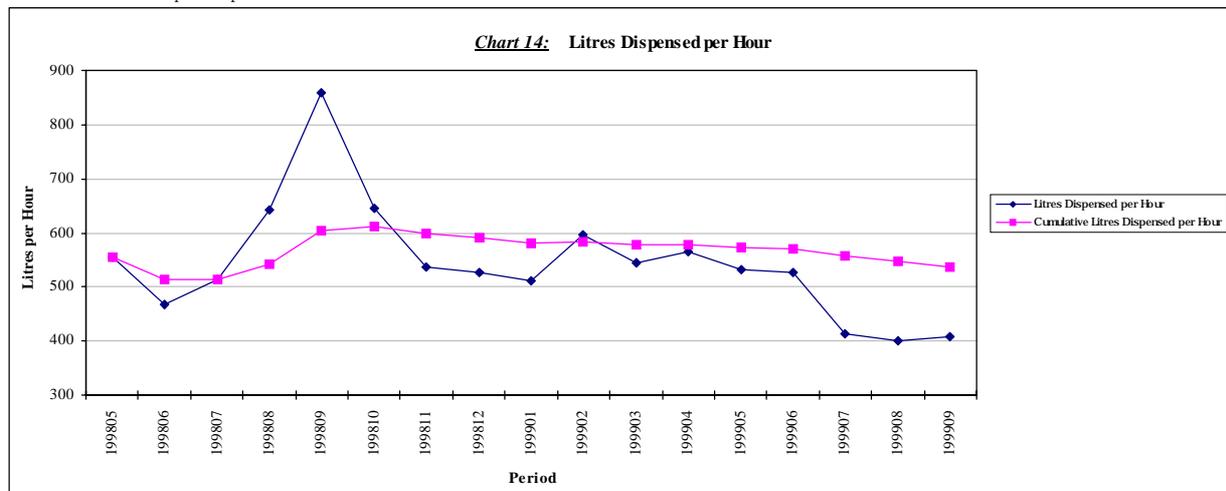


TABLE 18: LITRES DISPENSED PER HOUR (L/HR)

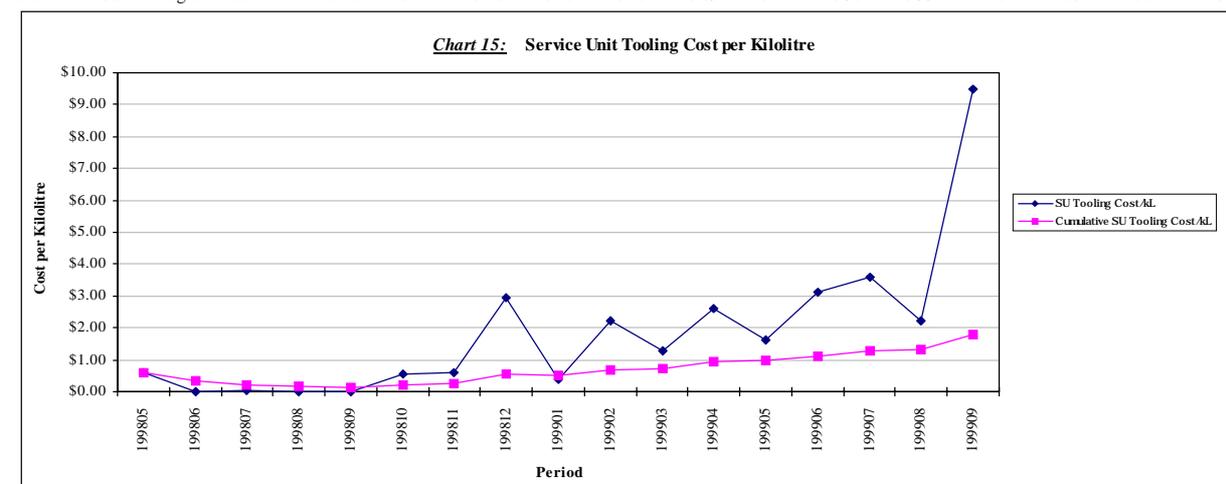
	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Total Litres Dispensed	1264754	1042546	832521	784113	960523	908828	897280	1113471	927071	872901	831156	668536	852795
Total Service Unit Hours	1473.5	1618.5	1553	1485.5	1878.5	1522.5	1645.5	1973	1740	1660	2010	1666	2087
Litres Dispensed per Hour	858	644	536	528	511	597	545	564	533	526	414	401	409
Cumulative Litres Dispensed per Hour	603	611	600	591	581	582	579	577	574	570	557	548	537



It should be noted that the following information is shown in KILOLITRES to compensate for the small unit cost per litre.

TABLE 19: SERVICE UNIT TOOLING COST PER KILOLITRE (\$/KL)

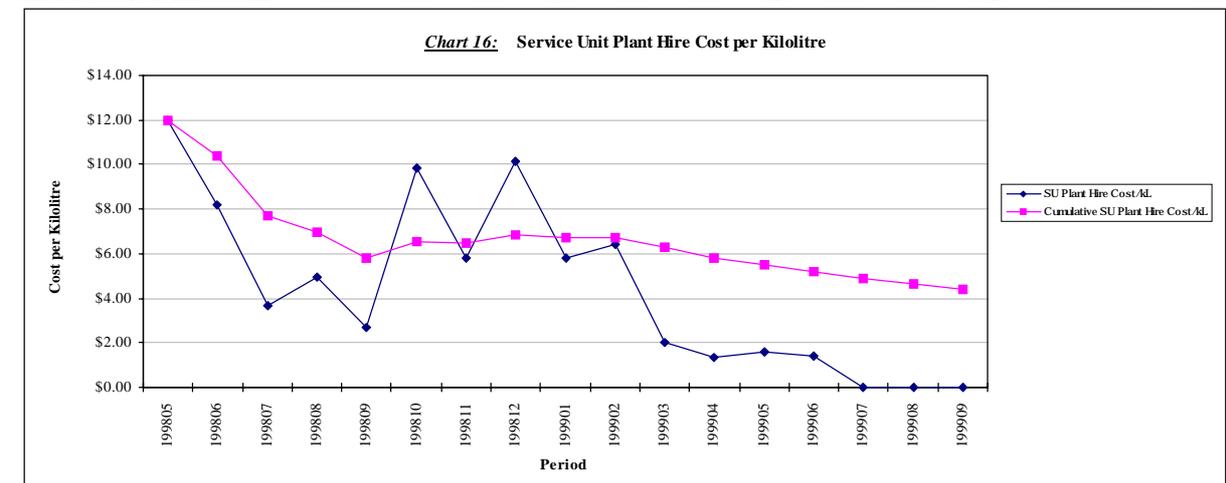
	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Cost per Period	0	599	505	2304	362	2011	1159	2925	1490	2737	2980	1494	8075
SU Tooling Cost/kL	0.00	0.57	0.61	2.94	0.38	2.21	1.29	2.63	1.61	3.14	3.59	2.23	9.47
Cumulative SU Tooling Cost/kL	0.12	0.21	0.26	0.55	0.53	0.69	0.75	0.93	0.99	1.13	1.28	1.32	1.78



It should be noted that the following information is shown in KILOLITRES to compensate for the small unit cost per litre.

TABLE 20: SERVICE UNIT PLANT HIRE PER KILOLITRE (\$/KL)

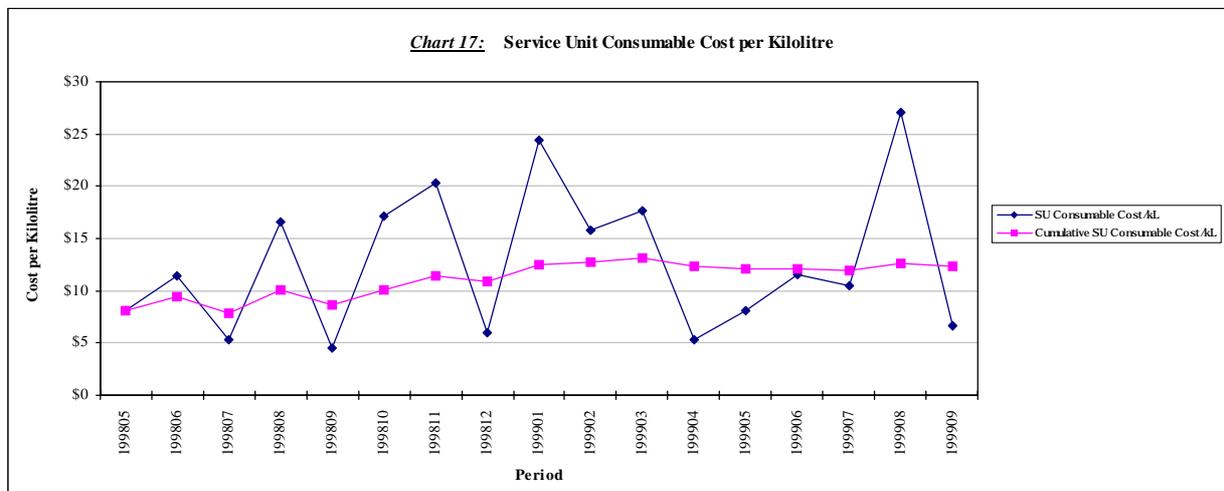
	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
Cost per Period	3365	10279	4846	7967	5572	5839	1820	1529	1490	1209	0	0	0
SU Plant Hire Cost/kL	2.66	9.86	5.82	10.16	5.80	6.42	2.03	1.37	1.61	1.39	0.00	0.00	0.00
Cumulative SU Plant Hire Cost/kL	5.80	6.55	6.46	6.85	6.73	6.70	6.28	5.79	5.47	5.20	4.89	4.66	4.40



It should be noted that the following information is shown in KILOLITRES to compensate for the small unit cost per litre.

TABLE 21: SERVICE UNIT CONSUMABLE COST PER KILOLITRE (\$/KL)

Cost per Period	199809	199810	199811	199812	199901	199902	199903	199904	199905	199906	199907	199908	199909
SU Consumable Cost/kL	5695	17802	16922	4677	23421	14354	15820	5907	7503	10040	8770	18080	5682
Cumulative SU Consumable Cost/kL	4.50	17.08	20.33	5.96	24.38	15.79	17.63	5.31	8.09	11.50	10.55	27.04	6.66
	8.58	10.14	11.44	10.85	12.43	12.76	13.20	12.41	12.08	12.04	11.95	12.65	12.32



I & C FIXING & MAINTENANCE/BLPPU AND THE CMETU COLLECTIVE AGREEMENT 2000.

No. AG 146 of 2000.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Atifate Pty Ltd

T/A I & C Fixing & Maintenance.

No. AG 146 of 2000.

I & C Fixing & Maintenance/BLPPU and the CMETU Collective Agreement 2000.

COMMISSIONER J.F. GREGOR.

19 June 2000.

Order.

HAVING heard Mr N Hodgson on behalf of the Applicant and there being no appearance on behalf of the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the agreement made between the two parties lodged in the Commission on 3 May 2000 entitled I & C Fixing & Maintenance/BLPPU and the CMETU Collective Agreement 2000 and as subsequently amended by the parties, to be registered in terms of the following schedule as an Industrial Agreement.

(Sgd.) J.F. GREGOR,

[L.S.]

Commissioner.

Schedule.

1.—TITLE

This agreement shall be known as the I & C Fixing & Maintenance/BLPPU and the CMETU Collective Agreement 2000.

2.—ARRANGEMENT

Title

CLAUSE NO.

1

Arrangement	2
Parties and Persons Bound	3
Application	4
Relationship to Parent Award	5
Period of Operation	6
Classification Structures & Rates of Pay	7
Industry Standards	8
Sick Leave	9
Negotiation of a Subsequent Agreement	10
Application of Project Agreements	11
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Seniority	13
All In Payments	14
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Training and Related Matters	19
Drug & Alcohol, Safety & Rehabilitation Program	20
Clothing & Safety Footwear	21
Income Protection	22
Accident Pay	23
Union Membership	24
Y2K	25
Signatories to the Agreement	26
Appendix A—Drug & Alcohol, Safety and Rehabilitation	
Appendix B—Site Allowance	

3.—PARTIES AND PERSONS BOUND

This agreement shall be binding on *Atifate Pty Ltd t/a I & C Fixing and Maintenance* (hereinafter referred to as “the company”), the Western Australian Builders’ Labourers, Painters and Plasterers Union of Workers and the Construction Mining Energy Timberyards Sawmills and Woodworkers Union of Australia – WA Branch (hereinafter referred to as “the unions”) and all employees of the company eligible to be members of the unions.

4.—APPLICATION

This agreement shall apply to all employees of the company engaged on work in or in connection with construction, alteration, maintenance, repair or demolition of buildings or other structures of any kind whatsoever.

This agreement shall apply in Western Australia only. There are approximately five employees covered by this agreement.

5.—RELATIONSHIP TO PARENT AWARD

1. This agreement is supplementary to, and shall be read and interpreted wholly in conjunction with, the Building Trades (Construction) Award 1987, Award No. R14 of 1978 (hereinafter referred to as "the award").

2. In the event of any inconsistency between the award and an express provision of this agreement, the terms of this agreement shall prevail to the extent of such inconsistency, unless the express provision of the agreement provides otherwise.

6.—PERIOD OF OPERATION

This agreement shall come into force from the first pay period commencing on or after November 1st 1999 and shall remain in force until the 1st of November, 2002.

7.—CLASSIFICATION STRUCTURE & RATES OF PAY

1. All employees working under this agreement shall be paid according to the wage rates set out below.

2. Wage Rates (per hour at ordinary time)

	Previous EBA Rate Hourly Rate \$	1st November 1999 Hourly Rate \$	1st November 2000 Hourly Rate \$	1st November 2001 Hourly Rate \$
Labourer Group 1	17.15	18.01	18.91	19.86
Labourer Group 2	16.56	17.39	18.26	19.17
Labourer Group 3	16.12	16.93	17.78	18.67
Plaster, Fixer	17.82	18.71	19.65	20.63
Painter, Glazier	17.42	18.29	19.20	20.16
Signwriter	17.80	18.69	19.62	20.63
Carpenter/Roofer	17.93	18.85	19.79	20.78
Bricklayer	17.75	18.63	19.61	20.59
Refractory Bricklayer	20.38	21.40	22.47	25.59
Stonemason	17.93	18.82	19.76	20.75
Rooftiler	17.62	18.50	19.43	20.40
Marker/Setter Out	18.46	19.38	20.35	21.37
Special Class T	18.69	19.62	20.61	21.64

APPRENTICE RATES

	Previous EBA Rate Hourly Rate \$	1st November 1999 Hourly Rate \$	1st November 2000 Hourly Rate \$	1st November 2001 Hourly Rate \$
Plasterer, Fixer				
Year 1	7.48	7.86	8.25	8.66
Year 2 (1/3)	9.81	10.29	10.81	11.35
Year 3 (2/3)	13.37	14.03	14.74	15.47
Year 4 (3/3)	15.69	16.46	17.29	18.15
Painter, Glazier				
Year 1 (.5/3.5)	7.32	7.68	8.06	8.47
Year 2 (1/3), (1.5/3.5)	9.58	10.06	10.56	11.09
Year 3 (2/3), (2.5/3.5)	13.06	13.72	14.40	15.12
Year 4 (3/3), (3.5/3.5)	15.33	16.10	16.90	17.74
Signwriter				
Year 1 (.5/3.5)	7.48	7.85	8.24	8.66
Year 2 (1/3, 1.5/3.5)	9.78	10.28	10.79	11.35
Year 3 (2/3, 2.5/3.5)	13.35	14.02	14.72	15.47
Year 4 (3/3, 3.5/3.5)	15.66	16.45	17.27	18.15
Carpenter/Roofer				
Year 1	7.54	7.92	8.31	8.73
Year 2 (1/3)	9.86	10.37	10.88	11.43
Year 3 (2/3)	13.45	14.14	14.84	15.59
Year 4 (3/3)	15.78	16.59	17.42	18.29
Bricklayer				
Year 1	7.46	7.82	8.24	8.65
Year 2 (1/3)	9.76	10.25	10.79	11.32
Year 3 (2/3)	13.31	13.97	14.71	15.44
Year 4 (3/3)	15.62	16.39	17.26	18.12
Stonemason				
Year 1	7.54	7.92	8.31	8.73
Year 2 (1/3)	9.86	10.37	10.88	11.43
Year 3 (2/3)	13.45	14.14	14.84	15.59
Year 4 (3/3)	15.78	16.59	17.42	18.29
Rooftiler				
6 months	10.04	10.54	11.07	11.62
2nd 6 months	11.04	11.59	12.17	12.78
Year 2	12.90	13.55	14.23	14.94
Year 3	15.14	15.90	16.70	17.54

3. All expense related allowances not specifically mentioned in this agreement will be paid as per the award as varied from time to time.

4. Site allowances relating to particular sites shall be paid in accordance with Appendix B of this Agreement.

5. An additional payment will be made to compensate for the impact of the Goods and Services Tax on the Consumer Price Index. In the circumstance that the CPI limit below is exceeded the appropriate additional payment will be made to the wage rates. The CPI figure for the applicable dates will be the official figure released by the ABS for the preceding year.

Date	CPI Limit	Additional Payment
June 2001	5%	1% (paid 1/9/2001)
June 2001	6%	2% (paid 1/9/2001)
June 2002	5%	1% (paid 1/9/2002)
June 2002	6%	2% (paid 1/9/2002)

8.—INDUSTRY STANDARDS

Redundancy

The company shall increase redundancy contributions on behalf of each employee to the following sums on a weekly basis—

Rate on signing	\$50
Rate as of 1/05/2001	\$60

Superannuation

- (i) The Company will make a payment of \$60 per week per employee or the percentage rate that is prescribed under the Superannuation Guarantee Charge, whichever is the greater.

The Company will advise all employees subject to the Agreement of their right to have payments made to a complying superannuation fund of their choice. The Company is bound by the employee's election. The aforementioned payment will then be made to that fund.

Until each employee nominates the fund of their choice the Company will make payments into the Construction + Building Unions Superannuation Scheme (the "C+BUSS").

In the event that any employee chooses a fund other than the C+BUSS the Company will, within seven days of the employee advising the Company of the fund of their choice, advise the Union in writing of the employee's decision.

In the event that the employee and the Company reach an agreement pursuant to section 49C(2)(d) of the Act to change the complying superannuation fund or scheme the Company will, within seven days of the employee and the Company reaching such an agreement, advise the Union in writing of the agreement. The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by the employee.

- (ii) "Ordinary Time Earnings" (which for the purposes of the Superannuation Guarantee (Administration) Act 1992 will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, industry allowance, trade allowances, shift loading, special rates, qualification allowances (eg. first aid, laser safety officer), multi-storey allowance, site allowance, asbestos eradication allowance, leading hand allowances, in charge of plant allowance and supervisory allowances where applicable. The term includes any regular over-award pay as well as casual rates received and any additional rates and allowances paid for work undertaken during ordinary hours of work, including fares and travel.

9.—SICK LEAVE

For sick leave accrued after the date of signing this agreement the following will apply—

- (a) The Company's employees shall have the option of converting 100% of accrued sick leave entitlement to a cash payment on termination

- (b) If an employee who has been terminated by the Company without exercising the above option is re-engaged within a period of six months, the unpaid balance of sick leave shall continue from the date of re-engagement.
- (c) Where the Company has signed a previous Agreement with the Union that also allowed for the conversion to cash payment on termination for accrued sick leave, that accrued sick leave will be treated as if it accrued under this agreement.
- (d) Sick leave shall accrue, for the purposes of this clause, at the rate of one day at the beginning of each of the first ten calendar months of each year.
- (e) Employees shall have the option of converting to a cash payment all sick leave entitlements over 5 days. Payment shall be made on the last pay period prior to the Christmas closedown.

10.—NEGOTIATION OF A SUBSEQUENT AGREEMENT

The parties agree to commence negotiations for a new collective agreement to succeed this agreement at least 3 months before the nominal expiry date. The parties intend to conclude these negotiations prior to the nominal expiry date. These negotiations shall be conducted on a collective basis between all of the parties with the negotiated outcome being subject to approval of a vote of the employees collectively.

11.—APPLICATION OF PROJECT AGREEMENTS

1. This agreement shall apply to all persons employed in the employer's business and every part thereof throughout Western Australia until **1st November 2002** except where the company commences work on a project where a site agreement to which the union is a party exists that provides for higher rates of pay and conditions.

2. The conditions contained in any such site agreement will take precedence over this agreement for the duration of the project.

12.—FARES AND TRAVELLING ALLOWANCE

In addition to Clause 12A of the award a travel payment shall be made in the form of a daily payment (on days worked) of \$6.15 per day per employee.

13.—SENIORITY

1. The parties agree the continuity of employment is desirable wherever possible, and that where it is not possible, employees will be retrenched in order of seniority.

2. When applying the "first on last off" principle it is agreed subject to the caveat of "all things being equal", it is intended to apply on a Company basis rather than a site by site basis.

3. It is recognised that from time to time instances may arise where the employee's individual skills may be subject to this caveat. Where there is any disagreement as to the application of this the matter will be processed in accordance with Clause 16—Dispute Settlement Procedure.

4. An employee who has been retrenched by the Company shall have absolute preference and priority for re-employment/re-engagement by the Company. Where an employee is re-engaged within a period of six months the employee shall maintain continuity of service and all accrued entitlements with the Company.

14.—ALL IN PAYMENTS

1. All-in payments to employees will not be made. All-in payments are defined as an hourly rate or piece work rate which is meant to cover wages and all allowances, such as annual leave, sick leave, etc., on which tax is being paid using the Prescribed Payments System.

2. It is agreed that where a breach of this clause is discovered, the employer shall continue paying the "all-in" rate as the employees hourly rate, but shall pay all award and other entitlements on top of this amount, back-dated to the commencement of the all-in rate arrangement. The company shall not be entitled to offset any amount in excess of the ordinary hourly rate against any other entitlement in this agreement.

3. This clause shall not be applied to prevent the employer subletting specialised work outside of the normal scope of work which the employer performs. The union shall be notified when specialist sub-contractors are to be engaged.

15.—PYRAMID SUB-CONTRACTING

1. "Pyramid Sub-Contracting" is defined as the practice of a sub-contractor, to whom a sub-contract is originally awarded, sub-letting that contract or part thereof to another sub-contractor.

2. Provided that where a sub-contractor does not have the technical capacity to handle a specialist section of the contract and intends to engage a specialist sub-contractor to perform that work, that section may be re-let to a specialist sub-contractor.

3. Further provided that when a sub-contract is let for labour and material, a labour-only sub-contract may be let by the sub-contractor, but it is unacceptable as a principle for further labour-only sub-contracts to be re-let.

4. A bona fide sub-contractor is generally an employer of labour, save for a machine owner-operator.

5. Where a disagreement arises in relation to the definition or application of the term "Pyramid Sub-Contracting" the parties shall discuss and determine the issue in accordance with the agreement dispute resolution procedure. In any event of a disagreement, the matter shall be negotiated further between the parties or referred to the Western Australian Industrial Relations Commission. Whilst these procedures are undertaken no industrial action shall occur.

16.—DISPUTE SETTLEMENT PROCEDURE

1. Disputes over any work related or industrial matter should be dealt with as close to its source as possible.

2. An employee or the union delegate should initially submit any work related grievance and/or industrial matter to the site foreperson, supervisor or other appropriate site representative of the company.

3. If the matter remains unresolved the union delegate may then submit the matter to the appropriate senior management person.

4. If still not resolved the delegate shall refer the matter to an appropriate official of the union, who shall discuss the matter with the nominated representative of the employer.

5. Whilst the above procedures are being followed work should continue as normal.

6. This procedure is to be followed in good faith and without unreasonable delay by any party.

7. Should the matter remain unresolved it shall be dealt with in one of the following ways as agreed to between the parties—

- referred to the Western Australian Industrial Relations Commission for conciliation and if required arbitration. The Commission's decision will be accepted by all parties subject to legal rights of appeal; or
- referred to a disputes board for determination; or
- referred to a private arbitrator agreed to between the parties, for determination.

8. This dispute settlement procedure does not apply to health and safety issues.

17.—SAFETY DISPUTE RESOLUTION

1. The parties to this agreement are committed to the safe operation of plant and equipment, to the observance of safe working practices, and the provision by the employer and correct use of all personal protective equipment. The company recognises its responsibilities to provide a safe and healthy workplace.

2. In the event of any disagreements on the necessity to carry out any safety measure or modify, reinforce or reinstate any safety device whatsoever, the procedures set out in this clause will be adopted.

3. No person shall dismiss a safety complaint. Any complaint should be referred to the company safety officer or workers' safety representative to be dealt with in accordance with the following procedures—

- (i) Where any employee becomes aware of an unsafe situation, that employee will immediately notify the company safety officer or the workers' safety representative.

- (ii) The company safety officer and the workers' safety representative will take immediate action to have the unsafe situation rectified.
- (iii) Should the company safety officer consider that no safety precautions are necessary, he/she will notify the workers' safety representative accordingly as soon as possible.
- (iv) While there is disagreement on the ruling of the company safety officer, the company safety officer will arrange for the immediate transfer of all employees from the disputed area.
- (v) Should the company safety officer be of the opinion that no action is necessary and the worker's safety representative disagrees, an appropriate inspector from Worksafe/Workcover will be requested to undertake an inspection of the disputed area for the purpose of resolving any such matter.
- (vi) If disagreement still exists the chief inspector or his/her nominee will be called in to assist in the resolution of the dispute.
- (vii) If no agreement can be reached between the parties the matter will be dealt with in accordance with the dispute resolution procedure of this agreement.
- (viii) Whilst the above procedure is being followed there will be no stoppage of work in respect of the matter being considered, except in the area alleged to be unsafe.
- (ix) It is accepted that safety considerations override normal work practices and depending on the degree of potential risk to persons on the job, or the general public, can override normal demarcation practices.

18.—AMENITIES

1. The parties agree that it is the responsibility of the company to ensure that the amenities prescribed by the Award are provided as a minimum. Where, however, that standard is not maintained due to an action or event beyond the control of the company, the union agrees that the company should be allowed reasonable time in which to rectify the problem. If the company acts promptly to rectify the problem, there should be no interruption to work from industrial stoppages, bans and limitations.

2. In all instances, the following procedure shall be observed—

3. A uniformly high standard of amenities and facilities such as ablution blocks, change rooms, crib sheds, etc. shall be provided.

4. All Sheds shall be weatherproof and soundly constructed to an approved standard with sufficient windows and doors, adequate ventilation and lighting. They must have a floor above ground level and be lined on ceilings and walls.

5. Mess Shed/s fitted with fly screens are provided for exclusive use of workers and not for the storage of employers' equipment, tools and materials.

6. Shed/s shall provide not less than 0.75 square metres of floor space per person employed at any one time, provided that the area be not less than 4.65 square metres. Fixtures, other than tables and chairs, shall not be included when calculating floor space.

7. Where 5 or more persons are employed at one time, the floor area shall not be less than 9 square metres.

8. Adequate facilities are to be provided for warmth and for drying clothes eg. strip heaters.

9. Provided that 20 or more persons are employed on the site at any one time, the employer shall provide a separate shed or sheds for messing, which shall be of such dimension as to provide not less than 0.75 square metres of floor space per person.

10. Where less than 20 persons are employed on site, Regulation 3.20 – Workplace Facilities of the Occupational Safety and Health Regulations 1996 shall apply to provisions of messing and changing facilities.

11. In the changing facilities, separate clothes-hanging facilities for each person employed are to be provided (coat hooks only to be used).

12. In the changing facilities, sufficient seating accommodation for the changing of work apparel is to be provided.

13. In the messing facilities, sufficient tables with fixed washable laminated or vinyl surface, and seating for the taking of meals, are to be provided.

14. Food warming facilities to be supplied, together with a supply of cool, clean water conveniently accessible, as well as boiling water at meal/rest breaks.

15. Receptacle for garbage with bin liner and rat and fly proof is to be supplied in mess area, and emptied regularly.

16. A washable vinyl floor surface in all facilities is to be provided.

17. Shelving is to be supplied in the mess shed for storage (cups, lunch bags, etc).

18. All facilities are to be cleaned and disinfected on a regular basis.

19. All mess sheds shall be supplied with reverse cycle air-conditioning.

20. Toilet blocks shall be soundly constructed and roofed with weatherproof material. The floor of each toilet shall be well-drained and constructed of concrete, bricks and cement, or other approved materials which shall be impervious to water. Every toilet shall be well lighted by natural or artificial light and shall be ventilated. Each toilet shall have a hinged door, capable of being fastened on the inside, lift seats/flaps and toilet paper.

21. Where practicable, toilets to be connected to sewerage before commencement of the job.

22. Toilet/urinal location to be conveniently accessible to employees, but not so close as to cause a nuisance to those persons.

23. Where necessary, portable water seal toilets of an approved standard are to be provided and regularly serviced.

24. Conveniently accessible toilets and urinals are to be distributed every 5th floor on multi-storey constructions.

25. Toilets and urinals are to be washed daily with disinfectant and kept in clean, hygienic condition.

26. Adequate washing facilities, suitably drained, and was basins/troughs are to be supplied with running water.

27. Soap and towels are to be supplied.

28. The following toilet/urinal ratio shall be applied in respect to all employees—

Employees	Toilets	Urinals
1—5	1	Nil
6—10	1	1
11—20	2	2
21—35	3	4
36—50	4	6
51—75	5	7
76—100	6	8

NB. For each additional 20 persons or part thereof up to 200 persons or part thereof up to 200 persons, one additional urinal and one additional toilet is required. For each additional 35 persons or part thereof in excess of 200 persons, one additional urinal and one additional toilet is required. If a slab urinal is provided, each 600mm shall be regarded as one urinal.

19.—TRAINING AND RELATED MATTERS

1. A training allowance of \$13.00 per week per worker shall be paid by the employer to the Union Education and Training Fund. This shall increase to \$14.00 per week on 1 November 2000 and a further increase to \$15.00 per week on 1 November 2001.

2. Subject to all qualifications in this clause, an employee shall, upon application in writing to and with approval of the employer, be granted leave with pay each calendar year pro-rata to attend courses conducted or approved by the NBCITC. The employers approval shall not be unreasonably withheld.

The application for leave shall be given to the employer at least two weeks in advance of the date of commencement of the course.

The time of taking leave shall be arranged so as to minimise any adverse effect on the employer's operations. The onus shall rest with the employer to demonstrate an inability to grant leave where an employee is otherwise entitled.

An employer shall not be liable for any additional expenses associated with an employee's attendance at a course other than payment of ordinary time earnings for such absence.

For the purpose of this clause ordinary time earnings shall be defined as the agreement classification rate.

Leave of absence granted pursuant to this clause shall count as service for all purposes of this agreement.

3. The Company will actively encourage employees to seek formal recognition of their skills (recognition of prior learning), and will allow leave as per (2) above for such purposes including but not limited to securing Tradesmen's Rights Certificates.

20.—DRUG & ALCOHOL, SAFETY & REHABILITATION PROGRAM

The parties are committed to the Drug and Alcohol, Safety and Rehabilitation program as outlined in Appendix A—Drug and Alcohol, Safety and Rehabilitation Program.

21.—CLOTHING AND SAFETY FOOTWEAR

1. The following items will be supplied to each employee by the Company, upon the completion of five working days.

- (a) 1 pair safety boots, to be replaced on a fair wear and tear basis.
- (b) 2 T-shirts with collars, and will be replaced on a fair wear and tear basis.
- (c) 1 bluey jacket for each employee employed during the period 1 April to 31 October. (One issued per year)

2. The Company will also make available to each employee, when requested by them, sun screen lotion and sun brims to fit over safety helmets.

22.—INCOME PROTECTION

The Company agrees to insure employees covered by this Agreement for injury and sickness. The scheme is to be negotiated between the parties

23.—ACCIDENT PAY

1. The Company agrees to pay each employee accident pay where the employee receives an injury for which weekly payments or compensation are payable by or on behalf of the Company pursuant to the provisions of the Workers' Compensation and Rehabilitation Act 1981, as amended.

2. "Accident Pay" means a weekly payment of an amount being the difference between the weekly amount of compensation paid to the employee pursuant to the Workers' Compensation and Rehabilitation Act and the employee's ordinary wage under this Agreement.

3. The Company shall pay accident pay during the incapacity of the employee arising from any one injury for a total of 39 weeks whether the incapacity is in one continuous period or not.

24.—UNION MEMBERSHIP

The employer will encourage, as far as possible, all employees covered by the agreement, to be financial members of the Unions.

25.—Y2K

On the following key dates the Company will issue written records of accrued entitlements to each employee. The accrued entitlements will include annual leave, sick leave, any accruing productivity bonuses, redundancy payments and Superannuation payments and also on each employees anniversary date—

- ❖ 31 December 1999
- ❖ 28 February 2000
- ❖ 31 December 2000
- ❖ 28 February 2001

26.—SIGNATORIES

BLPPU

KEVIN REYNOLDS

Common Seal over name

Date: 26/5/00

CMETU

JOE McDONALD

Common Seal over name

Date: 26/5/00

The Company:

SIGNATURE

Date: 15/5/00

Company

Seal

CHRISTOPHER O'DWYER

PRINT NAME

APPENDIX A—DRUG AND ALCOHOL, SAFETY AND REHABILITATION PROGRAM

1. PRINCIPLE

People dangerously affected by alcohol, and/or drugs are a safety hazard to themselves and all other persons in the workplace.

2. FOCUS

- Site safety and the involvement of the site safety committee
- Peer intervention and support
- Rehabilitation

3. WORKPLACE POLICY

- a) A person who is dangerously affected by drugs or alcohol will not be allowed to work until that person can work in a safe manner.
- b) The decision on a persons ability to work in a safe manner will be made by the safety committee, or on projects with no safety committee, by a body of at least equal numbers of employee/employer representatives.
- c) There will be no payment of lost time to a person unable to work in a safe manner.
- d) If this happens 3 times the worker shall be given a written warning and made aware of the availability of treatment/counselling. If the worker refuses help he/she may be transferred/dismissed the next time he/she is dangerously affected.
- e) For the purposes of disciplinary action a warning shall be effective for a period of 12 months from the date of issue.
- f) A worker having problems with alcohol and or other drugs—
 - Will not be sacked if he/she is willing to get help.
 - Must undertake and continue with the recommended treatment to maintain the protection of this program.
 - Will be entitled to sick leave or leave without pay while attending treatment.

4. IMPLEMENTATION

To assist with the adoption and implementation with this policy the company will—

- a) Clearly state its endorsement of the BTG Drug and Alcohol program and comply with it.
- b) Provide access at an agreed time and venue for a representative of the BTG Drug and Alcohol Program to address a meeting of employees to discuss and endorse the program.
- c) Authorise the attendance of appropriate company personnel eg. Safety delegate/officer, safety committee members, union delegate, consultative committee members(s) at the two hour BTG Drug and Safety in the Workplace training course.

APPENDIX B—SITE ALLOWANCE

1. This agreement is between the parties to this agreement and shall apply to construction work undertaken by principal contractors who are engaged in the commercial/industrial sector of the building industry in the state of Western Australia within a 50km radius of the Perth General Post Office.

2. This agreement provides for a site allowance to be paid to employees engaged on particular building projects, and for such site allowance to be paid in addition to the wage rates and allowances prescribed by the award as well as any industrial or certified agreements made in conjunction with the award which does not prescribe a site allowance.

3. The site allowance payable under this agreement is to be paid at a flat rate per hour for all hours worked to compensate for all special factors/disabilities on the project and in lieu of all award special rates, with the exception of rates relating to the lifting of heavy blocks, cleaning down brickwork and the use of explosive powered tools which will be payable to an employee when he/she encounters that particular disability.

4. Site Allowance Formula

At the commencement of a project the particular site allowance to apply shall be determined in accordance with the following formula—

4.1 Projects Located Within Perth C.B.D. (as defined)

New Work

Project Contractual Value	Site Allowance
Up to \$520,000	NIL
Above \$520,000 to \$2.17 m	\$1.90
Above \$2.17m to \$4.55m	\$2.25
Over \$4.55m	\$2.85

Renovations, Restorations
and/or Refurbishment Work

Project Contractual Value	Site Allowance
Up to \$520,000	NIL
Above \$520,000 to \$2.17m	\$1.70
Above \$2.17m to \$4.55m	\$1.90
Over \$4.55m	\$2.45

4.2 Projects Located Within West Perth (as defined)

New Work

Project Contractual Value	Site Allowance
Up to \$520,000	NIL
Above \$520,000 to \$2.17 m	\$1.70
Above \$2.17m to \$4.55m	\$1.90
Over \$4.55m	\$2.45

Renovations, Restorations
and/or Refurbishment Work

Project Contractual Value	Site Allowance
Up to \$520,000	NIL
Above \$520,000 to \$2.17m	\$1.60
Above \$2.17 m to \$4.55m	\$1.80
Over \$4.55m	\$2.05

The site allowance on projects which are a combination of new and renovation work shall be governed by the majority of work involved. For example, where the majority of work is new work, then the site allowance appropriate to new work shall be paid for all employees on the project.

4.3 Projects within 50 km radius of Perth G.P.O.

but not including the C.B.D. or West Perth (as defined)

Project Contractual Value	Site Allowance
Up to \$1 m	NIL
Above \$1 m to \$2.17 m	\$1.30
Above \$2.17m to 6m	\$1.60
Above \$6m to \$11.98m	\$1.85
Above \$11.98m to \$24.43m	\$2.05
Above \$24.43m to \$60.5m	\$2.35
Over \$60.5m	\$2.55

“C.B.D.”—Central Business District shall mean the area bounded by the Swan River South, Swan River East to Nile Street running into Wittenoom Street, Hill Street to Royal Street, Royal Street to Lord Street, Lord Street to Newcastle Street, along Newcastle Street to the Freeway, the Freeway South to the Perth-Fremantle railway line, along the Perth-Fremantle railway line to Dyer Street, Dyer Street through to

Havelock Street, Havelock Street to Kings Park Road, Kings Park Road to Fraser Avenue, Fraser Avenue projected through to the Swan River.

“West Perth”—shall mean the area contained within the boundaries formed by Thomas Street, Kings Park Road, Havelock Street, Dyer Street and the Perth-Fremantle railway line back to Thomas Street.

Boundary roads: If a road borders between two regions in which site allowances are to be paid as per this agreement, the parties confirm that one side of such a boundary road will be deemed to fall in one region and the other side of the boundary road will be deemed to fall in the other region. For example, the eastern side of Havelock Street will be in the “CBD” and the western side of Havelock Street shall be in “West Perth”.

“Project Contractual Value”—shall be deemed to mean the value of all tendered work which falls under the scope of the principal contractor’s contract.

5. The site/project allowance and project contractual value detailed in this agreement shall be adjusted on 1 October each year by the total C.P.I. movements for Perth during the preceding four quarters ending 30 June and accordingly, the site allowance amounts shall be adjusted up or down to the nearest five cents.

6. Project contractual values shall be subject to review at any renewal of this agreement, but in any event shall not be adjusted by a percentage less than the total CPI movements for Perth during the preceding four quarters ending 30 June. Such adjustment being to the nearest \$10,000.

7. The agreed site allowance once set pursuant to this agreement shall be recorded in a site agreement to which the applicable principal contractor and the Union will be signatories. The level of allowance once nominated at the commencement of the project will continue without change until completion of the project.

8. It is acknowledged that on certain projects a site agreement may be entered into between the principal contractor and the building trades group of unions for that project that may include matters regularly addressed within the industry, such as, but not limited to, the following—

- Disputes Procedures
- Occupational Health and Safety Procedures
- Demarcation Procedures
- First Aid Provisions and On-Site Amenities

and the unions will not unreasonably refuse to continue to discuss such matters if raised by the principal contractor.

9. This agreement does not apply to resource development projects or civil and engineering projects.

10. Where a dispute arises as to the application of the terms of this agreement, if the issue cannot be resolved in discussions between the parties, it is agreed that the matter will be referred to the appropriate industrial tribunal for resolution without recourse to industrial action.

11. It is a term of this agreement that all site allowance agreements entered into prior to this date will be honored by all parties and will continue to apply for the life of the particular project.

12. Where because of a condition of contract the principal contractor is required not to allow for a site allowance, before final application of this agreement, discussions will be held between the parties with a view to resolving any problems that may arise as a result of this situation.

13. Productivity Allowance

In return to increase productivity and/or timely completion of projects it is agreed that a productivity allowance of \$1.00 per hour worked shall be paid to employees engaged upon projects in excess of \$10 million, or such other sum as agreed. The productivity allowance may be accumulated and paid at the end of the project.

14. Structural Frame Allowance

It is agreed that a structural frame allowance of \$1.00 per hour all purpose shall be paid to all employees engaged upon projects (new construction only) which exceed two stories in height or building where the structure exceeds 10 metres in height (excluding spires, flagpoles and the like).

15. Provision of Canteen

It is agreed that canteen accommodation shall be provided where a project exceeds \$35 million in values and where the operation of the canteen is financially self supporting in respect of consumables. Canteen to come into operation when on site manning levels exceed 50 and to cease when manning levels reduce to below 50.

16. Provision of Nurse

It is agreed that a qualified nurse shall be engaged where the forecast long term staffing levels for a project exceed 100 (one hundred) or when actual numbers exceed 100 notwithstanding that forecasts may have been below that level. The nurse shall commence duties when staffing levels reach (fifty) and shall terminate when levels reduce to 50 (fifty). The requirement for a provision of a nurse shall be waived if the project is adjacent to a hospital with a public emergency department.

17. This agreement shall only apply to building contracts entered into on or tendered for on or after 1 January 1999.

18. Application to Apprentices

The rates prescribed in this agreement shall apply to all apprentices commencing employment after 31 December 1997 in the same proportion as the percentage of a tradesperson's wage rate as prescribed by the appropriate award or Enterprise Bargaining Agreement, being

1st year	42%
2nd year	55%
3rd year	75%
4th year	88%

**LOWER GREAT SOUTHERN HEALTH SERVICE
BOARD (ENGINEERING DEPARTMENT)
ENTERPRISE BARGAINING AGREEMENT 1999.**

No. AG 129 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Lower Great Southern Health Service Board
and

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

AG 129 of 2000.

Lower Great Southern Health Service Board (Engineering
Department) Enterprise Bargaining Agreement 1999.

COMMISSIONER S J KENNER.

26 June 2000.

Order.

HAVING heard Ms D Cuthbert on behalf of the applicant and Ms J Harrison on behalf of the respondent, Mr G Sturman on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch, Ms T Greer on behalf of the Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers and Mr J Fiala on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

- (1) THAT the Lower Great Southern Health Service Board (Engineering Department) Enterprise Bargaining Agreement 1999 as filed in the Commission on 10 May 2000 in the terms of the following schedule be and is hereby registered as an industrial agreement.

- (2) THAT the Albany Health Service (Engineering) Department) Enterprise Bargaining Agreement 1998 No. AG 47 of 1998 be and is hereby cancelled.

(Sgd.) S. J. KENNER,

Commissioner.

[L.S.]

1.—TITLE

This Agreement shall be known as the Lower Great Southern Health Service Board (Engineering Department) Enterprise Bargaining Agreement, 1999.

2.—ARRANGEMENT

1. Title
2. Arrangement
3. Scope and Parties Bound
4. Relationship to Parent Awards
5. Aims and Objectives of the Agreement
6. Joint Consultative Committee
7. Dispute Settlement Procedure
8. Key Performance Indicators
9. Wages
10. Hours of Work
11. Commuted Allowances
12. Terms of the Agreement
13. Agreement not to be used as a Precedent
14. No Extra Claims
15. Framework and Principles for Further Productivity Bargaining
16. Salary Packaging
17. Signatories to the Agreement
 - Schedule A—Rates of Pay
 - Schedule B—Commuted Allowances
 - Appendix 1—Past Productivity
 - Appendix 2—Future Productivity

3.—SCOPE AND PARTIES BOUND

3.1 This Agreement shall be binding on the Board of Management of the Lower Great Southern Health Service Board and all employees engaged in the Engineering Department of the Lower Great Southern Health Service Board covered by the unions detailed in sub clause 3 of this clause.

3.2 The estimated number of employees bound by this Agreement at the time of registration is 21 employees.

3.3 This Agreement shall be binding on the following unions—

Communication, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch.

Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia.

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers.

Plumbers Gasfitters Employees Union of Australia, WA Branch

Western Australian Builders Labourers, Plasterers and Painters Union of Workers

3.4 The parties to this Agreement shall be the Board of Management of the Lower Great Southern Health Service Board and the Unions listed in subclause (3) of this clause.

3.5 This agreement amends, consolidates and replaces the Albany Health Service (Engineering Department) Enterprise Bargaining Agreement 1998 (AG 47 of 1998).

4.—RELATIONSHIP TO PARENT AWARDS

4.1 This Agreement is to be read in conjunction with the following Awards—

Building Trades (Government) Award

Engineering Trades (Government) Award

Engine Drivers (Government) Award

Miscellaneous Government Conditions and Allowances Award

4.2 Where this Agreement is inconsistent with the provisions of those Awards, the Agreement shall take precedent to the extent of any inconsistencies.

5.—OBJECTIVES, PRINCIPLES AND COMMITMENTS

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

- (a) improve the productivity and efficiency of Lower Great Southern Health Service Board;
- (b) facilitate greater decentralisation and flexibility in negotiating employment conditions and work arrangements at Lower Great Southern Health Service Board;
- (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 for a wage increase to employees based upon the achievement of improved productivity, efficiency and participation in a flexible way of working as part of general workplace reform (including multi skilling in “family of trades”).

5.2 By—

- (a) ensuring that gains achieved through agreed improved productivity and changes in workplace culture are shared by employees, Lower Great Southern Health Service Board and its clients and the Government on behalf of the community;
- (b) ensuring that Lower Great Southern Health Service Board operates in a manner consistent with the principles outlined in Section 7 of the Public Sector Management Act;
- (c) developing and pursuing changes on a co-operative basis; and
- (d) ensuring that Lower Great Southern Health Service Board operates as effectively, efficiently and competitively as possible.

5.3 The Unions specified in clause 3 and the Lower Great Southern Health Service Board, Management and Employees bound by this Agreement are committed to—

- (a) Support and actively contribute to health service continuous quality improvement, including best practice, where best practice—
 - (i) is the best way of doing things;
 - (ii) is a continuous improvement process which involves constantly changing, adapting and integrating related approaches to health service issues;
 - (iii) practices are not fixed and not restricted to an examination of costs, but also include quality and delivery issues;
 - (iv) is outcome as well as simply activity based;
 - (v) provides the processes, structures, rights and obligations which are essential to ensure that the full capacity for innovation 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 participate in multi skilling as outlined in Clause 5.1 (e); and
 - (vii) are to be based on the following principles—
 - customer/patient focus
 - management commitment
 - employee participation
 - leadership
 - information analysis
 - policies and plans
 - appropriate standards
 - hospital/health service performance
 - cost effectiveness
 - working smarter
- (b) Support the organisation goals of the health service and contribute to the achievement of those goals as active members of the health service community.
- (c) Support and actively contribute to the achievement and/or maintenance of ACHS Accreditation.

- (d) Actively contribute to the achievement of health service budgets.
- (e) Assist with achieving Health Department waiting list priorities and day surgery targets.
- (f) Co-operate with the development and implementation of strategies to achieve length of stay targets.
- (g) Participate in a multidisciplinary approach to patient care.
- (h) The principles of public sector administration, in particular to the principles contained in Sections 7., 8. and 9. of the Public Sector Management Act 1994.
- (i) It is agreed that the implementation of Workplace Reform initiatives will complement the flexible way of working that is fundamental to this agreement and that both the employer and the employees will participate in any Workplace Reforms that are agreed.

In addition, Lower Great Southern Health Service Board is committed to facilitating and encouraging the participation and commitment of employees.

6.—JOINT CONSULTATIVE COMMITTEE (JCC)

The management of the Lower Great Southern Health Service Board is committed to consultation with employees in relation to decisions affecting employees, their work and working environment and to the improvement of communications, information sharing and consultation within the workplace.

To facilitate this consultation a Joint Consultative Committee will be established to—

- a. To provide a forum for management to consult with employees on issues affecting them;
- b. To provide a forum for employees to raise issues and matters of concern for management consideration;
- c. To improve management/employee relations so that the needs of the customers, management and employees are satisfied in a cost effective manner;
- d. To increase employee contributions in the decision making process particularly in the areas of job design, skill information, training and the work environment.
- e. To deal with issues arising from the implementation of this Agreement.

Details of the composition and operation of the Joint Consultative Committee will be agreed between the parties within one month of the Registration of this Agreement.

7.—DISPUTE AVOIDANCE AND SETTLEMENT PROCEDURES

7.1 The objective of this Clause is to provide a set of procedures for dealing with any questions, disputes or difficulties arising under this Agreement and for dealing with any questions, dispute or difficulty between the parties during negotiations for amendments to this Agreement.

7.2 Subject to the Public Sector Management Act 1994, in the event of any question, dispute or difficulty between the parties as to the application of Government policy and the Wage Principles and/or their effect upon this Agreement, the Health Department and/or the Department of Productivity and Labour Relations (DOPLAR) may provide advice to Lower Great Southern Health Service Board in an attempt to resolve the matter.

7.3 Subject to the Public Sector Management Act 1994, in the event of any question, dispute or difficulty arising under this Agreement, the following procedures shall apply, provided that nothing in these procedures shall prevent the Union to which the Employee involved belongs from intervening to assist in the process—

- (a) The matter is to be discussed between the employee and his immediate supervisor.
- (b) If the matter is unresolved the matter is to be discussed between the Union employee representative and the employer representative and an attempt made to resolve the matter;
- (c) If the matter is unable to be resolved through discussions between the Union employee representative and the Lower Great Southern Health Service Board

representative, the matter is to be discussed between the employee representative and the General Manager of the Lower Great Southern Health Service Board 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;

- (d) The parties may individually or collectively seek advice from any appropriate organisation or person in an attempt to resolve the matter;
- (e) If the matter is not resolved within five working days of the date of notification in (b) hereof, either party may notify the Union Office, or the General Manager of the Lower Great Southern Health Service Board (or his/her nominee) of the existence of a dispute or disagreement;
- (f) The Union Office and the General Manager of the Lower Great Southern Health Service Board (or his/her nominee) shall confer on the matters notified by the parties within five working days and—
 - (i) where there is agreement on the matters in dispute the parties shall be advised within two working days;
 - (ii) where there is disagreement on any matter it may be submitted to the Western Australian Industrial Relation Commission.

7.4 Where any matter is referred to the Western Australian Industrial Relations Commission and the matter is not resolved by conciliation, then the matter remaining in dispute may be resolved by arbitration in accordance with the provisions of the Industrial Relations Act 1979 and the State Wage Principles.

8.—KEY PERFORMANCE INDICATORS

The parties have agreed to the following continuous quality improvement initiatives and productivity measurement & monitoring program—

- 8.1 The parties have agreed that the measurement and monitoring of productivity improvements is important because it provides feedback to the parties on performance.
- 8.2 The parties have agreed that the Engineering Department employees will develop a proactive, involved and whole of job approach to all tasks undertaken.
- 8.3 The parties have developed the following key performance indicators, which are designed to enable the monitoring of performance in order to show real and demonstrable improvements in efficiency, effectiveness and flexibility—
 - 1. % of requisitioned tasks completed the same day
 - 2. number of days to complete 80% of requisition tasks
 - 3. % of time spent on
 - (i) breakdown repair
 - (ii) Planned maintenance
 - (iii) Project or new work

The key performance indicators listed above will be monitored and measured through regular review and recording at workshop meetings. The parties agree that the Key Performance Indicators identified are valid representative measures of performance which will be used in assessing the overall performance of the Lower Great Southern Health Service Workshop and the achievement of various specific objectives and commitments of the parties.

- 8.4 The JCC will ensure implementation of the initiatives identified in Appendix 2 immediately following the approval of this Agreement.

9.—WAGES

9.1 The wage rates prior to the registration of this Agreement are shown in Column 1 of Schedule A.

9.2 From the date of registration, wages will increase by 3.0% to the rate shown in Column 2 of Schedule A in recognition of the implementation of the initiatives listed in Appendix 1.

9.3 A second wage increase of 3.0 % will be paid twelve months after that date. The rates payable under this sub clause are shown in Column 3 of Schedule A.

9.4 Apprentices employed by the Lower Great Southern Health Service Board will be paid the percentage specified in the relevant Award of either the C 10 Engineering Trade or the C4 Building Trade rate payable under this Agreement.

10.—HOURS OF WORK

Staff employed under the Building Trades (Government) Award and the Engineering Trades (Government) Award.

10.1 Standard hours

It is agreed that the development of flexible working hours will take into consideration customer needs, business efficiency and where practicable, the preference of employees, subject to the provisions of this clause.

10.2 Consultation

In determining any variation in hours, the Health Service will consult with the Employee.

10.3 Hours of Work

(a) The ordinary hours of work will be 76 hours per fortnight with the actual hours of work being 80 hours per fortnight, 8 hours per day, with 0.4 hours each day accruing as an entitlement to take the twentieth day in each cycle as a rostered day off;

(b) The flexibility to vary ordinary hours to a minimum of 4 hours and a maximum of 12 hours, exclusive of meal breaks, on any given day is available to meet operational requirements and individual employee needs. This provision will operate on a mutual agreement basis as per the provisions of sub clause 10.2 and 10.5.

(c) When ordinary hours are varied as per the provisions of sub clauses 10.2 and 10.5 so that work starts after 12 noon on any day then it is agreed that a loading of 15% of ordinary hours of pay will be paid for that entire shift.

10.4 Span of Hours

Ordinary hours may be worked in the span from 6.00 am to 6.00 pm Monday to Friday.

10.5 Starting and Finishing Times

Starting and finishing times will be flexible and responsive to customer needs and other operational requirements as determined by the Health Service.

However the normal start and finish times shall be 7.30 am and 4.00 pm unless otherwise mutually agreed.

10.6 Meal Breaks

(a) Ordinary hours of service will be consecutive except for an unpaid meal break of not less than 30 minutes and not more than one hour.

(b) Subject to (c), the time and length of a meal break may be altered by the Health Service to meet operational requirements.

(c) The Employee will not be required to work for more than 6 hours without a meal break, except in an emergency situation, when the Employee will take a meal break as soon as is possible after the emergency situation.

10.7 Hours Worked in Excess of Ordinary Hours

(a) Where the employer requires the employee to work hours in excess of the actual hours described in sub clause (3)(a) of this clause or outside of the span of hours described in sub clause (4) of this clause payment will be at over time rates. Overtime may be taken as either paid overtime or time off in lieu at overtime rates as agreed between the parties prior to the overtime being worked.

(b) Where the additional hours as described in subclause 10.7 (a) are worked to meet the needs of the employee the hours worked will be credited as ordinary hours worked to be taken as time off in lieu at a time agreed between the parties prior to the additional hours being worked.

Staff employed under the Engine Drivers Award (Hospital Plant Operators)

10.8 Accrued Days Off may be paid out by agreement between the parties.

11.—COMMUTED ALLOWANCES

11.1 Except where specifically excluded in this clause all allowances are replaced by a single commuted allowance for each trade detailed in Schedule B. Column 4 of Schedule B represents the estimated value of allowances prior to the commencement of this Agreement, Column 5 is the rate payable from the date of registration of this Agreement and Column 6 is the rate payable in conjunction with the payment of the wage increase detailed in Clause 9.3. This allowance will be paid on a fortnightly basis including during periods of leave.

11.2 The commuted allowance for Hospital Plant Operators does not include annual leave loading which will be dealt with as per the Award.

11.3 The commuted allowance referred to above does not include payments for leading hand allowance and licence allowances paid to individual specified employees.

11.4 The provisions of this clause do not apply to apprentices.

12.—TERM OF THE AGREEMENT

12.1 The term of this Agreement will be 24 months from the date of registration.

12.2 Negotiations for a new agreement will commence not later than six months prior to the expiry of this agreement.

13.—AGREEMENT NOT TO BE USED AS A PRECEDENT

This Agreement stands alone and will not be used by any of the parties as a precedent for Agreements elsewhere.

14.—NO EXTRA CLAIMS

It is a condition of this Agreement that the parties will not make any further claims with respect to wages and conditions during the term of the Agreement unless they are consistent with the Wages fixing Principles of the WA Industrial Relations Commission.

15.—FRAMEWORK AND PRINCIPLES FOR FURTHER PRODUCTIVITY BARGAINING

15.1 (a) Following the receipt of a request from the Unions listed in Clause 3 of this Agreement to negotiate an amendment to this Agreement with Lower Great Southern Health Service Board, a representative from Lower Great Southern Health Service Board will meet with a representative from the unions 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 Lower Great Southern Health Service Board.

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

- (i) changes in work organisation, job design and working patterns and arrangements;
- (ii) examination of terms and conditions of employment to ensure they are suited to Lower Great Southern Health Service Board'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.

15.2 In negotiating further wage increases in return for productivity improvements, the parties will 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 Lower Great Southern Health Service Board in meeting its agreed and contracted service programs and outcomes. Productivity improvements may be related to work practices or arrangements. They may be things which go to minimise the cost of what is done, to the way things are done, to when they are done, to the quality of what is done or to improve the ability of the provider to meet patient and customer needs. They may or may not require changes from Award conditions.

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

(b) Sharing Gains from Productivity Improvement

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

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 Lower Great Southern Health Service Board 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 Lower Great Southern Health Service Board and the Unions 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 Lower Great Southern Health Service Board can be returned to the employees.

(c) Quantum and Timing of Increases

The aggregate productivity gains negotiated at Lower Great Southern Health Service Board 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.

16.—SALARY PACKAGING

An employee may, by agreement with the employer, enter into a salary packaging arrangement in accordance with Government Health Industry Salary Packaging Arrangements or any similar salary packaging arrangement being offered by the employer.

Salary packaging is an arrangement whereby the entitlements under this agreement, contributing toward the Total

Employment Cost (as defined) of an employee, can be reduced by and substituted with another, or other benefits.

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.

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

- The base salary;
- Other cash allowances, eg annual leave loading,
- Non cash benefits; eg superannuation etc
- Any variable components, eg performance based incentives (where they exist)

Where an employee enters into 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.

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

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

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

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

The cancellation of salary packaging will not cancel or otherwise effect the operation of this Agreement.

An employer will not unreasonably withhold agreement to salary packaging on request from an employee.

17.—SIGNATORIES TO THE AGREEMENT

The common seal of the Lower Great Southern Health Service was affixed by the authority of the Board in the presence of—

.....
(General Manager)

.....
(Witness)
(Date) 212/3/00

On behalf of the Communication, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch.

(Date) 17/4/2000

.....
(Signed)

On behalf of The Construction, Mining, Energy, Timber-yards, Sawmills and Woodworkers Union of Australia, Western Australian Branch

(Date) 18/4/2000

.....
(Signed)

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

(Date) 17/4/2000

.....
(Signed)

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

(Date) 17/4/2000

.....
(Signed)

On behalf of The Plumbers and Gasfitters Union of Australia, WA Branch

(Date) 18/4/2000

CEPU Plumbing Division, WA Branch, PO Box 359 Mouth Hawthorn WA 6916.

SCHEDULE A

RATES OF PAY

	Column 1 Weekly Rate 09/01/99	Column 2 Weekly Rate 1st 3% Increase	Column 3 Weekly Rate* 2nd 3% Increase
Engineering Trades			
C 10	509.48	524.77	540.51
C 9	533.41	549.41	565.89
C 8	557.77	574.51	591.74
C 7	581.58	599.03	617.00
C 6	630.21	649.12	668.59
C 5	654.35	673.98	694.20
Building Trades			
C 4	502.39	517.47	532.99
C 5	526.21	541.99	558.25
C 6	550.03	566.53	583.52
C 7	573.72	590.93	608.66
C 8	597.53	615.46	633.92
C 9	621.35	639.99	659.19
Engine Drivers			
12A	448.90	462.37	476.24
C 11A	468.72	482.79	497.27
C 10	488.66	503.32	518.42
C 9	523.32	539.02	555.19

SCHEDULE B

COMMUTED ALLOWANCES

Engineering Trades

	Column 4	Column 5	Column 6
Fitters			
C 10	\$ 47.59	\$49.02	\$50.49
C 9	\$ 47.91	\$49.35	\$50.83
C 8	\$ 48.24	\$49.69	\$51.18
C 7	\$ 48.56	\$50.02	\$51.52
C 6	\$ 49.22	\$50.70	\$52.22
C 5	\$ 49.55	\$51.04	\$52.57
Electrician			
C 10	\$ 60.79	\$62.61	\$64.49
C 9	\$ 61.11	\$62.94	\$64.83
C 8	\$ 61.44	\$63.28	\$65.18
C 7	\$ 61.76	\$63.61	\$65.52
C 6	\$ 62.42	\$64.29	\$66.22
C 5	\$ 62.75	\$64.63	\$66.57
Building Trades			
Plumbers			
C 4	\$ 70.74	\$72.86	\$75.05
C 5	\$ 71.07	\$73.20	\$75.40
C 6	\$ 71.39	\$73.53	\$75.74
C 7	\$ 71.71	\$73.86	\$76.08
C 8	\$ 72.03	\$74.19	\$76.42
C 9	\$ 72.35	\$74.52	\$76.76
Carpenters			
C 4	\$ 56.49	\$58.18	\$59.93
C 5	\$ 56.82	\$58.52	\$60.28
C 6	\$ 57.14	\$58.85	\$60.62
C 7	\$ 57.46	\$59.18	\$60.96
C 8	\$ 57.78	\$59.51	\$61.30
C 9	\$ 58.10	\$59.84	\$61.64
Painters			
C 4	\$ 54.65	\$56.29	\$57.98
C 5	\$ 54.98	\$56.63	\$58.33
C 6	\$ 55.30	\$56.96	\$58.67
C 7	\$ 55.62	\$57.29	\$59.01
C 8	\$ 55.94	\$57.62	\$59.35
C 9	\$ 56.26	\$57.95	\$59.69

	Column 4	Column 5	Column 6
Engine Drivers			
C 12A	\$ 218.99	\$225.56	\$232.33
C 11A	\$ 218.99	\$225.56	\$232.33
C 10	\$ 218.99	\$225.56	\$232.33
C 9	\$ 218.99	\$225.56	\$232.33

APPENDIX 1

Past Productivity Gains

1. The implementation of the principle of commuted allowances for workshop employees.
2. The introduction of quality improvement systems.
3. Improved performance appraisals.
4. Increased use of pagers by having apprentices on page.
5. Increased use of multiskilling.
6. The Committee will develop a clause formalising existing arrangements for staff availability in accordance with the current practice.
7. Review of planned maintenance system.
8. Increased responsibility for the planning and coordination of projects.
9. Introduction of labour saving measures such as steam trap testing devices.
10. Taking on the painting of Mt. Barker and Denmark Hospitals.
11. Afternoon tea breaks to be traded off for an increase in pay while still allowing refreshment to be taken at workstation if convenient.
12. Annual Leave excess to requirements to be paid out by negotiation between individual employees and the hospital.
13. Annual Leave may be taken in single days.
14. The introduction of improved technology such as computer controlled maintenance systems, portable appliance testing and backflow valve maintenance systems.
15. Commitment to and active participation in optimising energy and other utility usage and costs including reducing usage and costs where possible and practical.
16. Source, locate and order parts and materials required in each individual trade area.
17. Liaise with outside company sales representatives to keep abreast of prices and new equipment.

APPENDIX 2

Future Productivity Improvements

1. Commitment to and active participation in a flexible way of working and workplace reform.
2. The introduction of an electronic bulletin board, to include items such as requests for repairs, requests for new works, stores ordering.
3. Increased use of multi-skilling in family of trades
4. Introduction of a text based paging system
5. Use of local suppliers to get competitive prices for materials
6. Commitment of the employer and the employees to improving lost time injury performance.
7. Planned maintenance schemes for Jerramungup and Bremer Bay.

**MAIN ROADS WESTERN AUSTRALIA
ENTERPRISE AGREEMENT 2000.**

No. PSG AG 1 of 2000.

**WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.**

Industrial Relations Act 1979.

The Commissioner of Main Roads Western Australia
and

Civil Service Association of Western Australia Incorporated
and Others.

No. PSG AG 1 of 2000.

Main Roads Western Australia Enterprise Agreement 2000.
20 June 2000.

Order.

HAVING heard Mr B Ballard as agent for the Applicant and Mr G C Sturman on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch, and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch, and Mr K E Ross on behalf of The Civil Service Association of Western Australia Incorporated, the Construction, Forestry, Mining and Energy Union and The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the agreement made between the parties as lodged in the Commission on the 6th day of June 2000 entitled Main Roads Western Australia Enterprise Agreement 2000 and as subsequently amended by direction of the Commission be registered in the terms of the following Schedule as an industrial agreement and replaces the Main Roads Western Australia 1996 Enterprise Agreement (No. PSG AG 18 of 1996) which is hereby cancelled.

(Sgd.) G.L. FIELDING,

[L.S.]

Senior Commissioner/
Public Service Arbitrator.

Schedule.

1.—TITLE

This agreement shall be known as the "Main Roads Western Australia Enterprise Agreement 2000" and will replace the Main Roads Western Australia 1996 Enterprise Agreement and Common Working Conditions, (No. PSG AG 18 of 1996 and C 60997 of 1996).

2.—ARRANGEMENT

1. Title
2. Arrangement
3. Scope
4. Parties To The Agreement
5. Date And Period Of Operation
6. Objectives And Principles
7. Productivity Improvement Plan
8. Pay Increases
9. No Further Claims
10. Relationship To Awards And Agreements
11. Definitions
12. Consultation
13. Contract Of Employment
14. Remuneration And Classification Structure
15. Salary Packaging
16. Hours Of Work
17. Flexible Work Arrangements
18. Leave Of Absence And Public Holidays

- 19. Allowances
- 20. Special Conditions For Remote Locations
- 21. Meals And Accommodation
- 22. Travel
- 23. Relocation
- 24. Resolving Disputes And Grievances
- 25. Discipline
- 26. Employee Record
- 27. Signatories
- Attachment A—Pay Scales
- Attachment B—Meals And Accommodation Allowance Rates
- Attachment C—Motor Vehicle Allowance Rates
- Attachment D—District Allowance Rates And Boundaries

3.—SCOPE

This Enterprise Agreement shall apply to all employees working in Main Roads who are members or eligible to be members of the Associations/Unions party to this Agreement. At the date of registration of this Agreement the number of employees eligible to be covered by this Agreement was approximately nine hundred (900).

4.—PARTIES TO THE AGREEMENT

The parties to this agreement are—

Employer

- Commissioner of Main Roads

Unions/Associations

- Association of Professional Engineers, Scientists and Managers, Australia
- Australian Workers’ Union
- The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch
- Civil Service Association of Western Australia Incorporated
- The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch
- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch
- The Western Australian Builders’ Labourers, Painters and Plasterers Union of Workers

5.—DATE AND PERIOD OF OPERATION

5.1 The Agreement is to be presented for registration by the appropriate industrial jurisdiction as follows—

Australian Industrial Relations Commission

(Under the terms of Section 170LS of the Workplace Relations Act 1988).

Western Australian Industrial Relations Commission

(Under the terms of Section 41 of the Industrial Relations Act 1979 and the Public Service Arbitrator).

5.2 The Agreement shall operate from the beginning of the first pay period commencing on or after the date of this Agreement’s registration by both the Australian Industrial Relations Commission (under the terms of Section 170LS of the Industrial Relations Act 1988), the Western Australian Industrial Relations Commission (under the terms of Section 41 of the Western Australian Industrial Relations Act 1979), and the Public Service Arbitrator (under the terms of Division Two of the Western Australian Industrial Relations Act 1979).

5.3 (a) This Agreement shall remain in operation for a period of 24 months from the date of registration.

(b) It is agreed that the terms and conditions of this Agreement will continue to apply beyond the expiry date until it is replaced by a new agreement.

5.4 Negotiations between the parties for the formation of a new agreement will commence no later than six (6) months prior to the expiry date of this Agreement.

6.—OBJECTIVES AND PRINCIPLES

6.1 This Agreement seeks to ensure that Main Roads employees have the required skills and competencies to be able to meet the changing role and needs of the organisation in the Best Roads Redefined environment.

6.2 The parties will assess achievements in performance, productivity and efficiency during the term of this Agreement. To achieve this aim, the parties to this Agreement are committed to developing a remuneration and classification system that—

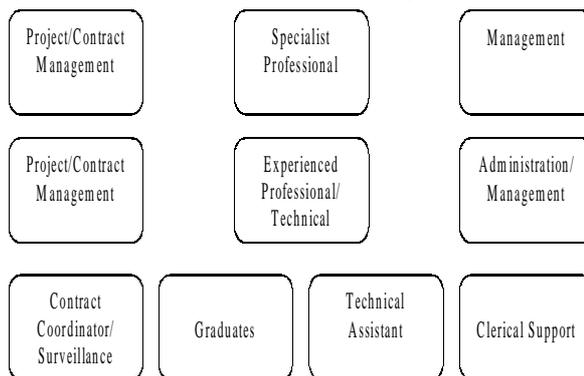
- encourage skills development and provide greater career opportunities
- better align skills development and careers with the changing role of Main Roads
- provide for the job classification and progression through the salary structure to be more competencies based
- provide for ongoing, fair and sustainable remuneration
- encourage and reward employee performance, including through improved performance assessment
- encourage skills retention and attraction through consideration of market rates

6.3 The parties to this Agreement will develop the remuneration and classification system in consultation with each other. Any changes to the current system will be implemented by agreement and with the appropriate variation to the Agreement and/or relevant award.

6.4 In the development of competency standards and any classification system, the parties will consider and take into account national standards and established classification systems to ensure skill and employee mobility across both the public and private sectors. The parties also agree that there will be no loss of salary for any employee as a result of the implementation of any new system.

6.5 To provide an understanding of the skills and competencies required by Main Roads in the Best Roads Redefined environment, the parties to this Agreement have mapped all the differing organisational working categories and skills.

Work Categories Map



The Work Categories Map will be used as a framework guide in—

- determining the organisation’s skills and competencies needs, including the development of individual job competencies
- identifying the likely career streams for Main Roads employees
- developing particular career development and competency progression systems
- developing particular employment conditions and remuneration systems

6.6 Identification and Implementation of Tasks

To achieve a remuneration and classification system that better meets the needs of Main Roads and employees, the parties are committed to the following tasks within the specified timeframe—

	Competency Development	Classification Structure	Recruitment and Selection	Employee Development	Remuneration/ Employee Reward
June 2000	Develop work categories and competencies matrix for organisation based on changing organisational role	Review existing classification structure and consider alternate competency based systems	Review existing recruitment and selection process	Review existing skills/ competencies within the organisation to determine skill gaps	
Dec 2000	Develop individual job competencies	Introduce competency based or revised classification structure	Introduce individual job competencies into role statements	Conduct competency and development needs analysis for individual employees Review succession planning and career development systems	Devise new competency based progression system that rewards performance and encourages competency and skill development
June 2001		If necessary translate employees across into any new competency based classification structure		Ensure training and development systems address individual and organisation competency gaps and needs	Devise rewards system that encourages and rewards high performance
Dec 2001	Review competencies needs of organisation based on continued evolution of the organisations role			Revise competency based performance development and assessment systems	Consider introduction of market based pay system of attract/retain highly skilled employees

6.7 Objectives of the Agreement include—

- recognising the significant work and savings already generated through the restructure;
- ensuring employees remain committed to achieving the outcomes required for the new organisation;
- contributing to the achievement of a new single integrated organisation;
- developing consistent salaries for all employees covered by the Agreement;
- agreement by the parties to review, make recommendations and implement agreed modifications to employment conditions and allowances applying to employees in regional and remote areas (including the way air-conditioning subsidies and remote location allowances are paid),

This is to be done in consultation with employees in remote locations and shall be concluded and implemented by July 1, 2000.

6.8 Immediate improvements and basis for the salary increases in this Agreement are savings achieved through reduced and reallocated staffing levels.

6.9 One of the aims of the Agreement is to ensure that our people are committed to the ongoing reforms necessary for the restructure to deliver benefits required.

6.10 The Agreement will commit employees to the following—

- corporate planning process—completion of business plans
- implementing the planned achievements for the next 12 months as outlined in Main Roads business plan
- develop productivity measures for the next round of agreement
- reducing leave liability by 10% by June 2000
- developing, implementing and adhering to all new integrated policies, strategies and systems
- participation in employee development
- new Main Roads structure
- performance management systems
- diversity management policies
- flexibility in decision making
- risk management framework

7.—PRODUCTIVITY IMPROVEMENT PLAN

Initiative	Target	Outcome	Date to be Achieved
7.1 Good Management			
Main Roads Directions and Priorities	A strategic plan is developed which establishes the corporate direction and goals for Main Roads	Enables organisational purpose Sets corporate goals Establishes performance indicators for the organisation	On Implementation
Directorate Business Plans	Directorate business plans which contain the strategic objectives to be achieved by each Directorate in accordance with the requirements of the Main Roads strategic plan	Directorate objectives are established which are linked to Main Roads priorities and directions	June 30 2000 and 2001
Branch Business Plans	Branch plans are established for each Branch in each Directorate which are linked to the Directorate and Main Roads priorities and directions	The Branch goals are established Each person within each Branch is aware of the outcomes that need to be achieved Facilitated planning of work programs Re-establishes performance indicators for the Branch Assists in the collection of base line performance data	June 30 2000 and 2001
Leave liability	Main Roads leave liability will be reduced by at least 10%	Reduction in the outstanding leave liability held by Main Roads employees Increases the level of leave management within the organisation Increased awareness of both staff and management of the importance of managing leave	June 30 2000 and 2001
Employee Development	Participation in relevant training and development programs	Integrated training and development across Main Roads Emphasises the corporate approach to training	December 2000
External Relations	Co-ordinated approach to external relations to the community, government and other government agencies	Satisfied Minister with the services provided Main Roads Satisfied community Satisfied government agencies who interact with Main Roads	June 2000 and 2001
Diversity Management	Best practice diversity management policies and procedures Training packages relating to skills development for managers and employees	A more diverse workforce actively serving a diverse community Better service to the community of Western Australia A workforce that is representative of the community Improved understanding and tolerance of different cultural groups Improved ability to work and liaise with different cultural groups	December 2000 and 2001

Our People's Performance	Best practice procedures to acknowledge the effort, innovation and achievement by our people within Main Roads	Promotion of the feeling of ownership by employees of the achievements of Main Roads Encouragement for employees to strive to achieve Encouragement for employees to delivery an improved level of service Reinforcement of the importance of "How We Conduct our Business" within Main Roads Skills better aligned with the changing role of Main Roads	December 2000
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7.2 Financial Reform

Establishment of performance measures and the collation of baseline data	Performance measures are developed throughout the organisation Baseline data is collected with reference to those performance measures	Performance of the organisation is a whole, of directorates and branches can be measured Progress of the organisation towards its targets can be monitored The baseline position is established	December 30 2000
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7.3 Work Practices

New Main Roads	Positive approach undertaken by all Main Roads people to work towards a fully integrated organisation Reduced and reallocated staffing levels	Embraces the new role of Main Roads as a manager of the road network Creates corporate identity Facilitates the achievement of all corporate objectives	On implementation Reviewed December 2000
Performance Management for Employees	A performance management system focussed on achieving business outcomes	An effective and efficient performance management system Focuses on the requirement to achieve business outcomes Emphasises the need to delivery high quality services	December 2000
Risk Management	A comprehensive risk management plan will be developed for Main Roads Project and contract managers trained in risk management, project and contract management	Ensure corporate strategic objectives are achieved through effective and efficient processes and well balanced risks versus controls and costs associated with managing risks Improve the risk profile of Main Roads Enhance statutory compliance and reduce the costs and risks associated with non-compliance Enhance risk awareness and add value to management processes Reduce risk likelihood and/or risk impact Protect employees, property, information and clients Increase quality of service Respond to increasing levels of expectation and scrutiny from various other bodies	The plans will contain recommendations with action plans that will be implemented—date to be determined December 2000
Dynamic Resourcing	Revised transfer policy will be introduced	Meet changing organisational requirements Cater for employees personal requirements Provide skilled employees for successor management Enhance employee professional technical and leadership skills	On implementation
Working Arrangements	Review of remote location allowances	Working arrangements that meet changing organisational requirements	June 2000

8.—PAY INCREASES

8.1 A wage increase of 3.5% will be paid from the first pay period on or after the date of registration of the Agreement with the Western Australian Industrial Relations Commission/ Australian Industrial Relations Commission.

8.2 Main Roads employees should also be eligible for a further increase of 1%, subject to productivity improvement plan achievements, with payment to be effective from the first pay period on or after December 31 2000.

8.3 A further increase of up to 1.5%, subject to productivity improvement plan achievements, will apply from a pay period no earlier than 12 months after the date of registration of the Agreement.

8.4 Where agreed targets as detailed in Clause 7 are not attained in full, employees will receive pro rata payment as agreed between the parties.

8.5 Employees will not be disadvantaged where targets are not achieved and fault is not attributable to employees.

9.—NO FURTHER CLAIMS

The parties to this Agreement undertake that for the duration of the Agreement there shall be no further salary or wage increases sought or granted, except for those provided—

- (a) under the terms of this Agreement
- (b) for in National or State Wage Case Decisions

10.—RELATIONSHIP TO AWARDS AND AGREEMENTS

This Agreement shall be read in conjunction with the existing awards and agreements that apply to the parties bound to this Agreement. In the case of any inconsistencies, this Agreement shall have precedence to the extent of the inconsistencies. All parties recognise that the relevant Parent Awards consist of—

Awards of Australian Industrial Commission	<ul style="list-style-type: none"> • Australian Workers Union (Western Australian Public Sector) Award 1992 • Professional Engineers (Main Roads Department) Award 1990
Awards of Western Australian Industrial Commission	<ul style="list-style-type: none"> • Building Trades (Govt) Award 1966 • Catering Employees and Tea Attendants Award (Govt) 1982 • Engineering Trades (Govt) Award 1967 • Government Officers Salaries Allowances and Conditions Award 1989

11.—DEFINITIONS

“Adoption” In relation to a child means a reference to a child who—

- (a) is not the natural child or step-child of the employee or the employee’s spouse;
- (b) is less than five (5) years of age; and
- (c) has not lived continuously with the employee for six (6) months or longer.

“APESMA” means Association of Professional Engineers Scientists and Managers, Australia

“AWU” means Australian Workers Union

“Base location” means the location, depot or office specified to the employee by Main Roads at the time of employment or transfer

“Cadet” means an employee engaged for a cadetship under an agreement that may include a period of service in the employment after the cadetship

“Casual employee” means an employee engaged by the hour

“Commissioner” means Commissioner of Main Roads or the Deputy Commissioner appointed in accordance with Section 7 of the Western Australia Main Roads Act 1930 or as amended at any time

“CSA” means Civil Service Association of Western Australia (Inc)

“Defacto spouse” means a person who lives with the employee as the spouse of the employee on a bona fide domestic basis, although not legally married to that person

“Enterprise Agreement” means Agreement signed by Main Roads and the Unions and Associations and registered with the Australian Industrial Relations Commission and Western Australian Industrial Relations Commission

“Fixed term employee” means an employee who is employed on a full time or part time basis on a contract of service for a specified duration

“Line manager” means person with day to day responsibility for the management of the employee

“Main Roads” means Commissioner of Main Roads or the Commissioner’s delegated authority

“Metropolitan area” means area within a radius of 50 kilometres from Perth City Railway Station

“Part time employee” means an employee engaged for permanent part time employment

“Permanent employee” means an employee employed on an ongoing basis

“Primary care giver” means the employee who is the family or household member with the primary or significant responsibility for the care giving at the time the ill person requires the care and support

“Spouse” means an employee’s husband or wife who lives with the employee, including defacto spouse

“Trades groups” means The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch; The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch; Federated Liquor and Allied Industries Employees Union of Australia, WA Branch, Union of Workers; The Western Australian Builders’ Labourers, Painters and Plasterers Union of Workers

“Union/Association” means Association of Professional Engineers Scientists and Managers, Australia; Civil Service Association of Western Australia (Inc); Australian Workers Union; The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch; The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia—Western Australian Branch; Australian Liquor, Hospitality and Miscellaneous Workers, WA Branch; The Western Australian Builders’ Labourers, Painters and Plasterers Union of Workers

“Work team” means team the employee is assigned to work with from time to time

The following definitions relate to Clause 23.2—Property Allowance

“Agent” means a person carrying on business as an estate agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under that law

“Dependent relative” In relation to an employee means a relative or other person who is solely dependent on the employee for support

“Expenses” In relation to an employee means all costs incurred by the employee in the following areas—

- (a) legal fees in accordance with the Solicitor’s Remuneration Order, 1976 as amended and varied, duly paid to a solicitor or in lieu thereof fees charged by a settlement agent for professional costs incurred in respect of the sale or purchase, the maximum fee to be claimed shall be as set out under item 8 of the above order;
- (b) disbursements duly paid to a solicitor or a settlement agent necessarily incurred in respect of the sale or purchase of the residence;
- (c) real estate agent’s commission in accordance with that fixed by the Real Estate and Business agents Supervisory Board, acting under Section 61 of the Real Estate and Business Agents Act, 1978, duly paid to an agent for services rendered in the course of and incidental to the sale of the property, the maximum fee to be claimed shall be fifty percent (50%) as set out under Items 1 or 2 Sales by Private Treaty

or Items 1 or 2 Sales by Auction of the Maximum Remuneration Notice;

- (d) stamp duty;
 - (e) fees paid to the Registrar of Titles or to the officer performing duties of a like nature and for the same purpose in another State of the Commonwealth;
 - (f) expenses relating to the execution or discharge of a first mortgage;
 - (g) the amount of expenses reasonably incurred by the employee in advertising the residence for private sale.
- “Locality” In relation to an employee means—
- (a) within the metropolitan area, that area within a radius of 50 kilometres from the Perth City Railway Station; and
 - (b) outside the metropolitan area, that area within a radius of 50 kilometres from an employee’s headquarters when they are situated outside of the metropolitan area.

“Property” means a “residence” as defined in this clause, including a block of land purchased for the purpose of erecting a residence thereon to the extent that it represents a normal urban block of land for the particular locality

“Residence” means including any accommodation of a kind commonly known as a flat or a home unit that is, or is intended to be, a separate tenement, including dwelling/house, and the surrounding land, exclusive of any other commercial property, as would represent a normal urban block of land for the particular locality

“Settlement agent” means a person carrying on business as settlement agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under that law

The following definitions relate to Clause 19—Special Conditions for Remote Locations

“Spouse” means an employee’s husband or wife who lives with the employee, including defacto spouse

“Defacto spouse” means a person who lives with the employee as the spouse of the employee on a bona fide domestic basis, although not legally married to that person

“Dependent” In relation to an employee means—

- (a) a spouse; or
- (b) where there is no spouse, a child or any other relative resident within the State who rely on the employee for their main support; who does not receive a district or location allowance of any kind.

“Ducted system” means as referred to in the annual power subsidy for air conditioning refers to one air conditioning system that is ducted throughout the entire house and is controlled from one switch

“Unit” means as referred to in the annual power subsidy for air conditioning refers to an internal control unit

12.—CONSULTATION

The parties are committed to working together to improve the business performance and working environment in Main Roads. Whilst it is acknowledged by the parties that decisions will continue to be made by the employer, which is responsible and accountable to Government by statute for the effective and efficient operation of its business, the parties are committed to effective communication and agree, in particular, that—

Where Main Roads proposes to introduce major changes likely to have significant effects on existing practises and employees, Main Roads shall notify employees affected and the union as early as possible.

Consultation with employees and the union parties to this Agreement on proposed changes to work organisation shall occur before implementation.

Employees will be involved in contributing to the efficiency and effectiveness of their workplace within policies and guidelines.

In the context of this clause consultation shall mean information sharing and discussion on matters related to the

introduction of major change, the effects the changes are likely to have on employees. Main Roads shall give prompt consideration to matters raised by employees and/or the Union in relation to the changes.

13.—CONTRACT OF EMPLOYMENT

13.1 Engagement

Employees may be engaged on a permanent full time, permanent part time, casual or fixed term basis.

(a) Permanent employee

A permanent employee will be engaged on an ongoing basis.

(b) Part time employee

A part time employee is an employee who is engaged in regular and continuing employment for less than an average of 40 hours per week for CSA/APESMA and AWU, and 38 hours per week for Trades. The employee shall not be required to work for a period less than three (3) hours on any single occasion.

(i) Each permanent part-time arrangement shall be confirmed by Main Roads in writing and will include the following specifications—

- (aa) agreed period of the arrangement; and
- (bb) the hours and days to be worked by the employee, include starting and finishing times, which shall hereinafter be referred to as “ordinary working hours”.

(ii) Main Roads shall give an employee one (1) month’s notice of any proposed permanent variation to that employees’ ordinary working hours, provided that Main Roads shall not vary the employees’ total weekly hours of duty without the employee’s prior written consent, copy of which shall be forwarded to the Union.

(iii) In addition to sub-clause 13.1 b(ii), whenever agreement with an employee in writing is reached for a temporary variation to an employee’s ordinary working hours, time worked during the normal business hours as set out in the relevant award is not to be regarded as over time but an extension of the contract hours and should be paid at the normal rate of pay.

(iv) The overtime provisions of the relevant award shall apply to all time worked outside the ordinary working hours prescribed by sub-clause 13.1. b(i) unless an arrangement pursuant to sub-clause 13.1 b(ii) or 13.1 b(iii) is in place.

(v) The rates of pay for a part time employee will be proportionate to the time worked relative to full time employment.

(vi) A part time employee shall be entitled to the same leave and conditions prescribed in this Agreement as for a full time employee proportionate to the hours worked.

(vii) Payment to a part time employee proceeding on annual leave and long service leave will be calculated on a pro-rata basis having regard for any variations to the employee’s ordinary working hours during the accrual period.

(viii) Employees are entitled to the public holidays prescribed in Clause 18.21—Public Holidays of this Agreement without variation of the employee’s fortnight pay provided the holidays occur on a day which is normally worked.

(c) Fixed term employee

A fixed term employee is an employee who is employed on a full time or part time basis on a contract of service for a specified duration.

(i) Employees appointed for a fixed term contract shall be advised in writing of the terms of appointment and such advice shall specify the dates of commencement and termination of employment.

- (ii) Fixed term employment will end on the nominated finish date.
- (iii) Main Roads and the employee can agree to transfer any accrued and pro-rata leave and entitlements where a following fixed term appointment is agreed by Main Roads and the employee starts within seven (7) calendar days.
- (iv) All other conditions for a fixed term employee will be the same as for a permanent employee.
- (v) Main Roads may only employ persons on fixed term contracts in accordance with the following—
 - (aa) to meet peak work load needs: contracts will not exceed six months but may be extended for up to a further six months; or
 - (bb) to provide specialist skills not possessed by Main Roads: contracts will not exceed 12 months but in some circumstances may be extended for up to a further 12 months. Specialist skills does not include the normal range of skills required by Main Roads but are additional skills that Main Roads may require from time to time for short periods but not on a permanent ongoing basis; or
 - (cc) to cover employees on periods of leave either with or without pay for the duration of the leave.

Fixed term contracts are not to be used to engage people if permanent employees with the appropriate skills are available to act in jobs when other employees proceed on leave.

(d) Casual employee

- (i) A casual employee is engaged on an hourly basis—
 - (aa) for a maximum of three (3) months; or
 - (bb) for not less than three (3) hours, unless otherwise agreed between Main Roads and the relevant Union.
- (ii) A casual employee will be entitled to the same conditions of employment as a permanent employee, except—
 - (aa) a casual employee is not entitled to payment for leave and public holidays. They will receive a 20% loading in addition to their ordinary hourly rate in lieu of these provisions. For AWU/Trades Group employees this extra 20% shall be in addition to and calculated on any shift penalties payable; and
 - (bb) either Main Roads or the employee may terminate employment by giving one (1) day's notice or payment of one (1) day's pay.
- (iii) The hourly rate of a casual employee shall be calculated as follows—

<u>CSA/APESMA AND AWU</u>	<u>TRADES</u>
<u>Fortnightly Salary (including loading)</u>	<u>Fortnightly Salary</u>
80	76

(e) Cadets

Main Roads may appoint cadets in areas where specific skills are required in Main Roads which are not readily available. Requirements for work and study periods and conditions that apply are as provided for in the Main Roads Engineering Cadets Regulations 1982.

A sustenance allowance will be paid as per Attachment A

13.2 Probationary Period

- (a) On appointment, permanent employees will serve up to the following probationary periods—

AWU	3 months
CSA/APESMA	6 months
Trades	1 month

Employees appointed from the Public Sector who have completed their periods of service in a satisfactory manner immediately prior to their appointment will not be required to serve a probationary period.
- (b) Main Roads may review the appointment and terminate the services of the employee during the probationary period by giving one (1) week's notice or payment in lieu of notice. The employee may also give one week's notice of termination.
- (c) Main Roads will, within ten days of the end of the probationary period, notify the employee of the intention to—
 - (i) confirm the appointment; or
 - (ii) extend the probationary period for up to six (6) months (to a maximum period of 12 months). Notification will be given as to why the probationary period has been extended including the setting of performance targets to be achieved over the extended probationary period; or
 - (iii) allow the probationary employment to lapse.
- (d) Where Main Roads extends the probationary employment period, the contract of employment may be terminated as set out in Clause 13.2 b)—Probationary Period.

13.3

- (a) Main Roads or the employee will give four (4) weeks written notice of termination.

Notice of termination by Main Roads will be extended to five (5) weeks for employees who are older than 45 years of age and have been employed by Main Roads for not less than two (2) years.

A lesser period of notice may be negotiated between Main Roads and the employee.
- (b) An employee who fails to give the required notice period shall forfeit one weeks pay (or part thereof), which may be withheld from monies due on termination. Main Roads shall pay the employee the equivalent of the required notice period in lieu of the agreed notice period.
- (c) Main Roads may summarily dismiss an employee for gross misconduct committed during the course of or in connection with the performance of the employee's duties in accordance with Clause 25—Discipline of this Agreement.
- (d) Main Roads will grant employees identified as surplus reasonable paid leave, inclusive of travel time, to attend;
 - (i) employment interviews, and
 - (ii) career counselling of a kind approved by Main Roads,

for the purpose of seeking alternative employment.
- (e) Any employee who is 55 years of age or over will be entitled to retire from Main Roads.

Main Roads can require the employee to retire on the grounds of ill health if—

 - (i) he/she is unfit to perform their duties; and
 - (ii) suitable alternative employment is not available.

This will be subject to all relevant legislation and an independent medical assessment arranged and paid for by Main Roads.

13.4 Certificate of Service

On termination of an employee's service Main Roads shall provide a Certificate of Service containing the period of service and the nature of the duties performed by the employee.

13.6 Performance Agreements

All employees covered by this Agreement will develop a Performance Agreement with their manager. The Performance Agreement will directly link the work they do with the direction and objectives of Main Roads.

13.7 Promotions

Recruitment and promotion will be based on merit selection subject to consideration of redeployees and relevant legislation.

13.8 Transfers

- (a) Main Roads can transfer the employee from one position to another. However, in considering a transfer Main Roads will give appropriate consideration to employees needs and circumstances as well as organisational requirements.
- (b) Employees in nominated occupations and positions or equivalent positions may be transferred between different towns or cities in a fair and reasonable manner.
- (c) Employees in the following nominated occupations and positions or equivalent positions may be transferred between different towns or cities in a fair and reasonable manner—
 - Regional Managers, Project/Contract Managers,
 - Contract Co-ordinators, Program Co-ordinators, Engineers
 - Technical Officers
 - Materials Managers
 - Business Services Managers, Roadside Management Officers and Customer Service Managers
 - Planning Officers
 - Environmental Management Officers
 - Planning and Asset Managers, Asset Management Officers
- (d) Where the employer has a requirement for Contract Surveillance Officers to be relocated between regions on projects over twelve (12) months duration, discussions shall take place with the employee and union in meeting such work requirements.

13.9 Voluntary Regression

An employee may request or agree to voluntary regression to a lower classification. An employee will be paid at the highest pay increment of the lower classification from the effective date of their regression.

14.—REMUNERATION AND CLASSIFICATION STRUCTURE

14.1 Payment into Nominated Account

All pay and allowances, via Payroll and Accounts Payable will be paid via Electronic Funds Transfer (EFT) into an account nominated by the employee. The account must be at a bank, building society or credit union approved by the Under Treasurer of the Western Australian State Government or an Accountable Officer. When an employee ceases work the final payment will be paid into the nominated account within two (2) working days of the employee's last day of work.

14.2 Pay Advice

Employees may be notified of their pay details via written or electronic means.

14.3 Overpayments

- (a) Where an overpayment error is identified Main Roads is required to notify the employee of the intention to seek to recover the overpayment.
- (b) If an overpayment is acknowledged by the employee then arrangements for the recovery of the overpayment may be negotiated between Main Roads and the employee in accordance with the following provisions—
 - (i) One-Off Overpayments
Subject to sub-clause a), Main Roads may recover one-off overpayments 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 an overpayment occurred.

- (ii) Cumulative Overpayments

Subject to sub-clause a), cumulative overpayments may be recovered at a rate agreed between Main Roads 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 fortnight, depending on which is the lesser amount per pay period.

- (c) Before any deductions may be made Main Roads must have agreement in writing from the employee.
- (d) In exceptional circumstances, other arrangements for the recovery of overpayments may be agreed between Main Roads and the employee. Main Roads will take into consideration the full circumstances of the individual case.
- (e) If an employee disputes the overpayment, then Main Roads shall provide evidence of the overpayment to the employee. If the overpayment is still disputed the matter should be resolved in accordance with Clause 24.1 -Dispute Resolution.

14.4 Pay and Deductions

- (a) The annual pay applicable to an employee under this Agreement is shown in Attachment A.
- (b) The fortnightly and hourly rates are determined according to the formulae—

$$\text{Fortnightly Rate} = \frac{\text{Annual Rate}}{313} \times \frac{12}{1}$$

AWU, CSA/APESMA

$$\text{Hourly Rate} = \frac{\text{Fortnightly Rate}}{80}$$

Trades

$$\text{Hourly Rate} = \frac{\text{Fortnightly Rate}}{76}$$

- (c) An employee may request regular deductions be made from their pay. This will be subject to authorisation in writing by the employee and subject to Main Roads agreement.

14.5 Entry Level

Employees being appointed to a salaried Level 1 position shall be appointed as follows—

- (a) employees 20 years of age and under shall be appointed to "entry level" as provided for at Attachment A—Pay Rates and progress through the Level 1 range on an annual basis from their date of appointment; and
- (b) employees 21 years of age or over shall be appointed at Level 1 Year 1 as provided for at Attachment A—Pay Rates.

14.6 Specified Callings

- (a) The following positions are specified callings that require a degree qualification and employees appointed to these positions shall be classified in the Level 2/4 pay range as detailed at Attachment A—Pay Rates—
 - Geologists
 - Engineers
 - Landscape Architects
 - Research Officers
 - Librarians
 - Quantity Surveyors
 - Land Surveyors
 - or any professional calling determined by Main Roads
- (b) On appointment or promotion to Level 2/4 under this clause employees who have completed an approved—
 - (i) three year degree qualification relevant to their calling shall commence at the First Year increment;
 - (ii) four year degree qualification relevant to their calling shall commence at the Second Year increment; and

(iii) Masters or PhD qualification relevant to their calling shall commence at the Third Year.

(c) Employees who attain a higher qualification after appointment are not entitled to any advanced progression through the range.

14.7 Annualisation of Allowances

All allowances as provided for in Clause 17 of the Engineering Trades (Government) Award 1967 have been annualised and incorporated into the pay structure with the exception of the following allowances listed below in sub-clause 14.7.1—

14.7.1 Trades Allowance

If the employee is classified in the engineering or building trades work groups (including apprentices), they will be entitled to receive a tool allowance as per the table below. In addition, a licensed electrical employee will be entitled to receive a licence and/or a nominee allowance as per below—

WORK TRADES	WEEKLY RATE ALLOWANCE		
	Tool	Licence	Nominee
Building Trades			
Carpenters/Joiners	\$21.11	N/A	N/A
Painters	\$5.22	N/A	N/A
Plasterers	\$15.40		
Engineering Trades			
Mechanical Tradesperson & Electrician (with tools)	\$11.63	N/A	N/A
Electrician	N/A	\$13.20	\$11.50

15.—SALARY PACKAGING

15.1 Employees may by agreement with Main Roads enter into a salary packaging arrangement.

15.2 Salary packaging is an arrangement whereby the entitlements under the relevant award or agreement, contributing toward the Total Employment Cost (as defined—refer sub-clause 15.3) of an employee, can be reduced by and substituted with another or other benefits.

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

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

- the base salary;
- other cash allowances, eg. annual leave loading, shift allowance (where annualised), commuted overtime allowance (where annualised);
- non-cash benefits, eg. superannuation, motor vehicles etc;
- any fringe benefit tax liabilities currently paid; and
- any variable components, eg. performance based incentives (where they exist).

15.4 Where an employee enters into a salary packaging arrangement they will be required to enter into a separate written agreement with Main Roads that sets out the terms and conditions of the arrangement.

15.5 Where an employee enters into a salary packaging arrangement, the salary rate as specified in Attachment A—Pay Rates to this Agreement will be used as the basis to calculate entitlements in respect of—

- leave loading;
- shift penalty rates;
- overtime rates;
- redundancy payments;
- early retirement; and
- any other salary related entitlements.

15.6 The salary packaging arrangement must be cost neutral in relation to the total cost to Main Roads.

15.7 The salary packaging arrangement must also comply with relevant taxation laws and Main Roads will not be liable for additional tax, penalties or other costs payable or which may become payable by the employee.

15.8 In the event of any increase or additional payments of tax or penalties under the salary packaging arrangement associated with the employment of the employee or the provision

of employer benefits under the salary packaging agreement, such tax, penalties and any other costs shall be borne by the employee.

15.9 In the event of significant increases in fringe benefit tax liability or administrative costs relating to arrangements under this clause, the employee may vary or cancel a salary packaging arrangements.

15.10 Main Roads shall not unreasonably withhold agreement to salary packaging on request from an employee.

15.11 The Dispute Settlement Procedures contained in this Agreement shall be used to resolve any dispute arising from the operations of this clause.

16.—HOURS OF WORK

16.1 Working Hours

- For CSA, APESMA and AWU employees, the ordinary hours of work shall be an average of 40 hours per week (Trades Group employees an average of 38 hours per week), Monday to Friday. Ordinary hours of work are between the hours of 6:00 am and 6:30 pm, up to a maximum of 12 hours per day in accordance with operational requirements as determined by the manager.
- Special work arrangements can be agreed to meet particular work requirements as specified in Clause 16.3—Special Work Arrangements.
- Starting and finishing times will be flexible and responsive to customer needs and other operational requirements as determined by the manager in consultation with the employee.
- Employees shall be entitled to an unpaid meal break which shall not be less than 30 minutes. The meal break will generally be required after having worked five (5) hours but the employee shall not be required to work more than six (6) hours without taking a meal break, provided that this period may be extended in the case of an emergency situation, in which case an employee will take a meal break as soon as possible.

Line managers and employees may determine specific working hours to meet work team and individual requirements.

- Minimum break between days is ten (10) hours but may be reduced to eight (8) hours in special circumstances or an emergency subject to adequate health and safety provisions (if the break includes normal work hours, these are paid at normal rates).
- Maximum number of continuous working days is 14 subject to the agreement of employees.

16.2 Overtime, Meal Breaks and Allowances

(a) Payment of Meal Allowance

Where a meal break is provided and an employee did not have time to return home between receiving notice to work overtime and the commencement of the overtime Main Roads will provide a meal or employees will be paid a meal allowance at the breakfast rate provided for in the meal allowance shown in Attachment B.

No meal allowance is paid if—

- the work does not go over a meal break; or
- notice of the overtime is given on the previous work day or before.

(b) Taking of Meal Breaks

A meal break of 30 minutes is to be taken after each six consecutive hours of overtime work and is unpaid.

16.3 Special Work Arrangements

Special work arrangements may be agreed to in the form of work cycles or other arrangements. The following is the format for special work arrangements—

- either Main Roads or the employee may request special work arrangements;
- the full particulars must be explained to all employees affected by the agreement in order to work the special work arrangement;

- (c) if the special work arrangement is agreed to, the arrangement is to be documented as an agreement and Main Roads and all affected employees must sign the agreement;
- (d) the agreement must then be forwarded to the Unions for ratification before commencement unless an emergency situation arises;
- (e) the Unions shall not unreasonably withhold agreement.

16.4 Standard Nine Day Fortnight

The standard nine (9) day fortnight applies to AWU and Trades employees and applies when the normal hours of duty are worked over nine (9) days in a fortnight, excluding Saturday and Sunday. The tenth day is a Rostered Day Off (RDO) and is unpaid.

Where agreement is reached between the employee and the employer to working on what would otherwise be an accrued RDO, the employee is paid normal rates for that day and the RDO is rescheduled.

16.5 Annualised Working Hours

- (a) Annualised hours applies to AWU employees and are available to enable longer hours to be worked in periods where there are peak workload requirements and shorter hours when the workload is lower. The total ordinary hours per year is 2 080 at ordinary rate (an average of 40 hours per week). Annualised hours are available in conjunction with any of the working hour arrangements described in fixed working hours and flexible working hours through consultation between the employees and the Union.
- (b) An employee is paid at the rate of 40 hours per week throughout the year.
- (c) On termination of employment an employee is paid for any accumulated credit hours or Main Roads deducts any money owed for debit hours from the employee's final pay.
- (d) The line manager may agree to clearance of accumulated annualised credit hours under special circumstances where other paid leave entitlements are exhausted. An employee will be required to make up the cleared hours at a later time.

16.6 Shift Work

For all employees required to work shifts the following definitions and allowances shall apply. For AWU and Trades employees allowances will be in accordance with the relevant award.

- Day shift (no allowance payable) starts from 6:00 am up to 12:00 noon;
- Afternoon shift (\$1.00 per hour) starts from 12:00 noon up to 6:30 pm; and
- Night shift (\$3.00 per hour) starts from 6:30 pm up to 6:00 am.

Rosters shall be made available to employees at least five (5) working days prior to commencement of the roster.

A roster may only be altered on account of contingency, which Main Roads could not have reasonably been expected to foresee. In such case the employee shall be notified at least 24 hours before the changed shift commences.

17.—FLEXIBLE WORK ARRANGEMENTS

17.1 Flexible Working Hours

- (a) Flexible working hours can be utilised where it is not necessary for all work team members to commence and complete work at the same time. The working of flexible working hours is to be implemented by agreement between the employee and the employer.
- (b) Employees will work an average of 160 hours per four (4) week period. Employees may accrue flex leave up to a maximum of 40 credit hours and a maximum of eight (8) debit hours.
- (c) Any flex leave must be agreed to by the line manager and taken at a time to suit work requirements.

- (d) The alternative to flexible working hours is standard hours which are—

- * Monday—Friday 8.30am to 5.00pm
- * Lunchbreak 12.00 noon to 12.30pm

17.2 Working From Home

17.2.1 Terms and Conditions

- (a) The employee's home based site will be deemed to be his/her base location headquarters for the purposes of payment of allowances and other arrangements.
- (b) The employee must maintain an accurate record of hours worked, including work carried out at the home based work site. The employee must be contactable during periods in which home based work is carried out and available for communication with the employer.
- (c) The employer will be responsible for the provision and maintenance of Main Roads equipment in a condition that complies with relevant legislation. Suitable alternative arrangements may be agreed and must be documented.

17.2.2 Initiation of and Approval for Home Based Work

- (a) A home based working arrangement will only be entered into on a voluntary basis which may be initiated by the employee. An employee may only initiate a proposal for home based work in respect of—
 - (i) that employee's substantive position, or
 - (ii) a position in which the employee is temporarily performing duties.
- (b) The employer shall provide the unions with an annual report of home based work arrangements under this agreement.
- (c) A home based work arrangement is not a substitute for dependant care.
- (d) The employer agrees to advise the employee of the employee's responsibility to assess the personal implications of commencing home based work with respect to taxation, insurances, leasing or mortgage arrangements.
- (e) The employer shall as far as practicable ensure that home based employees have the same opportunities for career development and training as office based employees.

17.2.3 Job Characteristics not Considered Appropriate for Home Based Work

- (a) Employees performing the duties of a position where the position could be described as having at least one of the following characteristics will not be considered for home based work—
 - (i) the position requires a high degree of supervision or close scrutiny;
 - (ii) the position requires a direct client face-to-face contact on a frequent basis without the option of easy rescheduling;
 - (iii) the position does not lend itself to objective performance monitoring of outcomes;
 - (iv) the position requires the occupant to be a member of a team and that regular direct face-to-face contact on a daily basis with other team members at the office based site is an integral part of the job's responsibilities; or
 - (v) the position has other characteristics which Main Roads has decided are unsuitable for home based work.

17.2.4 Access Arrangements

- (a) Unless urgent access is required to a home based work site, or the home based work employee agrees otherwise, on a case by case basis, the home based employee must be given at least two clear days notice of any persons intention to physically enter to the home based work site.

(b) The purposes for which management may require urgent access during normal business hours to a home based work site are—

- (i) repair of faulty equipment;
- (ii) occupational health and safety purposes;
- (iii) urgent security and audit purposes; and
- (iv) other purposes agreed between the employer and the employee.

(c) The purpose for which non-urgent access may be sought include, but are not limited to—

- (i) routine maintenance of equipment and supplies;
- (ii) assessing and monitoring security arrangements of equipment and documents;
- (iii) routine occupational health and safety assessments;
- (iv) supervision where office based supervision would not be adequate.

The employee's consent shall be obtained as per the requirements of sub-clause a).

(d) Employee will not unreasonably withhold access.

17.2.5 Termination and Renegotiation

(a) A home based working agreement may be—

- (i) altered or discontinued by agreement at the request of the employer or the employee provided that neither party will unreasonably withhold agreement to alter or discontinue the arrangement;
- (ii) terminated by the employer or employee after the period of four weeks notice or a lesser period as agreed.

(b) Written notice must be given where an arrangement is terminated with reasons as to why the arrangement has been terminated.

18.—LEAVE OF ABSENCE AND PUBLIC HOLIDAYS

18.1 Annual Leave

- (a) CSA, APESMA and AWU employees will be entitled to 160 hours of paid annual leave (152 hours for Trades Group employees) after each 12 months of qualifying service.
- (b) Annual leave for CSA, APESMA and AWU employees shall accumulate on the basis of 3.08 hours pay (2.92 hours for Trades Group employees) at the ordinary rate of pay for each completed week of continuous service in the qualifying period.
- (c) All employees' are entitled to pro-rata annual leave for the current year. An employee may clear pro-rata leave during the year as agreed by the line manager.
- (d) By agreement between Main Roads and the employee, and subject to Main Roads operational and customer requirements, accrued annual leave may be taken at half the normal rate of pay and for double the period of time.
- (e) The minimum period of annual leave that may be taken is four (4) hours. Otherwise leave is to be taken at a time mutually convenient to Main Roads and the employee. Leave may not be taken in advance except under special circumstances as agreed by Main Roads.
- (f) During approved paid and unpaid leave—
 - (i) An employee shall retain their substantive level;
 - (ii) An employee's continuity of employment is not affected;
 - (iii) An employee retains their substantive position except during periods of leave without pay that are of a period greater than three (3) months, unless prior agreement between Main Roads and the employee; and
 - (iv) An employee continues to have access to career opportunities such as transfers and promotions

(g) All existing accrued and pro rata leave and other entitlements will be retained under this Agreement. Future leave and entitlements will be calculated as provided for in the Agreement and added to existing leave and entitlements.

(h) Any unauthorised absence is unpaid.

(i) On termination of employment, all accrued annual leave entitlements and pro-rata entitlements shall be paid to the employee on termination except where summarily dismissed in accordance with Clause 25—Discipline.

18.2 Purchased Leave

(a) With approval from Main Roads, employees may request to receive 48 or 50 weeks of pay spread over the full 52 weeks of the year. The employee will then be entitled to eight (8) or six (6) weeks annual leave instead of four (4) weeks per year.

(b) All other accrued leave must first be cleared before utilising purchased leave.

(c) The purchased leave will not be able to be accrued and must be taken within a 12 month period. 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 the salary.

(d) Superannuation arrangements and taxation effects will be discussed with the employee and Main Roads will put the relevant arrangements in place.

(e) If the employee is unable to take their purchased leave for more than two (2) consecutive years then this arrangement will be reviewed.

18.3 Annual Leave Clearance

(a) Where an employee has accrued a minimum of eight (8) weeks annual leave, and does not immediately apply to reduce the accrued leave, the employee will within four (4) weeks of the leave becoming due, provide the employer with a Leave Clearance Plan. The plan should clearly indicate the time frames and quantum for clearance of the outstanding accrued leave.

(b) Having accrued eight (8) weeks or more annual leave, an employee will not have an application to take leave to effect reduction of that accrued annual leave denied by the employer provided the leave does not adversely affect critical operational requirements. In addition the employee may not be directed to take more than 20 additional days annual leave in any calendar year.

18.4 Annual Stand Down

Main Roads may require an employee to take accrued leave during stand down periods.

18.5 Long Service Leave

(a) New CSA/APESMA employees appointed to Main Roads from outside the Public Sector workforce, on or after April 18 1997, are entitled to 520 hours of long service leave at the completion of the initial ten (10) years of qualifying service and a further 520 hours for each subsequent seven (7) years.

It is agreed that the initial ten (10) year qualifying service period shall remain with the employee and continue to apply to any subsequent agreements.

(b) All other CSA/APESMA employees will be entitled to 520 hours of long service leave after an initial seven (7) years qualifying service, except for employees appointed as per the above sub-clause and a further 520 hours for every seven (7) years of qualifying service after the initial qualifying period.

(c) AWU employees will be entitled to 520 hours of long service after an initial ten (10) years qualifying service and a further 520 hours for every seven (7) years of qualifying service after the initial qualifying period.

(d) Trades Group employees will be entitled to 494 hours of long service leave after an initial ten (10) years qualifying service, and a further 494 hours for every

seven (7) years of qualifying service after the initial qualifying period.

- (e) Pro-rata long service leave may be paid to an employee who retires at or over the age of 55 years or who is retired on the grounds of ill health if the employee has completed not less than 12 months continuous service before the date of retirement.
- (f) Pro-rata long service leave may be paid in respect of an employee who dies if they have completed not less than 12 months continuous service before the date of death. Payment will be made to the deceased estate.
- (g) Long service leave is not to be taken in periods less than 40 hours for CSA, APESMA and AWU employees (38 hours for Trades Group employees). Main Roads will require an employee to clear long service leave that has accrued for three (3) years or more. Otherwise, long service leave is to be taken at a time mutually convenient to Main Roads and the employee.
- (h) Main Roads may approve an employee's request for long service leave for—
 - (i) half the normal rate of pay and double the period of long service leave; or
 - (ii) double the normal rate of pay and half the period of long service leave,
 provided that—
 - (iii) there is a maximum of two (2) hours leave for each hour accrued;
 - (iv) appropriate relief is available to replace the employee; and
 - (v) the extra period is treated as leave without pay for the purposes of determining qualifying service for leave and other entitlements.

18.6 Compaction of Leave

- (a) If any of an employee's entitlement to long service leave has been accrued whilst employed wholly or partially on a part time basis, that employee may request to compact the period of leave entitlement due, to the equivalent of full time ordinary hours.
- (b) The period of leave taken, as equivalent of full time ordinary hours, will count as service towards the employee's next entitlement for long service leave.
- (c) Subject to Main Roads approval, compacted long service leave may be taken in minimum periods of one (1) week.

18.7 Leave Without Pay

With the employer's approval, an employee may be granted leave without pay for special circumstances for a period of up to two (2) years.

Sick leave will not be granted during leave without pay.

18.8 Sick Leave

- (a) CSA, APESMA and AWU employees will be entitled to 80 hours (76 hours for Trades employees) paid sick leave for each 12 months qualifying service. If unused, this sick leave accumulates from year to year. When all paid sick leave has been exhausted, the employee may take sick leave without pay.
- (b) All new CSA, APESMA and AWU employees will receive 40 hours (38 hours for Trades Group employees) of paid sick leave on appointment and a further 40 hours (38 hours for Trades Group employees) after six (6) months of qualifying service. A further 80 hours (76 hours for Trades employees) sick leave will be credited after each 12 months of qualifying service.
- (c) Sick leave may be used—
 - (i) for illness or injury which makes an employee unfit to carry out their duties; and
 - (ii) when an employee is restricted by law from attending work due to contact with a person suffering from an infectious disease.
- (d) Sick leave is available by the hour. An employee will be required to provide Main Roads with a medical

certificate from a registered medical practitioner or other documentation acceptable to Main Roads—

- (i) where an employee requires more than two (2) consecutive days of sick leave;
- (ii) for each day in excess of an accumulated total of five (5) days sick leave (including carer's leave) in each 12 months of qualifying service; and
- (iii) for all sick leave without pay.

18.9 Sick Leave for War caused Illness

If an employee is unfit for work due to war caused illness they may be granted special paid sick leave of up to 120 hours per year in addition to the normal sick leave. This leave may be accumulated up to a maximum of 360 hours. The leave credits are recorded and cleared separately from normal sick leave.

18.10 Substitution of Sick Leave and Other Leave

- (a) Where an employee who is certified unfit for work seven (7) continuous days or more by a medical practitioner, during a period of annual or long service leave, the leave taken will be credited to the employee's entitlements and the employee will be given sick leave instead.
- (b) Sick leave may also be used by an employee who is unfit for work while waiting for approval for Workers' Compensation. If the claim is approved any sick leave taken will be reinstated to the employee's sick leave credits.

18.11 Carer's Leave

- (a) Employees can use accrued sick leave to care for family members or members of their household who need care and support while they are ill, provided that they are the 'primary' care-giver.
- (b) Where an employee requires more than two (2) consecutive days of sick leave for the purpose of caring for a member of their family or household, they will be required to provide Main Roads with a medical certificate from a registered medical practitioner for that person.
- (c) Main Roads may grant unpaid leave to an employee for the purpose of providing care to a family or household member who is ill.

18.12 Study Leave

- (a) Part time paid study leave

Main Roads may provide study assistance to an employee who is undertaking a study course that is of benefit to Main Roads. The amount of leave available is based on hours recommended for the course per week by the educational institution. An employee will receive paid part time study leave for—

- (i) half the nominated study hours, including travel time up to a maximum of five (5) hours per week; and
- (ii) up to half a day examination leave per examination.

Study leave may be calculated as an annual equivalent and be taken as a block where the employee is undertaking distance education courses or study by research.

- (b) Professional development leave

At Main Roads discretion, professional development leave normally for up to 12 months, may be provided to the employee to increase their expertise. This will be subject to the development being relevant to the employee's area of expertise and to Main Roads needs.

Leave may be paid or unpaid depending on individual circumstances. Assistance may also be provided with fees and other expenses. Conditions for each individual case will be negotiated between Main Roads and the employee. Agreed conditions will be confirmed in writing by Main Roads and signed by the employee.

18.13 Parental Leave

18.13.1 An employee, other than a casual employee, is entitled to take up to 52 consecutive weeks of unpaid leave in respect of—

- (a) the birth of a child to the employee or the employee's spouse; or
- (b) the placement of a child with the employee with a view to the adoption of the child by the employee.

18.13.2 Notification—Commencement and Cessation

- (a) An employee should give Main Roads at least ten (10) weeks written notice of his/her intention to take parental leave.

A female employee who has given notice of her intention to take parental leave, other than for an adoption, is to start the leave six (6) weeks before the expected date of birth unless in respect to any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work.

- (b) An employee who is taking parental leave is to notify Main Roads of any change to the date on which he/she wishes to finish the leave.
- (c) An employee may apply to extend the maximum period of parental leave without pay.
- (d) An employee shall confirm the intention to return to work by notice in writing to the employer not less than four (4) weeks before the end of parental leave.
- (e) The starting and finishing dates of a period of parental leave are to be agreed between the employee and Main Roads.

18.13.3 Adoption

An employee seeking to adopt a child shall be entitled to two (2) days unpaid leave for the employee to attend interviews or examinations as required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to one (1) additional days leave. The employee may take any paid leave entitlement in lieu of this leave.

18.13.4 Additional Entitlements

- (a) Where the pregnancy of an employee ceases, other than by birth of a living child, then the employee shall be entitled to a period of paid or unpaid sick leave for a period certified as necessary by a registered medical practitioner.
- (b) An employee proceeding on parental leave may elect to utilise any accrued leave or accrued long service leave for the whole or part of the period of parental leave or extend the period of parental leave with such leave.

18.13.5 Exclusions

- (a) An employee is not entitled to take parental leave at the same time as the employee's spouse but this subsection does not apply to one week's parental leave—
 - (i) taken by the male parent immediately after the birth of the child; or
 - (ii) taken by the employee and the employee's spouse immediately after a child has been placed with them with a view to adopting the child.
- (b) Subject to subsection a) above, where Main Roads employ both partners, the leave shall not be taken concurrently except for special circumstances and with the approval of the employer.

18.13.6 Review of Duties

- (a) Where illness or risks arising out of a pregnancy or hazards connected with 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 of the same classification until the commencement of parental leave.
- (b) If the transfer to a safe position is not practicable, the employee may take leave for such a period as is certified necessary by a registered medical practitioner.

18.13.7 Return from Parental Leave

- (a) An employee on return from parental leave is entitled to the position that the employee occupied immediately before they went on parental leave. If an employee is transferred to a safe job they are entitled to return to the substantive position occupied before the transfer.
- (b) An employee may return, with the approval of the employer, on a part-time basis to the same position occupied prior to the start of leave or to a different position of the same classification level on a part-time basis in accordance with the part-time provision of the relevant award.
- (c) Where the position occupied by the employee no longer exists the employee is entitled to a position of the same classification level with duties similar to that of the abolished position.

18.14 Bereavement Leave

An employee is entitled to paid bereavement leave of up to two (2) days on the death of one of the following close family members—

- spouse or de facto spouse;
- child or stepchild;
- parent, step-parent or parent-in-law;
- grandparent;
- brother, sister, brother-in-law or sister-in-law;
- any other person who at the time of their death lived with employee as a member of the employee's family;
- any other close family member as approved by Main Roads.

The two (2) days need not be consecutive.

Where requested by Main Roads, the employee will be required to support the claim for bereavement leave by providing reasonable evidence of—

- (a) the death of the family member; and
- (b) the relationship of the deceased to the employee.

18.15 Jury Service and Witness Leave

- (a) An employee subpoenaed or called as a witness to give evidence in any proceeding shall as soon as practicable notify their manager/supervisor.
- (b) Where an employee is subpoenaed or called as a witness to give evidence in an official capacity that employee shall be granted leave of absence with pay, but only for such a period as is required to enable the employee to carry out duties related to being a witness. If the employee is on any form of paid leave, the leave involved in being a witness will be reinstated.
- (c) An employee subpoenaed or called as a witness on behalf of the Crown, not in an official capacity, shall be granted leave with full pay entitlements. If the employee is on any form of paid leave, this leave shall not be reinstated as such witness service is deemed to be part of the employees civic duty.
- (d) An employee subpoenaed or called as a witness under any other circumstances other than specified in sub-clauses a) and b) of this clause shall be granted leave without pay except when the employee makes an application to clear accrued leave in accordance with this agreement.
- (e) An employee required to serve on a jury shall as soon as practicable after being summoned to serve, notify their supervisor/manager.
- (f) An employee required to serve on a jury shall be granted leave of absence on full pay, but only for such period as is required to enable the employee to carry out their duties as a juror.

18.16 Training with the Defence Forces

- (a) Subject to Main Roads convenience, leave of absence may be granted by Main Roads to an employee who is a volunteer member of the Defence Force Reserves or the Cadet Force for the purpose of attending a training camp, school, class or course of instruction under the conditions contained in this clause.

- (b) In order to attend at a camp for annual continuous obligatory training, an employee may be granted one period of not exceeding ten (10) working days on full pay in any period of 12 months commencing on and from July 1 in each year.
- (c) If the officer in charge of a unit certifies that it is essential for an employee to be at the camp in advance or rear party, a maximum of four (4) extra days on full pay may be granted in a 12 month period.

For attendance at one special school, class or course of instructions—

- (i) In addition to the leave granted under sub-clause 1, a period not to exceed 16 calendar days in any period of 12 months commencing on and from July 1, in each year may be granted provided purpose and not for a further routine camp;
- (ii) This leave may, at the option of the employee, be granted from annual recreation leave due;
- (iii) If the leave is not taken from accrued leave, salary during the period shall be at the rate of difference between the normal remuneration of the employee and the defence force to which the employee is entitled if this does not exceed normal pay from Main Roads. In calculating pay differential, pay for Saturdays, Sundays, and public holidays prescribed in Clause 18.21—Public Holidays of this Agreement and special roster days off is to be excluded, and no account is to be taken of the value of any board or lodging provided for the employee;
- (iv) Leave without pay shall be granted if the defence force payments exceed the normal pay of the employee.
- (d) Application for leave of absence for the above reasons shall, in all cases, be accompanied by evidence of the necessity for attendance. At the expiration of the leave of absence granted, the employee shall furnish a certificate of attendance to Main Roads. Where leave of absence has been granted with pay at the rate of difference between normal remuneration and defence force payment, the employee shall also furnish a detailed certificate of the defence force payment received.
- (e) On written application, an employee shall be paid salary in advance when proceeding on such leave.
- (f) Where annual leave is not utilised for attendance at a special school or course the period shall be treated as leave without pay and then adjusted for the pay differential when the certificate and payment is received.

18.17 English Language Training Leave

- (a) Leave during normal working hours without loss of pay shall be granted to employees who are unable to meet standards of communication to advance career prospects, or who constitute a safety hazard or risk to themselves and/or fellow workers, or are not able to meet the accepted production requirements of that particular occupation, to attend English training conducted by an approved and authorised Authority. The selection of employees for training will be determined by consultation between Main Roads and the Union/Association.
- (b) Leave will be granted to enable employees selected to achieve an acceptable level of vocational English proficiency. In this respect the tuition content with specific aims and objectives incorporating the pertinent factors at sub-clause 1 shall be agreed between Main Roads and the Union Representative and an approved Authority conducting the training.
- (c) Subject to appropriate needs assessment, participation in training will be on the basis of up to a 100 hours per employee per year.

- (d) The agreed desired proficiency level will take account of the vocational needs of an employee in respect to communication, safety, EEO, welfare industrial relations, training and productivity within their current position as well as those positions to which they may be considered for promotion or re-deployment.

18.18 Sports Event Leave

18.18.1 International Sports Events

Main Roads may grant special paid leave to an employee chosen to represent Australia as a competitor or official at a sporting event under the following criteria—

- it is a recognised international amateur sport;
- it is a world or international regional competition; and
- no contribution is made by the sporting organisation towards the normal salary of the employee.

Main Roads will liaise with the relevant Government organisation when determining—

- whether the application meets the above criteria; and
- the period of leave to be granted.

18.18.2 Interstate Sports Events and National Competitions

Unpaid leave may be granted by Main Roads to an employee selected to represent the State of Western Australia for the purposes of competing in an interstate sporting event or in teams competing in a national competition.

18.18.3 Sport Scholarships

Main Roads may grant unpaid leave to an employee selected to undertake in a recognised sport scholarship.

An employee will not be required to exhaust other leave credits prior to being granted unpaid leave to attend sports events.

18.19 Ceremonial or Cultural Leave

An employee covered by this Agreement is entitled to time off for tribal/ ceremonial/cultural purposes provided prior notice is given to Main Roads of the intention to take leave, the reasons for taking such leave and the estimated length of absence.

Such leave shall include leave to meet the employee's customs, traditional law and to participate in ceremonial/cultural activities.

Ceremonial/cultural leave may be taken four (4) hourly in accordance with sub-clause 1 and will be deducted from annual leave or granted as leave without pay for up to ten (10) working days.

18.20 Emergency Service Leave

Special leave may be granted during normal working hours by Main Roads to an employee required to attend emergency service (training and emergency work).

Where an employee receives reimbursement for this work the employee will—

- arrange for payment of such fees to Main Roads, or
- authorise Main Roads to deduct the amount received from their pay.

18.21 Public Holidays

The following days or the days observed in lieu shall, subject as hereinafter provided, be allowed as holidays without loss of pay, namely—

- | | |
|--------------------|----------------------|
| (a) New Year's Day | Labour Day |
| Australia Day | Foundation Day |
| Good Friday | Sovereign's Birthday |
| Easter Monday | Christmas Day |
| Anzac Day | Boxing Day |

- (b) Where any of the days mentioned in a) of this sub-clause fall on a Saturday or Sunday, the holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or Monday, the holiday shall be observed on the next succeeding

Tuesday. In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.

- (c) Public holidays which fall during paid leave are paid and are not included as part of the leave period. Public holidays which fall during unpaid leave—
- (i) are unpaid if they fall during the leave period;
 - (ii) are paid if they fall at the beginning or end of the leave period.

19.—ALLOWANCES

19.1 Acting

19.1.1 Payment of Higher Duty Allowance (HDA)

- (a) Where an employee acts in a position at a higher level than their substantive position for five (5) continuous working days or more, a full or partial HDA will be paid.
- (b) For full HDA an employee will be paid at the pay scale of the classification level of the acting position. For partial HDA an employee will be paid at an appropriate pay scale part way between their current pay scale and the pay scale of the acting position.
- (c) Full HDA is paid if an employee undertakes all the duties of the position. Partial HDA is paid if an employee undertakes some of the higher level duties. In this case the duties to be performed and the pay scale of the partial HDA will be confirmed in writing by Main Roads prior to commencement of the acting period.

19.1.2 Payment of HDA During Public Holidays and Paid Leave

The HDA is paid for public holidays that fall during or at the end of the acting period but not for public holidays that fall at the beginning of the acting period.

Where an employee takes paid leave during or immediately after a period of acting at a higher level—

- (a) the HDA will not be paid for any annual or long service leave during the first 12 continuous months of acting at the higher level;
- (b) the HDA will be paid for the first 20 days of paid annual or long service leave taken in any continuous 12 month period after an employee has completed 12 continuous months acting at the higher level;
- (c) for each occasion of sick leave, the HDA will only be paid for the first five (5) continuous working days and will cease thereafter; and
- (d) the HDA will be paid for any flex leave or time in lieu accrued during the period of acting at a higher level.

19.1.3 Incrementing Higher Duties Allowance

- (a) Where annual pay increments apply to the classification of an acting position, the full HDA is incremented when the total time spent acting at the level higher than your substantive level totals 12 months in the proceeding 18-month period. The preceding 18 months shall be calculated back from the date of commencement of the current acting arrangement.
- (b) Following a break of 18 months or more, subsequent HDA will recommence at the lowest increment in the classification.
- (c) The continuity of acting service is not affected by approved paid leave up to a total of 20 days and sick leave of up to five (5) continuous working days during each 12 month period, providing an employee is acting at the higher level immediately before and after the period of leave.
- (d) There are no pay increments for partial HDAs.
- (e) All other conditions for pay increments for HDAs are subject to the same conditions as for an employee permanently appointed at that classification level.

19.1.4 Acting for Less than Five (5) Continuous Days

Employees possessing the necessary skills may be required to act in a position at a higher level than his/her substantive position for periods of less than five (5) days. HDA will not be paid in these circumstances.

Rostered days off will be counted as a day worked for the purposes of acting.

19.2 Adjustment of Allowances

The rates or specifications for allowances expressed in clauses or schedules to this Agreement shall, unless specified otherwise, be varied in line with adjustments made to the—

- Australian Workers Union (WA Public Sector) Award 1992
- Building Trades (Government) Award 1966
- Catering Employees and Tea Attendants Award (Government) 1982
- Engineering Trades (Government) Award 1967
- Government Officers Salaries Allowances and Conditions Award 1989

Any variation to rates or specifications to this Agreement shall, unless specified otherwise, have the same operative date as the relevant variations to the—

- Australian Workers Union (WA Public Sector) Award 1992
- Building Trades (Government) Award 1966
- Catering Employees and Tea Attendants Award (Government) 1982
- Engineering Trades (Government) Award 1967
- Government Officers Salaries Allowances and Conditions Award 1989

19.3 Protective Clothing Allowance

CSA and APESMA employees who work in conditions that require the need to protect their person from injury or their usual work clothing from damage may claim an annual allowance of \$269.95, unless Main Roads provides clothing and cost for laundry.

19.4 Work and Safety Equipment

19.4.1 Safety Clothing and Equipment

Main Roads will provide all necessary safety clothing and equipment to comply with the provision of the relevant safety and health legislation. The employee will be responsible for ensuring that the equipment is used in an appropriate and safe manner and will wear all safety and clothing equipment as provided by Main Roads.

19.4.2 Using Private Telephones for Main Roads Business

If the employee is required to use their own telephone for Main Roads business they will be reimbursed such costs of calls and receive 1/52 of the annual rental for each seven (7) calendar days or part thereof that they are required to use their telephone for Main Roads business.

19.5 Out of Hours Phone Contact

“Contact” shall mean a salaried officer (GOSAC to Level 5, APESMA to Level 6) who agrees in writing to remain contactable via mobile phone, and in a reasonably fit state, for the purposes of receiving emergency calls and to provide appropriate advice.

- (a) The officer shall receive an hourly allowance at the rate of one third (1/3) ‘availability’ rate.
- (b) Where the employee reasonably determines, due to the nature of the emergency, that it is essential to return to the place of work, the employee shall receive minimum payments at the applicable overtime rates in accordance with the ‘on call’ provisions of the relevant award.
- (c) An officer may withdraw from the ‘contact’ arrangement by giving 14 days prior written notice to the employer.

20.—SPECIAL CONDITIONS FOR REMOTE LOCATIONS

20.1 Payment of Allowances

Employees based in remote locations shall be paid various allowances to contribute to the extra costs of living and working in a remote location for employees and their families.

Where the employee's spouse/dependent is receiving allowances for these purposes from their employer the amount paid to the employee will be reduced by the amount paid to the employee's spouse/dependent.

An employee who is employed on a part-time basis shall be entitled to allowances, except for commuted overtime in Clause 20.5, on a pro-rata basis.

The allowances are paid during periods of paid annual leave and except for Clause 20.5 for periods of paid long service leave or other approved paid leave where the employee or spouse/dependent remain in the Region during the period of paid leave.

All allowances shall cease on the last working day within a remote location.

20.2 District Allowance

Employees based in remote locations shall be paid an annual rate for district allowance for each district as per Attachment D.

Employees with a spouse or dependent shall be paid double the appropriate rate.

The child component is paid for each dependent child from 4 to 18 years of age (dependent means having an income less than the minimum taxable limit).

20.3 Power Subsidies

All employees based in a remote location who own or rent accommodation that includes either gas or electric hot water systems (excluding solar hot water systems) and air conditioning shall be provided the following annual power subsidy paid fortnightly—

ANNUAL POWER SUBSIDY						
Region -Town	Hot Water Systems		Air conditioning			
	Gas	Electric	One Unit or Caravan	Two Units or Triplex	Three or more Units (Duplex / House)	Ducted System (Duplex / House)
Gascoyne	\$ 317	\$ 370	\$ 211	\$ 370	\$ 528	\$ 739
Goldfs/Esp	N/A	N/A	\$ 106	N/A	N/A	N/A
Pilbara	\$ 317	\$ 370	\$ 739	\$ 1 373	\$ 1 796	\$ 2 218
Kimb-Derby	\$ 317	\$ 370	\$ 845	\$ 1 479	\$ 1 901	\$ 2 324
Kimb-Kun	\$ 317	\$ 370	\$ 739	\$ 1 268	\$ 1 690	\$ 2 113

N/A - Not Available

For employees who rent and share Main Roads accommodation the power subsidy shall only be paid to the employee in which the power account is held.

Power subsidies will be increased or decreased by 1.5 times the percentage of any increase or decrease in power costs by power authorities.

20.4 Travel Time and North/West Leave

Following 12 months service in a remote location employees shall receive either annual travel days and annual north/west leave or an annual percentage pay out in lieu of a combination of travel days and north/west leave as follows—

Region	Annual Travel Days	Annual North/West Leave	Annual % pay out in lieu
Kimberley	5	5	3.8 %
Pilbara	4	5	3.5 %
Gascoyne	4	5	3.5 %

When employees leave a region annual travel days and annual north/west leave is available on a pro-rata basis after the initial 12 months living in a remote location.

20.5 Commuted Overtime Allowance for Northern Operational Centre

CSA and APESMA employees located in the Kimberley, Pilbara or Gascoyne Regions shall be paid a commuted overtime allowance for daily hours of work as follows—

Region	Daily Hours of Work	Annual % pay rate in lieu
Kimberley	8.5	12 %
Pilbara	8.5	12 %
Gascoyne	8	3.7 %
Gascoyne outside the area bounded by Minilya, Gascoyne Junction and Yaringa	8.5	12 %

The commuted overtime allowance shall not be paid where employees take paid long service leave, unpaid leave or greater than ten (10) continuous working days of sick leave.

All other specific overtime shall be paid in accordance with the overtime clause in the parent award.

20.6 Goldfields/Esperance Region

Employees based in the Goldfields/Esperance Region shall, in addition to the annual base pay rate, receive a further 3.5%. This is in addition to the district allowance payable under Clause 20.2.

20.7 Travel Concessions during Leave

A travel concession of an airfare to Perth or an equivalent payment will be available during leave to employees and their families who live with the employee following every 12 months service in either the Gascoyne, Goldfields-Esperance, Pilbara and Kimberley Regions.

The concession will lapse if not taken within 12 months of becoming due.

A travel concession for the employee's spouse will not be paid if provided for by the spouse's employer.

20.8 Payment when Working in a Different Location on a Temporary Basis

20.8.1 Employees Based in a Remote Location

Where employees are working away from their base location or acting in a different base location they shall receive allowances, as follows—

- Employees who are paid an allowance for meals and accommodation as provided for in Clause 21.1.1 c), shall maintain all allowances for the remote location they are based in for a maximum period of up to six months.
- Employees who are paid an allowance for meals and accommodation, as provided for in Clause 21.1.1 a) and b), shall maintain all allowances for the remote location they are usually based in except for the employee component for district allowance in Clause 20.2, which shall be paid in accordance with the district, town or place for the period of work or acting in a different location.

20.8.2 Employees not Based in a Remote Location

Where employees are working away from their base location or acting in a different base location they shall receive allowances, as follows—

- (a) Employees who are paid an allowance for meals and accommodation as provided for in Clause 21.1.1 c), shall not receive any remote location allowances.
- (b) Employees who are paid an allowance for meals and accommodation, as provided for in Clause 21.1.1 a) and b), shall be paid the employee component for district allowance, as per Clause 20.2, for the period of work or acting.

21.—MEALS AND ACCOMMODATION

21.1 Working Away from Base Location

(a) An employee who travels outside a radius of 50 km from their base location, and does not stay overnight but returns home past 6.00 pm and purchases a meal is entitled to an evening meal allowance as per Attachment B.

(b) Main Roads will cover the costs of providing meals and accommodation when Main Roads requires an employee to stay away from their base location overnight due to work requirements.

(c) All accommodation arranged by Main Roads shall be of an appropriate standard.

21.1.1 Where an overnight stay is involved meals and accommodation shall be provided from the following options—

- (a) Main Roads provides meals and accommodation
Main Roads pays for meals and accommodation in hotel, motel, or in other accommodation with meals provided (not camp). An incidental allowance is paid to an employee at the rates provided in Attachment B Item 1—Meal and Accommodation Allowance.

- (b) Main Roads provides accommodation and the employee provides meals
Main Roads pays for accommodation in hotel, motel or camp or other and pays. Meal allowance as follows—

- (i) Hotel, Motel or Other (not Camp)

A meal allowance and incidental allowance is paid to an employee at the rates provided in Attachment B Items 1-2.

- (ii) Normal Camp (Main Roads or Contractor's Camp)

North of 26th parallel \$39.70 per day

South of 26th parallel \$37.60 per day

If cook is provided the employee will be charged a struck rate for meals provided.

- (iii) Rough Camp (Tents)

North of 26th parallel \$58.50 per day

South of 26th parallel \$56.35 per day

- (c) Employee provides meals and accommodation

An employee pays for all meals and accommodation in a hotel, motel or other accommodation and is paid a meals and accommodation allowance at the rates provided in Attachment B Items 3-6—Meal and Accommodation Allowance.

21.2 Payment for Part Days

(a) Where an employee is entitled to a meal and/or accommodation allowance in accordance with Clause 21.1.1 c) and is in a location for part of a day a portion of the relevant allowance is paid as follows—

Time	Percentage of Daily Rate on day of Departure	Percentage of Daily Rate on day of Return
8:00 am or before	100 %	0 %
After 8:00 am to 1.00 pm	90 %	10 %
After 1:00 pm to 6:00 pm	75 %	25 %
After 6:00 pm	50 %	50 %

(b) If travelling between two locations (including between an employee's home and a location) the time spent travelling is counted as time in the destination, except when returning to base location the time spent travelling is at the last o/night location.

21.3 Payment During Weekends or Work Cycle Breaks

The allowances described in Clause 21.1.1 continue during weekends or work cycle breaks where the employee remains in the work location because Main Roads and the employee considers it is not practical to return to the base location. The allowances cease when Main Roads and the employee considers it is practical to return to the base location as per Clause 22 -Travel.

21.4 Payment During Leave

During paid or unpaid sick leave the allowances described in this clause continue if the employee remains in the work location but ceases if the employee returns to their base location. The allowances are not paid during annual or long service leave.

21.5 Temporary Change to Base Location due to Acting Arrangements

(a) Where employees are acting in a position with a base location different from their substantive position they shall be paid meal and accommodation allowances as per Clause 21.1.1 for a period of up to a maximum of six months. For periods greater than six months employees shall be relocated to the new base location.

(b) Payment for travel on weekends shall be as per Clause 21.3.

(c) Payment during leave shall be as per Clause 21.4.

22.—TRAVEL

22.1 Travel on Engagement and Termination of Employment

(a) Transport costs are not paid on engagement or termination of employment unless it is agreed by Main Roads in writing prior to starting work.

(b) Transport costs on termination of employment shall only be paid by Main Roads where an employee and their family, if applicable, has been transferred to a base location other than the base location the employee commenced employment with Main Roads. Costs shall not exceed transport costs to Perth.

(c) All travel on engagement or termination of employment is in an employee's time and is unpaid.

22.2 Daily Travel to Worksite

(a) All travel between an employee's home and their usual office, depot or pick up point is in an employee's own time and at the employee's expense.

(b) Where an employee is required to report direct to the work site (including driving or travelling in a Main Roads vehicle) instead of the usual office, depot or pick up point—

- (i) normal work hours commence when an employee reaches the worksite;
- (ii) average travel time to and from the worksite will be paid at ordinary rates;
- (iii) only travel time in excess of the usual time spent by an employee travelling to and from their residence to the usual office or depot is payable;
- (iv) provided that for all APESMA/GOSAC Award employees, with the exception of Contract Surveillance Officers, there is no entitlement where the total travel time is less than 30 minutes for either the approach or return trips.

(c) Main Roads will provide transport from the office or depot to the worksite.

22.3 Waiting Time at Airports

22.3.1 Where an employee is required to wait for flights to or from a destination prior to, or after completing business on behalf of the employer, the employee—

May be assigned other reasonable duties by the employer until required to leave for the airport for the next flight, the employee shall be entitled to payment at the appropriate rate of salary including overtime rates where necessary.

- (a) Where other duties are not assigned an employee may elect to utilise, for their own purposes—
 - (i) Time Off in Lieu
 - (ii) Flexi Time

(b) An employee may be credited hours at the normal rate for—

- (i) The period stipulated by the airline carrier as the required check-in time prior to departure
- (ii) If there is no overnight stay, the period of time spent between completion of duties and the next available flight

22.3.2 Compensation for waiting time will be by agreement between the employer and the employee. The employee may with the agreement of the employer utilise one of or a combination of the options provided in subclause 22.3.1 (b) and (c).

22.4 Travel when working in a Different Location

Where the nature and location of the work requires the employee to live away from their base location, travel time and cost of transport for rest and recreation during weekends or work cycle breaks will be paid as follows—

22.4.1 Where it is Practical to Return on Weekends or Work Cycle Breaks

CSA/APESMA

(a) Where Main Roads and the employee considers it is practical for an employee to return to their base location each weekend or work cycle break Main Roads will pay travel time at ordinary rates and transport costs.

(b) Travel between base location and work location four hours and over will be regarded as “excessive” and be negotiated on a ‘case by case basis’.

22.4.2 AWU/Trades

(a) Where Main Roads and the employee considers it is practical for an employee to return to their base location each weekend or work cycle break the employee will travel in their own time and be paid a travel allowance according to the following table—

Distance Between Base Location and Work Location	Amount Paid Each Way
Up to and including 100 km	\$15.80
More than 100 km and including 200 km	\$28.30
More than 200 km and including 300 km	\$42.50
More than 300 km and including 400 km	\$55.50
More than 400 km and including 500 km	\$67.40
More than 500 km and including 600 km	\$77.00
More than 600 km and including 700 km	\$84.90
More than 700 km and including 800 km	\$91.10
For each 100 km thereafter	\$ 6.20

(b) The full travel allowance is paid when an employee arranges transport between their base and work location at their own cost. Half the travel allowance is paid where Main Roads provides transport between the base and work location whether or not the employee uses the transport provided.

(c) If an employee chooses to remain in the work location the travel allowance is still paid but any allowances provided for in the meals and accommodation clause cease.

(d) Travel between base location and work location four hours and over will be regarded as “excessive” and be negotiated on a ‘case by case basis’ as part of a work cycle as specified in Clause 16.3—Special Work Arrangements.

22.4.3 Where it is not Practical to Return on Weekends or Work Cycle Breaks

(a) Where Main Roads and the employee considers it is not practical to return to the base location each weekend or work cycle break, arrangements for timing for travel back to the base location and payment for travel time will be negotiated between Main Roads and the employee at the beginning of each such job.

(b) Main Roads will pay the cost of transport back to the base location at the agreed times.

(c) An employee may request travel to a location other than their base location. This may be approved by Main Roads provided costs to Main Roads do not exceed the cost of travel to the base location.

(d) CSA and APESMA employees shall receive an additional day’s leave, to be provided as time in lieu, for every completed four working weeks they are away from their base location. Main Roads will pay travel time at ordinary rates and transport costs back to the base location at the agreed times.

22.5 Travel When Acting in a Different Location

(a) Where an employee is acting in a position with a base location different from their substantive position, Main Roads will pay for travel time at commencement and cessation of the acting period at ordinary rates and transport costs.

(b) Main Roads will not pay for travel time and transport costs if Main Roads has contributed to the cost of moving the employee’s family with them to the new location.

(c) Where it is agreed that an employee may return to their base location at weekends during periods of acting, they shall be paid for payment of transport costs as per Clause 22.7 and travel in their own time.

22.6 Travel for Training and Development and Interviews

(a) Where Main Roads directs employees to attend training and development or job interviews, Main Roads will pay for travel time at ordinary rates and transport costs.

(b) Where employees request to attend training and development or for job interviews arrangements for payment of transport costs and travel time will be negotiated between Main Roads and the employee prior to travel taking place.

(c) Where an employee requests to attend training and development or for job interviews as a result of redeployment, arrangements for payment of transport costs and travel time will be negotiated between Main Roads and the employee prior to travel taking place.

22.7 Payment of Transport Costs

Main Roads will pay transport costs by—

- (a) providing Main Roads transport; or
- (b) authorising an employee to use their own vehicle and reimbursing transport costs by paying a motor vehicle allowance at the rates provided in Attachment C, Motor Vehicle Allowance.

These rates shall be paid in full for all work related travel and half rates for all other travel covered by—

- Clause 22.4—Travel When Working In Different Location,
 - Clause 22.5—Travel When Acting in a Different Location,
 - Clause 23—Relocation.
- (c) other arrangements as agreed between the parties.

23.—RELOCATION

Relocation allowances will be paid to compensate an employee who is transferred and relocated from one town to another provided that—

- (1) employees are transferred to meet Main Roads requirements
- (2) employees are recruited to a new position
- (3) employees have requested a transfer from the base location they commenced their employment in and they have been employed with Main Roads for a period greater than three years within that base location

Relocation allowances include—

- Disturbance Allowance
- Property Allowance
- Removal Allowance
- Transfer Allowance

23.1 Disturbance Allowance

The disturbance allowance covers all costs associated with—

- (a) the installation of a telephone at the new residence providing a telephone was installed at the previous residence;
- (b) connection or re-connection of water, gas and electricity services at the employee’s new residence; and
- (c) redirection of mail to the employee’s new residence.

Main Roads reimburses actual expenses when an employee produces receipts or other documentation as required.

23.2 Property Allowance

(a) Property allowance will be paid for expenses incurred in the sale of the employee’s home in the previous locality and

in the purchase of a residence in the new locality provided that at the date of the advice of the transfer the employee—

- owned and occupied the residence; or
- was purchasing a residence under a contract of sale providing for vacant possession; or
- was building a house for their own occupation when completed.

(b) Where the employee sells or purchases a residence jointly, or in common with a person other than a spouse or dependent, they are only entitled to the proportion of expenses for which they are responsible.

(c) Applications for property allowance must be supported with appropriate evidence of expenses incurred. The expenses which will be covered by Main Roads include—

- (i) selling a property
 - 50% of a licensed Real Estate Agent's commission (as defined by the appropriate professional organisation) or the costs of advertising if sold privately;
 - if a solicitor was engaged to act in connection with the sale of the residence, the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor in respect to the sale,
 - settlement fees paid to a solicitor or settlement agent;
 - fees and expenses for discharging a first mortgage; and
 - fees paid to the Registrar of Titles.
- (ii) buying a property
 - settlement fees paid to a solicitor or settlement agent or reasonable costs if the employee acts on their own behalf;
 - valuation fees for taking out a mortgage;
 - stamp duty; and
 - fees paid to the Registrar of Titles.

23.3 Removal Allowance

23.3.1 Removal allowance for property and possessions shall include—

- (a) the actual cost (including insurance) of moving household furniture and effects up to a maximum of 35 cubic metres. Main Roads may approve larger volumes in special cases.
- (b) accelerated depreciation for each occasion the employee is required to transport furniture and household effects. The allowance paid will be \$493 if furniture is valued at \$2 946 or more.
- (c) the costs associated with the sale or storage of furniture if it is not required in the new location. Costs of storage include insurance premiums and will be paid for a maximum of four years. Main Roads may approve payment for a longer period in special cases,
- (d) transport of a motor vehicle to the new location, and
- (e) reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of \$134.

23.3.2 For the purpose of the above clause pets are defined as dogs, cats, birds or other domestic animals kept by an employee or the employee's dependants for the purpose of household enjoyment. Pets do not include domesticated livestock, native animals or equine animals.

23.3.3 Employees can claim the following for the relocation of themselves, their spouse and dependent family to a new base location—

- (a) A meals and accommodation allowance as per Clause 21.1.1, for the employee only, or provide receipts for actual costs of meals and accommodation for themselves, their spouse and dependant family members, and
- (b) costs of transport. If the employee travels by motor vehicle, payment will be made in accordance with Clause 22.6—Payment of Transport Costs.

23.3.4 The employee will also be allowed reasonable travel time during work hours. Reasonable time will be as determined by Main Roads for the particular relocation.

23.4 Transfer Allowance

Employees who have been transferred to a new base location may claim for a meals and accommodation allowance as per Clause 21.1.1, for the employee only, or provide receipts for actual costs of meals and accommodation for the employee, their spouse and dependant family members for up to seven days while the employee's furniture is in transit, or if the new residence is unable to be occupied. The seven (7) days may be extended at the discretion of Main Roads in exceptional circumstances.

24.—RESOLVING DISPUTES AND GRIEVANCES

24.1 Dispute Resolution

The parties to this Agreement commit themselves to expeditiously deal with any disputes that may arise in the workplace and to resolve any differences by consultation and negotiation.

24.2 Dispute Resolution Procedure

Any questions, disputes or difficulties arising under this Agreement will be dealt with in accordance with the following—

- (a) Workplace discussions
 - (i) The employee and/or accredited Union representative shall discuss the matter with the employee's immediate supervisor.
 - (ii) If the matter cannot be resolved satisfactorily at this level, it shall be referred by either party to a senior Main Roads employee for resolution.
 - (iii) If the matter still remains unresolved, the employee or their Union representative shall be provided with facilities to make contact with an official of the Union and the senior Main Roads employee shall contact a Main Roads Human Resources Consultant.
- (b) Formal procedure

These procedures are to be followed in the event that the matter is not resolved under sub-clause a)—

 - (i) as early as practical, meeting(s) are to be held either on or offsite as appropriate between the parties; and
 - (ii) if the matter cannot be resolved under sub-clause b)(i) above, either party may refer it to the Australian Industrial Relations Commission or the Western Australian Industrial Relations Commission for resolution.

24.3 Conditions

The parties commit themselves to maintain the status quo and not take any industrial action during the course of the dispute settlement procedure set out in sub-clause 24.2.

Subject to prior consultation between the parties this procedure shall not apply to industrial action taken on a State or Nation wide basis as a result of a formal decision of either the Trades and Labour Council of Western Australia or the Australian Council of Trade Unions. This in no way means that Main Roads endorses such action.

24.4 Other

Industrial action in relation to this clause does not include local stopwork meetings of short duration to enable full time officials to report back on union business. As far as practicable such meetings shall occur outside of normal working hours but may with prior agreement by Main Roads be held during normal working hours.

Main Roads are to be notified of such meetings at least 24 hours, or such lesser time as may be agreed, prior to the meetings occurring.

The provisions of this clause do not apply in the case of matters covered by Clause 25—Discipline or Clause 24.5—Grievance Settlement.

24.5 Grievance Settlement

When an employee considers they have a grievance, the matter shall be acted on in accordance with the provisions of this clause.

The types of grievances that can be resolved under this sub-clause are as follows—

- (a) EEO grievances
 - racial harassment
 - sexual harassment
 - discrimination or harassment due to a person's sex, marital status, pregnancy, race, impairment, age, family responsibility or family status, and political or religious conviction.
- (b) Health and safety grievances
 - safety issues in the workplace
 - hazardous substances in the workplace
 - protective clothing and equipment
- (c) General grievances

This covers a variety of grievances that can occur from time to time in the workplace, excluding the following—

- those referred to in sub-clauses a) and b);
- those referred to in Clause 25—Discipline and Clause 24.1—Dispute Settlement; and
- those that have a formal appeal process such as grievances relating to promotions or classifications.

Grievances will be handled in a manner which ensures that they are resolved promptly, confidentially and in accordance with legislative requirements.

Grievances will be considered seriously and sympathetically and in all cases the utmost care will be taken to handle them impartially by recognising the rights of all parties.

An employee who considers they have grounds for a grievance may submit the grievance as follows—

- (i) EEO grievances—to their line manager, authorised Grievance Officer or a Human Resources Consultant/Officer
- (ii) Health and safety grievance—to their line manager, their Health and Safety Representative or a Human Resource Consultant
- (iii) General grievances—to their line manager in the first instance and, if not resolved, to be submitted in writing to their branch manager

The grievance should be reported as soon as practical after the grievance has arisen so as to enable the line manager or other authorised person to remedy the grievance rapidly and as near as possible to the point of origin.

The employee may request the assistance or presence of the Union representative or other person of their choice as provided for in Main Roads procedures at any stage of the grievance resolution process.

An employee is not to be subject to any retaliation because they raised a grievance.

The provisions of this clause do not apply in the case of matters covered by Clause 25—Discipline or Clause 24.1—Dispute Settlement.

25.—DISCIPLINE

25.1 Where an allegation of misconduct or inappropriate work behaviour is made against an employee, the matter shall be subsequently acted upon in accordance with the provisions of this clause.

25.2 Through all investigations and actions, Main Roads shall ensure that the principles of fairness, equity and natural justice are adhered to.

25.3 Employees shall be able to elect to have in attendance at any meetings with Main Roads, either their Union Official or representative of their choice.

25.4 Where it is determined that action is to be taken against an employee, the following options are available to Main Roads, having regard to the level of seriousness of the alleged offence/behaviour—

- (a) issuing of a written warning;
- (b) counselling the employee;

- (c) suspension with pay (this would only apply where the matter needs further investigation and it is inappropriate for the employee to remain at work);
- (d) termination of the employee's services;
- (e) summary dismissal;
- (f) other alternative arrangements as agreed with the employee and the Union.

25.5 Main Roads, except where required by an external authority, shall advise employees in advance of the commencement of any investigations into their alleged misconduct or inappropriate work behaviour.

25.6 Main Roads, except where required by an external authority, shall on request provide employees with copies of all documentation relevant to their alleged misconduct or inappropriate work behaviour.

25.7 Employees or the Union may make application to the Australian or Western Australian Industrial Relations Commissions in the case of termination or summary dismissal.

25.8 The provisions of this clause do not apply in the case of matters covered by Clause 24.1—Dispute Resolution unless a dispute exists or Clause 24.5—Grievance Settlement applies.

26.—EMPLOYEE RECORD

26.1 Main Roads shall keep or cause to be kept an employees record showing—

- The name of each employee;
- The nature of the work performed;
- The hours worked each day;
- The pay, allowances and overtime paid to each employee

Any system of automatic recording by means of machines shall be deemed to comply with the provision to the extent of the information recorded.

26.2 The employee record shall on demand be produced for inspection by the duly authorised official of the Union during Main Roads' usual office hours and when necessary the duly authorised official of the Union may take a copy of the record.

26.3 The Union shall—

- (a) give prior notification to Main Roads on when it proposes to inspect the record;
- (b) not conduct interviews during normal business hours in circumstances which will result in Main Roads business being unduly interrupted or otherwise hampered; and
- (c) treat with confidentiality any information obtained from time and employee records.

26.4 Main Roads office shall be deemed to be a convenient place for the purposes of inspecting records and if for any reason the time and salary record is not available when the duly authorised official of the Union calls to inspect it, the record will be made available for inspection at a mutually convenient time at Main Roads office.

26.5 Employees, subject to Main Roads convenience, shall be entitled to examine and take copies of all materials maintained on their personal file or other Main Roads information relating to them. They can do this either directly or through an authorised representative.

27.—SIGNATORIES

Employers (<i>indecipherable</i>) (Commissioner of Main Roads)	29/5/2000 (date)
Association/Unions (<i>indecipherable</i>) (On behalf of the Association of Professional Engineers, Scientists and Managers, Australia)	30/5/2000 (date)
(<i>indecipherable</i>) (On behalf of the Australian Workers Union)	31/5/2000 (date)

<i>(indecipherable)</i>	31/5/2000
(On behalf of the Communication, Electronics, Engineering and Plumbing Union)	<i>(date)</i>
<i>(D Robinson)</i>	31/5/2000
(On behalf of the Civil Service Association of Western Australia Incorporated)	<i>(date)</i>
<i>(indecipherable)</i>	2/6/2000
(On behalf of the Construction, Forestry, Mining and Energy Union of Australia)	<i>(date)</i>
<i>(S M Jackson)</i>	1/6/2000
(On behalf of the Australian Liquor, Hospitality and Miscellaneous Workers Union, WA Branch)	<i>(date)</i>
<i>(J Sharp-Collett)</i>	31/5/2000
(On behalf of the Australian Manufacturing Workers Union registered as AFMEPKIU)	<i>(date)</i>
<i>(indecipherable)</i>	2/6/2000
(On behalf of the Western Australian Builders Labourers, Painters, Plasterers Union of Workers)	<i>(date)</i>

ATTACHMENT A—PAY SCALES—SALARIED
ENGINEERING, SCIENCE, PROFESSIONAL,
TECHNICAL and CLERICAL

Enterprise Bargaining Agreement 2000

PAY RATE

Level	Increment	Pay Scale	Annual	Fortnight
Entry	—	EL	25 015	959.04
Level 1	Year 1	1.1	27 481	1053.58
	Year 2	1.2	28 363	1087.40
	Year 3	1.3	29 242	1121.10
	Year 4	1.4	30 116	1154.61
	Year 5	1.5	30 995	1188.31
	Year 6	1.6	31 876	1222.08
	Year 7	1.7	32 890	1260.96
	Year 8	1.8	33 592	1287.87
	Year 9	1.9	34 625	1327.48
Level 2	Year 1	2.1	35 866	1375.05
	Year 2	2.2	36 815	1411.44
	Year 3	2.3	37 814	1449.74
	Year 4	2.4	38 869	1490.19
	Year 5	2.5	39 973	1532.51
Level 3	Year 1	3.1	41 491	1590.71
	Year 2	3.2	42 673	1636.03
	Year 3	3.3	43 892	1682.76
	Year 4	3.4	45 146	1730.84
Level 4	Year 1	4.1	46 862	1796.63
	Year 2	4.2	48 207	1848.19
	Year 3	4.3	49 591	1901.25
Level 2/4	Year 1	2.1	35 866	1375.05
	Year 2	2.3	37 814	1449.74
	Year 3	2.5	39 973	1532.51
	Year 4	3.2	42 673	1636.03
	Year 5	4.1	46 862	1796.63
	Year 6	4.3	49 591	1901.25
Level 5	Year 1	5.1	52 258	2003.50
	Year 2	5.2	54 059	2072.55
	Year 3	5.3	55 932	2144.36
	Year 4	5.4	57 874	2218.81
Level 6	Year 1	6.1	60 998	2338.58
	Year 2	6.2	63 119	2419.90
	Year 3	6.3	65 320	2504.28
	Year 4	6.4	67 665	2594.19
Level 7	Year 1	7.1	71 264	2732.17
	Year 2	7.2	73 753	2827.59
	Year 3	7.3	76 463	2931.49
Level 8	Year 1	8.1	80 865	3100.26
	Year 2	8.2	84 017	3221.10
	Year 3	8.3	87 929	3371.08

Level	Increment	Pay Scale	Annual	Fortnight
Level 9	Year 1	9.1	92 813	3558.33
	Year 2	9.2	96 111	3684.77
	Year 3	9.3	99 876	3829.11
Class 1	—	C1	105 566	4047.26
Class 2	—	C2	111 259	4265.52
Class 3	—	C3	116 947	4483.59

ATTACHMENT A—PAY SCALES—TRADES
EMPLOYEES

BUILDING TRADES

Enterprise Bargaining Agreement 2000

PAY RATE

Level	Increment	Pay Scale	Annual	Fortnight
LEVEL 3	Year 1	3.1	25 704	985.46
	Year 2	3.2	26 043	998.45
	Year 3	3.3	26 369	1010.95
LEVEL 4	Year 1	4.1	27 815	1066.39
	Year 2	4.2	28 153	1079.34
	Year 3	4.3	28 481	1091.92
LEVEL 5	Year 1	5.12	29 214	1120.02
	Year 2	5.2	29 551	1132.94
	Year 3	5.3	29 879	1145.52
LEVEL 6	Year 1	6.1	30 608	1173.47
	Year 2	6.2	30 944	1186.35
	Year 3	6.3	31 275	1199.04
LEVEL 7	Year 1	7.1	31 992	1226.53
	Year 2	7.2	32 329	1239.45
	Year 3	7.3	32 657	1252.02

Allowance for Lost Time: Thirteen Days' sick leave and follow the job per fortnight

An employee whose employment is terminated through no fault of their own and who has not completed nine months continuous service with his employer shall, for each week of continuous employment with Main Roads, immediately prior to their termination of employment be paid the lost time allowance prescribed hereunder less any payments made to them in respect of sick leave during that employment.

(a) Bricklayers, Carpenters, Joiners, Painters—\$81.46 per fortnight

Disabilities Allowance (Per Fortnight): \$38.00

(a) Subject to the provisions of paragraph (b) of this Sub-clause, an allowance of \$38.00 shall be paid to all employees excepting employees who are employed for the major portion of any week in or about a permanent maintenance depot or who are usually employed in or about Main Roads business when an employee coming within the exception is engaged on the erection or demolition of a building exceeding 25 square metres in floor area.

(b) Employees who are directed to work temporarily in or about a permanent maintenance depot and who immediately prior to being so directed were in receipt of the allowance for a period of not less than three months shall be paid two-thirds of the allowance prescribed herein.

LEADING HANDS

1. Any employee referred to in Clause 9 of the Building Trades (Government) Award No 31A of 1966 or a leading hand defined in paragraph (h) of Sub-clause (3) of Clause 6—Definitions, who is placed in charge for not less than one day of—

(a) not less than three and not more than ten other employees shall be paid at the rate of \$61.90 per fortnight extra;

(b) more than ten and not more than twenty other employees shall be paid at the rate of \$82.56 per fortnight extra;

(c) more than twenty other employees shall be paid at the rate of \$102.90 per fortnight extra.

2. Any leading hand defined in paragraph (h) of Sub-clause (3) of Clause 6—Definitions Building Trades (Government)

Award No 31A of 1966 being a licensed scaffolder who, in compliance with the provisions of the Construction Safety Act 1972, and the regulations made thereunder, is employed or engaged in the supervision of the erection or demolition of scaffolding or gear on any scaffold exceeding or likely to exceed 6.1 metres in height from the horizontal base, shall be paid the rate prescribed in paragraph (a) of Sub-clause 37.1 hereof when placed in charge of less than three other employees.

3. The rates herein prescribed shall be deemed to form part of the ordinary rate of wage of the employee concerned for all purposes of this award.

ATTACHMENT A—PAY SCALES—TRADES
EMPLOYEES

ENGINEERING TRADES

Enterprise Bargaining Agreement

Annual & Fortnightly Pay rate

Level	Level	Pay Scale	Annual	Fortnight
C5		Year 1	37 500	1437.70
		Year 2	37 500	1437.70
		Year 3	37 500	1437.70
C6	(Level I)	Year 1	35 717	1369.34
		Year 2	35 717	1369.34
		Year 3	35 717	1369.34
C7	(Level II)	Year 1	32 856	1259.65
		Year 2	33 192	1272.54
		Year 3	33 523	1285.23
C8	(Level I)	Year 1	31 426	1204.83
		Year 2	31 769	1217.98
		Year 3	32 089	1230.59
C9	(Level II)	Year 1	29 999	1150.12
		Year 2	30 343	1163.31
		Year 3	30 672	1175.92
C10	(Level I)	Year 1	28 566	1095.18
		Year 2	28 909	1108.33
		Year 3	29 242	1121.10
C11	(Level IV)	Year 1	26 401	1012.18
		Year 2	26 741	1025.21
		Year 3	27 077	1038.10
C12	(Level III)	Year 1	24 971	957.35
		Year 2	25 317	970.62
		Year 3	25 648	983.31
C13	(Level II)	Year 1	23 424	898.04
		Year 2	23 768	911.23
		Year 3	24 098	923.88

LEADING HANDS

(a) A tradesperson placed in charge of three or more other employees shall, in addition to the ordinary rate, be paid per fortnight—

- (i) \$41.80 if placed in charge of not less than three and not more than ten other employees.
- (ii) \$63.82 if placed in charge of more than ten and not more than twenty other employees.
- (iii) \$82.12 if placed in charge of more than twenty other employees.

(b) A certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance with the provisions of the Occupational, Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees, shall be deemed to be a Leading Hand and be paid at the rate prescribed for Leading Hand in charge of not less than three and not more than ten other employees.

ATTACHMENT A—PAY SCALES—TRADES
EMPLOYEES

CONSTRUCTION ALLOWANCE

(a) In addition to the appropriate rate of pay prescribed in Schedule G hereof, an employee shall be paid—

- (i) \$69.10 per fortnight if engaged on the construction of a large industrial undertaking or any large civil engineering project.
- (ii) \$62.08 per fortnight if engaged on a multi-storey building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A “multi-storey building” is a building which, when completed, will consist of at least five stories.
- (iii) \$39.16 per fortnight if engaged otherwise on construction work falling within the definition of construction work in Clause 5—Classification Structure and Definitions of the Engineering Trades (Government) Award 1967.

(b) Any dispute as to which the aforesaid allowance applies to then particular work shall be determined by the Board of Reference.

(c) Any allowance paid under this Sub-clause includes any allowance otherwise prescribed in Clause 17—Special Rates and Provisions of the Engineering Trades (Government) Award 1967.

AWU EMPLOYEES—PAY SCALES—AWU

AWU Employees

Enterprise Bargaining Agreement 2000

PAY RATE

Level	Pay Scale	Annual	Fortnight
LEVEL 1	L1	26 302	1008.38
LEVEL 2	2.1	27 232	1044.04
	2.2	28 172	1080.08
	2.3	29 138	1117.11
	2.4	30 098	1153.92
	2.5	31 048	1190.34
LEVEL 2/3	2.6	32 001	1226.88
	2.7-3.1	33 550	1286.26
LEVEL 4	2.8-3.2	35 098	1345.61
	4.1	36 644	1404.88
LEVEL 5	4.2	38 194	1464.31
	5.1	39 734	1523.35
	5.2	41 276	1582.47
	5.3	42 823	1641.78
LEVEL 6	5.4	44 373	1701.20
	6.1	45 913	1760.24
	6.2	47 669	1827.57

ATTACHMENT A—PAY SCALES—TEA ATTENDANTS

Tea Attendants

Enterprise Bargaining Agreement 2000

PAY RATE

Level	Pay Scale	Annual	Fortnight
TEA	Year 1	22 179	850.34
ATTENDANT	Year 2	22 477	861.76
	Year 3	22 728	871.38

The above Tea Attendants pay rates include service allowance.

SUSTENANCE FOR CADETS DURING STUDY PERIODS		
CADETS		
SUSTENANCE CATEGORY	Year of Study	Pay Rate
Category I		Fortnightly Rate
A Cadet attending a Western Australian University who is not eligible to receive a living away from home allowance as defined in Category II	1st Year	259.56
	2nd Year	298.78
	3rd Year	335.86
	4th Year	368.56
	5th Year	381.70
Category II		Fortnightly Rate
A Cadet attending a Western Australian University whose ordinary place of residence is outside a radius of 40 km from the Perth GPO and who is obliged to live away from their ordinary residence.	1st Year	344.62
	2nd Year	399.12
	3rd Year	449.24
	4th Year	492.84
	5th Year	508.22
Category III		Annual Rate
A Cadet attending an Australian University in another State.	1st Year	7 453
	2nd Year	8 627
	3rd Year	9 687
	4th Year	10 643
	5th Year	10 984

Special Supplementary Allowance

Full-time cadets in Categories II or III who are in residence at a University College, are entitled to a special supplementary allowance to cover the cost of college accommodation. The cost of accommodation in excess of \$355 per fortnight is reimbursed by Main Roads.

A Cadet who is living in accommodation other than a University College is also entitled to this allowance. However, the reimbursement will not exceed the amount which would have been payable if the Cadet was in residence at a College of the University which they are required to attend.

ATTACHMENT B—MEALS & ACCOMMODATION ALLOWANCE RATES

Item	Locations	Payment (Daily Rate)
1. Incidental Allowance		
	WA—South of 26th Parallel	\$9.30
	WA—North of 26th Parallel & Interstate	\$11.55
2. Meals Allowance		
	WA—South of 26th Parallel	
	Breakfast	\$11.95
	Lunch	\$18.70
	Evening Meal	\$25.90
	WA—North of 26th Parallel & Interstate	
	Breakfast	\$13.05
	Lunch	\$19.15
	Evening Meal	\$26.30
3. Meals & Accommodation Allowance at a Hotel or Motel		
	Broome \$202.30	Newman \$216.05
	Carnarvon \$160.70	Nullagine \$111.70
	Christmas Island \$148.75	Onslow \$150.05
	Cocos Island \$133.75	Pannawonica \$153.20
	Dampier \$164.05	Paraburdoo \$209.55
	Derby \$164.30	Port Hedland \$213.15
	Exmouth \$167.80	Roebourne \$123.75
	Fitzroy Crossing \$218.05	Sandfire \$104.55
	Gascoyne Junction \$119.55	Shark Bay \$146.55
	Halls Creek \$209.70	Tom Price \$176.05
	Karratha \$245.55	Turkey Creek \$113.20

Kununurra	\$179.55	Wickham	\$145.05
Marble Bar	\$138.05	Wyndham	\$138.05
4. Meals & Accommodation Allowance at a Hotel or Motel for the Perth Metropolitan Area or Locality South of 26th Parallel			
	Perth Metropolitan Area		\$179.55
	Locality South of the 26th Parallel		\$133.35
5. Meals & Accommodation—at an Interstate Hotel or Motel			
	Sydney		\$202.40
	Melbourne		\$195.40
	Other Capital Cities		\$165.20
	Interstate Other than Capital Cities		\$133.35
6. Meals & Accommodation—at Other than—Hotel or Motel			
	WA South of the 26th Parallel		\$65.85
	Interstate & WA—North of the 26th Parallel (except Christmas And Cocos Islands)		\$70.05
	Christmas & Cocos Islands		\$60.30
7. Meals & Accommodation—Normal Camp (MRWA/Contractor)			
	WA—South of 26th Parallel		\$37.60
	WA—North of 26th Parallel		\$39.70

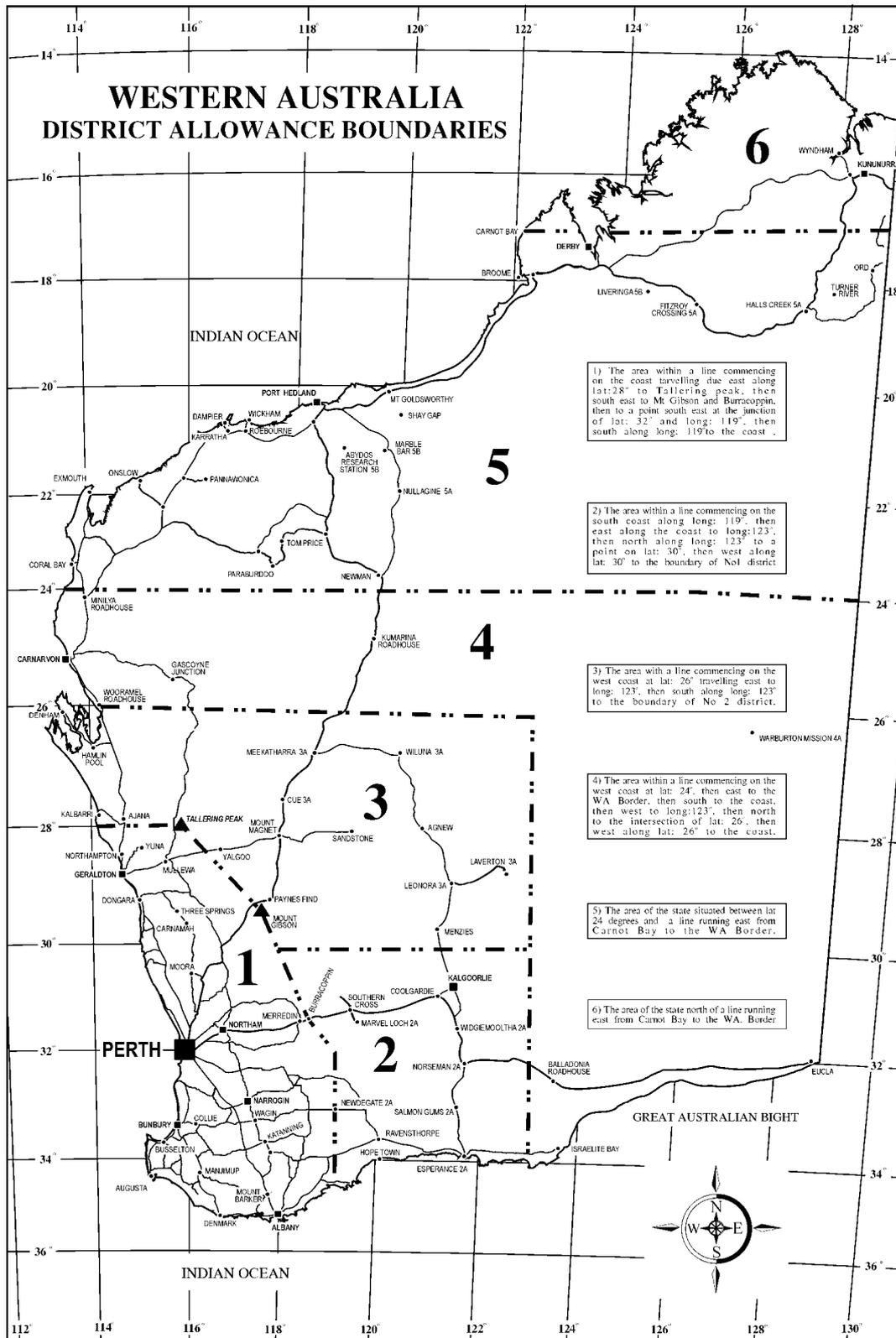
ATTACHMENT C—MOTOR VEHICLE ALLOWANCE RATES

Area and Details	Engine Displacement (in Cubic Centimetres)		
	Over 2600cc	Over 1600cc - 2600cc	1600cc & under
MOTOR CAR			
Perth Metropolitan Area	63.3	54.9	48.7
Central and Southern Operational Centres	65.1	56.5	50.2
Northern Operational Centre	71.4	62.3	55.5
Goldfields/Esperance Operational Centre	67.3	58.4	51.8
MOTOR CYCLE		21.9	
ADDITIONAL RATE FOR TOWING A CARAVAN		3.0	
ADDITIONAL RATE FOR TOWING A TRAILER		2.0	

ATTACHMENT D—DISTRICT ALLOWANCE RATES AND BOUNDARIES

District	Standard Rate \$pa	Town or Place Exceptions	Exceptions to Standard Rate	Child Component \$pa
6	\$ 3 032	Nil	Nil	\$100
5	\$ 2 481	Fitzroy Crossing Halls Creek Turner River Camp Nullagine	\$ 3 341	\$100
		Liveringa (Camballin)	\$ 3 104	\$100
		Marble Bar	\$ 2 922	\$100
		Wittenoom	\$ 2 718	\$100
		Karratha Port Hedland		
4	\$ 1 250	Warburton Mission	\$ 3 359	\$100
		Carnarvon	\$ 1 177	\$100
3	\$788	Meekatharra Mount Magnet Wiluna Laverton Leonora Cue	\$ 1 250	\$100
2	\$565	Kalgoorlie Boulder Ravensthorpe Norseman Salmon Gums Marvel Loch Esperance	\$589	\$50
			\$746	\$50
1	Nil	Nil	Nil	Nil

ATTACHMENT D—DISTRICT ALLOWANCE RATES AND BOUNDARIES



SAFE SCAFFOLD/BLPPU COLLECTIVE AGREEMENT 2000.

No. AG148 of 2000.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Western Australian Builders' Labourers Painters & Plasterers Union of Workers

and

Safe Scaffold Pty Ltd.

No. AG148 of 2000.

COMMISSIONER J.F. GREGOR.

29 June 2000.

SAFE SCAFFOLD/BLPPU COLLECTIVE AGREEMENT 2000.

Order.

HAVING heard Mr P Joyce for the applicant and there being no appearance for the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the agreement between the two parties lodged in the Commission on 31 May 2000 entitled Safe Scaffold/BLPPU Collective Agreement and as subsequently amended by the parties, to be registered in terms of the following schedule as an Industrial Agreement and replacing Agreement No. AG338 of 1997, which is hereby cancelled.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

1.—TITLE

This agreement shall be known as the Safe Scaffold / BLPPU Collective Agreement 2000.

2.—ARRANGEMENT

	Clause No.
Title	1
Arrangement	2
Parties and Persons Bound	3
Application	4
Relationship to Parent Award	5
Period of Operation	6
Classification Structures & Rates of Pay	7
Industry Standards	8
Sick Leave	9
Negotiation of a Subsequent Agreement	10
Application of Project Agreements	11
Fares and Travelling Allowance	12
Seniority	13
All In Payments	14
Pyramid Sub-Contracting	15
Dispute Settlement Procedure	16
Safety Dispute Resolution	17
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Training and Related Matters	19
Drug & Alcohol, Safety & Rehabilitation Program	20
Clothing & Safety Footwear	21
Income Protection	22
Accident Pay	23
Union Membership	24
Y2K	25
Signatories to the Agreement	26
Appendix A—Drug & Alcohol, Safety and Rehabilitation	
Appendix B—Labour Levels for Scaffolding	

3.—PARTIES AND PERSONS BOUND

This agreement shall be binding on Safe Scaffold Pty Ltd (hereinafter referred to as "the company"), the Western Australian Builders' Labourers, Painters and Plasterers Union of Workers (hereinafter referred to as "the union") and all employees of the company eligible to be members of the union.

4.—APPLICATION

This agreement shall apply to all employees of the company engaged on work in or in connection with the construction, alteration, maintenance, ornamentation, repair or demolition of buildings or any other structures of any kind whatsoever.

This agreement shall apply in Western Australia only. There are approximately eight (8) employees covered by this agreement.

5.—RELATIONSHIP TO PARENT AWARD

1. This agreement is supplementary to, and shall be read and interpreted wholly in conjunction with, the Building Trades (Construction) Award 1987, Award No. R14 of 1978 (hereinafter referred to as "the award").

2. In the event of any inconsistency between the award and an express provision of this agreement, the terms of this agreement shall prevail to the extent of such inconsistency, unless the express provision of the agreement provides otherwise.

6.—PERIOD OF OPERATION

This agreement shall come into force from the first pay period commencing on or after April 1st 2000 and shall remain in force until the 1st of November, 2002.

7.—CLASSIFICATION STRUCTURE & RATES OF PAY

1. All employees working under this agreement shall be paid according to the wage rates set out below.

2. Wage Rates (per hour at ordinary time)

	Previous EBA Rate Hourly Rate \$	1st November 1999 Hourly Rate \$	1st November 2000 Hourly Rate \$	1st November 2001 Hourly Rate \$
Scaffolder	16.56	17.39	18.26	19.17

3. In a addition, the following allowance will be paid for work carried out—

(a) A rate of \$5.25 per hour will be paid to all employees. This allowance is "all purpose" and shall be included as part of the ordinary rate.

4. All expense related allowances not specifically mentioned in this agreement will be paid as per the award as varied from time to time.

5. An additional payment will be made to compensate for the impact of the Goods and Services Tax on the Consumer Price Index. In the circumstance that the CPI limit below is exceeded the appropriate additional payment will be made to the wage rates. The CPI figure for the applicable dates will be the official figure released by the ABS for the preceding year.

Date	CPI Limit	Additional Payment
June 2001	5%	1% (paid 1/9/2001)
June 2001	6%	2% (paid 1/9/2001)
June 2002	5%	1% (paid 1/9/2002)
June 2002	6%	2% (paid 1/9/2002)

8.—INDUSTRY STANDARDS

Redundancy

The company shall increase redundancy contributions on behalf of each employee to the following sums on a weekly basis—

Rate on signing	\$50
Rate as of 1/05/2001	\$60

Superannuation

(i) The Company will make a payment of \$60 per week per employee or the percentage rate that is prescribed under the Superannuation Guarantee Charge, whichever is the greater.

The Company will advise all employees subject to the Agreement of their right to have payments made to a complying superannuation fund of their choice. The Company is bound by the employee's election. The aforementioned payment will then be made to that fund.

Until each employee nominates the fund of their choice the Company will make payments into the Construction + Building Unions Superannuation Scheme (the "C+BUSS").

In the event that any employee chooses a fund other than the C+BUSS the Company will, within seven days of the employee advising the Company of the fund of their choice, advise the Union in writing of the employee's decision.

In the event that the employee and the Company reach an agreement pursuant to section 49C(2)(d) of the Act to change the complying superannuation fund or scheme the Company will, within seven days of the employee and the Company reaching such an agreement, advise the Union in writing of the agreement. The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by the employee.

(ii) "Ordinary Time Earnings" (which for the purposes of the Superannuation Guarantee (Administration) Act 1992 will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, industry allowance, trade allowances, shift loading, special rates, qualification allowances (eg. first aid, laser safety officer), multi-storey allowance, site allowance, asbestos eradication allowance, leading hand allowances, in charge of plant allowance and supervisory allowances where applicable. The term includes any regular over-award pay as well as casual rates received and any additional rates and allowances paid for work undertaken during ordinary hours of work, including fares and travel.

9.—SICK LEAVE

For sick leave accrued after the date of signing this agreement the following will apply—

- (a) The Company's employees shall have the option of converting 100% of accrued sick leave entitlement to a cash payment on termination
- (b) If an employee who has been terminated by the Company without exercising the above option is re-engaged within a period of six months, the unpaid balance of sick leave shall continue from the date of re-engagement.
- (c) Where the Company has signed a previous Agreement with the Union that also allowed for the conversion to cash payment on termination for accrued sick leave, that accrued sick leave will be treated as if it accrued under this agreement.
- (d) Sick leave shall accrue, for the purposes of this clause, at the rate of one day at the beginning of each of the first ten calendar months of each year.

10.—NEGOTIATION OF A SUBSEQUENT AGREEMENT

The parties agree to commence negotiations for a new collective agreement to succeed this agreement at least 3 months before the nominal expiry date. The parties intend to conclude these negotiations prior to the nominal expiry date. These negotiations shall be conducted on a collective basis between all of the parties with the negotiated outcome being subject to approval of a vote of the employees collectively.

11.—APPLICATION OF PROJECT AGREEMENTS

1. This agreement shall apply to all persons employed in the employer's business and every part thereof throughout Western Australia until 1st November 2002 except where the company commences work on a project where a site agreement to which the union is a party exists that provides for higher rates of pay and conditions.

2. The conditions contained in any such site agreement will take precedence over this agreement for the duration of the project.

12.—FARES AND TRAVELLING ALLOWANCE

In addition to Clause 12A of the award a travel payment shall be made in the form of a daily payment (on days worked) of \$6.15 per day per employee.

13.—SENIORITY

1. The parties agree the continuity of employment is desirable wherever possible, and that where it is not possible, employees will be retrenched in order of seniority.

2. When applying the "first on last off" principle it is agreed subject to the caveat of "all things being equal", it is intended to apply on a Company basis rather than a site by site basis.

3. It is recognised that from time to time instances may arise where the employee's individual skills may be subject to this caveat. Where there is any disagreement as to the application of this the matter will be processed in accordance with Clause 16—Dispute Settlement Procedure.

4. An employee who has been retrenched by the Company shall have absolute preference and priority for re-employment/re-engagement by the Company. Where an employee is re-engaged within a period of six months the employee shall maintain continuity of service and all accrued entitlements with the Company.

14.—ALL IN PAYMENTS

1. All-in payments to employees will not be made. All-in payments are defined as an hourly rate or piece work rate which is meant to cover wages and all allowances, such as annual leave, sick leave, etc., on which tax is being paid using the Prescribed Payments System.

2. It is agreed that where a breach of this clause is discovered, the employer shall continue paying the "all-in" rate as the employees hourly rate, but shall pay all award and other entitlements on top of this amount, back-dated to the commencement of the all-in rate arrangement. The company shall not be entitled to offset any amount in excess of the ordinary hourly rate against any other entitlement in this agreement.

3. This clause shall not be applied to prevent the employer subletting specialised work outside of the normal scope of work which the employer performs. The union shall be notified when specialist sub-contractors are to be engaged.

15.—PYRAMID SUB-CONTRACTING

1. "Pyramid Sub-Contracting" is defined as the practice of a sub-contractor, to whom a sub-contract is originally awarded, sub-letting that contract or part thereof to another sub-contractor.

2. Provided that where a sub-contractor does not have the technical capacity to handle a specialist section of the contract and intends to engage a specialist sub-contractor to perform that work, that section may be re-let to a specialist sub-contractor.

3. Further provided that when a sub-contract is let for labour and material, a labour-only sub-contract may be let by the sub-contractor, but it is unacceptable as a principle for further labour-only sub-contracts to be re-let.

4. A bona fide sub-contractor is generally an employer of labour, save for a machine owner-operator.

5. Where a disagreement arises in relation to the definition or application of the term "Pyramid Sub-Contracting" the parties shall discuss and determine the issue in accordance with the agreement dispute resolution procedure. In any event of a disagreement, the matter shall be negotiated further between the parties or referred to the Western Australian Industrial Relations Commission. Whilst these procedures are undertaken no industrial action shall occur.

16.—DISPUTE SETTLEMENT PROCEDURE

1. Disputes over any work related or industrial matter should be dealt with as close to its source as possible.

2. An employee or the union delegate should initially submit any work related grievance and/or industrial matter to the site foreperson, supervisor or other appropriate site representative of the company.

3. If the matter remains unresolved the union delegate may then submit the matter to the appropriate senior management person.

4. If still not resolved the delegate shall refer the matter to an appropriate official of the union, who shall discuss the matter with the nominated representative of the employer.

5. Whilst the above procedures are being followed work should continue as normal.

6. This procedure is to be followed in good faith and without unreasonable delay by any party.

7. Should the matter remain unresolved it shall be dealt with in one of the following ways as agreed to between the parties—

- referred to the Western Australian Industrial Relations Commission for conciliation and if required

arbitration. The Commissions decision will be accepted by all parties subject to legal rights of appeal; or

- referred to a disputes board for determination; or
- referred to a private arbitrator agreed to between the parties, for determination.

8. This dispute settlement procedure does not apply to health and safety issues.

17.—SAFETY DISPUTE RESOLUTION

1. The parties to this agreement are committed to the safe operation of plant and equipment, to the observance of safe working practices, and the provision by the employer and correct use of all personal protective equipment. The company recognises its responsibilities to provide a safe and healthy workplace.

2. In the event of any disagreements on the necessity to carry out any safety measure or modify, reinforce or reinstate any safety device whatsoever, the procedures set out in this clause will be adopted.

3. No person shall dismiss a safety complaint. Any complaint should be referred to the company safety officer or workers' safety representative to be dealt with in accordance with the following procedures—

- (i) Where any employee becomes aware of an unsafe situation, that employee will immediately notify the company safety officer or the workers' safety representative.
- (ii) The company safety officer and the workers' safety representative will take immediate action to have the unsafe situation rectified.
- (iii) Should the company safety officer consider that no safety precautions are necessary, he/she will notify the workers' safety representative accordingly as soon as possible.
- (iv) While there is disagreement on the ruling of the company safety officer, the company safety officer will arrange for the immediate transfer of all employees from the disputed area.
- (v) Should the company safety officer be of the opinion that no action is necessary and the worker's safety representative disagrees, an appropriate inspector from Worksafe/Workcover will be requested to undertake an inspection of the disputed area for the purpose of resolving any such matter.
- (vi) If disagreement still exists the chief inspector or his/her nominee will be called in to assist in the resolution of the dispute.
- (vii) If no agreement can be reached between the parties the matter will be dealt with in accordance with the dispute resolution procedure of this agreement.
- (viii) Whilst the above procedure is being followed there will be no stoppage of work in respect of the matter being considered, except in the area alleged to be unsafe.
- (ix) It is accepted that safety considerations override normal work practices and depending on the degree of potential risk to persons on the job, or the general public, can override normal demarcation practices.

18.—AMENITIES

1. The parties agree that it is the responsibility of the company to ensure that the amenities prescribed by the Award are provided as a minimum. Where, however, that standard is not maintained due to an action or event beyond the control of the company, the union agrees that the company should be allowed reasonable time in which to rectify the problem. If the company acts promptly to rectify the problem, there should be no interruption to work from industrial stoppages, bans and limitations.

2. In all instances, the following procedure shall be observed.

3. A uniformly high standard of amenities and facilities such as ablution blocks, change rooms, crib sheds, etc. shall be provided.

4. All Sheds shall be weatherproof and soundly constructed to an approved standard with sufficient windows and doors,

adequate ventilation and lighting. They must have a floor above ground level and be lined on ceilings and walls.

5. Mess Shed/s fitted with fly screens are provided for exclusive use of workers and not for the storage of employers' equipment, tools and materials.

6. Shed/s shall provide not less than 0.75 square metres of floor space per person employed at any one time, provided that the area be not less than 4.65 square metres. Fixtures, other than tables and chairs, shall not be included when calculating floor space.

7. Where 5 or more persons are employed at one time, the floor area shall not be less than 9 square metres.

8. Adequate facilities are to be provided for warmth and for drying clothes eg. strip heaters.

9. Provided that 20 or more persons are employed on the site at any one time, the employer shall provide a separate shed or sheds for messing, which shall be of such dimension as to provide not less than 0.75 square metres of floor space per person.

10. Where less than 20 persons are employed on site, Regulation 3.20—Workplace Facilities of the Occupational Safety and Health Regulations 1996 shall apply to provisions of messing and changing facilities.

11. In the changing facilities, separate clothes-hanging facilities for each person employed are to be provided (coat hooks only to be used).

12. In the changing facilities, sufficient seating accommodation for the changing of work apparel is to be provided.

13. In the messing facilities, sufficient tables with fixed washable laminated or vinyl surface, and seating for the taking of meals, are to be provided.

14. Food warming facilities to be supplied, together with a supply of cool, clean water conveniently accessible, as well as boiling water at meal/rest breaks.

15. Receptacle for garbage with bin liner and rat and fly proof is to be supplied in mess area, and emptied regularly.

16. A washable vinyl floor surface in all facilities is to be provided.

17. Shelving is to be supplied in the mess shed for storage (cups, lunch bags, etc).

18. All facilities are to be cleaned and disinfected on a regular basis.

19. All mess sheds shall be supplied with reverse cycle air-conditioning.

20. Toilet blocks shall be soundly constructed and roofed with weatherproof material. The floor of each toilet shall be well-drained and constructed of concrete, bricks and cement, or other approved materials which shall be impervious to water. Every toilet shall be well lighted by natural or artificial light and shall be ventilated. Each toilet shall have a hinged door, capable of being fastened on the inside, lift seats/flaps and toilet paper.

21. Where practicable, toilets to be connected to sewerage before commencement of the job.

22. Toilet/urinal location to be conveniently accessible to employees, but not so close as to cause a nuisance to those persons.

23. Where necessary, portable water seal toilets of an approved standard are to be provided and regularly serviced.

24. Conveniently accessible toilets and urinals are to be distributed every 5th floor on multi-storey constructions.

25. Toilets and urinals are to be washed daily with disinfectant and kept in clean, hygienic condition.

26. Adequate washing facilities, suitably drained, and was basins/troughs are to be supplied with running water.

27. Soap and towels are to be supplied.

28. The following toilet/urinal ratio shall be applied in respect to all employees—

Employees	Toilets	Urinals
1—5	1	Nil
6—10	1	1
11—20	2	2

Employees	Toilets	Urinals
21—35	3	4
36—50	4	6
51—75	5	7
76—100	6	8

NB. For each additional 20 persons or part thereof up to 200 persons or part thereof up to 200 persons, one additional urinal and one additional toilet is required. For each additional 35 persons or part thereof in excess of 200 persons, one additional urinal and one additional toilet is required. If a slab urinal is provided, each 600mm shall be regarded as one urinal.

19.—TRAINING AND RELATED MATTERS

1. A training allowance of \$13.00 per week per worker shall be paid by the employer to the Union Education and Training Fund. This shall increase to \$14.00 per week on 1 November 2000 and a further increase to \$15.00 per week on 1 November 2001.

2. Subject to all qualifications in this clause, an employee shall, upon application in writing to and with approval of the employer, be granted leave with pay each calendar year pro-rata to attend courses conducted or approved by the NBCITC. The employers approval shall not be unreasonably withheld.

The application for leave shall be given to the employer at least two weeks in advance of the date of commencement of the course.

The time of taking leave shall be arranged so as to minimise any adverse effect on the employer's operations. The onus shall rest with the employer to demonstrate an inability to grant leave where an employee is otherwise entitled.

An employer shall not be liable for any additional expenses associated with an employee's attendance at a course other than payment of ordinary time earnings for such absence.

For the purpose of this clause ordinary time earnings shall be defined as the agreement classification rate.

Leave of absence granted pursuant to this clause shall count as service for all purposes of this agreement.

3. The Company will actively encourage employees to seek formal recognition of their skills (recognition of prior learning), and will allow leave as per (2) above for such purposes including but not limited to securing Tradesmen's Rights Certificates.

20.—DRUG & ALCOHOL, SAFETY & REHABILITATION PROGRAM

The parties are committed to the Drug and Alcohol, Safety and Rehabilitation program as outlined in Appendix A—Drug and Alcohol, Safety and Rehabilitation Program.

21.—CLOTHING AND SAFETY FOOTWEAR

1. The following items will be supplied to each employee by the Company, upon the completion of five working days.

- (a) 1 pair safety boots, to be replaced on a fair wear and tear basis.
- (b) 2 T-shirts with collars, and will be replaced on a fair wear and tear basis.
- (c) 1 bluey jacket for each employee employed during the period 1 April to 31 October. (One issued per year)

2. The Company will also make available to each employee, when requested by them, sun screen lotion and sun brims to fit over safety helmets.

22.—INCOME PROTECTION

The Company agrees to insure employees covered by this Agreement for injury and sickness. The scheme is to be negotiated between the parties

23.—ACCIDENT PAY

1. The Company agrees to pay each employee accident pay where the employee receives an injury for which weekly payments or compensation are payable by or on behalf of the Company pursuant to the provisions of the Workers' Compensation and Rehabilitation Act 1981, as amended.

2. "Accident Pay" means a weekly payment of an amount being the difference between the weekly amount of

compensation paid to the employee pursuant to the Workers Compensation and Rehabilitation Act and the employee's ordinary wage under this Agreement.

3. The Company shall pay accident pay during the incapacity of the employee arising from any one injury for a total of 39 weeks whether the incapacity is in one continuous period or not.

24.—UNION MEMBERSHIP

The employer will encourage, as far as possible, all employees covered by the agreement, to be financial members of the Unions.

25.—Y2K

On the following key dates the Company will issue written records of accrued entitlements to each employee. The accrued entitlements will include annual leave, sick leave, any accruing productivity bonuses, redundancy payments and Superannuation payments and also on each employees anniversary date—

- 31 December 1999
- 28 February 2000
- 31 December 2000
- 28 February 2001

26.—SIGNATORIES

BLPPU	K Reynolds.
	Date 30/5/00
The Company:	A. R. Weskin
	Date 10/5/00

Company Seal

APPENDIX A—DRUG AND ALCOHOL, SAFETY AND REHABILITATION PROGRAM

1. PRINCIPLE

People dangerously affected by alcohol, and/or drugs are a safety hazard to themselves and all other persons in the workplace.

2. FOCUS

- * Site safety and the involvement of the site safety committee
- * Peer intervention and support
- * Rehabilitation

3. WORKPLACE POLICY

(a) A person who is dangerously affected by drugs or alcohol will not be allowed to work until that person can work in a safe manner.

(b) The decision on a persons ability to work in a safe manner will be made by the safety committee, or on projects with no safety committee, by a body of at least equal numbers of employee/employer representatives.

(c) There will be no payment of lost time to a person unable to work in a safe manner.

(d) If this happens 3 times the worker shall be given a written warning and made aware of the availability of treatment/counselling. If the worker refuses help he/she may be transferred/dissmised the next time he/she is dangerously affected.

(e) For the purposes of disciplinary action a warning shall be effective for a period of 12 months from the date of issue.

(f) A worker having problems with alcohol and or other drugs—

- Will not be sacked if he/she is willing to get help.
- Must undertake and continue with the recommended treatment to maintain the protection of this program.
- Will be entitled to sick leave or leave without pay while attending treatment.

4. IMPLEMENTATION

To assist with the adoption and implementation with this policy the company will—

- (a) Clearly state its endorsement of the BTG Drug and Alcohol program and comply with it.
- (b) Provide access at an agreed time and venue for a representative of the BTG Drug and Alcohol

Program to address a meeting of employees to discuss and endorse the program.

- (c) Authorise the attendance of appropriate company personnel eg. Safety delegate/officer, safety committee members, union delegate, consultative committee members(s) at the two hour BTG Drug and Safety in the Workplace training course.

APPENDIX B

Labour Levels for Scaffolding

This appendix sets out parameters for labour levels on scaffolding work, however it has been an understanding between the parties that a common sense approach in keeping with practical and safe working conditions forms the basis of this Agreement.

1. Steel Scaffolding

Scaffolding work of a substantial nature erected over 4 metres high in accordance with Division 7 of the Occupational Safety and Health Regulations and Australian Standard 1576 shall where that scaffolding is to be erected at one time be the work of at least 3 workers.

Scaffolding that will ultimately be erected over 4 metres high, however is built in stages can be erected up to 4 metres by a two person team one of which shall be a licensed scaffolder.

Notwithstanding the abovementioned agreements and due to the variation of circumstances applicable in scaffolding work such as towers, scaffolding over uneven sites, etc, there will be consultation between the Licensed Scaffolder and the Employer on labour levels in line with practical and safe working conditions is an understanding between the parties to this agreement.

2. Aluminium Mobiles

There shall not be a requirement for 3 person gangs up to a height of 9.2 metres on Aluminium Mobiles unless deemed necessary by the employer.

SMALL BUSINESS DEVELOPMENT CORPORATION ENTERPRISE BARGAINING AGREEMENT 2000—2002. No. PSA AG 51 of 2000.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia
Incorporated

and

Managing Director, Small Business Development
Corporation of Western Australia.

No. PSA AG 51 of 2000.

Small Business Development Corporation Enterprise
Bargaining Agreement 2000—2002.

30 June 2000.

Order.

HAVING heard Ms K F M Franz as agent for the Applicant and Ms C F Holmes as agent for the Respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the agreement made between the parties as lodged in the Commission on the 20th day of June 2000 entitled Small Business Development Corporation Enterprise Bargaining Agreement 2000—2002 and as subsequently amended by direction of the Commission be registered in the terms of the following Schedule as an industrial agreement and replaces the Small Business Development Corporation Enterprise Bargaining Agreement 1998 – 2000 (No. PSA AG 34 of 1998) and the Small Business Development Corporation Enterprise

Bargaining Agreement (No. PSA AG 134 of 1996) both of which are hereby cancelled.

[L.S.]

(Sgd.) G. L. FIELDING,
Senior Commissioner,
Public Service Arbitrator.

Schedule.

1.—TITLE

This Agreement shall be known as the Small Business Development Corporation Enterprise Bargaining Agreement 2000 – 2002 and shall replace the Small Business Development Corporation Enterprise Bargaining Agreement 1998—2000.

2.—ARRANGEMENT

1. Title
2. Arrangement
3. Area and Scope
4. Number of Employees Covered
5. Parties Bound
6. Definitions
7. Relationship to Parent Award
8. Duration of Agreement
9. No Further Claims
10. Single Bargaining Unit (SBU)
11. Mission Statement
12. Overall Objective and Goals
13. Productivity Improvement
14. Productivity Measurement
15. Salary
16. Hours of Work
17. Part-Time Employment
18. Flexible Working Hours
19. Payment of Overtime
20. Public Holidays
21. Compaction of Annual Leave
22. Annual Leave Loading
23. Higher Duties Allowance and Annual Leave
24. Family Carers Leave
25. Bereavement Leave
26. Short Leave
27. Long Service Leave
28. Paid Parental Leave
29. Future Productivity
30. Dispute Resolution Procedure
31. Signatures of Parties to the Agreement

Schedule A—Salaries

Schedule B—2000—2002 Productivity Improvement Plan

Schedule C Dispute Resolution Procedure

3.—AREA AND SCOPE

The Agreement shall apply to Small Business Development Corporation Employees in Western Australia eligible to be members of the Civil Service Association of Western Australia Incorporated (CSA).

4.—NUMBER OF EMPLOYEES COVERED

As at May 1, 2000 the approximate number of staff to be covered by the Agreement is 18.

5.—PARTIES BOUND

5.1 The Employer—

The Managing Director of the Small Business Development Corporation.

5.2 The Union—

The Civil Service Association of Western Australia Incorporated (CSA).

5.3 The parties bound by this Agreement will oppose any subsequent application by any other body or organisation to be joined to this Agreement.

6.—DEFINITIONS

“CSA” means the Civil Service Association of Western Australia Incorporated.

“Employee” for the purpose of this Agreement, means someone who is referred to at Clause 3—Area and Scope of this Agreement.

“Employer” means the Managing Director of the Small Business Development Corporation of Western Australia

“Government” means the State Government of Western Australia

“Minister” means the Hon Minister for Small Business

“Parties” means the Employer and the Union, as referred to in Clause 5.2, when referred to jointly in this Agreement.

“SBDC” means the Small Business Development Corporation of Western Australia

“Union” means the Civil Service Association of Western Australia Inc (CSA).

“WAIRC” means the Western Australian Industrial Relations Commission

7.—RELATIONSHIP TO PARENT AWARD

This Agreement shall be read wholly in conjunction with the Government Officers’ Salaries Allowances and Conditions Award 1989 which applies to the parties bound by this document. In the case of any inconsistency this Agreement shall prevail to the extent of the inconsistency.

8.—DURATION OF AGREEMENT

8.1 This Agreement shall operate from the date on which it is registered in the Western Australian Industrial Relations Commission and shall remain in force for a period of two years from the date of registration.

8.2 Each party to this Agreement accepts that its conditions shall be binding for the duration of its term.

8.3 The parties will review this Agreement six months prior to the date of expiration and begin negotiations on its renewal or replacement.

8.4 The parties will assess achievements in performance, productivity and efficiency during the term of this agreement.

8.5 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, subject to the working arrangements continuing and the productivity improvements being achieved.

8.6 The Agreement will continue in force after the expiry of its term until such time as any of the parties withdraw from the Agreement by notification in writing to the other party and to the WAIRC.

8.7 This Agreement may be amended by consent of the parties, renewed or replaced by another Agreement or canceled as appropriate.

9.—NO FURTHER CLAIMS

The parties to this Agreement undertake that for the duration of the Agreement there shall be no further salary or wage increases sought or granted except where expressly provided for in a State Wage Case decision.

All arbitrated safety net adjustments are to be absorbed into the pay rates provided for in this Agreement.

10.—SINGLE BARGAINING UNIT (SBU)

For the purpose of negotiating this and future Agreements, a Single Bargaining Unit has been formed as a representative of all parties. The Single Bargaining Unit will continue to monitor the implementation of the Agreement and be responsible for its replacement.

11.—MISSION STATEMENT

The Small Business Development Corporation’s Mission is—

To create opportunity and wealth for small to medium sized enterprise in Western Australia.

12.—OVERALL OBJECTIVE AND GOALS

The shared objective of the parties is—

To encourage economic growth and enhanced employment opportunities through the development of effective small to medium sized enterprise in Western Australia.

To meet the Corporation’s overall objective the following strategic goals have been determined—

1. To facilitate the pursuit of opportunity by small business in the growth sectors of Tourism, the Service Sector, Global Markets and Exporting, Local Content in Government Contracts and Women in Business.
2. To remove external barriers and impediments to business growth.
3. To improve business skills in the small to medium enterprise sector.
4. Foster an enterprise culture and emphasis the value and success of small business.
5. To increase confidence in the small business sector.
6. To facilitate regional small business development.
7. To create an SBDC culture that facilitates the achievement of SBDC’s goals.

13.—PRODUCTIVITY IMPROVEMENT

The Small Business Corporation is an independent source of innovative enterprise development in Western Australia. The Corporation’s objective is to encourage the growth and development of small to medium enterprise in WA.

The SBDC is firmly committed to serving its clients, encouraging their growth and ability to create permanent employment opportunities, by providing—

- enterprise development services and assistance to existing and prospective small business operators;
- support to industry and regional groups to enhance the development of small to medium enterprise; and
- representation for the sector to minimise barriers to its operators and promote a business environment conducive to growth.

The Corporation has been and will continue to—

- Encourage the development of new and existing small to medium sized businesses in Western Australia.
- Provide to the small business sector information and advice on policies, legislation, regulatory arrangements and services to enable them to become informed on small business matters.
- Satisfy the requirements of SBDC clients and customers through the provision of reliable, efficient and competitive services.
- Provide information on licences and regulations necessary to small business.
- Provide access to information and advice to the small business sector in matters relating to employment, management, tax and other related issues.
- Undertake research and inquiries to address marketplace situations and problems facing the small business sector, including advising the Minister for Small Business on these issues.

FUTURE PRODUCTIVITY

In recent years, the Corporation has undergone a major restructure process which has resulted in changed work practices and enabled employees to work smarter thereby contributing to achieving future productivity. Such a focus will allow the SBDC to meet increased demand for its services—stemming from tax reform and the increasing importance of information technology—with little or no increase to its resource levels.

The parties agree that increased productivity will be achieved through the implementation of SBDC’s new structure and agreed quality management concepts, including team based approaches to the work environment.

The parties propose to maintain the process of continuous improvement by undertaking strategies and initiative in—

- Development of a ‘learning organisation’ in which a learning culture is developed and the knowledge assets of the Corporation are continuously enhanced.
- Changed work practices in which a team based approach to project management is adopted and team work awareness is heightened.

- Development of a performance management system, which will identify training and development requirements for all employees, to include formal off or on the job training, customised individual development programs, and in-house training, as required.
- Improved customer service and continuous improvement, which will be linked through the performance management system to corporate and individual goals.
- Continued maintenance of a safe workplace in compliance with the Occupational Health and Safety legislation.

The Corporation aims to achieve its overall objective and goals through a commitment to continuous improvement by management and staff.

The parties agree that increased productivity will be achieved through the implementation and continuation of the under mentioned—

[a] Better alignment to strategic direction

(i) Building businesses through new programs

The Corporation, in its quest for continual improvement and enhanced service delivery, has or will expand its services to introduce a number of new programs, such as—

- Small Business Strategic Improvement Program
- Business Innovation Development Service
- Best Practice Workplace Relations Guide for Small Business
- Aussie Host Customer Service Program
- Olympic Opportunities Program
- Women in Exporting Program
- Seniors Business Mentor Program
- Year 2000 Awareness Program
- Interactive web-site
- Business Licence Information System
- Youth Initiative
- E-commerce Training and Development Course
- GST Transition Centre
- Production of GST Video

These new programs are aimed at assisting and building businesses to promote the growth and development of small to medium enterprise in WA. Some of the programs which commenced on a pilot basis were evaluated and will continue on an ongoing basis.

These new programs will be continually monitored and evaluated with a view to further develop and enhance services provided.

(ii) Linking strategically with other agencies

The Corporation has strategically linked with other agencies to enhance service delivery and provide further support and assistance to the small business sector. Some of the agencies that the Corporation has formed alliances with are—

- Office of the Seniors Interest—in regard to the Seniors Mentor Service.
- DOPLAR—for the development of a Workplace Relations Guide.
- Department of Commerce and Trade—for a number of programs including the year 2000 date change and the Olympic Opportunities program.
- Women's Policy Development Office—regarding Women in Business Two Year Plan.
- State Supply—with regard to small business input to Government purchasing.
- Ministry for Fair Trading—for seeking small business input to Commercial Tenancy Act amendments.

The Corporation will continue to expand its liaison and alliances with other agencies for the benefit of the small business sector.

(iii) Corporate development

A Human Resource System will be evaluated and installed, so that better quality information on all HR matters will be available to the Corporation.

Human Resources will play an important role in developing the learning organisation, focusing on the changing role of managers to co-ordinate teams, and the development of all employees to meet challenges of the continuous improvement culture.

Directors will work together to—

- Monitor the relevance of the existing organisational structure.
- Introduce and maintain team work awareness.
- Arrange for individual training needs analysis to be conducted and the production of an 'All Corporation' training plan to meet individual and Corporation needs.
- Implement and maintain an effective Performance Management System to incorporate performance based goal setting strategies.
- Promote the development of trust and motivation and continue to foster enhanced employee relations
- Deliver business outcomes through strategic and accountable human resource management.
- Promote health, safety, welfare and equal opportunity for all employees.

In addition, a clear understanding of the information requirements of SBDC staff and customers will continue to be developed and refined. Information requirements of business systems will be continually evaluated and upgraded to improve the quality and efficiency of services offered by the Corporation

Corporate development will also encompass improved monitoring of financial services, output measures and feedback surveys to identify where resources are used to assist the Corporation to assess and improve the quality and effectiveness of services provided.

In order to achieve a better alignment with the Corporation's strategic direction the management and staff of the five operational Directorates will work in conjunction with the small business sector and industry groups to—

- continue to monitor the issues of concern to the small business sector
- research and comment into matters concerning sector policy development, regulation review and enterprise development
- provide up to date business information and advice
- promote small business and develop healthy, growing and innovative small to medium enterprises
- be an effective advocate for small to medium enterprise issues.

[b] Better alignment to the Government's agenda for public sector management

- Customer focus
- Delivery of business outcomes through strategic and accountable human resource management and information systems e.g. website, online WA etc.
- The public sector standards in human resource management.
- Disability Services Plan and Equal Opportunity Employment Management Plan.
- Competitive Tendering and Contracting (CTC).
- Program management and evaluation

[c] Attainment of productivity through continual improvement and best practice principles.

The Corporation is committed to a program of quality and continuous improvement. This is to be achieved through the new Organisation Structure and a program of continual review of all the Corporation's structures, processes, practices and conditions, including—

- Evaluation of the most cost effective ways to provide services.
- Development of new methods for working smarter.
- Devolvement of responsibility for service delivery to the most appropriate person.
- Focusing on teamwork and team awareness.
- Accountability for the achievement of outcomes and further enhancement in individual performance.
- Employee professional development including acquisition of new skills.
- Involvement of all staff in decision making.
- Fostering a culture where staff are committed to the strategic objectives of the organisation.
- Adopting best practice principles.
- Continual review of work practices/procedures and resource allocation to improve customer service.
- Using participative practices to pursue changes in a co-operative manner.

14.—PRODUCTIVITY MEASUREMENT

14.1 The parties agree that the measurement and monitoring of productivity improvements is important because it provides critical feedback on the performance of the Corporation to management, employees and other relevant stakeholders. The parties therefore commit themselves to the development of effective performance monitoring and evaluation.

14.2 It is agreed that continuing development of performance monitoring will take place throughout the term of this Agreement.

14.3 Performance monitoring will include, but will not be limited to—

- Customer and client satisfaction surveys.
- Individual staff performance management.
- Further development of the Corporation's Performance Indicators.
- Development and implementation of a productivity measurement tool to measure and evaluate inputs and outputs of service delivery.

14.4 Assessment of Improvement Initiatives

14.4.1 The second three percent salary increase available under this Agreement shall be contingent upon the attainment, or satisfactory progress toward the attainment, of the initiatives listed in Schedule B to this Agreement.

14.4.2 Responsibility for the evaluation of the Corporation's performance against the milestone dates and outcomes listed above rests with the Managing Director.

14.4.3 Not less than 4 weeks prior to the first anniversary of the registration of the Agreement, the Managing Director, in consultation with Corporation staff, as appropriate, shall prepare a report as to the Corporation's performance with respect to the Improvement Initiatives listed in Schedule B.

14.4.4 The report shall either—

- (a) recommend the payment of the additional 3% salary increase;
- (b) recommend the partial payment of the additional 3% salary increase;
- (c) recommend no payment of the additional 3% increase.

14.4.5 In the case of 14.4.4(b) or (c), above, the Managing Director is to—

- (a) issue detailed reasons for his/her conclusion, and recommend a course of action to overcome identified deficiencies in the performance of the Corporation against the initiatives; and
- (b) re-review the performance of the Corporation against the initiatives and the Managing Director's own recommendations within three (3) months of the date on which the salary increase became available.

14.4.6 Where there is disagreement in relation to the Managing Director's assessment, the employee or employees concerned shall reduce the substance of such disagreement to writing and provide this to the Managing Director.

14.4.7 Where the Managing Director receives a written summary of disagreement pursuant to subclause 14.4.6 above, he or she shall immediately consider the matters raised therein and shall report in writing back to the employee(s) concerned at the earliest opportunity.

14.4.8 Where the issue still cannot be resolved satisfactorily, it shall be processed in accordance with the Dispute Resolution Procedure contained in Clause 29, hereof.

15.—SALARY

15.1 The salary rates payable are those contained in Schedule A which reflects the following increases—

15.1.1 A salary increase of 3.0 % paid in accordance with Column 2 of Schedule A of this Agreement, which will be paid from the date of registration of the Agreement in the W.A.I.R.C. This increase is in recognition of the initiatives attached in Schedule C hereof.

15.1.2 A salary increase of up to 3.0 %, subject to the completion of, or (in the opinion of the Managing Director) satisfactory progress towards the completion, of the productivity initiatives listed in Schedule B. This increase will be paid in accordance with Column 3 of Schedule A of this Agreement from the first pay period 12 months after the date of registration. This increase is in recognition of productivity improvements, programs and tasks undertaken in the pursuit of better quality outputs throughout the life of this Agreement as per the SBDC 2000 Productivity Plan (Refer to—Schedule B).

15.2 The adult range of the Level 1 band has been compacted from nine salary points to seven. No averaging of the remaining salary points has occurred and there is no change in the range of salary itself, other than as prescribed in subclauses 15.1.1 and 15.1.2 above. Level 1 Employees will move to the next salary point on their anniversary of employment date, subject to satisfactory performance.

15.3 Salary Packaging

(1) The Employee may, by agreement with the Employer, enter into a salary packaging arrangement in accordance with the Guidelines to Salary Packaging in the WA public sector, or any similar salary packaging arrangements offered by the Employer.

(2) Salary packaging is an arrangement whereby the entitlements under this agreement contributing to 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 benefit, 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) Salary related payments within this Agreement, excluding superannuation, are to be calculated on the pre-packaged salary as expressed in the Schedule A hereto.

(5) Where the 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.

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

(7) 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.

(8) In the event that 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.

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

(10) The cancellation of a salary packaging arrangement will not cancel or otherwise effect the operation of this Agreement.

16.—HOURS OF WORK

16.1 The Employee's normal hours of work will be an average of 38 hours per week. These hours are to be worked in accordance with Clause 18 of this Agreement—Flexible Working Hours.

16.2 For the purpose of this Agreement, hours of work shall be varied to accommodate the following—

- (a) An Employee's normal hours of work will be an average of 38 hours per week.
- (b) A normal work day will be an average of 7 hours and 36 minutes.

17.—PART-TIME EMPLOYMENT

17.1 Permanent part-time employment is defined as regular and continuing employment for a minimum of five (5) hours per week and a maximum of thirty two (32) hours per week.

17.2 Provided that the employee shall not be required to work for a period of less than five (5) hours on any single occasion.

18.—FLEXIBLE WORKING HOURS

18.1 Flexible working hours means that Employees will have greater flexibility with the ordinary hours of work incorporating a 7.30 am to 7.00 pm span.

18.2 Resource needs and hours required to be worked will be determined within the work environment subject to fulfilling agreed minimum hours over a four week period, meeting agreed work commitments, contributing towards achievement of the Corporation's objectives and agreed by the Section Director to decide the most suitable working arrangements.

18.3 For the purpose of meal breaks—Clause 16(2)(a), (b) and (c) of the Government Officers Salaries Allowance and Conditions Award 1989 shall apply.

18.4 When an Employee is required to work overtime, then overtime rates in accordance with Clause 19—Payment of Overtime of this Agreement will be paid.

18.5 Hours of overtime worked will not form part of the flexible working hours credit for the purpose of calculating Time in Lieu.

19.—PAYMENT OF OVERTIME

Where overtime is required to be worked by the Employee, payment will be made at the rate of 1.5 times the Employee's normal salary rate as set out in Schedule A.

20.—PUBLIC HOLIDAYS

20.1 The following days shall be allowed as holidays with pay—

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

20.2 When any of the days mentioned in subclause 20.1 of this clause falls on a Saturday or on a Sunday the holiday shall be observed on the next succeeding Monday.

When Boxing Day falls on a Sunday or Monday the holiday shall be observed on the next succeeding Tuesday.

In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.

21.—COMPACTION OF ACCRUED ANNUAL LEAVE

21.1 An employee may, at the time of taking annual leave, apply to compact an accrued period of annual leave to a half period (ie 4 weeks to 2 weeks), and take the leave at double pay.

21.2 An employee will not be able to compact annual leave if a lesser period than 4 weeks (uncompact) is taken at any one given time or if the employee's total accrued leave before the application is made is less than 6 weeks.

22.—ANNUAL LEAVE LOADING

22.1 Annual leave loading as stated in the Government Officers Salaries Allowances and Conditions Award 1989 in Clause 19 subclause (15) (a) shall not apply to this Agreement. (The annual leave loading was incorporated into fortnightly salary in the Enterprise Bargaining Agreement of 1996/97).

22.2 Subject to subclause (3), an annual leave loading of 17.5% shall be paid in respect of all annual leave accrued on or prior to the signing of this Agreement. (The amount paid as loading may be varied in accordance with the Circulars to Departments and Authorities issued by the Dept of Productivity & Labour Relations, or equivalent notices.

22.3 Annual leave loading will not be paid on leave accrued under an Agreement that did not provide for the payment of annual leave loading.

23.—HIGHER DUTIES ALLOWANCE AND LEAVE

This Clause is to be read in conjunction with Clause 14 of the Parent Award. Where an employee is on Higher Duties Allowance for twelve months or more and takes leave of more than four weeks, the employee shall be entitled to receive Higher Duties Allowance for the first four weeks of that leave.

24.—FAMILY CARERS LEAVE

24.1 The Employee will be entitled to utilise up to five [5] days of his or her accrued sick leave entitlements each calendar year to care for a family member. A family member is defined as person who is a spouse, de facto spouse, child, step child, parent, step parent, grandparent, grandchild, brother, sister, mother-in-law, father-in-law, brother-in-law, sister-in-law, or any other person who lives with the Employee as a member of the Employee's family or, upon application and approval, any other person.

24.2 In such cases an application for family carers leave exceeding two [2] consecutive days must be supported by a certificate from a registered medical practitioner or registered dentist.

24.3 If more than five [5] single days of leave (comprising of either personal sick leave or a combination of personal sick leave and family carers leave) is taken in any one credit year, then each day after that must be supported by a certificate from a registered medical practitioner or registered dentist.

24.4 Family leave entitlements will be deducted from the Employee's accrued sick leave entitlements. If the Employee does not have any accrued sick leave entitlements remaining, they may elect to have Family Leave deducted from their existing annual or long service leave entitlements.

24.5 Family leave is not cumulative from year to year.

25.—BEREAVEMENT LEAVE

25.1 The Employee will be entitled to paid bereavement leave for up to 2 days on the death of a spouse, de facto spouse, child, step child, parent, step parent, grandparent, grandchild, brother, sister, mother-in-law, father-in-law, brother-in-law, sister-in-law, or any other person who immediately before that person's death lived with the Employee as a member of the Employee's family or, upon application and approval, any other person.

25.2 An employee who claims to be entitled to paid leave under subclause (25.1) of this clause is to provide to the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to—

- (a) the death that is the subject of the leave sought; and
- (b) the relationship to the employee of the deceased person.

26.—SHORT LEAVE

Short leave as stated in the Government Officers Salaries Allowances and Conditions Award 1989 in Clause 26(1), (2) and (3) shall not apply to this Agreement.

27.—LONG SERVICE LEAVE

27.1 Employees are entitled to 13 weeks paid long service leave on full pay at the completion of each 7 years continuous

service. Employees are entitled to an additional 13 weeks of long service leave on full pay on completion of each subsequent period of 7 years of continuous service.

27.2 An employee may opt to take 26 weeks long service leave on half pay, or a combination thereof, with approval from the Managing Director.

27.3 An employee may, at the time of taking a full accrual of the 13 weeks of long service leave, elect to compact the accrued 13 weeks long service leave to 6.5 weeks and take half the leave at double pay. This compaction will not apply if a lesser period than the full 13 weeks is taken at any one given time.

27.4 An employee may, make application to the Managing Director, to receive a partial payout of accrued long service leave to a maximum of 50% of the total 13 weeks accrued entitlement subject to only one application being made for a partial payout in any one full accrual period.

27.5 An employee may, in accordance with sub-clause 27.4 of this clause, make an application for a partial payout of accrued long service leave at any given time and not necessarily at the time of taking such leave.

28.—FUTURE PRODUCTIVITY

The parties recognise that it is important to encourage future productivity improvements beyond those currently identified in this Agreement. Where such improvements are identified and implemented they will be considered as part of the next enterprise agreement.

29.—DISPUTE RESOLUTION PROCEDURE

29.1 It is the intention of all parties to implement this agreement in the context of best practice. It is acknowledged however that there may be instances where parties to the agreement have concerns regarding its interpretation or implementation. In these circumstances the agreed dispute settlement procedure will be applied [Refer Schedule C].

29.2 The purpose of the dispute resolution procedure is to allow all parties access to a system to discuss and resolve all matters of dispute. All parties agree to take all necessary steps to ensure that issues of dispute receive prompt attention and are resolved by conciliation and preferably through the internal settlement procedure. For the duration of this Agreement all parties shall comply with the dispute settlement procedures outlined in Schedule C of this Agreement as the primary means of resolving disputes arising from this agreement.

30.—SIGNATURE OF PARTIES TO THE AGREEMENT

On this 12th day of June 2000, the Small Business Development Corporation of Western Australia and the Civil Service Association of Western Australia (CSA) agreed to the terms and conditions of this Agreement.

Signatories

Signed for and on behalf of the—

SMALL BUSINESS DEVELOPMENT CORPORATION
WESTERN AUSTRALIA by the—
MANAGING DIRECTOR

(signed: G Etrelezis)

George Etrelezis

Date: 12/6/2000

Signed for and on behalf of the—

CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA by the—
GENERAL SECRETARY

(signed: D Robinson)

Dave Robinson

Date: 20/6/2000

SCHEDULE A—SALARIES

Small Business Development Corporation
ENTERPRISE BARGAINING AGREEMENT 2000—2002
SALARIES

Please Note:

“Wage increases payable from Date of Registration and at the end of the first year of the Agreement are dependant on the actual achievement and or implementation of productivity improvements in recognition of current and ongoing productivity improvements and in accordance with the productivity

targets outlined in Schedule B. The parties are satisfied that the productivity initiatives generated are sufficient to justify each of the milestone salary increases”.

SBDC—EBA 2000—2002

SCHEDULE A—SALARIES

SBDC—Enterprise Bargaining Agreement—1998—2000

Salaries Schedule—Per annum

CLASSIFICATION	SBDC	+ 3%	+ 3% 12
	1998 - 2000 EBA Rate	From Date of Signing	months from signing
LEVEL 1			
Under 17 years	\$13,098	\$13,491	\$13,896
17 years	\$15,307	\$15,766	\$16,239
18 years	\$17,855	\$18,391	\$18,942
19 years	\$20,668	\$21,288	\$21,927
20 years	\$23,209	\$23,905	\$24,622
21 years or 1 st year of adult service	\$25,496	\$26,261	\$27,049
22 years or 2 nd year of adult service	\$26,281	\$27,069	\$27,882
23 years or 3 rd year of adult service	\$27,844	\$28,679	\$29,540
24 years or 4 th year of adult service	\$28,630	\$29,489	\$30,374
25 years or 5 th year of adult service	\$30,316	\$31,225	\$32,162
26 years or 6 th year of adult service	\$30,939	\$31,867	\$32,823
27 years or 7 th year of adult service	\$31,863	\$32,819	\$33,803
LEVEL 2			
1st year	\$32,967	\$33,956	\$34,975
2nd year	\$33,813	\$34,827	\$35,872
3rd year	\$34,704	\$35,745	\$36,817
4th year	\$35,645	\$36,714	\$37,816
5th year	\$36,629	\$37,728	\$38,860
LEVEL 3			
1st year	\$37,981	\$39,120	\$40,294
2nd year	\$39,035	\$40,206	\$41,412
3rd year	\$40,123	\$41,327	\$42,566
4th year	\$41,238	\$42,475	\$43,749
LEVEL 4			
1st year	\$42,768	\$44,051	\$45,373
2nd year	\$43,966	\$45,285	\$46,644
3rd year	\$45,200	\$46,556	\$47,953
LEVEL 5			
1st year	\$47,575	\$49,002	\$50,472
2nd year	\$49,181	\$50,656	\$52,176
3rd year	\$50,850	\$52,376	\$53,947
4th year	\$52,581	\$54,158	\$55,783
LEVEL 6			
1st year	\$55,364	\$57,025	\$58,736
2nd year	\$57,257	\$58,975	\$60,744
3rd year	\$59,215	\$60,991	\$62,821
4th year	\$61,307	\$63,146	\$65,041
LEVEL 7			
1st year	\$64,513	\$66,448	\$68,442
2nd year	\$66,732	\$68,734	\$70,796
3rd year	\$69,147	\$71,221	\$73,358
LEVEL 8			
1st year	\$73,070	\$75,262	\$77,520
2nd year	\$75,880	\$78,156	\$80,501
3rd year	\$79,365	\$81,746	\$84,198
LEVEL 9			
1st year	\$83,717	\$86,229	\$88,815
2nd year	\$86,658	\$89,258	\$91,935
3rd year	\$90,012	\$92,712	\$95,494
CLASS 1	\$95,083	\$97,935	\$100,874
CLASS 2	\$100,154	\$103,159	\$106,253
CLASS 3	\$105,223	\$108,380	\$111,631
CLASS 4	\$110,295	\$113,604	\$117,012

SCHEDULE B—SBDC 2000 PRODUCTIVITY IMPROVEMENT PLAN
Small Business Development Corporation

ENTERPRISE BARGAINING AGREEMENT 2000—2002

2000—2002 PRODUCTIVITY IMPROVEMENT and PERFORMANCE PLAN

Note: The Small Business Development Corporation 2000—Productivity, Improvement and Performance Management Plan is outlined in the matrix overleaf

SCHEDULE B

SCHEDULE B – SBDC 2000 PRODUCTIVITY IMPROVEMENT PLAN

SMALL BUSINESS DEVELOPMENT CORPORATION

2000 – 2002 PRODUCTIVITY IMPROVEMENT & PERFORMANCE MANAGEMENT PLAN

3rd Round EBA / WPA Initiatives

Initiatives	Rationale	Benefit	Productivity Increase/ Service Enhancement/ Cost Savings	Links to Outputs
SERVICE ENHANCEMENT, PRODUCTIVITY INCREASE OR COST SAVING INITIATIVES				
<p>E-COMMERCE/ON-LINE</p> <p>Youth Initiative Development of b.generation website and resource book aimed at young people aged 15 to 25 to assist them to succeed in small business. These resources provide young people with details of education and training opportunities, enterprise competitions and funding schemes as well as an action plan and checklist and case studies of other successful young entrepreneurs. The Website will be linked to the SBDC site and educators and business advisers around the State made aware of the product via launch and other means.</p>	<p>The nature of employment is changing and b.generation encourages young people to look at starting a business as an alternative means of employment.</p>	<p>More young people entering into small business resulting in a reduction in youth unemployment.</p>	<p>Significant new initiative to be achieved and maintained from existing resources. Targets 6% of small business owners but about 20% of the WA population.</p> <p>Target: 5,000 users of website by July 1, 2000.</p>	<p>Directly related to Output 1, SBDC's Mission Statement and Goals 3 & 4.</p>
<p>Web site modification and updating – make this an in house operation (formerly outsourced to external company)</p>	<p>Cheaper, more timely updates to the website. More direct control over format and content.</p>	<p>More cost effective website. Information updates easier and more immediate in execution. Navigation within the site dramatically improved.</p>	<p>The SBDC was spending \$32Kp.a plus staff time when an external provider handled website updating and modifications. This has been drastically reduced to \$3K plus staff</p>	<p>Directly related to Output 1</p>

Initiatives	Rationale	Benefit	Productivity Increase/ Service Enhancement/ Cost Savings	Links to Outputs
			<p>time. Timeliness of updates and staff expertise has also increased dramatically. A further reduction in staff time (equivalent to \$17Kp.a.) will be possible due to re-design of website, which will allow the reallocation of third of a Level 5.4 FTE to other functions/duties.</p> <p>The total potential saving of this initiative is thus \$46,000 per annum.</p> <p>Milestone: Website to be redesigned to specifications in RFQ No. 129901 by August 30, 2000.</p>	
Extranet/Intranet	<p>Establish these utilities to enable the efficient storage, updating dissemination and retrieval of small business related information. Transfer of hardcopy information into electronic format for use by Enterprise Development Officers and, indeed, all SBDC staff and BEC Network using an authorised access approach. Streamline the provision of information and guidance by Enterprise Development staff when they address commonly asked questions through the development of cue cards, both in hard copy and electronic formats. Better customer service, better use of human resources.</p>	<p>Substantially better organisation and access to existing and emerging information services. Provide prompt updated information on all topics referred by clients and a more timely response to clients needs. Greater consistency and concomitant increase in quality of minimum standard information delivered by each Enterprise Development Officer. These measures will lead to more efficient operations and a more effective service to clients, including BECs. Ensures that clients and SBDC staff are fully informed of all services and programs applicable to them.</p>	<p>Significant increase in the organisation and accessibility and timeliness of information delivery leading to an enhanced service. Each interaction will, therefore, be more effective from the client's point of view and may prevent a return visit, thus allowing SBDC staff to be more productive.</p> <p>Whilst it is difficult to estimate the exact effect of this initiative on productivity, there is expected to be a direct cost impact as follows:</p> <p>1. Currently, EDOs are required to physically obtain hard-copy information from filing area for each site visit. On average, this takes approximately 3 minutes per day for each of the 10 EDOs (amounting to 390</p>	<p>These significant projects are directly related to Output 1 and Goals 1, 3 & 5.</p>

Initiatives	Rationale	Benefit	Productivity Increase/ Service Enhancement/ Cost Savings	Links to Outputs
			<p>hours per annum). The use of electronic files rather than hard copy files is expected to remove the vast majority of this three minute requirement, allowing some 390 hours of Level 6 time to be reallocated annually, at a saving of \$11,649 per annum.</p> <p>In addition, the initiative will impact the requirement for maintenance of the hard copy information (ie filing and sorting), including the current practice of biannual culling of hard copy data. This is expected to save approximately \$3744 per annum.</p> <p>Thus, the total potential cost saving of this initiative is \$15,393 per annum. NB: this is the estimated productivity saving from only one component of the Extranet.</p> <p>Milestones: Extranet to be completed by November 2000. EISAR Information to be loaded September 1 and fully operational by October 1. BIZ Info module to be loaded August 1 and fully operational by September 1. HR Induction and Industrial information to be loaded August 1 and fully operational by September 1. HR Policies to be loaded by February 1, 2001 and fully operational by March 2001.</p>	

Initiatives	Rationale	Benefit	Productivity Increase/ Service Enhancement/ Cost Savings	Links to Outputs
<p>On-line E-Commerce Training Development Course SBDC to develop E-Commerce program to be delivered through its website.</p>	<p>E-Commerce is a rapidly emerging technology in business and small business needs the skills to embrace E-Commerce for its continued and future viability.</p> <p>Essentially, the training course will help business owners to understand how to use e-commerce in their businesses in a very practical way.</p>	<p>Small Business can work at its own pace and at a relatively low cost on gaining E-Commerce knowledge and skills through the Internet.</p> <p>New ways for operating a business in terms of efficiency and marketing opportunities could be seized.</p> <p>Based on a realistic assessment of the penetration of E-commerce generally, the SBDC expects to target approximately 5% of small businesses (5,250 businesses) over the life of the Agreement.</p> <p>Given the need to set up and market the service, the first year target is expected to be approximately 2,000 business, with the balance (3,250) targeted in the second year.</p>	<p>This new service utilises modern approaches to reach more clients for the same output. Overcomes the tyranny of distance and other access issues.</p> <p>While the targets set are, in the view of the SBDC both realistic and conservative, the potential benefit is very large. Currently, there are 105,000 small businesses in WA, employing 345,000 people. Two thirds of businesses have a PC and 1/3rd have access to the Internet. Hence, the potential increase in service and information delivery is significant and equates to a direct productivity benefit to the Corporation, as this new service will be offered with existing resource levels.</p> <p>Milestone: Online course to be trialled by July 1, 2001.</p>	<p>Directly related to Mission Statement, Output 1 and Goal 3</p>
<p>Business Licence and Information System (BLIS) A vast number of Local government licences required by small business are to be added to the SBDC's databases, and made available through the Internet.</p>	<p>Provide a comprehensive database of business licences and licence information relevant to the whole gamut of small business operations. Facilitate fast and effective compliance with licence requirements - a "one-stop-service" for business licence information providing access to licence information from all 3 tiers of government 24 hours a day. Service will be of great assistance to all</p>	<p>Ability to maintain a tenfold increase in the number of licences held with the same resources. Ability to provided a service to many more clients due to the launching of an internet-based service (as well as through the Business Information and Licence Centre). Substantial project and a significant new initiative.</p>	<p>It is expected that the productivity benefit here will be twofold:</p> <p>Firstly, the new system will result in a tenfold increase in the number of licences maintained by the SBDC for its clients. Currently, the BLIS is maintained by one half of an FTE at Level 2. With the new electronic system, the ten-fold increase in the comprehensiveness of the service offered will be able to be maintained by</p>	<p>Directly related to Outputs 1 and 2.</p>

Initiatives	Rationale	Benefit	Productivity Increase/ Service Enhancement/ Cost Savings	Links to Outputs
	prospective and existing small business owners.		<p>one FTE at Level 2. This thus equates to a productivity benefit of 500% for this service. (However, with the potential for efficiencies to be produced in other areas by this initiative, the actual impact on resources required by the BLIS is expected to be negligible).</p> <p>The second benefit will arise from an increase in the actual number of clients serviced, as the convenience of the service becomes more widely known. It is conservatively estimated that there will be an increase of 2000 clients of the BLIS per year across the life of the agreement (equating to a 13% increase in year 1 and an 11.5% increase in year 2). Again, this equates to a direct productivity benefit, as these additional clients will be serviced by the same level of resources.</p> <p>Milestones: BLIS to be operational by July 1, 2000. User Testing to occur in May 2000, with Training to occur in June.</p>	
Increase sources of feedback on red-tape issues and other issues relevant to small business and reduce need for Red-tape Forums	Develop on-line mechanisms and forums, including Ready Response Network for receiving feedback, opinions and comments on red-tape and other issues affecting the small business sector.	Simpler, more effective methods of seeking feedback than making individual contacts. Less Red Tape forums required with associated costs, saving more than \$11K a year.	<p>More efficient method because a greater volume of comments will be obtained with less inputs.</p> <p>Milestones: initial feedback mechanism to be developed by July 31, 2000. Ready Response Network to be operational by January 31, 2001</p>	Directly related to Output 2 i.e. "Policy, analysis and advocacy for small business issues".

Initiatives	Rationale	Benefit	Productivity Increase/ Service Enhancement/ Cost Savings	Links to Outputs
Client Statistics – revamp methods	Reduce the cost of data input by stream lining forms, re-engineering processes and utilising more modern software that will require less key strokes and automate some counting and statistical functions	Save time and inputting costs. Paper costs also reduced. Total saving expected to be \$4,000.	Less time spent filling in forms, less time and fewer key strokes when inputting data. Less time in retrieving results (post data input). Savings expected in second year. Milestones: Develop specifications by January 31, 2001. New system to be implemented by May 31, 2001	Directly related to Output 2

Initiatives	Rationale	Benefit	Productivity Increase/ Service Enhancement/ Cost Savings	Links to Outputs
<p>GST Transition Centre</p> <p>A one-stop service to assist small business make the transition to a GST and PAYG taxation regimes.</p>	<p>The new Goods and Services Tax and Pay as You Go taxation systems will have a substantial impact on small business. These are completely different tax systems to those currently in place and many policies and procedures will need implementation. Small businesses need to be made aware of the transition issues that they must address and will need information and guidance to help them achieve it. The GST Transition Centre at the SBDC will provide a non-threatening environment for businesses to obtain assistance and relief from the frustration of trying to deal with the taxation system.</p>	<p>Meet the needs of small business in coping with the introduction of GST, which directly impacts on the operating of a small business.</p>	<p>It is envisaged that the GST Transition Centre will receive 15,000 enquiries in 2000. Based on current figures of 67059 client contacts in 1999, this is an increase of 22% in total direct client contact.</p> <p>The GST Transition Centre has been designed to function without the requirement for additional resources from the SBDC. Given that costs are likely to remain static, the average cost per client contact will be reduced from the current level of \$58.72 to approximately \$48 (a decrease of 8.2%).</p> <p>Targets: 9,000 contacts by June 2000 through the GST Transition Centre and a further 6,000 by December 2000. Significant training of staff involved. New Tax System is embodied over 31 Acts (to which there have been over 1,000 amendments) and there are many Taxation Determinations to be cognisant of as well.</p>	<p>The GST Transition Centre is the cornerstone of the State Government's response to the GST and small business operational requirements. It is a significant and timely initiative.</p>
<p>Production of GST video via WestLink and Channel 31</p>	<p>This initiative will extend the service of the GST Transition Centre to businesses in regional W.A. The video service will be offered to some 52 regional locations that are not expected to be visited by ATO field officers.</p>	<p>Enhance the access to the services offered by the GST Centre, particularly for regionally based businesses. Provision of an important information service to small businesses that would not otherwise be available from any other source.</p>	<p>The SBDC's commitment to regional areas and particularly the regional BECs means that, in normal circumstances, the introduction of the GST would have required numerous field visits by EDOs. It is estimated that such visits would have equated to approximately ¼ of a FTE at Level 6 over the year. Use of the broadcast service will thus save the SBDC approximately \$15,000 in salary costs</p>	<p>As above</p>

Initiatives	Rationale	Benefit	Productivity Increase/ Service Enhancement/ Cost Savings	Links to Outputs
			<p>that can now be reallocated to other functions, plus travel costs of the same quantum.</p> <p>In addition, once the broadcast phase is complete, the video will be edited and then distributed to BECs and local Telecentres. This will have a direct impact on the level of resources required for follow-up in regional areas and will equate to a further productivity and service improvement.</p>	

Initiatives	Rationale	Benefit	Productivity Increase/ Service Enhancement/ Cost Savings	Links to Outputs
<p>BEC referrals Ensure that the referral rate to the BEC Network is increased by 1000 referrals over 2 years.</p>	<p>Increase BECs' involvement with local small business community and reallocate scarce SBDC resources towards higher value added specialised services to help businesses to develop and grow. BECSs would be able to provide more time in a hands-on mode to assist business owners get over the problems they face. This local/regional know-how is very valuable and allows a real value-added service to be delivered. SBDC would still provide initial information and guidance, in accordance with its standards. However, the ability to then pass the client to a knowledgeable "local" allows SBDC to concentrate on other services (particularly GST and E-Commerce related programs), while still being able to provide a relevant service through the BEC network.</p>	<p>Greater awareness and utilisation of the BEC Network by small business.</p> <p>BECs are conveniently placed for client contact. Help small business develop and grow by giving higher quality of assistance through the referral process utilising existing resources</p>	<p>This initiative will have a direct impact on SBDC's productivity by better utilisation of appropriate external resources, allowing the SBDC to focus its existing resources in other areas, while continuing to monitor BEC performance to ensure the quality of services delivered.</p> <p>This initiative does not in any way represent an abrogation of the SBDC's responsibilities. What it does represent is a more efficient and practical way of delivering services to regional areas to allow the SBDC to utilise its resources more effectively.</p> <p>Target: 400 additional referrals by July 1, 2000 and a further 600 by July 1, 2001.</p>	<p>Linked to Output 1</p>
<p>Commercial Tenancy Develop new publication dealing with practical and commercial considerations in respect of the renting of business premises both retail and non-retail.</p>	<p>Leases are vital to the profitability of a business and usually central to the goodwill, value and future sale of the business. Many practical considerations are not considered by small business operators before entering into a lease, often causing considerable detriment to their commercial viability. Guidance in this important area can beneficially effect success.</p>	<p>Improve and enhance current service by providing materials not readily available elsewhere. Improve the awareness of the multitude of issues that must be considered when leasing business premises and so assist small businesses to prosper. Reduction in business failures as a result of poor leasing arrangements.</p>	<p>New output achieved within existing resources.</p> <p>Milestone: New publication to be produced by July 1, 2000 and 500 copies to be distributed by July, 2001.</p>	<p>One of the more vexed areas in business and hopefully this service will reduce frustration and failure. Directly related to Mission Statement and Goals 2 & 3.</p>

Initiatives	Rationale	Benefit	Productivity Increase/ Service Enhancement/ Cost Savings	Links to Outputs
PROPOSED CHANGES TO EMPLOYMENT CONDITIONS				
Family / Carers leave to increase to 5 days and standardise definition of eligibility for this type of leave. NB: Bereavement Leave to have a standardised definition as well) See Clauses 24 & 25 of EBA	Increase Carer's leave to industry standards and standardise definition of eligibility by adding the words "or any other person upon application."	Gives employees more peace of mind and flexibility on these issues.	Flexibility of leave can build loyalty of staff. Costs, based on past history of leave utilisation would be minor as there is no actual increase in the sick leave provisions	Directly related to an important element of SBDC's Values Statement and to Goal 6.
HDA on Leave(pro rata) See Clause 23 of Agreement	Pay Higher Duties Allowance (HDA) when employees have been acting for twelve months or more and take more than 4 weeks leave. Currently under the Award they would receive no HDA for their period of leave (if taken at once). Under this provision, they would receive HDA for the first 4 weeks of their leave. Any period of leave beyond 4 weeks would be paid at the officer's substantive rate.	Equity provision	As there is only a minimal amount of acting within SBDC, the long-term additional cost of this proposal is negligible. If an officer breaks up their leave entitlements to period of 4 weeks or less (providing the period of acting is 12 months or more) they are currently entitled to HDA, so essentially, this provision is a no cost option.	As per above
Compaction of Level 1 adult range from 9 to 7 steps See Clause 15.2 of Agreement	Reduce the number of steps in the Level 1 range from 9 to 7, with no averaging.	Fairer classification range for Level 1 employees.	Provides a better reward structure for Level 1 employees. Most existing Level 1 employees at the higher end of the range, so immediate cost is nil. Long term cost is expected to be negligible (0.006% increase in salary costs based on historical evidence).	Better reward structure assists with motivation of employees. Relates to SBDC's Values Statement and to Goal 6.
Compaction of accrued annual leave See Clause 21 of Agreement	Option to take double pay for half leave eg take 2 weeks leave and receive 4 weeks pay (subject to an officer having 6 or more weeks accrued leave and having a minimum balance of 2 weeks after the compaction has occurred).	Reduce Corporation's leave liability.	May reduce costs in the long term. Will allow some staff to afford an overseas or interstate holiday and still take a significant break.	Flexibility of leave provisions provides a better reward structure for employees. May help reduce leave liability. Relates to SBDC's Values Statement and to Goal 6.

Initiatives	Rationale	Benefit	Productivity Increase/ Service Enhancement/ Cost Savings	Links to Outputs
Update EBA to include provisions for Salary Packaging – see Clause 15.3 of Agreement	Bring EBA into line with Award conditions and current government policy	Makes EBA more equitable document.	No increase to Total Employment Cost	Improved employment condition to provide a better reward structure for employees. Relates to SBDC's Values Statement and to Goal 6.

SCHEDULE C—DISPUTE RESOLUTION PROCEDURE
 Small Business Development Corporation
 ENTERPRISE BARGAINING AGREEMENT 2000—2002
 DISPUTE RESOLUTION PROCEDURE
 SBDC—EBA 1998—2000

SCHEDULE C—DISPUTE RESOLUTION PROCEDURE

In keeping with the spirit of this agreement the parties are committed to the principle of conciliation and direct negotiation on any issues or disputes arising out of this Agreement. Any issues or disputes will, if possible, be resolved promptly by direct informal consultation between the parties involved.

1. DEFINITIONS

1.1 An issue is defined as a difference of opinion between an Employee or groups of Employees and Management concerning the meaning or effect of this Agreement, including any provisions implied in the Agreement by the Minimum Conditions of Employment Act 1993.

1.2 A dispute occurs when an issue cannot be resolved by discussion between section management and employees.

2. DISPUTE SETTLEMENT PROCESS

The following procedures are to be followed in conjunction with questions, disputes or difficulties arising under this Agreement—

- 2.1 The employee shall discuss the matter with the immediate supervisor in the first place. The employee may be accompanied by a union representative, if so desired.
- 2.2 If the matter is not resolved within 5 working days (excluding weekends and public holidays) then the matter should be discussed between the employee, the immediate supervisor and the Section Director.
- 2.3 If the matter is not resolved within 5 working days then the matter should be submitted in writing to the Managing Director or nominated representative.
- 2.4 As soon as possible, but usually within 2 working days (excluding weekends and public holidays), of receipt of the written submission, the Managing Director or nominated representative shall convene a meeting with a view to resolving the dispute.
- 2.5 Each party is to be given prior notice of who will be present at the meeting.
- 2.6 The Managing Director or nominated representative shall confirm the decision in writing to the parties concerned.
- 2.7 If the matter is still not settled then a meeting will be held between a representative of SBDC and a representative from the CSA.
- 2.8 If the matter cannot be settled by a meeting between the representatives, an application may be made to the Western Australian Industrial Relations Commission for a conference for the purpose of settling such dispute.



AWARDS/AGREEMENTS— Variation of—

BUILDINGS TRADES (CONSTRUCTION) AWARD 1987.

No. R 14 of 1978.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Adsigns Pty Ltd & Others.

No. 822 of 1999.

Buildings Trades (Construction) Award 1987.

No. R 14 of 1978.

COMMISSIONER S J KENNER.

29 June 2000.

Order.

HAVING heard Mr P Joyce on behalf of the applicant and Ms J Wesley on behalf of the Chamber of Commerce and Industry of Western Australia and Mr K Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers) and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Building Trades (Construction) Award 1987, No R 14 of 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 19 November 1999.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

Schedule.

1. Clause 8—Rates of Pay: Delete this clause and insert the following in lieu thereof—

8.—RATES OF PAY

- (1) Except as elsewhere provided in this Award the rates of pay payable to an employee (other than an apprentice) shall be that prescribed herein calculated as an hourly rate in accordance with subclause (4) of this clause.
- (2) Weekly Rate: The following amounts shall be applied for the purpose of the calculation in subclause (4) of this clause of the hourly rate to apply under this Award.

	Base Rate \$	Supple- mentary Payment \$	Arbitrated Safety Net Adjustment \$	Weekly Rate \$
(a) (i) Bricklayers, stoneworkers, stonemasons, carpenters, joiners, painters, signwriters, glaziers, and plasterers roof tile fixers	365.20	52.10	60.00	477.30
(ii) Plumber and/or gasfitter	368.00	52.10	60.00	480.10
(iii) Plumber holding registration in accordance with the Metropolitan Water Supply, Sewerage and Drainage Act— Base Rate	368.00			
Reg. Allowance \$ 17.30	385.30	52.10	60.00	497.40
(iv) Marker/Setter Out	378.60	52.10	60.00	490.70
(v) Special Class Tradesman	385.00	52.10	60.00	497.10
(b) (i) Group 1 Rigger	362.30	52.10	60.00	474.40
Drainer	362.30	52.10	60.00	474.40
Dogman	362.30	52.10	60.00	474.40
(ii) Group 2 Scaffolder	346.70	52.10	60.00	458.80
Powder Monkey	346.70	52.10	60.00	458.80
Hoist or Winch Driver	346.70	52.10	60.00	458.80
Concrete Finisher	346.70	52.10	60.00	458.80
Steel Fixer including Tack Welder	346.70	52.10	60.00	458.80
Concrete Pump Operator	346.70	52.10	60.00	458.80

	Base Rate \$	Supple- mentary Payment \$	Arbitrated Safety Net Adjustment \$	Weekly Rate \$
(iii) Group 3 Bricklayer's Labourer	335.10	52.10	60.00	447.20
Plasterer's Labourer	335.10	52.10	60.00	447.20
Assistant Powder Monkey	335.10	52.10	60.00	447.20
Assistant Rigger	335.10	52.10	60.00	447.20
Demolition Worker (after three months' experience)	335.10	52.10	60.00	447.20
Gear Hand	335.10	52.10	60.00	447.20
Cement Gun Operator	335.10	52.10	60.00	447.20
Concrete Cutting or Drilling Machine Operator	335.10	52.10	60.00	447.20
Pile Driver	335.10	52.10	60.00	447.20
Tackle Hand	335.10	52.10	60.00	447.20
Jackhammer Hand	335.10	52.10	60.00	447.20
Mixer Driver (Concrete)	335.10	52.10	60.00	447.20
Steel Erector	335.10	52.10	60.00	447.20
Aluminium Alloy Structural Erector	335.10	52.10	60.00	447.20
Gantry Hand or Crane Hand	335.10	52.10	60.00	447.20
Concrete Gang Including Concrete Floater	335.10	52.10	60.00	447.20
Steel or Bar Bender to Pattern or Plan	335.10	52.10	60.00	447.20
Concrete Formwork Stripper	335.10	52.10	60.00	447.20
Concrete Pump Hose Hand	335.10	52.10	60.00	447.20
Trades Labourer	335.10	52.10	60.00	447.20
Brick Paver Labourer	335.10	52.10	60.00	447.20
Brick Cleaner/Labourer	335.10	52.10	60.00	447.20
(iv) Group 4 Builders' Labourers Employed on Work Other Than Specified in Classifications (i) to (iii)	306.60	52.10	60.00	418.70

(c) Supplementary Payments

Supplementary payments set out in this clause represent payments in lieu of equivalent overaward payments.

The rates of pay in this award include three arbitrated safety net adjustments totalling \$24.00 per week available under the Arbitrated Safety Net Adjustment Principle pursuant to either the December 1993 State Wage Decision, the December 1994 State Wage Decision and the March 1996 State Wage Decision. The first, second and third \$8.00 per week arbitrated safety net adjustments may be offset to the extent of any wage increase payable since 1 November 1991 pursuant to enterprise agreements or consent awards or award variations to give effect to enterprise agreements, insofar as that wage increase or part of it has not previously been used to offset an arbitrated safety net adjustment. Increases made under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements are not to be used to offset arbitrated safety net adjustments.

Furthermore the rates of pay in this award include the \$10.00 per week arbitrated safety net adjustment payable from the beginning of the first pay period on or after 14th day of November 1997

This arbitrated safety net adjustment shall be offset against any equivalent amount in rates of pay received by employees since 1 November 1991 whose wages and conditions are regulated by this award and which are above the wage rates prescribed in it, provided that the above award payments include wages payable under an enterprise agreement in which absorption is not contrary to the terms of the enterprise agreement.

Increases made under State Wage Case Principles prior to November 1997, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of \$10.00 per week.

The rates of pay in this award include the arbitrated safety net adjustment payable under the June 1998 State Wage Case Decision. This arbitrated safety net adjustment shall be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments

include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases made under previous State Wage Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

Further the rates of pay in this award include the \$12 per week or \$10 per week arbitrated safety net adjustments payable from the beginning of the first pay period on or after 1st August, 1999.

This arbitrated safety net adjustment shall be offset against any equivalent amount in rates of pay received by employees since 1 November 1991 whose wages and conditions are regulated by this award and which are above the wage rates prescribed in it, provided that the above award payments include wages payable under an enterprise agreement in which absorption is not contrary to the terms of the enterprise agreement.

Increases made under State Wage Case Principles prior to July 1999, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of \$12 per week or \$10 per week.

(3) Industry Allowance

The industry allowance at the rate of \$17.40 per week to be paid to each employee is to compensate for the following disabilities associated with construction work—

- (a) Climate conditions when working in the open on all types of work.
- (b) The physical disadvantage of having to climb stairs or ladders.
- (c) The disability of dust blowing in the wind, brick dust and drippings from concrete.
- (d) Sloppy and muddy conditions associated with the initial stages of the erection of a building.
- (e) The disability of working on all types of scaffolding or ladders other than a swing scaffold, suspended scaffold, or a bosun's chair.
- (f) The lack of the usual amenities associated with factory work (e.g. meal rooms, change rooms, lockers).

(4) Hourly Rate Calculation—Follow the Job Loading

(a) The hourly rate of pay to be paid to an adult employee (other than an apprentice) shall be calculated to the nearest cent (less than half a cent to be disregarded) by multiplying the sum of the amounts prescribed in subclause (2) and the amount prescribed in subclause (3) and where applicable in subclauses (6), (7), (8) and (9) of this clause by 52 and dividing the result by 50.4 by adding to that the amount prescribed in subclause (5) of this clause and by dividing the total by 38.

(b) The aforementioned calculation shall take into account a factor of eight days in respect of the incidence of loss of wages for periods of unemployment between jobs.

(5) Special Allowance

The special allowance at the rate of \$7.70 per week to be paid to each employee is to compensate for the following—

- (a) Excess travelling time incurred by employees in the building industry;
- (b) The removal of loadings from the various building awards consequent upon the introduction of this paid rates award in the industry.

(6) Tool Allowance

Tool allowances shall be paid to tradesmen as prescribed hereunder—

	Per Week \$
Carpenters, Joiners, Plumbers, Stonemasons,	
Stoneworkers	18.90
Plasterers, Fixers	15.50
Bricklayers	13.50
Roof Tile Fixers	9.90
Signwriters, Painters, Glaziers	4.60

(7) Location Allowance

Where applicable location allowances in accordance with Appendix A will be paid.

(8) Underground Allowance

(a) (i) Subject to paragraph (b) hereof, an employee required to work underground shall be paid an allowance of \$8.79 per week in addition to the allowance prescribed in subclause (3) of this clause and any other amount prescribed for such employee elsewhere in this award.

(ii) Where a shaft is to be sunk to a depth greater than six metres the payment of the underground allowance shall commence from the surface.

(iii) This allowance shall not be payable to an employee engaged upon "pot and drive" work at a depth of 3.5 metres or less.

(b) Where an employee is required to work underground for no more than four days or shifts in any ordinary week he/she shall be paid an underground allowance in accordance with the provisions of paragraph (t) of subclause (1) of Clause 9.—Special Rates and Provisions in lieu of the allowance prescribed in paragraph (a) hereof.

(9) Plumbing Trade Allowance

Plumbers shall be paid an allowance at the rate of \$14.00 per week to compensate for the following classes of work and in lieu of the relevant amounts in Clause 9.—Special Rates and Provisions whether or not such work is performed in any one week. When working outside the categories listed hereunder, a plumber shall receive the appropriate rates provided for in the said Clause 9.—Special Rates and Provisions.

(a) General Plumber

- (i) Clearing stoppages in soil or waste pipes, or sewer drain pipes, also repairing and putting same in proper order;
- (ii) Work in wet places;
- (iii) Work requiring a swing scaffold, swing seat or rope;
- (iv) Dirty or offensive work;
- (v) Work in any confined space;
- (vi) Work on a ladder exceeding eight metres in height.

(b) Mechanical Services Plumber

- (i) Handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, or other recognised insulation material of a like nature or working in the immediate vicinity so as to be affected by the use thereof;
- (ii) Work in a place where the temperature has been raised by artificial means to between 46 and 54 degrees celsius or exceeding 54 degrees celsius;
- (iii) Work in a place where fumes of sulphur or other acid or other offensive fumes are present;
- (iv) Dirty or offensive work;
- (v) Work in any confined space;
- (vi) Work on a ladder exceeding eight metres in height.

(c) Roof Plumber

- (i) Work on the fixing of aluminium foil insulation on roofs or walls prior to the sheeting thereof;
- (ii) Use of explosive powered tools;
- (iii) Work requiring use of materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority including the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus);
- (iv) Dirty or offensive work;
- (v) Work requiring a swing scaffold, swing seat or rope;
- (vi) Work on a ladder exceeding eight metres in height.

(10) Leading Hands

(a) A person specifically appointed to be a leading hand shall be paid at the rate of the undermentioned additional

amounts above the rate of the highest classification supervised, or his/her own rate, whichever is the highest, in accordance with the number of persons in his/her charge—

	Weekly Base Only \$	Rate Per Hour \$
(i) In charge of not more than one person	11.20	0.31
(ii) In charge of two and not more than five persons	24.80	0.68
(iii) In charge of six and not more than ten persons	31.60	0.85
(iv) In charge of more than ten persons	42.10	1.14

(b) The hourly rate prescribed in paragraph (a) hereof is calculated to the nearest cent (less than half a cent to be disregarded) by multiplying the weekly base amount by 52 and dividing the result by 50.4 and by dividing the amount by 38.

(11) Licensed Plumbers Accepting Responsibility

Any licensed plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any week—\$27.30 for that week.

(12) Plumber Acting on Welding Certificate

A plumber who is requested by his/her employer to hold the relevant qualifications and has obtained a certificate of competency pursuant to procedures as set out by the Standards Association of Australia or other relevant recognised codes, or, who may have to carry out work which is subject to other special tests but not a normal trade test, and is required by his/her employer to act on such qualifications, shall be paid an additional 37 cents per hour for oxyacetylene welding and 37 cents per hour for electric welding for every hour of his/her employment whether or not he/she has in any hour performed work relevant to those qualifications held.

(13) Lead Work

A plumber engaged in leadburning or lead work in connection therewith shall be paid an additional \$1.19 per hour.

(14) Ship's Plumbing

A plumber engaged on plumbing work in connection with ships shall be paid an additional 83 cents per hour.

(15) Casual Hands

In addition to the rate appropriate for the type of work, a casual hand shall be paid an additional 20 per cent of the rate per hour with a minimum payment as for three hours employment. The penalty rate herein prescribed shall be deemed to include, inter alia, compensation for annual leave.

(16) Site Allowances

The Union on behalf of its members may request an employer to consider a site allowance to compensate for all special factors and/or disabilities on a project.

Where the parties have considered the merit of the claim and have agreed on a proposed rate, it shall be referred to the Commission for ratification.

Where agreement cannot be reached, the parties shall refer the matter to the Commission which shall determine an appropriate rate, if any, to compensate for such special factors and/or disabilities: Provided, however, that the Commission may determine that such site allowance shall be paid in lieu of any of the special rates related to conditions on the site as prescribed in Clause 9 subclause (1).

The Commission shall ratify or determine such matters on the criteria outlined in the Full Bench Decision of the Conciliation and Arbitration Commission dated February 25, 1983 (Print F1957).

Where the procedure prescribed by this subclause is being followed, work shall continue normally.

A site allowance determined in accordance with this subclause shall be deemed to be prescribed by this Award.

2. Clause 9—Special Rates and Provisions: Delete subclause (1) of this clause and insert the following in lieu thereof—

(1) In addition to the rates otherwise prescribed in this Award, the following rates shall be payable to employees covered by the said Award—

(a) Insulation

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, limpet fibre, vermiculite or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof 48 cents per hour or part thereof.

(b) Hotwork

An employee who works in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius—40 cents per hour or part thereof, exceeding 54 degrees Celsius—48 cents per hour or part thereof.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(c) Cold Work

An employee who works in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid 40 cents per hour.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(d) Confined Space

An employee required to work in a confined space shall be paid 48 cents per hour or part thereof.

("Confined Space" means a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation.)

(e) Swing Scaffold—

(i) an employee required to work from any type of swing or any scaffold suspended by rope or cable, bosun's chair, or suspended scaffold requiring use of steel or iron hooks or angle irons shall be paid the appropriate allowance set out below corresponding to the storey level at which the anchors or bracing, from which the stage is suspended, has been erected.

Such allowance shall be paid for minimum of four hours' work or part thereof until construction work (as defined) has been completed.

Height of Bracing	First Four Hours \$	Each Additional Hour \$
0-15 storeys	2.87	0.60
16-30 storeys	3.70	0.77
31-45 storeys	4.36	0.89
46-60 storeys	7.16	1.48
Greater than 60 storeys	9.13	1.88

Provided that an apprentice with less than two years' experience shall not use a swing scaffold or bosun's chair, and further provided that solid plasterers when working off a swing scaffold shall receive an additional 11 cents per hour.

(f) Explosive Powered Tools

An operator of explosive powered tools, as defined in this award, who is required to use

- an explosive powered tool, shall be paid 94 cents for each day on which he/she uses such a tool.
- (g) **Wet Work**
An employee working in any place where water is continually dripping on him/her so that clothing and boots become wet, or where there is water underfoot, shall be paid 40 cents per hour whilst so engaged.
- (h) **Dirty Work**
An employee engaged on unusually dirty work shall be paid 40 cents per hour.
- (i) **Towers Allowance**
An employee working on a chimney stack, spire, tower, radio or television mast or tower, air shaft (other than above ground in a multi-storey building), cooling tower or silo, where the construction exceeds fifteen metres in height shall be paid 40 cents per hour for all work above fifteen metres, and 40 cents per hour for work above each further fifteen metres.
Provided that any similarly constructed building, or a building not covered by Clause 10.—Multi-Storey Allowance, which exceeds 15 metres in height may be covered by this subclause, or by that clause by agreement or where agreement is not reached, by determination of the Commission.
- (j) **Toxic Substances**
- (i) An employee required to use toxic substances shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.
 - (ii) Employees using such materials will be provided with and shall use all safeguards as are required by Clause 29.—Protection of Employees and the appropriate Government authority or in the absence of such requirement such safeguards as are defined by a competent authority or person chosen by the union and the employer.
 - (iii) Employees using toxic substances or materials of a like nature shall be paid 48 cents per hour. Employees working in close proximity to employees so engaged shall be paid 40 cents per hour.
 - (iv) For the purpose of this paragraph toxic substances shall include epoxy based materials and all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.
- (k) **Fumes**
An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer; provided that, in default of agreement, the matter may be referred to a Board of Reference for the fixation of a special rate.
Any special rate so fixed shall apply from the date the employer is advised of the claim and thereafter shall be paid as and when the fume condition occurs.
- (l) **Asbestos**
Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) shall be paid 48 cents per hour extra whilst so engaged.
- (m) **Furnace Work**
An employee engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid \$1.06 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.
- (n) **Acid Work**
An employee required to work on the construction or repairs to acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid \$1.06 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.
- (o) **Cleaning Down Brickwork**
An employee required to clean down bricks using acids or other corrosive substances shall be paid 37 cents per hour. While so employed employees will be supplied with gloves by the employer.
- (p) **Bagging**
Employees engaged upon bagging brick or concrete structures shall be paid 37 cents per hour.
- (q) **Bitumen Work**
An employee handling hot bitumen or asphalt or dipping materials in creosote shall be paid 48 cents per hour.
- (r) **Roof Repairs**
Employees engaged on repairs to roofs shall be paid 48 cents per hour.
- (s) **Computing Quantities**
Employees who are regularly required to compute or estimate quantities of materials in respect to the work performed by other employees shall be paid \$2.88 per day or part thereof.
Provided that this allowance shall not apply to an employee classified as a leading hand.
- (t) **Underground Allowance**
- (i) An employee required to work underground for no more than 4 days or shifts in an ordinary week shall be paid \$1.72 a day or shift in addition to any other amount prescribed for such employees elsewhere in this award.
Provided that an employee required to work underground for more than four days or shifts in an ordinary week shall be paid an underground allowance in accordance with the provisions of subclause (8) of Clause 8.—Rates of Pay.
 - (ii) Where a shaft is to be sunk to a depth greater than 6 metres the payment of the underground allowance shall commence from the surface.
 - (iii) This allowance shall not be payable to employees engaged upon "pot and drive" work at a depth of 3.5 metres or less.
- (u) **Plumbing**
- (i) A plumber doing sanitary plumbing work or repairs to sewer drainage or waste pipe services in any of the following places—
 - (aa) Infectious and contagious diseases hospitals or any block or

portion of a hospital used for the care of or treatment of patients suffering from any infectious or contagious disease; or

(bb) Morgues:

shall be paid 38 cents per hour or part thereof.

- (ii) A plumber required to enter a well 9 metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith shall be paid \$1.71 for such examination and 76 cents per hour thereafter for fixing, renewing or repairing such work.
- (iii) A plumber or an apprentice to plumbing, other than one in his/her first or second year of apprenticeship, on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose or on work involving the cleaning out of septic tanks or dry wells shall be paid a minimum of \$2.10 per day.
- (v) (a) An employee who—
- (i) is appointed by his or her employer to be responsible for carrying out first aid duties as they may arise; and
 - (ii) holds a recognised first aid qualification (as set out hereunder) from the Australian Red Cross Society, St John Ambulance Association or similar body; and
 - (iii) is required by his or her employer to hold a qualification at that level; and
 - (iv) the qualification satisfies the relevant statutory requirement pertaining to the provision of first-aid services at the particular location where the employee is engaged;
- (v) those duties are in addition to his or her normal duties, recognising what first aid duties encompass by definition;
- shall be paid at the following additional rates to compensate that person for the additional responsibilities, skill obtained, and time spent acquiring the relevant qualifications;
- (A) an employee who holds the Basic First Aid certificate or equivalent qualification recognised under the Occupational Safety and Health Act 1984—\$1.70 per day; or
 - (B) an employee who holds at least a Senior First Aid certificate, Industrial First Aid certificate or equivalent, or higher qualification recognised under the Occupational Safety and Health Act 1984—\$2.65 per day.
- (b) In payment of an allowance under this clause, a person shall be paid only for the level of qualification required to be held, and there shall be no double

counting for employees who hold more than one qualification.

- (c) An employer shall be under no obligation to provide paid training leave or other payment of any kind to employees to acquire or update first aid qualifications.

(w) Heavy Blocks

(i) Employees lifting other than standard bricks

An employee required to lift blocks (other than cindcrete blocks for plugging purposes) shall be paid the following additional rates—

Where the blocks weigh over 5.5 kg and under 9 kg—40 cents per hour.

Where the blocks weigh 9 kg or over and up to 18 kg—71 cents per hour.

Where the blocks weigh over 18 kg—\$1.01 per hour.

An employee shall not be required to lift a building block in excess of 20 kg in weight unless such employee is provided with a mechanical aid or with an assisting employee; provided that an employee shall not be required to manually lift any building block in excess of 20 kg in weight to a height of more than 1.2 metres above the working platform.

Provided that this subclause shall not apply to employees being paid the extra rate for refractory work.

(ii) Stonemasonry Employees

The employer of stonemasonry employees shall provide mechanical means for the handling, lifting and placing of heavy blocks or pay in lieu thereof the rates and observe the conditions prescribed in paragraph (i) herein.

(x) Plaster or Composition Spray

An employee using a plaster or composition spray shall be paid an additional 40 cents per hour whilst so engaged.

(y) Slushing

An employee engaged at "Slushing" shall be paid 40 cents per hour.

(z) Dry Polishing of Tiles

Employees engaged on dry polishing of tiles (as defined) where machines are used shall be paid 48 cents per hour or part thereof.

(aa) Cutting Tiles

An employee engaged at cutting tiles by electric saw shall be paid 48 cents per hour whilst so engaged.

(bb) Second Hand Timber

Where, whilst working with secondhand timber, an employee's tools are damaged by nails, dumps or other foreign matter on the timber he/she shall be entitled to an allowance of \$1.55 per day on each day upon which his/her tools are so damaged, provided that no allowance shall be payable under this paragraph unless it is reported immediately to the employer's representative on the job in order that he/she may prove the claim.

(cc) Height Work—Painting Trades

An employee working on any structure at a height of more than 9 metres where an adequate fixed support not less than 0.75 metres wide is not provided, shall

be paid 37 cents per hour in addition to ordinary rates. This subclause shall not apply to an employee working on a bosun's chair or swinging stage.

This provision shall not apply in addition to the Towers Allowance prescribed in paragraph (i) of this subclause.

(dd) Brewery Cylinders—Painters

A painter in brewery cylinders or stout tuns shall be allowed 15 minutes' spell in the fresh air at the end of each hour worked by him/her.

Such 15 minutes shall be counted as working time and shall be paid for as such. The rate for working in brewery cylinders or stout tuns shall be at the rate of time and one-half. When an employee is working overtime and is required to work in brewery cylinders and stout tuns he/she shall, in addition to the overtime rates payable, be paid one half of the ordinary rate payable as provided by Clause 8.—Rates of Pay of this award.

(ee) Certificate Allowance

A tradesman who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Industrial Affairs and is required to act on that Certificate whilst engaged on work requiring a certificated person shall be paid an additional 40 cents per hour.

Provided that this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(ff) Spray Application—Painters

An employee engaged on all spray applications carried out in other than a properly constructed booth approved by the Department of Industrial Affairs shall be paid 40 cents per hour extra.

(gg) Bricklayer Operating Cutting Machine

One bricklayer on each site to operate the cutting machine and to be paid 48 cents per hour or part thereof whilst so engaged.

(hh) Spray Painting—Painters

(i) Lead paint shall not be applied by a spray to the interior of any building and no surface painted with lead paint shall be rubbed down or scraped by a dry process.

(ii) All employees (including apprentices) applying paint by spraying shall be provided with full overalls and head covering and respirators by the employer.

(iii) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of \$1.13 cents per day.

(ii) Grindstone Allowance

Where a grindstone or wheel is not made available as required by Clause 32(5)(b) of the award, an allowance of \$4.23 per week shall be paid in lieu of same to each Carpenter or Joiner.

3. Clause 10—Multi-Storey Allowance: Delete subclause (3) of this clause and insert the following in lieu thereof—

(3) Rates For Multi-Storey Buildings

Except as provided for in subclause (4) of this clause, an allowance in accordance with the following table shall be paid to all employees on the building site. The second and subsequent allowance scales shall, where applicable, commence to apply to all employees when one of the following components of the building—structural steel, re-inforcing steel, boxing or walls, rises above the floor level first designated in each such allowance scale.

“Floor Level” means that stage of construction which in the completed building would constitute the walking surface of the particular floor level referred to in the table of payments.

From commencement of Building to Fifteenth Floor Level—32 cents per hour extra;

From Sixteenth Floor Level to Thirtieth Floor Level—39 cents per hour extra;

From Thirty-first Floor Level to Forty-fifth Floor Level—60 cents per hour extra;

From Forty-sixth Floor Level to Sixtieth Floor Level—76 cents per hour extra;

From Sixty-first Floor Level Onwards—95 cents per hour extra.

The allowance payable at the highest point of the building shall continue until completion of the building.

4. Appendix C—Pinjarra and Kwinana Alumina Refineries: Delete clause (2) of this Appendix and insert the following in lieu thereof—

2.—SITE ALLOWANCE

(a) A site allowance of \$1.34 per hour for each hour worked shall be paid on all work performed at the Pinjarra Alumina Refinery Site.

(b) A site allowance of \$1.59 per hour for each hour worked shall be paid on all work performed at the Kwinana Alumina Refinery Site.

5. Appendix D—North West Shelf Gas Project: Delete clauses (5) and (6) of this Appendix and insert the following in lieu thereof—

5.—SITE DISABILITY ALLOWANCE

To compensate for conditions which exist and far exceed those conditions which are provided for within the award, including excessive dust, heat and extremes of terrain, an employee shall be entitled to a payment of \$1.50 per hour for each hour worked.

6.—SPECIAL RATES

Employees shall be paid an allowance at the rate of \$3.22 per hour for each hour worked to compensate for disabilities associated with the following classes of work and in lieu of the relevant amounts in Clause 9.—Special Rates and Provisions of this award, whether or not such work is performed in any one hour—

(a) dirty or offensive work;

(b) work in wet places;

(c) work in any confined space;

(d) handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, or other recognised insulation material of a like nature, or working in the immediate vicinity so as to be affected by the use thereof;

(e) work in a place where fumes of sulphur or other acid or other offensive fumes are present.

When working outside the categories here listed the employee shall receive the appropriate additional rate prescribed in Clause 9.—Special Rates and Provisions of this award.

6. Appendix F—Asbestos Eradication: Delete clause (5) of this Appendix and insert the following in lieu thereof—

5.—RATE OF PAY

In addition to the rates prescribed in this award, an employee engaged in asbestos eradication (as defined)

shall receive \$1.33 per hour worked in lieu of Special Rates prescribed in Clause 9(1) with the exception of subclauses (b), (c), (e), (x), (ab) and (af).

7. Appendix G—Laser Equipment: Delete clause (4) of this Appendix and insert the following in lieu thereof—

4.—LASER SAFETY OFFICER ALLOWANCE

Where an employee has been appointed by his employer to carry out the duties of a laser safety officer he shall be paid an allowance of \$1.64 per day or part thereof whilst carrying out such duties. The allowance shall be paid as a flat amount without attracting any premium or penalty.

**AWARDS/AGREEMENTS—
Application for variation of—
No variation resulting—**

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Hon. Minister for Works and Services
& Others

and

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

No. 1094 of 1999.

COMMISSIONER J F GREGOR.

15 June 2000.

Order.

WHEREAS on 13 July 1999, Hon. Minister for Works and Services & Others applied to the Commission for an order pursuant to Section 40 of the *Industrial Relations Act 1979*; and

WHEREAS on 13 June 2000, a Notice of Discontinuance had been filed and the Commission decided to discontinue the proceedings;

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

THAT the application be, and is hereby, discontinued.

(Sgd.) J. F. GREGOR,

[L.S.]

Commissioner.

**AGREEMENTS—
Industrial—Retirements from—**

**GROUND AND FOUNDATION SUPPORTS
INDUSTRIAL AGREEMENT.**

No. AG 87 of 1998.

IN THE WESTERN AUSTRALIAN INDUSTRIAL
RELATIONS COMMISSION

No. 939 of 2000.

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

Ground and Foundation Supports Pty Ltd will cease to be a party to the Ground and Foundation Supports Industrial Agreement No AG 87 of 1998 on and from the 19th day of July 2000.

Dated at Perth this 19th day of June 2000.

J. A. SPURLING

Registrar.

**NOTICES—
Award/Agreement matters—**

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Application No. 978 of 2000.

APPLICATION FOR VARIATION OF AWARD
ENTITLED "SECURITY OFFICERS AWARD
No A25 of F 1981".

NOTICE is given that an application has been made to the Commission by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch under the Industrial Relations Act 1979 for a variation of the above Award.

As far as relevant, those parts of the proposed variation which relate to area of operation or scope are published hereunder.

1. Clause 3.—Area and Scope—Delete this clause and insert in lieu—

3.—Area and Scope

This award shall apply to all officers in the callings set out in Clause 21A.—Wages, alternatively Clause 21.—Classification Structure and Wage Rates, in the security industry and shall apply throughout the State of Western Australia; provided that this award shall not apply to those employees employed as Control Room Operators pursuant to the Clerks' (Control Room Operators) Award No. A14 of 1981.

A copy of the proposed variation may be inspected at my office at the AXA Centre, 111 St George's Terrace, Perth.

J.A. SPURLING,

Registrar.

29 June 2000.

**PUBLIC SERVICE
ARBITRATOR—
Matters Dealt With—**

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.

No. P 10 of 2000.

PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT.

13 June 2000.

Order.

WHEREAS this is an application pursuant to Section 80E(1) of the Industrial Relations Act 1979; and

WHEREAS by a letter to the Commission dated the 8th day of June 2000, received on the 9th day of June 2000, the Applicant sought leave to discontinue the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby withdrawn by leave.

(Sgd.) P. E. SCOTT,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia
Incorporated

and

Executive Director, Fisheries Western Australia.

No. P8 of 2000.

COMMISSIONER A.R. BEECH.

26 June 2000.

Reasons for Decision.

The matter before the Commission is an application by The Civil Service Association of Western Australia Incorporated for an interpretation of the *Public Service Allowances (Fisheries and Wildlife Officers) Award 1990*. The application seeks a declaration as to the true interpretation of paragraph (2)(a) of Clause 5.—Commuted Overtime Allowance of the award. Subclause (2) in its entirety is as follows—

“(2) Technical Officers and Technical Assistants involved in Fisheries Research and any other officers authorised by the Chief Executive Officer excluding officers employed in specified calling positions pursuant to Clause 7 of the Public Service Salaries Agreement 1985, PSA AG No. 5 of 1985.

- (a) All officers shall be paid an allowance at a rate of 20% of gross annual salary for days when working on field duties away from headquarters.
- (b) Officers who occupy positions which generally do not require work to be performed outside of or in excess of the prescribed hours of duty may, at the discretion of the Chief Executive Officer, be paid overtime pursuant to Clause 20.—Overtime Allowance of the Public Service General Conditions of Service and Allowances Award No. PSA A 4 of 1989, in lieu of the allowances prescribed in paragraph (a) of this subclause.”

The union advises that two officers had reported for duty at headquarters prior to commencing field duties away from headquarters and, subsequently, terminated duty at headquarters. The officers, having taken the view that they had satisfied all of the requirements of paragraph (2)(a) of the Clause 5.—Commuted Overtime Allowance of the award claimed payment of the allowance. Following the respondent's rejection of the claim, the union has taken the matter up and has sought the answers to a number of questions.

The first question is as follows—

1. Does “working on field duties away from headquarters” include field duties performed within a radius of 50km from the headquarters at the Western Australian Marine Research Laboratory, Watermans?

The task of the Commission when an award is to be interpreted is well settled. The first task of the Commission is to determine whether the used words are capable in their ordinary sense of having unambiguous meaning. If they are, then the further consideration of the expressed or supposed intention of the award-making tribunal does not fall to be considered. If the contrary was the case, every employer, union official and indeed each employee would need to have available to him the expressed views of the award making tribunal whether they be expressed before or after the making

of the award in order to determine the intentions of the tribunal whilst the award itself would be rendered meaningless (*Norwest Beef Industry Limited v. AMIEU* (1984) 64 WAIG 2124 at 2133). Putting to one side for the present how the allowance is calculated, the allowance is payable “when working on field duties away from headquarters”. It is significant that the field duties which are worked have to be field duties “away from headquarters”. To put it another way, the allowance is not paid merely for working on field duties. The field duties have to be away from headquarters. It seems clear from the evidence that was brought to the Commission that field duties are not able to be performed at, or in headquarters. Therefore, it can be understood that field duties are duties in the field, that is, they are performed somewhere other than headquarters. Therefore, the use of the words “away from headquarters” suggests that the field duties are not only performed outside headquarters, they are in fact performed away, that is at a distance from, headquarters. That tends to suggest, therefore, that the allowance is only paid where the field duties are sufficiently far away from headquarters.

However, although that meaning is able to be deduced from the plain and ordinary meaning of the words concerned, the result is uncertainty regarding precisely what constitutes “away from headquarters”. It is precisely that uncertainty which has led to this matter being brought to the Commission. It is not possible to determine on the plain and ordinary language used by the clause precisely what constitutes “away from headquarters”. In order to answer that question it is therefore necessary to have regard to extrinsic material. In that regard, the evidence of the respondent is that the history of the payment of the allowance relates it to the concept of “metropolitan area” as that has been variously defined. It is currently defined as being a radius of 50km from the Perth City Railway Station (see: *Government Officers Salaries, Allowances and Conditions Award 1989*, Clause 6). The respondent has also tendered an internal memorandum (exhibit C) dated 15 November 1999 which effectively is a revised administrative instruction. That refers to 50km distance from usual base, that is the Western Australian Marine Research Laboratory, Watermans. On the evidence of Dr Penn I am satisfied that there is a custom and practice in relation to the payment of this allowance and the fact that the allowance was only paid where that radius is exceeded leads only to the conclusion that it has the notoriety which is required in order to establish a custom and practice. Such a custom is not contrary to the express terms of the award and a person may be bound by it notwithstanding that he had no knowledge of it (*Robe River Iron Associates v. AMWSU* (1987) 67 WAIG 1097 at 1098). Accordingly, “working on field duties away from headquarters” does not include field duties performed within a radius of 50km of the headquarters at the Western Australian Marine Research Laboratory, Watermans and the first question is answered “No”.

The second question is as follows—

2. In order to qualify for payment of the allowance must the field duties be performed prior to 7:00am or after 7:00pm?

The plain and ordinary meaning of the words of paragraph (2)(a) does not limit the payment of the allowance to field duties performed prior to or after certain times of the day. Nevertheless, the terms of paragraph (2)(a) must be read in the context of the clause as a whole. The allowance is a Commuted Overtime Allowance. Overtime may be paid in lieu of the Commuted Overtime Allowance to officers who occupy positions which generally do not require work to be performed outside of or in excess of the prescribed hours of duty (paragraph (2)(b)). Accordingly, the Commuted Overtime Allowance paid in paragraph (2)(a) is to be paid to officers who occupy positions which generally do require work to be performed outside of or in excess of the prescribed hours of duty. It follows that the allowance is payable when work is performed outside of or in excess of the prescribed hours of duty.

Indeed, that much was observed by the Commission when the award issued in 1990 (see 70 WAIG 3612). On that occasion, Fielding C. (as he then was) noted that the nature of the work covered by the award involved a need for a flexible approach to hours of work in the field rather than a defacto adherence to public service overtime provisions. He notes that

this much appears to have been recognised by the union as well as by the respondent. Further, both the union and the respondent appear to have accepted before Fielding C. that the Commuted Overtime Allowance was the most appropriate means of compensating the officers in question for their overtime, including work at irregular hours. The decision of Fielding C. makes clear that the allowance is directly linked to fieldwork and thereby to overtime actually occurred such that those who work overtime will be compensated for it and those who do not work overtime will not be compensated for something they have not done. Accordingly, the field duties should be performed outside of or in excess of the prescribed hours of duty. The question posed refers to the hours prior to 7:00am or after 7:00pm. The Commission understands that these are the spread of hours, as distinct from the ordinary hours worked. The Commuted Overtime Allowance is not paid if the fieldwork is done only during ordinary working hours. Accordingly, the answer to question two is "No, provided that they must be worked outside of or in excess of the employee's ordinary hours of duty".

The third question is as follows—

3. Does paragraph (2)(a) require an officer to be away from headquarters for at least one-calendar day performing field duties in order to qualify for payment of the allowance?

The wording of the clause is that the allowance is paid "for days when working on field duties away from headquarters". The award defines a "day" as being from midnight to midnight. A literal application of that definition would mean that the allowance is paid for the period between midnight to midnight when working on field duties away from headquarters. However, the information before the Commission shows that the allowance has been paid for part of a day provided that it is undertaken at a location greater than a 50km distance from usual base (exhibit C). For the reasons given above, I believe that extrinsic material is necessary in order to properly interpret the clause. By the use of that extrinsic material the answer to the question is shown to be "No".

The fourth question is as follows—

4. In the event an officer reports for duty at headquarters prior to commencing field duties away from headquarters and, subsequently, terminates duty at headquarters is the officer precluded payment of the allowance?

The answers to the foregoing questions have shown that the allowance is payable when even part of a day is worked provided that the work is undertaken at a location greater than a 50km distance from usual base. Provided that that work is also done outside of or in excess of the employee's usual working hours then the allowance is payable. It would be irrelevant whether an officer reported for duty at headquarters prior to undertaking fieldwork outside of or in excess of ordinary hours at a location greater than 50km distance from usual base. Accordingly, the answer to question four is that the officer is not precluded from payment of the allowance in the event that the officer reports for duty at headquarters prior to commencing field duties away from headquarters and subsequently terminates duty at headquarters. The answer to the question is "No".

The fifth question is as follows—

5. Does the award require that the undertaking of fieldwork be given prior approval in order to qualify for payment of the allowance?

It is to be noted that the question refers to whether the award, as distinct from paragraph (2)(a), requires prior approval to be given. The award is, of itself, an award concerned only with the allowances which are to be paid. It is apparent that the prescription of the ordinary hours of duty to be worked, and of the overtime to be worked, is to be found elsewhere. In that regard, the decision of Fielding C. referred to earlier is most apposite when he stated—

Furthermore, the material submitted by Mr Bowen, and the testimony of Dr Penn, suggests that it is still Departmental policy for officers to organise field work programmes so that wherever possible hours are not worked in excess of those for which the existing commuted overtime allowance is designed. To a large degree that was acknowledged by the two Technical Assistants

who gave evidence in these proceedings. I accept that to be the basis upon which the existing Agreement was entered into and still the basis upon which field work is to be conducted. It may be that with the effluxion of time research scientists and the officers in question have not adhered to that requirement as rigidly as intended when planning or carrying out field work. If that is the case I consider it preferable that appropriate adjustments be made to the work requirements of the officers concerned to accord with the original plan, rather than increase or amend the allowance in the way now sought. I would have thought that in any enterprise there needs to be some control on the amount of overtime worked. Clearly the officers cannot be expected to work for an inordinate length of time nor frequently at irregular hours without proper recompense. Equally, given the nature of the funding arrangements for research projects outlined by Dr Penn and Mr Bowen, and indeed, given the need to satisfy proper management concepts, overtime or work at irregular hours cannot be allowed to go unchecked. Rather, they have to be maintained within manageable limits.

(70 WAIG at 3614)

Accordingly, the undertaking of fieldwork is to be given prior approval because it involves the working of overtime. It is the working of overtime that requires the prior approval. If the overtime is worked then the Commuted Overtime Allowance is payable in the circumstances outlined above. The answer to question five therefore is "No, but the working of overtime must be given prior approval".

The questions submitted for interpretation are therefore decided accordingly.

The respondent has requested that the Commission exercise its powers under s.46 of the *Industrial Relations Act 1979* to now amend the award in the terms of this interpretation. The Commission at this stage declines to do so. It does so for the reason that the Commission has been informed that the parties are in the process of negotiating, perhaps finalising, an enterprise bargaining agreement. The Commission is unaware of the extent to which the parties intend to reflect in their agreement any understanding of the proper application of the Commuted Overtime Allowance. Accordingly, the Commission will issue these Reasons for Decision but will otherwise adjourn the application for eight weeks to allow the parties time to conclude their agreement. When the matter is re-examined at the end of the adjournment period, the Commission will re-examine whether the circumstances warrant the award being amended in the manner requested.

Appearances: Mr E. Rea appeared on behalf of the applicant.

Ms N. Embleton and with her Ms A. Davidson on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Megan Maree In De Braekt

and

Chief Executive Officer of the Department of
Productivity and Labour Relations.

No. P 42 of 1997.

30 June 2000.

Reasons for Decision.

(Given extemporaneously at the conclusion of the submissions, taken from the transcript as edited by the Senior Commissioner)

SENIOR COMMISSIONER: This is an application made ostensibly and indeed, now admitted to be made, under section 80E of the *Industrial Relations Act 1979* to the Commission constituted by a Public Service Arbitrator. As the Notice of Application indicates, it is an application for "the settlement of an industrial dispute".

It is common ground that the Applicant is a Government officer for the purposes of the Act. By the Notice of Application she seeks orders, firstly, that the decision of the Respondent and "the recommendation of the 1997 Department of Productivity and Labour Relations Classification Review Committee be made void ab initio"; secondly, that the Commission "make a determination on the facts as to the allowance to be paid to the Applicant for the relevant period and the Applicant's employment history be adjusted accordingly"; and thirdly, that the "Respondent pay the costs incurred by the Applicant".

The Respondent challenges the jurisdiction of the Commission, as presently constituted, to deal with the matter. It asserts that the Public Service Arbitrator is without jurisdiction to entertain the application, given that it is an application made by an individual Government officer. The Respondent argues that the jurisdiction under section 80E of the Act to entertain an application by an individual officer is confined to the matters listed in subsection 80E(2) and this is not one of those matters. Secondly, the Respondent argues that the decision of the Reclassification Review Committee, and, I take it, the decision of the Respondent consequent upon that decision of the Committee, was not a decision susceptible to review on the grounds of natural justice, any other ground of administrative law challenge or promissory estoppel. Further, the Respondent challenges the matter on the basis that, to the extent that the Applicant seeks a retrospect financial adjustment, or merely a bare declaration, such relief is beyond the jurisdiction of the Commission, either through the medium of the Public Service Arbitrator or otherwise. In addition, in its Notice of Answer the Respondent asserts that if the Applicant has an entitlement to a payment for duties beyond those associated with the post that she was occupying at the relevant time, she may be entitled to a higher duties allowance which the Respondent says is a matter governed by the Public Service Award and thus, in accordance with section 83 of the *Industrial Relations Act 1979*, is not a matter for the Commission but rather a matter to be enforced before the Industrial Magistrate's Court. On the other hand, if what the Applicant seeks is a payment in the nature of a temporary special allowance then that is a matter that is the exclusive preserve of the Chief Executive Officer of the Respondent and not a matter for the Commission.

In my view, the matter can be simply disposed of on the first of the objections raised by the Respondent. Section 80F of the *Industrial Relations Act 1979* sets out who may refer a matter to the Commission constituted by a Public Service Arbitrator. Consistent with the idea that access to the Commission is primarily limited to organisations and employers, the Commission constituted by a Public Service Arbitrator has limited authority to deal with an industrial matter referred to it by an individual officer.

The industrial matters which the Commission constituted by a Public Service Arbitrator is authorised to deal with on the application of an individual officer are, prescribed in subsection 80F(2) of the Act. In essence, those matters are limited to matters concerning the salary ascribed to "the office" occupied by the individual officer, applications most commonly represented in this jurisdiction by reclassification appeals. Quite clearly the instant application in so far as it seeks an order, more aptly a declaration, declaring the activities of the Respondent's Classification Review Committee to be void ab initio does not fall within the scope of the industrial matters referred to in section 80E(2). Indeed, with all respect to those who think otherwise, I fail to see how the Commission, however constituted, can entertain such a claim. Furthermore, the application, in so far as it seeks an award for an "allowance" to be paid to the Applicant for the period she acted as an industrial inspector does not, in my view, fall within the scope of subsection 80E(2). Relevantly, subsection 80E(2) confines the Commission, on the application of an individual officer, to dealing with the claim in respect of the range of salary or title allocated to "the office" occupied by the Applicant or, where there is a range of salary allocated to the office, a claim in respect of a particular salary within the range allocated to the individual occupant. Despite what the Applicant says, essentially what is permitted is a claim with respect to the remuneration of the office, as distinct from the office holder. Indeed, in my experience that has been accepted in the past

without question. What the Applicant seeks is a payment for herself as the holder of an office, not a loading to be allocated to that office once and for all. For myself, I do not see how the provisions of section 80E(2) authorise the Commission to award a special payment to the occupant of a particular office in the nature of a temporary special allowance. The Chief Executive Officer, as the employer of a Government officer, might be permitted to award a temporary special allowance to an individual, but it is not open to the Commission on the application by an individual officer, and I emphasise that point, to award a temporary special allowance because it does not relate to the office as such. Again, in my experience, that has generally, although not invariably, been accepted in the past. It was a practice apparently adopted by the Commission when dealing with the reclassification appeals by a number of the industrial inspectors to whom the Applicant has referred in the papers supporting her application.

It follows that, in my view, the application must fail. It has been improperly instituted. It is not an application which is within the jurisdiction of the Commission if brought by an individual officer.

In the course of the proceedings the Applicant implied, if not expressly suggested, that the Commission should amend the Notice of Application to become a reclassification appeal. Such an application would, of course, relate to the office and would fall fairly and squarely within the provisions of section 80E(2). As counsel for the Respondent rightly said, such an amendment involves a fundamental change in the character and nature of the existing application. That factor, plus the fact that on reading the papers, and there are volumes of them, it appears that the matter has hitherto never been pressed as a reclassification appeal. Rather, as counsel for the Respondent said, and I note as the Notice of Application itself indicates, it has always been advanced as a claim for an allowance to the Applicant for the time during which she says she performed the extra duties. I take the view, assuming the Commission has the power to make the necessary amendment as the Applicant suggests, that those factors coupled with the fact that it is now well over two years, almost three years, since the Application was launched that it is now too late for the application to be amended. I am satisfied on balance, that the application to amend ought not to be granted.

In so far as the Applicant seeks an order for costs, it follows from my determination in this matter that she would not be entitled to such an order.

For the forgoing reasons the application should be dismissed. I intend to so order.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Megan Maree In De Braekt

and

Chief Executive Officer,

Department of Productivity and Labour Relations.

No. P 42 of 1997.

30 June 2000.

Order.

HAVING heard Ms M In De Braekt and with her Mr G McCorry on behalf of the Applicant and Mr R L Hooker (of counsel) and with him Ms N J Embleton on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be, and is hereby, dismissed.

(Sgd.) G. L. FIELDING,

[L.S.]

Senior Commissioner/
Public Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Amanda Louise Pickering

and

Board of Management of Geraldton Health Service.

No. PSA 77 of 1998.

PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT.

13 June 2000.

Order.

WHEREAS this is an application pursuant to Section 80(E) of the Industrial Relations Act 1979; and

WHEREAS by a letter to the Commission dated the 9th day of June 2000 the Applicant's representative sought to discontinue the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby withdrawn by leave.

(Sgd.) P. E. SCOTT,
Commissioner.

[L.S.]

INDUSTRIAL MAGISTRATE— Complaints before—

IN THE INDUSTRIAL MAGISTRATE'S COURT

HELD AT PERTH

WESTERN AUSTRALIA

Complaint No. 161 of 1999

Date Heard: 9 February 2000

Date Decision Delivered: 2 March 2000

BEFORE: MR G. CICCHINI I.M.

BETWEEN —

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

and

Hanssen Pty Ltd
Defendant

APPEARANCES —

Ms J. Harrison appeared for the Complainant.

Mr G. Hanssen, Managing Director, appeared for the Defendant.

Reasons for Decision.

The Complaints

The Complainant alleges that the Defendant has committed 75 separate breaches of the *Building Trades Construction Award 1987 R14 of 1978 (the Award)*. Three different types of breaches are alleged to have been committed with respect to Richard Champion who the Complainant alleges was at the material terms an employee of the Defendant. It is alleged that—

The Defendant failed to keep a record as required by clause 28 of *the Award*; and

1. The Defendant failed to pay Richard Champion in cash contrary to clause 34 (1)(a)(ii) of *the Award*; and
2. The Defendant failed to provide pay packet details contrary to clause 34 (5) of *the Award*.

The breaches are alleged to have been committed during the relevant pay periods between 11 September 1998 and 24 November 1998 and again between 19 April 1999 and 25 June 1999.

Agreed Facts

The parties agree that Richard Champion worked for the Defendant between 11 September 1998 and 24 December 1998 and again between 19 April 1999 and 25 June 1999. It is agreed also that Mr Champion worked as a ceiling fixer when he worked for the Defendant and that the work undertaken by him for the Defendant was construction work as is defined in *the Award*. Further it is agreed that during the periods when Richard Champion worked for the Defendant that the Defendant was engaged in work in the 'building construction industry'.

The Defendant does not dispute that with respect to Richard Champion that it failed to keep a record of those matters required by clause 28 of *the Award*; that it failed to pay in cash and that it failed to provide pay packet details. The Defendant maintains that Mr Champion was not an employee but rather a sub-contractor.

The Issue

The issue in this case is whether or not Mr Champion was an employee. If I find that he was an employee then it is conceded that the Defendant is caught by *the Award* and is in breach of *the Award* as alleged. If Mr Champion was a sub-contractor the complainant cannot succeed with respect to any of its allegations.

The Evidence

There were only two witnesses who gave evidence in this matter. Richard Champion for the Complainant and Mr Gerry Hanssen for the Defendant.

Mr Champion told the Court that he is plasterer/ceiling fixer and has worked as such for the last 14 years. He has no trade qualifications. He has mainly worked on commercial construction sites around Perth such as shopping centres, schools and the like.

Mr Champion testified that in early September of 1998 Mr Hanssen telephoned him and asked if he could have a look at a job as he had a ceiling-fixing job for him. Mr Champion subsequently went to the job at Mill Point Road South Perth to discuss the matter with Mr Hanssen. He was shown the work required to be undertaken at a new apartment building. After viewing the job Mr Champion was told that he could start the next day if he wanted to "take the job on". He agreed to take the job on at a pay rate of \$25 per hour.

Upon arrival at the job the next day he was told to see Werner. He was also at that time introduced to another gentleman named Brian more commonly referred to as Boxer. Werner showed him what was required. Werner and Boxer directed what work was to be done and organised the supply of materials to be used by Mr Champion. Mr Champion only supplied small hand tools and power tools. All other necessary equipment and materials was supplied by the defendant through Werner and Boxer. The Defendant with exception of one occasion when Mr Champion brought in his own scaffolding in order to make the job easier supplied scaffolding.

Mr Champion was told that the standard work times were 7.00 am to 3.30 pm. On the first Friday following commencement Mr Champion attempted to cease work at 3.00 pm in order to cash the pay cheque he was given that day. Mr Hanssen told him that he preferred that Mr Hanson remained on the job until 3.30 pm as an earlier departure from the site by him might cause other workmen on site to follow suit. Accordingly Mr Champion remained working on site until 3.30 pm.

Mr Champion gave evidence that he worked on site as part of a team with labourers, carpenters, other ceiling fixers, riggers, electricians and so forth. The Defendant supplied any labourers required by him. Werner and Boxer gave instructions as to the work to be carried out. Each of them also carried out inspections of the work done by Mr Champion. All orders for materials required by Mr Champion were given to Boxer. From time to time Mr Champion was asked to do overtime work. He asked Mr Hanssen for payment at the rate of \$30 per hour when performing such over time. In fact he was paid that rate when he worked overtime.

Each Friday morning Mr Champion delivered to the Defendant an invoice claiming payment. The invoice was delivered in each instance to Mr Hanssen or alternatively Werner. Each invoice delivered by Mr Champion was addressed to the Defendant. In most instances the weekly sum of \$1000 less 20% tax was claimed. Accordingly a total amount of \$800 was usually claimed. However other lesser payments were also invoiced. The invoice generated a payment by cheque each Friday afternoon. No pay-slips accompanied the payment. There was no reference in each invoice as to the hours worked. In the main the invoices were endorsed to show a claim for services rendered and in some instances were endorsed 'for labour only'.

Just before Christmas in 1998 the ceiling fixing job ran out and Mr Champion was asked if he could fix Hardiflex. He did that for a short while before ceasing to work for the Defendant on 24 December 1998.

Mr Champion testified that he was not conducting his own business at the material time. He was not in partnership with any other person and he did not engage in quoting jobs for a fixed price.

In April 1999 Mr Champion received a telephone call from Mr Hanssen's son Bobby asking him to work at the Swan Valley Oasis Function Centre. He agreed to work at that place fixing ceilings at an hourly rate of \$25. He worked at that place for about two months fixing ceilings with his mate Mark. The Defendant supplied all materials for that job. The Defendant also supplied any labourers needed. Essentially the working conditions and systems were the same as those for the Mill Point Road job. Similarly pay was recovered by the production of an invoice which was given to the Defendant each Friday morning generating a payment by cheque each Friday afternoon. The invoices rendered for the function centre were initially formulated in the same way as those formulated for the Mill Point Road job. However the last two invoices rendered respectively dated 17 and 24 June 1999 were formulated in such a way that there was a claim made for work done at an hourly rate together with a claim for the installation of cornice at a lineal metreage rate. Mr Champion explained how his claim for lineal metreage came about. He said that at the material time ceiling requirements had failed to arrive and accordingly he set about fixing the cornice whilst waiting. Mr Hanssen was not happy with Mr Champion fixing the cornice and paying him at an hourly rate. Mr Champion was told that if he wanted to put up the cornice that he would be paid at a lineal metreage rate. Mr Champion was not happy with that situation feeling he would be underpaid. Under cross-examination he conceded telling Mr Hanssen that if he was going to be paid per lineal metre for the cornice fixing he wanted to be paid per lineal metre for the whole of the ceiling fixing job which he had previously carried out. It is to be noted that Mr Champion had previously been paid for that work. He thought he would be better off by revising his claim and would receive extra money. However it did not turn out that way. Infact he would have been worse off claiming on that basis and accordingly did not pursue the issue.

In about mid May of 1999 Mr Champion was sent by the Defendant to another job in South Perth. He worked on that site intermittently for two weeks subject to the same conditions that he had previously worked under for the Defendant. In June of 1999 dissatisfied with various factors of his relationship with the Defendant he decided to leave.

Whilst Mr Champion worked for the Defendant tax was deducted using the Prescribed Payments System (P.P.S.) method. Mr Hanssen gave the P.P.S. deduction form to Mr Champion. It was completed and returned to Mr Hanssen. The Defendant otherwise took care of all taxation obligations.

Gerry Hanssen gave evidence on behalf of the Defendant. He told the Court that he is the Managing Director of the Defendant, which trades as a builder. He personally has been involved in the *Construction Industry* for 33 years and has vast experience with respect to the employment of subcontractors and employees.

Mr Hanssen said that the Defendant generally engages subcontractors to its work. Mr Champion in this instance was engaged as a sub-contractor. He said that it matters not to the Defendant whether sub-contractors are paid at a lineal metreage rate or at an hourly rate. The hourly rate paid by the

Defendants to subcontractors reflects prevailing industry standards for sub-contractors paid at an hourly rate. He emphasised that *the Award rate of pay is far lower than the hourly rate paid to sub-contractors.*

Mr Hanssen admitted that the company did not keep any time and wages records, it did not pay in cash and did not provide pay slips. He said it did not need to do so given that Mr Champion was a sub-contractor. Indeed Mr Champion tendered a P.P.S. authority form to withhold tax at the rate of 20%. Invoices were tendered by Mr Champion for hours worked. It was never intended that Mr Champion be a P.A.Y.E. employee. Had he been a P.A.Y.E. employee he would have only been entitled to payment at the rate of \$19.21 per hour and not \$25 as he was paid.

Findings

It is obvious that apart from minor discrepancies the factual circumstances related to the Court by both witnesses are not in dispute. Both witnesses came across as being honest witnesses. It is clear to me that so far as Mr Hanssen was concerned, Mr Champion was taken on by the Defendant as a sub-contractor. Having said that however it is clear on the authorities that Mr Hanssen's view of what the relationship was is of little significance and of course not determinative of the issue. Indeed the issue of whether or not Mr Champion was an employee or a sub-contractor is to be determined on an objective basis having regard to the various indicia referred to in well known authorities. Those well known authorities include *The Australian Builders' Labourers' Federated Union of Workers, Western Australian Branch v. P.B. and K.A. Brajkovich Pty Ltd 71 WAIG 23* and *The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v. R.B. Exclusive Pools Pty Ltd trading as Florida Exclusive Pools 77 WAIG 4.*

It is suggested by the Complainant that, if I follow the approach taken in the abovementioned authorities, that the facts outlined in this case will inevitably result in a finding that Mr Champion was an employee within the meaning of Section 7 of the *Industrial Relations Act 1979.*

In *Florida Exclusive Pools* (supra) His Honour the President set out at pages 6 and 7 a number of indicia to be considered by the Court in arriving at its determination. I recognise that the indicia set out is not an exhaustive list of indicia to be considered, however it does provide a guide with respect to the consideration to be undertaken in this matter and I propose to follow that approach.

The indicia to be considered include the following—

- Control
- Time of starting work- hours
- Whether the worker was conducting his own business
- Obligation to work
- Mode of remuneration
- Taxation
- Mode of termination
- Provision of maintenance and equipment
- The organisation test

I will now move to consider the aforementioned indicia in the light of the factual matrix of this case—

• Control

Mr Hanssen and / or his delegates namely Werner or Boxer allocated the work to be performed. It is self evident from Mr Champion's evidence, which I accept, that his work was subject to supervision notwithstanding that he was an experienced worker. He was subject to Werner, Boxer and Mr Hanssen's direction. Evidence of *control* is also found in Mr Hanssen's requirement that Mr Champion remain on site until 3.30 pm on his first Friday on the job. There can be no doubt control was exercised in that way. Mr Champion was not able to choose when he should start and leave. The ultimate authority in that regard remained with the Defendant. Other examples of *control* include instructing Mr Champion to put up Hardiflex when the ceiling fixing work dried up and also instructing Mr Champion to move from the Swan Valley Oasis site to the South Perth site.

Time of Starting Work—Hours

The hours worked were regular commencing at fixed times and concluding at fixed times. Although to be regarded separately, the *control* of how and when Mr Champion worked his hours is an element of the right to *control*.

• Mr Champion Was Not Conducting His Own Business

The uncontradicted evidence before the Court is that Mr Champion was not in business as a sole trader or in partnership. He was not conducting a business for profit. It appears that he was, during the material period, providing his services exclusively to the Defendant. I accept his evidence in that regard. The evidence does not dictate that he came and went from the job as he pleased.

• Obligation to Work

There was an obligation to work for the Defendant on the jobs selected by Mr Hanssen or his delegate. He worked five days a week and sometimes on Saturdays. He worked continuous days and did not leave the Defendant's job to do other work. I recognise that Mr Champion only worked intermittently during his final weeks with the Defendant, however the evidence does not disclose whether he worked for others during that period.

• Mode of Remuneration

The mode of remuneration was clear. He was paid weekly. The quantum depended on the hours worked. The remuneration was calculated at the rate of \$25 per hour or alternatively \$30 per hour when overtime was worked. He did not quote a price for each job as a contractor might do. Although he rendered invoices, they were in the main no more than a representation of the calculation of time worked. The claim for metreage shown in the last two invoices are explained by Mr Champion as being an aberration and were only raised upon Mr Hanssen's instance. It was a departure from the agreed terms. He was paid in a manner, which is far more consistent with the manner of payment, which a wage earner might be subject to.

• Taxation

Taxation was deducted using P.P.S. systems which usually applies to sub-contractors. Tax was deducted on that basis because Mr Champion regarded it as being the normal industry practice. The P.P.S. form to withhold tax was provided to Mr Champion by Mr Hanssen on behalf of the Defendant. Mr Champion did not proffer it using his own initiative. Although suggestive of a sub-contractual arrangement the use of the P.P.S. system is not of itself in isolation determinative of the issue.

• Mode of Termination

There is very little evidence going to these particular indicia, which assists the Court in the determination of this matter.

• Provision and Maintenance of Equipment

Mr Champion only supplied basic tradesman's tools. All other equipment required was supplied and maintained by the Defendant.

• The Organisation Test

The evidence of Mr Champion dictates that he was part of the Defendant's organisation. That is evidenced by the fact that he was asked to move from one site to another. He carried out work which was not specifically in his field such as the fixing of Hardiflex. He was given that to do when it was quiet. That sits more with the way an employer would organise employees rather than the way an employer would deal with a sub-contractor.

Conclusion

In conclusion Mr Champion brought nothing more to the relationship other than his labour. He received a weekly payment indistinguishable from wages. He did work for the Defendant at the Defendant's direction using tools (other than hand tools and small power tools), equipment and material supplied by the Defendant. Mr Champion made no profit. He provided his services alone and was not in business. He was not in a partnership. He was controlled as to what work he did and the hours that he worked. Mr Champion was an integral part of the Defendant's business.

It cannot be denied that there are certain indicia and particularly that of the payment of P.P.S., which weighs in favour

of the Defendant in submitting that Mr Champion was a sub-contractor. However there are a number of other indicia referred to above which go to the establishment of a contract of service. In other words the weight of the indicia as supported by the evidence establishes on the balance of probabilities that Mr Champion was an employee within the meaning of S.7 of the *Industrial Relations Act*. I find that he was at all material times an employee. Having so found it follows that each of the complaints has been made out.

G. CICCHINI,
Industrial Magistrate.

IN THE INDUSTRIAL MAGISTRATE'S COURT OF WESTERN AUSTRALIA.

HELD AT PERTH

Complaint No. 193 of 1999

Heard : 9 & 16 March 2000

Delivered : 13 April 2000

BEFORE : Mr G. Cicchini I.M.

BETWEEN:

Angelita Bongcaras Butler

Complainant

and

Canon Food Service Pty Ltd.

Defendant.

Appearances —

Mr T. Crossley appeared as agent for the Complainant.

Mr D. Clarke and Mr C. Fayle appeared as agents for the Defendant.

Reasons for Decision.

Background

The complainant commenced working for the defendant on the 26th February 1996. She worked at the defendant's Canning Vale premises throughout. She was categorised as a casual worker. She was not paid for any annual leave, sick leave, or public holidays taken. The complainant generally worked five days a week, usually commencing at about 8 am. Her finish times would vary and was dependant upon the number of hours worked each day. The hours worked each day would depend upon demand. It was not uncommon however, for the complainant to work seven and half to ten hours per day. That work pattern continued until 2 October 1997 at which time the complainant suffered a work injury requiring her to take six weeks off work. Following the six week break, the complainant returned to work on light duties working reduced hours. Upon resumption and following the complainant generally worked only for a total of twenty-five hours per week. The defendant's workers compensation insurers paid for a shortfall of thirteen hours per week. It is axiomatic that by their conduct the defendant and its insurer treated the complainant as being an employee who usually worked thirty-eight hours per week. That situation continued until 27 August 1999. The complainant worked in various sections of the defendant's operation commencing in the production line and ultimately working in the defendant's value added section. Just prior to the employment relationship coming to an end the complainant's duties included making saute, stuffing chickens and crumbing.

Contractual Relationship

The complainant's employment was from time to time subject in part to workplace agreements. The documentary evidence before the court which is inconsistent with that pleaded by the complainant dictates that there were two *workplace agreements* between the parties. The first commenced on the 25th March 1997 and expired on 25th March 1998 and the second commenced on the 8th July 1998 and expired on 8 July 1999. The complainant submitted that the last *workplace agreement* was registered by the Commissioner of Workplace Agreements and that it bears the registration

number 98/9767. The fact of the registration of that agreement is not disputed by the defendant. It is noted however that there is no evidence before the Court of the registration of that agreement.

Workplace Agreements

The second agreement which expired on 8 July 1999 provides under the heading *Expiry of Agreement*—

“No later than 2 weeks before the expiry of this Agreement the parties shall meet to discuss the arrangements to apply after the Agreement expires. When this Agreement expires the same terms and conditions of the expired agreement shall apply until another Agreement is registered.”

It is apparent that following the expiry of the *workplace agreement* that the parties continued to operate as though the conditions set out in the second *workplace agreement* still applied. Those conditions were no doubt operative. However were they operative by reason of the force of the *workplace agreement* or rather by force of the common law?

Termination

The complainant in this action claims to have been unfairly dismissed on 27 August 1999. She claims that her employment was terminated on that day by Mr Dickinson on behalf of the defendant who told her;

“We are not busy. You are the first to go. We will call you in when we want you. Don't come in on Monday. I will call you when we need you.”

The complainant argues that she was not a true casual worker notwithstanding her classification. She regarded herself as a permanent worker who had a reasonable expectation of continued employment in view of the history of her employment relationship with the defendant.

The defendant's position is quite straight forward. It says that at the material time the company experienced a downturn causing insufficient work to be available for the defendant's full time workers. Accordingly casuals had to be put off so that their hours could be allocated to full time employees. The defendant says that the complainant was not terminated on 27 August 1999 and that she would be called in to work again so soon as economic circumstances permitted. Its actions were consistent with the complainant being a casual employee.

Jurisdiction

Before moving on to consider the substantive merits of this case I need to consider the threshold issue of jurisdiction.

It appears that the complainant's claim is based on unfair dismissal. The complaint is not expressed in that way but the complainant's particulars of claim are. In any event the relief claimed both in the complaint and the pleadings is consistent with a claim based on unfair dismissal. I accordingly treat it as such.

Section 51 of the *Workplace Agreements Act 1993* (the Act) provides—

“Unfair dismissal

51. (1) Where –

(a) a person who was a party to a workplace agreement as an employee claims that he or she has been unfairly dismissed from employment in breach of the provision implied in the agreement by section 18; and

(b) section 7G (1)(b) of the *Industrial Relations Act 1979* does not apply

the person dismissed may bring an action in an industrial magistrate's court against the employer for relief in respect of that dismissal.”

Section 18 of the Act provides—

“Implied provision as unfair dismissal

18. (1) There is implied in every workplace agreement a provision that the employer must not unfairly, harshly or oppressively dismiss from employment any employee who is a party to the agreement.

(2) The provision described in subsection (1) is enforceable under section 51 of this Act or

under section 7G of the *Industrial Relations Act 1979*, as the case may be, and not otherwise.

(3) A workplace agreement must not exclude the operation of subsection (1) and to the extent that it purports to do so it is of no effect.”

An action under section 51 (1)(a) is only available to a person who was a party to a *workplace agreement* at the time of dismissal.

Was the complainant a party to a workplace agreement on the date of the alleged dismissal being the 27th August 1999 given that the last *workplace agreement* had expired on 8 July 1999? Were the parties still bound by that *workplace agreement* by force of the arrangement entered into by the parties within the expired agreement under the clause entitled *Expiry of Agreement* notwithstanding the expiration?

The aforementioned questions can only be resolved by examining the relevant provisions of the Act going to the issue of jurisdiction. A starting point is the consideration of subsections 19 (3), 19 (4) and 19 (5) which provide—

“Commencement and duration

19 (1) ...

(2) ...

(3) A workplace agreement must provide for the day on which it expires which cannot be more than 5 years after it was entered into.

(4) On the expiry of a workplace agreement this Act no longer applies to any contract of employment that it governed and that contract then becomes subject to relevant award provisions (if any) unless it becomes subject to—

(a) another workplace agreement; or

(b) some other arrangement between the parties provided for in the expired workplace agreement.

(5) So long as a contract of employment is not subject to award provisions because of an arrangement under subsection (4) (b), sections 6 and 8 continue to apply to that contract as if the workplace agreement had not expired.”

Obviously subsection 19 (4)(b) is pertinent to this case because another arrangement as set out earlier had been entered into between the parties as provided for in the expired *workplace agreement*.

The contract of employment between the parties as at the date of expiration was not agreed to be subject to any award. Accordingly by virtue of subsection 19(5) section 6 of the Act continued to apply to the contract as if the *workplace agreement* had not expired.

Section 6 of the Act provides—

“Effect of workplace agreement

6 (1) Where a workplace agreement—

(a) has been made between—

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

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

and

(b) has come into force,

no award, whether existing or future, applies to—

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

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

so long as the workplace agreement remains in force.

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

- (3) A workplace agreement also has the effects described in sections 7B, 7C, 7D and 7E of the Industrial Relations Act 1979.
- (4) A workplace agreement does not displace the contract of employment between an employer and an employee but while it is in force it has effect—
 - (a) as if it formed part of that contract; and
 - (b) regardless of any provision of that contract.
- (5) Subsection (1)(c) may be an agreement of the kind described in section 14(2)."

The effect of section 6 is to displace the applicability of an award to the contract of employment or the parties thereto so long as the *workplace agreement* remains in force or is deemed to remain in force pursuant to subsection 19(5). It also goes so far as to import other protection as provided for under the *Workplace Agreements Act 1993*. I say that because subsection 19(3) has the effect, by the importation of section 7C of the *Industrial Relations Act 1979*, of removing the parties from the jurisdiction of the Industrial Relations Commission. Relevantly section 7C provides—

“Definition of “industrial matter limited”

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

- (a) is not—
 - (i) an industrial matter; or
 - (ii) capable of being agreed to be an industrial matter,
 for the purpose of the definition of “industrial matter in section 7(1)
 - (b) is not capable of being determined under section 24(1) to be an industrial matter; and
 - (c) cannot be referred to the Commission under section 80ZE
- (2)
- (3) Subsection (1) also applies where—
- (a) a workplace agreement has expired; and
 - (b) an arrangement is in force between the parties to that agreement of the kind referred to in section 19(4)(b) of the *Workplace Agreements Act 1993*,

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

The only other relevant provision that requires comment at this stage is section 14 of the Act, which provides—

“Termination of contract of employment

14. (1) Where a contract of employment of an employee comes to an end, a workplace agreement that governs that contract no longer applies to that person except where an agreement under subsection (2) provides otherwise.
- (2) An employer and a person who is employed by the employer may agree in writing that a specified workplace agreement is to apply to that person as an employee of that employer during a specified period, not exceeding 12 months, regardless of the number of separate contracts of employment between them that come into existence during that period.
- (3) Subsection (1) does not affect rights or obligations under a workplace agreement that are to take effect after termination of employment.”

In my view subsection 14(2) has no application in this case because the provisions imports the parties getting together and agreeing in writing separate to the expired *workplace agreement* that a specified *workplace agreement* is to apply for a specified period. No such agreement has been entered into between the parties. Even if it could be argued that the arrangement in the expired agreement is what is envisaged by subsection 14(2), then in any event subsection (2) can have no force because the agreement is not for a specified period not exceeding 12 months.

In the end the position is that the *workplace agreement* numbered 98/9767 between the parties expired on 8 July 1999. Accordingly as at 27 August 1999 neither the complainant nor the defendant was a party to a *workplace agreement*. It is clear however that their contract of employment was governed by the same terms and conditions as contained in their expired *workplace agreement*. The effect of the arrangement under the expired agreement was to extend the operation of the expired *workplace agreement* by virtue of subsections 19(4) and 19(5) of the Act. The expired *workplace agreement* continued to have force to the date of alleged termination. Accordingly their contract of employment was governed by the *Workplace Agreements Act 1993*. Consequently the complainant is able to avail herself of the provisions of the *Workplace Agreements Act 1993* to bring a claim for unfair dismissal. This Court has jurisdiction to hear and determine any claim for unfair dismissal involving any employee who was not at the relevant time a party to a *workplace agreement* but who is nevertheless caught by the inclusionary provisions in the Act.

Having resolved the threshold issue of jurisdiction I now move to consider the substantive merits of the case.

Witnesses

The complainant Angelita Butler gave evidence to support her claim. She also called Barbara Hayward a former work colleague and current employee of the defendant to give evidence on her behalf. The defendant called two witnesses namely John Dickinson its production director and Mr Brook Arnold being the defendant’s director responsible for accounting matters.

The Evidence

Angelita Butler

Mrs Butler is of Filipino origin and consequently only has a limited understanding of the English language. Indeed her evidence was given through an interpreter.

She told the Court that she was employed by the defendant for about three and a half years until her employment was terminated on the 27th August 1999. During the period of her employment she entered into two workplace agreements with the defendant. Notwithstanding having read and signed those agreements she really had little understanding of the same.

When she first started working for the defendant, she worked up to 40 or 50 hours per week. Subsequent to the work injury she sustained in October 1997 she has only worked twenty-five hours per week but has been paid for thirty-eight hours. The complainant testified that as at August 1999 she was the longest serving employee working in the value added section. There were about seven or eight people working within that section.

Mrs Butler testified that there was no reduction in work in July and August 1999 preceding her termination. She was not asked to work reduced hours on account of lack of work. The only factor which restricted her ability to work longer hours was her medical condition.

Prior to termination the complainant was not given any verbal or written warnings about her work performance or other problems.

Termination occurred soon after commencement of work on Friday the 27th August 1999. Mrs Butler was called in to see Mr Dickinson in his office and was told not go to work the next Monday. She was told that she would be called into work when required. The complainant subsequently continued to work until 1.00 pm which was her normal finishing time. When she finished she spoke to Mr Brook Arnold, the defendant’s accountant/paymaster. She asked Mr Arnold why she was the one to be put off given that she had been working for the defendant for a long time. Mr Arnold replied that he could not answer that and referred her back to Mr Dickinson. She consequently attempted to see Mr Dickinson again but was unable to do so given that Mr Dickinson was too busy.

The complainant told the court that she informed fellow workers about her termination. One of the workers was Mrs Barbara Hayward. Ms Hayward was surprised and shocked at the termination. The complainant herself was shocked at the termination given that there was no apparent shortage of work in July and August preceding her termination. Indeed she was very busy most days of the week.

The complainant did not receive any payment in lieu of notice. She was simply paid for the hours worked. She did however subsequently continue to receive payments of work-compensation for thirteen hours each week.

On the 2nd September the Complainant filed and served upon the defendant the complaint in this matter.

On the 10th September 1999 Mr Dickinson telephoned the complainant and left a message on her answering machine. He had left a message asking the complainant to ring him. The complainant then instructed her industrial agent to contact Mr Dickinson. The complainant acknowledged having received three telephone calls from Mr Dickinson between the 10th and 13th September 1999. She had her agent return those calls.

The complainant acknowledged also having received a letter from the defendant dated 15th September 1999. The letter advised the complainant that she was required for casual work on Monday 20th September 1999 at 8 am. The complainant instructed her industrial agent Mr Crossley to respond to the letter. By letter dated 17th September 1999 Mr Crossley on behalf of the complainant addressed several issues. At page two of the letter, he said,

"Our client is not prepared to return to any casual position whatsoever."

That statement was made in the context of a submission that the complainant was a permanent worker and not a casual worker.

Seizing the opportunity, the defendant replied by letter dated the 22nd September 1999 noting that the complainant was not prepared to return to any casual position and stating that in its view the complainant had frustrated the contract of employment. The defendant advised the complainant's agent that the statement was considered by it to be a notice of resignation and the defendant accepted such resignation. The complainant for her part never instructed her agent to offer her resignation. Indeed so far as she was concerned the complainant had terminated her position on the 27th August 1999 in any event.

There can be no doubt that the defendant's conduct was aimed at taking advantage of the perceived weakness in the agent's submission. Its stance was taken in order to achieve some tactical advantage in the dispute between the parties. The reality however is that Mr Crossley's submissions on behalf of the complaint did not amount to a resignation. It was never intended to be a resignation and was not. As far as the complainant was concerned there was no existing contract of employment because her services had already been terminated.

The complainant testified that she has not worked since termination notwithstanding her continued attempts to find work. She expressed the view that she would be prepared to return to work for the defendant on a full time permanent basis.

Under cross-examination the complainant acknowledged that she was employed as a casual employee under a *workplace agreement* and that she regarded herself as a casual worker up until the 17th September 1999. Furthermore she conceded that she was paid \$10.80 per hour being the rate paid to casual workers. Other than those concessions the cross examination of the complainant was otherwise uneventful. During re-examination the complainant reaffirmed that on the 27th August 1999 she was not given any indication as to when she would next be called into work. She said that she subsequently "kept on waiting but no one called her at all."

Barbara Hayward

Ms Hayward is employed by the defendant on a full time basis. She has worked for the defendant for about two and a half years. At the material time she worked in the value added section of the defendant's operations. At that time there had been a reduction in hours normally worked. Her hours had decreased from 38 hours to about 35 to 36 hours per week. She said that there were six workers in total working in the defendant's value added section at the time the complainant left. When the complainant left another worker did not replace her. The slowdown had only improved earlier this year.

Ms Hayward was not cross examined.

Mr John Dickinson

Mr Dickinson told the court that on Friday the 27th August 1998 he spoke to the complainant and told her that the value

added section was very slow and that accordingly she would not be needed on the following Monday. He told her that she would be called when needed.

Mr Dickinson testified that he had four full time employees and two casual employees other than the complainant working in the value added section at that time. He was struggling to keep the full time employees working 38 hours per week. He accordingly had to take action to ensure the viability of the operation. He said that it was never his intention to terminate the complainant. He would call her in as required. So far as he was concerned the employment relationship still continued.

He explained that on the 10th September 1999 he had lost a full time employee and things had got busy. He accordingly attempted to contact Mrs Butler to come into work. His attempts and those of his secretary in trying to get Mrs Butler into work proved to be fruitless.

Mr Dickinson said that the complainant was paid at a higher rate than a full time employee given her casual status.

The only other pertinent issue addressed in Mr Dickinson's evidence in chief was his evidence concerning the complainant's resignation. He said he took the letter from Mr Crossley on behalf of the complainant dated the 17 September 1999 to be a letter of resignation. He accepted her resignation by letter addressed to Mr Crossley dated the 22nd September 1999.

When cross examined, Mr Dickinson maintained his version of the conversation with the complainant on the morning of the 27th August 1999.

He conceded that the complainant worked for the defendant over three and a half years without taking any substantial breaks.

He said, under cross examination, that his obligations were for his full time employees and that he had no obligation to casual employees. He said that casuals by their very nature only worked when the company needed them. He also reaffirmed that at the material time the defendant struggled to ensure that full time employees had sufficient work. He conceded that he did not explain to the complainant the company's circumstances other than to say, "work was quiet".

Mr Brook Arnold

Mr Arnold a director of the company who has responsibility for accounting matters within the business gave evidence of his meeting with the complainant. He said that the complainant went to see him and told him that she had been terminated. His response was to say to her that he could not understand how she could have been terminated given that she was a casual employee on a *workplace agreement*.

He said that the complainant was otherwise paid for the hours that she worked that week.

When cross examined Mr Arnold was not willing to concede that the complainant worked for the defendant without a substantial break. He maintained that there were some substantial breaks from employment as reflected in exhibit 3.

He denied having had any conversation with the complainant concerning her return to work.

Assessment of Witnesses

Mrs Butler

Mrs Butler gave her evidence in a straight forward manner. Having said that it is clear that her lack of understanding of the English language has caused impediment to her in her articulation of the circumstances surrounding her meeting and discussion with Mr Dickinson.

Ms Hayward

She came across as being totally honest. Her evidence is clearly inconsistent with the complainant's evidence concerning the workload at the material time. Indeed her evidence goes to support Mr Dickinson's evidence on point.

Mr Dickinson

He was straightforward in his testimony. I accept his testimony as being accurate. Where there is conflict between his testimony and that of Mrs Butler, I prefer Mr Dickinson's testimony. His evidence on workload which is clearly a critical issue is supported by Ms Hayward. The only criticism of him is to be found in his attempt to use Mr Crossley's letter as a tactical ploy to gain advantage in these proceedings.

Mr Arnold

His evidence was of little assistance. Much of his evidence was self serving. His failure to concede that the complainant worked for the defendant without substantial break was in my view an attempt to defend the indefensible. His testimony suffered accordingly.

Findings of Fact

The complainant worked for the defendant from the 26th February 1996 to the 27th August 1999. She was at all material times categorised by the defendant as a casual employee. The complainant understood that to be the case. Notwithstanding her categorisation she worked a substantial amount of hours frequently working for 38 hours or more each week. She worked for the defendant on an ongoing basis and had very few breaks. One break was enforced due to a work-related injury. She effectively worked on a full time basis notwithstanding being labeled casual. Given her work history the complainant had an expectation of ongoing employment. She had not at any time been given any warnings concerning her work performance and there was no reason for her to believe her job was in jeopardy.

I find that there was a down turn in the complainant's value added section in July and August 1999. In an attempt to ensure that all full time employees had sufficient work the defendant through Mr Dickinson decided to put off the complainant. I infer that complainant was chosen because she was only working 5 hours per day given that she was on workers compensation. She was accordingly for that reason put off ahead of other less experienced casual employees. I prefer Mr Dickinson's version of his meeting with the complainant. Little turns on that in any event, as the versions are not drastically different.

I find that although Mr Dickinson did not regard what he said to the complainant to be an act of termination, it clearly was. He denied her the opportunity to keep working as she had been. She had no foreseeable prospect of returning to work for the defendant within the near future. Indeed she was not given any indication as to when she may have been able to return to work. Her position was uncertain and was totally different to the situation she was in prior to her meeting with Mr Dickinson. The complainant was entitled to and did regard Mr Dickinson's advice that she was put off as being an act of termination. I find that termination did occur on the 27th August 1999.

I find that the complainant took action for unfair dismissal on the 2nd September 1999 by making a complaint in this Court.

I find that the defendant attempted to regain the services of the complainant on or about the 10th September 1999 for combination of reasons. One reason was because she was needed to fill the shoes of a full time employee who had taken leave. I find by inference that the other reason was to ameliorate its position concerning these proceedings.

I find that the letter written by Mr Crossley to the defendant dated the 17th September 1999 did not constitute a resignation. The complainant was in no position to resign. She had been terminated from her employment on the 27th August 1999. The purported acceptance by the defendant of the alleged resignation was simply a tactical ploy to give it advantage in these proceedings. In any event its act of acceptance of resignation had no force or significance given the termination. I also find that from at least the 25th March 1997 until the 27th August 1999 the complainant was paid at a casual rate of \$10.80 gross per hour. I find that the rate paid to the complainant was higher than it would otherwise have been had she been categorised as a full time employee.

I find that the complainant was not given any notice of termination or paid in lieu thereof. I further find that subsequent to her termination the complainant has sought alternative employment but has been unsuccessful in finding any employment.

The Law

The pivotal issue to be decided in this case is whether or not the complainant was a casual employee. If she is found to have been a casual employee, then the defendant's act of termination on the 27th August 1999 could be argued to be justifiable. On the other hand if the complainant is found to a

permanent employee notwithstanding her categorisation then it could be argued that her dismissal on was unfair.

It is important to distinguish casual contracts from continuing contracts because by definition casual contracts impose no obligation on either party to continue the relationship. Each period of hiring is distinct and severable and any continuing relationship does not mean in law a continuing contract. Rather, it would be regarded as a series of individual and isolated contracts for work. In a continuing contract the nature of the obligations on the parties is fundamentally different. The employee is promising to be at work or be available for work unless he or she gives due notice of termination. Likewise, the employer is promising to continue the employment contract subject to termination only in accordance with the contract.

The term "casual employee" does not have a recognised legal meaning (see *AMIEU v. Sunland Enterprises (1988) 24 IR 467 at 473*). The term is not capable of exact definition but is more in the nature of a colloquial expression (see *Doyle v. Sydney Steel Co Ltd (1936) 36 CLR 545 at 551, 555 and 565*). In Doyle's case McTiernan J. said at 565.

"Each case is to be determined on its own facts, consideration being given not only to 'the nature of the work but also the way in which the wages are paid, or the amount of the wages, the period over, which the employment extends, indeed all the facts and circumstances of the case' (Stoker v. Wortham (1919 1KB 499 at pp. 503-504). The question being one of fact, the Commission's finding should not be set aside if there is evidence".

In *Squirrell v. Bibra Lakes Adventure World Pty Ltd 64 WAIG 1834*. Fielding C (as he then was) said at p. 1835.

"Thus it is possible for a 'casual employee' so defined to work for eight hours a day over a constant time of the day, seven days a week throughout a whole year. In those circumstances, it would be unlikely although not conceptually impossible, that the work was in reality done under a series of separate and distinct contracts. That is well illustrated by Port Noarlunga Hotel v. Stewart (supra), where the award defined a "casual employee" simply by reference to hours of work being less than 40 per week. In the main, industrial awards tend to classify all those employees who are not to be entitled to the normal holiday benefits and the like as 'casual employees', whether or not their employment is to be on a truly casual basis, that is under a series of separate contracts.

Whatever might have been meant by the label 'casual' on this occasion, the true nature of the relationship between the parties is that which is evidenced by all the dealings between them. That they may choose to call it one of casual employment, as I am satisfied they did, is but one of the factors to be taken into account in the circumstances of the present claim. The parties cannot, by use of a label, make the nature of the relationship something different to what it in fact is. In this respect, it is helpful to record the observations of Haese, D.P., with whom Layton and Russell D.P.P. agreed, in Port Noarlunga Hotel v. Stewart (supra) at p. 5-6—

In attempting to define on the evidence of any case whether there was one contract of service or many such contracts, it is important to keep firmly in proper perspective the classifying name attached to any given worker and mutually accepted by the parties, whether the source of such name is a relevant award or otherwise. Such name may be of some assistance. So also may be the provisions of the relevant award. But they are only indicia of the nature of the contract along with all other relevant facts. They are not, taken alone, in any sense determinative of the nature of the contract."

The Full Bench of the Western Australian Industrial Relations Commission (the Full Bench) in *Serco (Australia) Pty Ltd v. John Joseph Moreno 76 WAIG 937 at 939* said in respect of the definition of casual employee that the parties—

"Cannot by the use of a label render the nature of a contractual relationship something different to what it is (see Stewart v. Port Noarlunga Hotel Ltd (op cit) per Haese DPP at pages 5-6).

Certain indicia may be indicative of the nature of the contract but they are not determinative, taken alone. These may include the classifying name given to a worker and initially accepted by the parties, the provisions of the relevant award, the reasonable expectation that work would be available to him, the number of hours worked per week, whether his employment was regular, whether the employee worked in accordance with the roster published in advance, whether there was a reasonable mutual expectation of continuity of employment, whether the notice is required by an employee prior to the employee being absent on leave, whether the employer reasonably expected that work would be available, whether the employee had a consistent starting time and set finishing time, and there may be other indicia."

In *Forbes v. Ori Enterprises Pty Ltd* 1995 AILR at 3-277 the Industrial Relations Court held that once a casual employee exceeded a six month period of regular and systematic employment there was a prima facie presumption that it would be reasonable to expect continuity of that employment, albeit on a casual basis, unless there is objective evidence to negate such expectation.

In a case relating to a breach of an award and payment for holiday and annual leave, the Full Bench held that an employee who had been employed on a continual basis for six months and had worked ordinary hours under the impression he or she was engaged in permanent employment was not employed on a casual basis. This was so despite the fact that the employee had been paid at the casual rate (see *Metals and Engineering Workers Union WA v. Centurion Industries Ltd* (1996) 40 AILR at 13-089).

In *Coad & Coad v. Dalstar Pty Ltd* 79 WAIG 266 Commissioner Cawley said at 266 concerning the definition of casual.

"The Commission was referred to the report of the case Australian Municipal, Administrative, Clerical and Services Union v. Auscript (1998) 43 AILR 443 in support. It was said that statements by the Full Bench of the Australian Industrial Relations Commission in that matter could be considered apt in this case and, in particular, the observation that the label of 'casual' cannot be seen as true where the employee has an ongoing relationship with the employer which 'was both regular and systematic, with a reasonable expectation of continuing employment'. The applicants say that the employment relationships between them and the respondent can be so categorised. Accordingly, they say, the proper designation to be applied to their employment is not casual employment but permanent employment which was part time.

While noting that this case involved a federal industrial award and federal law and thereby is to be distinguished from the situation here, it can be said that with the development of employment practices in a modern industrial society the concept of 'casual' employment said to involve serial offers and acceptances of contract well may not stand up to scrutiny of, what exists under that label. What is necessary to ascertain for the determination of the true nature of an employment relationship said to be casual is whether, in fact, it has the qualities of informality, uncertainty and irregularity."

Was Mrs Butler a casual or permanent employee?

The complainant's employment could not be described as casual. Although Mrs Butler is categorised in the workplace agreement as being a casual, and she was paid as a casual, the actual operation of the contract of employment was not of a casual nature. The complainant had regular employment and her hours were worked in such a manner that it could not be said that her contract was anything other than ongoing. She had been employed by the defendant for three and a half years working 5 days a week. She had frequently worked in excess of 38 hours prior to her work related injury. Subsequent to her injury she was treated as a worker who generally worked 38 hours per week. She had regular starting times. Her finish times depended upon the work load. There was no evidence that the complainant was engaged on a series of contracts of employment. I am satisfied that the complainant was entitled to assume and did assume that she had ongoing employment. Her surprise at termination was indicative of that. The

complainant's employment came to an end by the decision of the defendant to terminate her employment and not by the expiration of any specified term. I am satisfied that the complainant was a permanent employee and not a casual worker as described in the agreement notwithstanding that she was paid at a casual rate of pay. There can be no doubt that the putting off the complainant by telling her that there was no more work for her and that she would be called in when needed was a termination. That act of termination constituted a dismissal albeit constructively. Accordingly the complainant is entitled to claim that her dismissal was unfair harsh or oppressive.

Was the dismissal unfair harsh or oppressive?

There can be no doubt that the defendant's action in dismissing the complainant was actuated by reason of economic circumstances. There was a down turn in business and there was a necessity to reduce staff. The complainant however was the longest serving employee in the "value added" section at the material time. Rather than to dismiss other workers who were labeled "full time" or indeed other "casual employees" from within that section, the defendant chose the complainant.

Mr Dickinson did not give the reason why she was chosen rather than another lesser serving "casual". Inferentially however it is possible to find that she was chosen because she was only actually working 25 a lesser number of hours than other employees. The termination of the complainant in such circumstances would have best suited the defendant and caused it the least amount of dislocation to its operations.

Any suggestion by the complainant that the defendant's act of termination was not actuated by economic circumstances is rejected. Indeed the complainant's suggestion in the pleadings that she was replaced within hours of termination is not supported by the evidence. Indeed the evidence dictates quite the opposite. That is that she was not replaced at all and further that the defendant has continued to operate its "value added" section with a reduced staffing level until early this year.

In determining whether the dismissal was harsh oppressive or unfair I apply the dicta enunciated in *Miles and others trading as The Undercliffe Nursing Home v. FMWU* 65 WAIG 385.

In that case Kennedy J. stated, at p. 387

"The question to be investigated is not a question as to the parties respective legal rights but a question as to whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right."

In that regard I am to assess the industrial fairness of the decision of the employer based on the quality of the conduct involved and an assessment of what is just and equitable upon the substantive merits of this matter. Clearly there must not only be substantive fairness displayed to the complainant but also procedural fairness.

The complainant's allegation of unfair dismissal is based on two levels. The first is the alleged oppressive act of the defendant in dismissing her and then replacing her with another employee. I will not comment on that in view of my findings against her in that regard. The second which is formulated in the alternative seems to be that the defendant should have applied the "last on first off" principle which applies in some redundancy situations.

In this case, the situation was clearly one of redundancy. Should a less experienced casual employee have been terminated instead of the defendant?

In *AMWSU and another v. Australian Shipbuilding Industries (WA) Pty Ltd* 67 WAIG 735 Brinsden J. stated at p. 735

"Now as the test is whether the respondent exercised its right to terminate the employment of those two men harshly or repressively so as to amount to an abuse of that right, how is that conduct to be measured in the circumstances of this case other than by examining the situation of these two men relative to other employees who are not dismissed. Somebody had to go. It is the managerial prerogative to decide who should go but in

exercising that right the respondent was obliged not to behave harshly or repressively in respect to any particular employee."

As the grounds for dismissal is redundancy the burden of establishing that ground lies upon the defendant but having discharged that burden it is up to the complainant to discharge the burden that the exercise of the employer's right of dismissal has been exercised harshly or repressively against Mrs Butler as to amount to an abuse of that right.

The concept of "last on first off" has been recognised in some situations as being a fair means of dealing with redundancy situations (see *ABLF W.A. v. Southdown Construction Company Pty Ltd Beech C. 70 WAIG 2487*). It has particular application to the construction industry given the nature of the industry.

The question of an employee's length of service is an important factor but not the only factor to be taken into account (see *Judd v. Western Mining Corporation Ltd 66 WAIG 150*, *Liva Construction v. ABLF 67 WAIG 1000*, *ABLF v. Multiplex Constructions Pty Ltd 67 WAIG 1001*, *BWIU v Bristle Ltd 67 WAIG 1002*.) Some decisions refer to the "last on first off" principle as being applicable "all things being equal".

CONCLUSION

The situation that presented the defendant employer in respect of the complainant was that all things were not equal with other employees given her circumstances. The defendant had to make a choice and exercise its managerial prerogative in such a way that best suited its situation without being harsh and repressive to the complainant.

In my view the particular factual matrix at the time which confronted the defendant on the 27th August 1999 was such that it justified the defendant in choosing the complainant as being the one to go. The decision was made on economic grounds having regard to the hours actually worked by the complainant. The decision to choose the complainant ahead of another casual employee cannot be said to have been exercised harshly or repressively.

However the matter does not end there because I am not only required to look at the substantive merits of the termination but also at the procedural fairness of the defendant's act. I am to judge according to equity and good consciousness whether the right to dismiss was exercised in a procedurally harsh or unfair manner and whether there was a "fair go all round" (see *Craigcare Hospital v. HSOA 62 WAIG 2929 at 2932*).

Taking all the circumstances of termination into account the Court is compelled to find that there has not been "a fair go all round." The way in which the defendant exercised its legitimate prerogative to dismiss the complainant was in my view unfair harsh and oppressive notwithstanding that its substantive decision to dismiss the complainant was not unfair.

The defendant had known in July and August of a down turn. It was foreseeable that a redundancy would take place. It should have put the complainant on notice of the possibility of loss of employment due to lack of work. The complainant could have then sought alternative employment. The sudden announcement of redundancy in the way it was made was unfair in all the circumstances. It was a bolt out of the blue to the complainant in circumstances where it did not need to be. The reasons for dismissal were not adequately explained. Accordingly the complainant was left ill prepared in her attempt at finding alternative employment. Accordingly the complainant's claim alleging unfair dismissal is made out so far as it relates to the way in which the dismissal was carried out rather than the substantive merits as to whether dismissal itself was justified.

REMEDY

Having found in favour of the complainant. I now turn to consider the remedy available.

The complainant has pleaded that reinstatement is not practicable. However in her testimony the complainant expressed a desire to return to work for the defendant. Having said that however it is abundantly clear that reinstatement is not practicable given the obvious bitterness that has resulted on both sides due to these proceedings. Having concluded that reinstatement is not appropriate I now turn to consider the appropriate quantum of damages.

The starting point in my view is that the complainant is to be paid for three weeks wages in lieu of notice. Given the history of the complainant's service to the defendant, two weeks notice is the appropriate notice required. She is entitled to payment of \$10.80 for 25 hours each week totaling \$810 for the three weeks being her actual loss sustained. Over and above that the complainant has suffered injury as a consequence of the harsh and unfair way in which the defendant went about the termination. The injury is to be assessed in view of the shock of the dismissal and the loss of opportunity to find alternative employment. The complainant is not entitled to 26 weeks of pay as claimed given that the substantive decision to terminate was not found to be unfair.

In my view a payment equivalent to a further three weeks pay over and above the three weeks already referred to would appropriately compensate the complainant for the injury sustained. The injury sustained includes the shock and distress caused by the dismissal together with the loss of opportunity to seek out alternative employment whilst still employed by the defendant. For those reasons a further amount of \$810 (comprising three weeks pay) is assessed as being the appropriate measure of damages.

I intend to make an order that the defendant pay to the complainant compensation in the amount of \$1620.00.

(Sgd.) G. CICHINI,

Industrial Magistrate.

[L.S.]

IN THE INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

HELD AT PERTH

Complaint No. 31 of 1999

BEFORE: Mr G. Cicchini I.M.

Date Heard: 9 December 1999

Date Decision Delivered: 29 December 1999

BETWEEN—

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

and

Shenton Enterprises Pty Ltd T/as John Shenton Pumps
Defendant.

APPEARANCES—

Mr C. Young appeared on behalf of the Complainant.

Mr G. McCorry appeared on behalf of the Defendant.

Reasons for Decision.

The Parties

The Complainant Union is an industrial Organisation registered under the Industrial Relations Act 1979 as amended. The Defendant is a company incorporated under the Corporations Law.

The Complainant is a named party to the Electrical Contracting Industry Award No. R 22 of 1978 (the award). The Defendant is not a named party to the award. The Complainant alleges that the Defendant is nevertheless bound by the award. The Defendant disputes the Complainant's contention.

There is no dispute that the Defendant employed Johnathan Michel as an electrical installer from mid November 1995 until 30 April 1997 in the calling of Electrical Installer as defined in Clause 5 of the award.

The Complaint and Issues

The Complainant alleges that from 24 October 1995 until 4 April 1997 the Defendant failed to pay its employee Johnathan Michel, various entitlements pursuant to clauses 12(1)(a) and 27(3)(a) of the award and 'wages' subclauses (9) and (2)(a)(iii)(aa) of the First Schedule to the said award. The Complainant accordingly seeks to recover the alleged underpaid sum of \$9,003.43 plus interest thereon said to be owing to Mr Michel. The Complainant also seeks the imposition of

penalties to be paid by the Defendant to the Complainant. The Complainant also seeks to recover the costs of the action.

The Defendant denies that the award binds it. It says that its principal business activity is not that of electrical contracting but rather that of pump service and repairs. It says that it is bound by the Metal Trades (General) Award 1966 No. 13 of 1965.

The parties have agreed that I am at this stage only required to determine the threshold issue of whether the award binds the Defendant. However it must be stated from the outset that the Complainant could not possibly succeed in any event with respect to its allegations relating to the period 24 October to 13 November 1995 in view of Mr Michel's evidence concerning his commencement date (see paragraph 16 of Exhibit 1)

The Witnesses

The Complainant called Jonathan Michel the subject of the complainants to give evidence. Mr Michel was at the material time and is currently a qualified and licensed electrician. Also called for the Complainant was Kevin Harris. Mr Harris is a duly qualified electrician who has in the main worked as an electrician from 1961 until the present. He obtained his electrical contractor's licence in 1976 and has been contractor since 1980. He owns and operates his own business. Mr Harris is a licensed trainer and conducts assessments for apprenticeship schemes. He is the past president and member of the *Federation of Electrical Contractors*. He was also a Government appointed member of an inquiry into the electrical licensing legislation and proposed changes thereto.

The Defendant called its General Manager Tony Sinagra. The Defendant has employed Mr Sinagra for 22 years. He started off as a junior and has worked his way up to become the Defendant's Service Manager, Products Manager, Sales Manager and ultimately its General Manager. Mr Sinagra does not have trade qualifications but has an intricate knowledge of the operations of the Defendant.

The Evidence

The Defendant operates its business in four divisions. The divisions are—

- Pool and Spa (Sales and Service);
- Bore Service and Repairs (Maintenance);
- Electric Motor Rewinds and Pump Repairs;
- Fibreglass Manufacturing Division

Mr Sinagra testified that the Pool and Spa Division and the Bore Service Division together comprise about 70% of the Defendant's business. The remainder of its business is equally divided between its other two divisions. The most dominant division is the Pool and Spa Division. On the figures given to the Court by Mr Sinagra it appears that the Pool and Spa (Service and Sales) Division accounts for about 49% of the total business of the Defendant whilst the Bore Service and Repair Division accounts for about 21% of the Defendant's total business. Consequently the bulk of the Defendant's advertising budget is targeted at those particular aspects of the business. Effectively the Defendant's advertising, which predominantly consists of "Yellow Pages" advertising is geared to attract customers who experience pump breakdowns of their pool, spa or bore. Three technicians are currently employed to service and repair pool and spa pumps. Two technicians are employed to service and repair bore pumps. The situation has not changed since Mr Michel worked for the Defendant.

Mr Sinagra described Mr Michel as being a technician. In reality however the Defendant employed him as an Electrical Fitter/Installer (See Annexure "JHM3", "31-IM7" and "JHM8" to Exhibit 1). I am satisfied that during his job interview with Mr Sinagra that Mr Michel raised the issue of whether the Defendant held a Electrical Contractor's License. He did so because he could only carry out his duties if his employer held such a license. It was clearly a critical issue for him and I have no doubt he raised it with Mr Sinagra. The fact that Mr Sinagra cannot recall it is not surprising given the passage of time and the comparative insignificance of the issue to him.

Mr Michel described the work he did for the Defendant both viva voce and also in paragraphs 21 to 44 of his affidavit sworn 2 December 1999 which was admitted into evidence by consent. I do not intend to recite his testimony except to say that it is clear that he worked for the Defendant in Perth and

country areas both in the domestic and commercial domain. His work involved wiring, electrically fixing, maintaining, servicing, replacing, removing and installing motors and associated pumps powered by either 240 or 440 volts of electricity. Mr Michel was required to install and reinstall motors. He was also required to carry out electrical fault finding. I accept Mr Michel's evidence concerning the work he carried out.

Mr Michel concedes that not every job attended to by him required electrical work to be carried out. It is self evident from the sample of job cards before the Court that in 6 out of the 39 jobs to which the samples relate that he did not carry out electrical work. In those instances he only carried out mechanical repairs and basic plumbing work. Notwithstanding that, the evidence otherwise dictates that the mainstay of his work consisted of electrical work.

Mr Sinagra told the Court that Mr Michel's work mainly consisted of the servicing of bore pumps in the field. Mr Michel had to usually necessarily disconnect and reconnect electricity to the pump's motor for that purpose. On Mr Sinagra's evidence Mr Michel was not usually engaged in the installation of cable or otherwise required to create new installations. His job was simply to service and repair faulty pumps.

Mr Sinagra told the Court that although the Defendant holds an Electrical Contractors Licence it was not involved in the electrical contracting industry. It does not contract out. It does not carry out work creating new installations and therefore is not required "to put a ticket into Western Power". He went on to testify that the Electrical Contractors Licence held by the Defendant was simply a leftover from a particular job carried out by the Defendant in excess of 6 years ago. The licence was simply renewed from year to year just to keep it current in the event a need arose for its use but it was not held for the purpose of carrying out its pump service business. Mr Sinagra also said that the advertisement in the "Yellow Pages" under the heading Electrical Contractors was not aimed at gaining electrical contracting work but rather aimed at covering the field in an attempt to attract prospective customers requiring pump servicing and repairs.

Notwithstanding the foregoing much of the evidence given by Mr Michel on the one hand and Mr Sinagra on the other is not in dispute. Where there is a dispute as to the evidence I prefer the evidence of Mr Michel who was able to give a more detailed account of the work he performed and the circumstances under which he performed such work. As stated previously, I also prefer his version of the discussions held during the interview.

Having reviewed the salient aspects of the evidence given by Mr Michel and Mr Sinagra, I now turn to review Mr Harris' evidence. Mr Harris was an extremely impressive witness. He is an electrical contractor. He indicated that part of his work in the electrical contracting industry involves the servicing and repair of pumps and motors used in sewerage, stormwater and bore systems. He has carried out and carries out such work in both domestic and commercial situations. It is clear from his evidence that part of the work he does is identical to that carried out by Mr Michel whilst working for the Defendant.

Does the Electrical Contracting Industry Award No. R 22 of 1978 Bind the Defendant?

The essential issue in this case is whether the Defendant not being a named party to the award, is bound by it and so subject to penalty for non compliance with its provisions. Having regard to S.37 of the Industrial Relations Act 1979 (the Act) that issue is to be decided by determining whether on its proper construction Mr Michel was, at the relevant time, one to whom the "Area and Scope Clause" (cl 3) of the award applies. Relevantly that clause provides—

3—Area and Scope

This award relates to the Electrical Contracting Industry within the State of Western Australia and to all work done by employees employed in the classification shown in the First Schedule-Wages and employed by the respondents in connection with the wiring, contracting, maintenance and the installation and maintenance of electrical light and power plants, and the installation of all classes of wiring, repair and maintenance of electric and

electronic installations and equipment including switchboards and appliances carried out by the respondents as electrical contractors. Provided that the award shall not apply to the manufacturing section of the business of any of the respondents.

Section 37 of the Act provides—

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

- (a) extend to and bind—
 - (i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and
 - (ii) all employers employing those employees and
- (b) operate throughout the State, other than in the areas to which section 3(l) applies”

In order to establish award coverage the Complainant must prove the following—

1. The existence of an award;
2. That the award bound the employer. This may be proved by establishing that the employer was operating a business or undertaking in the relevant industry at the time of the alleged breach;
3. That the person in relation to whom the complaint is made was employed in a classification under the award; and
4. That the person in relation to whom the complainant is made is an employee within the definition in s 7(1) of the Act.

The matters outlined in 1,3 and 4 above are not in dispute. The only issue that the Complainant is put to proof on is establishing that the employer was operating a business or undertaking in the relevant industry at the time of the alleged breaches.

The award has effect “according to its terms”. The scope clause must be carefully scrutinised in order to discover who is covered by it.

In The Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v. Terry Glover Pty Ltd, 50 WAIG 704 Burt J (as he then was) said at 705—

“Each and every award must relate to an industry and what the industry is, is in every case primarily a question of construction of the particular award. It may be that the question is not only primarily but finally a question of construction, and it may be that the award as a matter of construction fails to give the final answer and requires for that purpose that findings of fact be made.

An award if made in terms “to relate to the ship building industry” would be of the first-mentioned kind An award expressed to relate, as the one under construction here is expressed to relate, to “the industries carried on by the respondents set out in the schedule attached (sic) to this award” is of the other kind In such a case the industry to which the award relates cannot be made known without definition of the industries carried on by the respondents. And this is necessarily a question off act.”

The industry to which the award applies may be clearly specified. In other cases there are three well-known tests which have been used to identify an industry. They are the tests in Parker’s case, Parker and Son v Amalgamated Society of Engineers ii2gfil 29 WAIG 90, Glover’s case (supra), and Donovan’s case R.J. Donovan and Associates Pty Ltd v Federated Clerks Union of Australia WA Branch (1977) 57 WAIG 1312.

The Complainant alleges that the industry to which the award applies in this case is clearly specified. The Defendant on the other hand argues that it is not and that a fact-finding exercise is necessary to determine what the electrical contracting is. The Defendant suggests that I undertake the following process—

1. Look at what the named respondents do. (What is the common object of the employers and employees?); and

2. Determine whether those named respondents employ persons in any of the classifications listed; and
3. Determine if the work done by such persons, those electrical fitters employed by the named respondents is in connection with the Hiring contracting installation or in connection with all classes of repair maintenance etc as described in the award; and
4. Determine if the respondents carry out the work in their capacity as electrical contractors.

Only when that is done, it is suggested, can I determine to what type of work the award applies.

The Defendant suggests that the Complainant had to necessarily introduce evidence of what the named respondents do. It is axiomatic that such evidence was not called. It is argued that without such evidence the Court cannot say that the defendant is engaged in the electrical contracting industry. It is argued that the fact that Mr Michel wired up pumps, found electrical faults, replaced cable and conducted repairs on site does not of itself, suggest that the Defendant, falls it into the electrical contracting industry. The Defendant says that the Metal Trades (General) Award applies. Further it is submitted that without evidence of what any of the named respondents do, what their employees who are electrical fitters or electrical installers do, and without evidence from them of what the electrical contracting industry is, the Court cannot find in the light of the existence of the provisions of the Metal Trades Award, on the balance of probabilities, that the Electrical Contracting Industry Award applies to the Defendant.

The Complainant on the other hand argues that the clause is clear in its terms and is not “an abomination that is nearly incomprehensible offending not only every canon of good drafting but even basic English “ as suggested by Mr McCorry. Mr Young argues that the scope clause clearly identifies the industry. The scope clause simply then goes onto particularise the work which is to be regarded as being within the electrical contracting industry. The named respondents carry out such work within the electrical contracting industry as electrical contractors. Any other work carried out by the respondent or any of them in manufacturing is specifically prescribed as not being covered by the award.

In construing the area and scope clause the ordinary meaning of the words of the award must be used (See Norwest Beef Industries Ltd v WA Branch Australian Meat Industries Employees’ Union (1984) 64 WAIG 2124). Accordingly it is not appropriate, in my view, to reword or make grammatical changes to the clause in order to give it meaning. The Court must construe the clause as it is written. By doing so it appears to me that the industry to which the award relates is clearly identified as being the *Electrical Contracting Industry within the State of Western Australia*. The reference in the clause to—

and to all work done by employees employed in the classification shown in the First Schedule- Wages and employed by the respondents in connection with the wiring, contracting, maintenance and the installation and maintenance of electrical light and power plants, and the installation of all classes of wiring, repair and maintenance of electric and electronic installations and equipment including switchboards and appliances carried out by the respondents as electrical contractors”

is a particularisation of what the industry consists of and does not in any way derogate from the identification of the industry. Given that the industry to which the award applies is clearly identified and particularised it is not necessary to embark upon the process suggested by the Defendant in order to identify the industry.

Having concluded the issue of the identification of the industry it remains necessary to make a finding as to whether the Defendant at the material time carried out work within the electrical contracting industry. In that regard there can be no doubt that Defendant did not carry out electrical contracting in its Electrical Motor Rewinds and Pump Repair Division, nor did it carry out such work within its Fibreglass Manufacturing Division. The issue, which remains here, however is whether it carried out electrical contracting in its Pool and

Spa Service and Sales Division and/or in its Bore Service and Repair Division.

The evidence of Mr Michel and more critically the evidence of Mr Harris will hold the key to the outcome. Mr Sinagra maintained that although the Defendant employed Mr Michel to wire up pumps, fault find and where necessary to replace cable that of itself did not put the defendant into the electrical contracting industry. With all due respect to him it is clear that his assessment is -not determinative of the issue. The ultimate issue is to be decided by me on an objective assessment of the evidence.

The fact that Mr Michel was at the material time an electrician employed as an electrical fitter being a classification within the award is not in dispute. There can be no doubt on Mr Michel's evidence that he carried out the 'Airing, repair and maintenance of electric pumps. Electric pumps are appliances. There is specific reference to appliances within the award. Mr Michel carried out such work in the field, both in domestic and commercial situations. He was sent out to do what in the main consisted of electrical work. I agree with Mr Young in his submissions that conceptually there is simply no difference in Mr Michel being sent out to replace or repair an electric fan on the one hand and to do the same on an electric pump on the other.

Mr Harris' evidence is also of particular significance. He was, as I have said earlier, a most impressive witness. He gave evidence of the breadth of the electrical contracting industry. It is the case that as part of his electrical contracting work and business he carries out work of an identical nature to that carried out by Mr Michel and therefore the Defendant in wiring, repairing and maintaining electric pumps. The work carried out by the Defendant in its Bore Service and Repair Division is the same work as is carried out in the electrical contracting industry.

In view of the forgoing I conclude that the *Electrical Contracting Industry Award* has application to Mr Michel and to the Defendant.

It is argued by the Defendant that there are two awards namely the Metal Trades Award and the Electrical Contracting Industry Award that contain the same classifications and which bind electrical contractors. The Defendant suggests that the Metal Trades Award covers it because it is not engaged in the electrical contracting industry. However I have I have found against the Defendant in that regard. In my view, for the reasons that I have earlier expressed, the preponderance of the Defendant's business in its Bore Service & Repair Division is clearly within the electrical contracting industry. Indeed the substantial part of work carried out by Mr Michel for the Defendant was within that industry namely the electrical contracting industry.

In *Gail Patricia Harrison Trading as Rest Point Tourist Centre v The Federated Miscellaneous Workers' Union of Australia Hospital Service and Miscellaneous WA Branch*. 63 WAIG 1399, Fielding C (as he then was) said at 1401.

Where two or more awards prima facie apply to the work of an employee, it is well-established that the nature of the major and substantial part of the work done by that employee is the key factor in determining which award governs the work in question. I do not accept the proposition that the decision of the Industrial Appeal Court in Australian Shipbuilding Industries (WA) Ply Ltd v Maritime Workers Union (1977) 57 W.A.I.G 458 is authority for the proposition that where two awards apply to the work in question the provision which is most favourable to the employee applies. In that case, the appellant effectively conceded that the award with the higher rate of pay applied,—there was therefore no conflict The question of what was to happen when two or more awards were truly conflicting was expressly left open. It thus became necessary for the learned Magistrate to examine the nature of the major and substantial part of Mrs Christie's work, rather than, as appears to have been the case, the "total operation of the defendant's business at the Centre".

I follow what Fielding C (as he then was) said in the abovementioned matter. Accordingly it follows that I find that

the Electrical Contracting Industry Award No. R22 of 1978 applies and that the Defendant is bound by that Award.

G. CICCHINI,
Industrial Magistrate.

IN THE INDUSTRIAL MAGISTRATES'

COURT HELD AT PERTH

Complaint No. 243 of 1999

Date Heard: 29 March 2000

Date Decision Delivered: 4 May 2000

BEFORE: Mr G. Cicchini I.M.

B E T W E E N—

Corey Michael Lopdell
Complainant

and

Kulin Industries Pty Ltd
Defendant.

Appearances —

Mr G. McCorry appeared as agent for the Complainant.

Mr L. Pilgrim appeared as agent for the Defendant.

Reasons for Decision.

Claims

Mr Lopdell alleges that on 15 October 1999 being a party to a *workplace agreement* registered number 99 2619008 he was unfairly harshly or oppressively dismissed. His complaint made on 20 October 1999 is brought pursuant to the provisions of the *Workplace Agreements Act 1993* (the Act). By his statement of claim the complainant has expanded his cause of action to claim inter alia a breach of section 170 CM of the *Workplace Relations Act 1996* (Commonwealth) and a breach of section 24 (2) of the *Minimum Conditions of Employment Act 1993*. By his reamended statement of claim the complainant abandoned his claim made pursuant to section 170CM.

The defendant denies that it dismissed the complainant. It says that the complainant was at all material times engaged as a casual employee and further he was therefore not entitled to annual leave benefits under the *Minimum of Conditions of Employment Act 1993*.

The Issues

At the commencement of the hearing the parties agreed that I should determine liability only. If there is a finding in favour of the complainant then the matter is to be adjourned for discussion as to quantum.

The five issues requiring determination are—

1. Whether or not Mr Lopdell was a casual employee.
2. Whether he was entitled to annual leave on ceasing employment.
3. Whether this Court has jurisdiction to determine the issues of annual leave.
4. Whether the complainant was dismissed.
5. If there was a dismissal whether the dismissal was harsh or unfair.

Witnesses

The complainant gave evidence and also called his mother Jessica to testify on his behalf. The defendant called its manager of operations namely Mr Gregory Riley to testify on its behalf.

The Evidence

Corey Lopdell

Corey Lopdell told the Court that he is 20 years of age and is currently employed as a bricklayer. He has no trade qualifications.

In about May 1998 the complainant's father who at the material time worked for the defendant as a supervisor arranged for the complainant to be interviewed by the defendant with a view to obtaining employment as a labourer/finisher.

Scott Warner Gillon interviewed the complainant on behalf of the defendant. During his interview the complainant was told that the defendant had a substantial amount of work on. He was told that he would be required to work Mondays through to Fridays with the possibility of work on Saturdays and Sundays. Other than that the complainant did not make any other inquiries concerning his working conditions and/or payment nor indeed was he informed of such. He subsequently found out some of the detail through his father. The complainant was successful in gaining employment and consequently worked for the defendant between June 1998 and October 1999. Within the first week of his employment he was asked to sign a *workplace agreement*. He took home the *workplace agreement*, read the same and signed it. It was subsequently returned to his employer for registration.

During the period of his employment with the defendant the complainant worked as a general labourer and trowel hand. Much of the complainant's work consisted of concrete refurbishment. That involved stripping out damaged concrete and replacing the same. The work required the jack hammering and manhandling of concrete as well as the trowel finishing of new concrete surfaces. The complainant generally worked Monday to Friday with some weekend work. He usually started at 7.00 am or 7.30 am and finished at 4.30 pm. He had 3 breaks per day consisting of a morning and afternoon break of 15 minutes each and a lunch break of half an hour. The complainant understood that he was employed as a casual employee. He was paid for the time he worked. He was paid at the rate of \$16.10 per hour when working as a labourer and at the rate of \$21.00 per hour when he performed trowel finish work. As time went on the amount of trowel work increased. Accordingly he regularly achieved a higher average rate than that prescribed for labouring. His supervisor recorded the hours worked and the complainant was paid weekly, based on the record completed by the supervisor.

The complainant regularly worked five days a week and sometimes more. He took only a few breaks. The only significant periods of time taken off work were to go to Rottnest for a week on one occasion and to go to Bali in October 1998 on another. Other than that, the only other time taken off work was for a couple of weeks after Christmas during which time the defendant's operations were closed in any event. Mr. Lopdell did not receive payment for the time that he took off. On public holidays he had a choice of either working or not. If he chose to work he was paid at a flat rate.

In about February of 1999 the complainant was asked by Mr Riley on behalf of the defendant to enter into a new *workplace agreement* (exhibit 2). The agreement, which was ultimately registered as No 99/12619 008, had within it a new pay structure. The pay rates were not drastically changed. The agreement continued to provide that the complainant was employed as a casual and that he was not entitled to annual leave, sick leave, public holidays or parental leave. The complainant although somewhat unhappy about entering into the new agreement nevertheless reluctantly signed the same.

The complainant worked on a consistent and regular basis for the defendant. In the financial year 1998-1999, he earned a total of \$42,475.00.

In September 1999 during a regular meeting the complainant and other workers were asked by Mr Riley to consider a new pay structure. The proposed structure as set out in exhibit 4 provided for flat hourly rates dependent upon the level of competency. The rates commenced at \$16.10 for a level 1 position and increased at each level to \$20.10 for the highest level 5 position. Over and above that, additional incremental flat hourly rates were to be paid for work performed on weekends, public holidays, night shift and Water Corporation pipeline repair work. An increment was also payable for working outside the metropolitan area. All employees were asked to go away and consider the level at which they respectively considered they ought to be paid at.

The complainant's consideration of how much he regarded himself to be worth must be seen in the light of his repeated approaches to Mr Riley during the preceding weeks seeking an increase in pay. In fact he had told Mr Riley six to eight weeks earlier that he considered himself to be worth \$20.00 per hour. Mr Riley had responded at that time by saying that the complainant was earning good money for someone of his

age. He had informed the complainant that the general rate actually achieved by him was \$18.28, which was very good given the complainant's age and lack of experience.

On the afternoon of Friday the 15 October 1999 the complainant was called into Mr Riley's office. At the meeting Mr Riley asked the complainant if he had thought about what level he thought he should be paid at. Mr Lopdell replied that he had and that he thought he should be categorised as a level 5 and paid at the rate of \$20.00 per hour. Mr Riley informed the complainant that there was no chance of him being paid that much. Mr Riley went on to say that no one else had signed on above a level 3 and that the complainant should have been looking at a level 3 rate of pay. The complainant told Mr Riley that he was not prepared to accept a level 3 position. In the complainant's mind the acceptance of a level 3 position would have inevitably resulted in a reduction of his pay rate. Mr Riley told the complainant that he could not pay \$20.00 per hour and there were plenty of other places where the complainant could work at for that rate. That was a reference to the complainant's earlier demands during which he told Mr Riley that there were plenty of employers who would pay him \$20.00 per hour. Mr Riley then went on to say—

"I guess that probably means we will have to part company Corey."

The complainant replied—

"I guess so."

The complainant then asked Mr Riley when his employment was to cease. Mr Riley replied that it was up to the complainant. The complainant insisted that it be up to Mr Riley. Accordingly Mr Riley then indicated that if the complainant preferred he could finish work at the end of the pay period being the ensuing Wednesday. Mr Lopdell testified that Mr Riley told him that he would be working on a job at Kardinya until the next Wednesday if that was what he wanted to do. He accepted that and agreed to work on normal rates during that ensuing period. Following his discussion with Mr Riley the complainant told fellow workers and his parents as to what happened. After prompting he returned to speak to Mr Riley again in order to clarify the issue of where he stood in relation to his *workplace agreement*. Mr Riley responded by saying that he did not know. Mr Lopdell consequently advised Mr Riley that he would be contacting the *Commissioner for Workplace Agreements* for advice.

The complainant testified that he had no intention of leaving the defendant. Although wanting more he was quite prepared to stay on at the existing rate of \$16.10 per hour when labouring and \$21.00 per hour when doing trowel work.

On the 16 October 1999 the complainant received a call from Mr Riley advising him not to go into work on Monday. Mr Riley informed him that he would be back in touch on the Tuesday. It transpired that Mr Riley did not again contact the complainant. The complainant did not work for the defendant again.

Following termination, the defendant provided Mr Lopdell with an *Employment Separation Certificate*, which indicated inter alia, that the complainant left work voluntarily because he was not happy with pay and conditions. The complainant protested that the document was not accurate. Notwithstanding the complainant's stance Mr Riley was unwilling to change the document because of his concerns that any change may have left the defendant open to repercussions.

The complainant subsequently took a month off work and did not actively seek alternate employment. Upon resumption he commenced working as a bricklayer, which he continues to do to the present.

When subjected to cross-examination the complainant conceded that in his discussions with Mr Riley on 15 October 1999 he did not make any counter-offer. He just told Mr Riley that he wanted \$20.00 per hour and that \$18.10 per hour offered was unacceptable. Furthermore he conceded that he understood that by virtue of the *workplace agreement* that he was a casual with no guarantee of work and that he was not entitled to paid leave. Mr Lopdell maintained that he felt intimidated in being asked to accept the revised pay structure (exhibit 4). He felt that he was in a bind. If he did not agree to the \$18.10 per hour offered he would not have a job. If he did agree it meant he would have received a reduction in pay. It

appeared to him that there was no room for negotiation. Mr Lopdell maintained his view that the new proposed rate of pay of \$18.10 per hour plus incremental rates would have seen him worse off. That was so because he generally did not work during periods or at places, which would draw him into receiving the incremental rates of pay. Accordingly what was proposed would have meant a reduction in pay.

When cross-examined Mr Lopdell conceded that his hours of work varied and that there were times when work, for various reasons, was not available.

When re-examined Mr Lopdell clarified the reasons for the apparent varied work hours as shown up by exhibit 1. He said the varied work hours were due to various factors such as days not worked on account of public holidays, time off due to the defendant's Christmas breaks, inclement weather and so forth common within the building industry.

Jessica Lopdell

Jessica Lopdell the complainant's mother gave evidence concerning this matter. I do not however intend to comment about her testimony as it has little impact on the issues to be determined.

Gregory Riley

The defendant called Mr Gregory Riley to give evidence. He is its manager of operations and is responsible for between ten and thirty employees. He told the Court that the defendant is engaged in the maintenance and repair of civil engineering works. The lengths of contracts obtained by the company are varied and can last anywhere between half a day and three years. A significant amount of work carried out by the defendant is within marine situations such as wharves. Given the nature of the work and the circumstances in which the work is carried out the hours of work can vary greatly. Workers are accordingly employed on a casual basis given the nature of the work and the uncertainty of working hours and conditions. Mr Riley testified that casuals employed by the defendant are offered work on a daily basis. The senior supervisor telephones workers each evening to offer work for the next day. He said that was not done in Mr Lopdell's case because he worked directly under his father's supervision. Employees would be chosen on a "horses for courses" basis each day. No particular amount of work or earnings would be guaranteed. If an employee refused to work someone else was engaged. There was flexibility in the process. If work had to be expedited more workers were put on the job or alternatively employees were asked to work longer hours. Mr Riley told the Court that although generally speaking casual employees' hours fluctuated, the complainant's situation was different in that he was given preferential treatment because he was working under his father.

Mr Riley informed the Court that the pay rates under the *workplace agreements* were difficult to administer. As a result he sought to introduce a flat rate of pay with allowances as per exhibit 4. It was aimed at simplicity. He testified that his new proposal would see most employees better off. That included Mr Lopdell. He said that he had calculated Mr Lopdell average rate of pay to be \$18.29. That rate included allowances paid for working outside the metropolitan area, working night shifts and also the payment of vehicle expenses.

The new proposed pay rates scale was drawn up in the form as depicted in exhibit 4 and given to each employee to consider. Each employee was asked to nominate the pay scale under which he believed he should work. In doing so Mr Riley told the workers not be silly about the view of their worth as he had already calculated each worker's average pay rate. Prior to Mr Riley embarking upon the introduction of a new pay structure he had been approached by the complainant on an informal basis on a couple of occasions seeking a pay rate increase to \$20.00 per hour. Mr Lopdell had informed Mr Riley that he believed he could get that money elsewhere.

In any event about a week later Mr Riley met with the complainant to discuss the proposed pay rate change. Mr Riley asked Mr Lopdell as to what he thought about the proposal. Mr Lopdell responded by saying that Mr Riley knew how he "felt or stood" in relation to matter. Mr Riley took that mean that the complainant wanted \$20.00 per hour as previously sought. Mr Riley informed the complainant that the defendant was only prepared to offer \$18.10 per hour plus allowances.

Mr Lopdell responded by saying that he was not prepared to accept the level 3 position paying \$18.10 per hour. Mr Riley then said—

"I suppose we will have to part company."

Mr Lopdell replied—

"Yes."

Mr Riley told Mr Lopdell that he was being silly in turning down a good deal. Mr Riley thereafter told Mr Lopdell that he could work until the end of the pay week being the following Wednesday. However upon discovering that Mr Lopdell was to take part in an induction at a wharf on the Monday he contacted the complainant and told him not to go in to work. Mr Lopdell did not thereafter work for the defendant.

When cross-examined Mr Riley told the Court that given the nature of the industry that the defendant is involved in flexibility is all-important. Workers were and are employed as casuals to afford flexibility. Workers are free to reject work. No grudges are held if the employees do not want to work. The freedom to decline work is characteristic within the building industry. Mr Lopdell was only one of a pool of workers. Work could accordingly be regular or irregular. The complainant could have been stood down at any time.

On the issue of a change in the rates of pay, Mr Riley said under cross-examination, that he would have done anything that was legally necessary in order to achieve that. If it meant entering into new *workplace agreements* that would have been done. Mr Riley conceded that had Mr Lopdell accepted the \$18.10 per hour pay rate offered there was no guarantee that he would achieve greater hourly rate than the \$18.29 average rate already achieved. Notwithstanding that however he said it was fanciful to suggest that the complainant would not be carrying out night shift work or other duties, which would draw in allowances. By the payment of such allowances the complainant should exceed his previous average hourly rate.

Finally Mr Riley went on to concede that his discussion with the complainant on 15 October 1999 was, with the exception some minor detail, substantially as Mr Lopdell had related it to the Court.

Assessment of Witness

It is clear that each of Mr Lopdell and Mr Riley gave evidence in a straightforward and forthright manner to the best of their recollection. Much of the evidence is not diametrically opposed. Indeed there is much common ground. To a very large extent the issues in dispute will not be determined on credit but rather on the legal effect of the factual matrix which is common to both parties.

Jurisdiction

There can be no doubt that the pivotal issue to be determined is whether Mr Lopdell was a casual employee. In that regard the defendant pleads that the *workplace agreement* provides in *clause M* thereof that any question or dispute regarding a provision of the agreement or any provision implied by the *Minimum Conditions of Employment Act 1993*, are subject to any right of appeal to be determined by an arbitrator. It is argued therefore that this Court cannot determine the allegation that the complainant was not casual employee.

I reject the defendant's argument concerning the issue of jurisdiction. It is clear having regard to the provision of section 14 (1) of the *Workplace Agreements Act 1993* that the provisions of the agreement no longer apply when the contract of employment comes to an end. Any requirement to submit to arbitration is only relevant during the currency of the agreement. In this case the contract of employment came to an end on 15 October 1999 and the complainant for unfair dismissal was made on 20 October 1999. It is accordingly apparent that the *arbitration clause* being *clause M* within the *workplace agreement* has no effect particularly given that the complaint was made following the contract of employment coming to an end. It follows that the certificate filed with the complaint was appropriately given. This Court therefore has jurisdiction to hear and determine the issues in dispute.

Was Mr Lopdell a Casual Employee?

Clearly this issue is pivotal. The registered *workplace agreement* by its terms expresses the complainant to be a casual employee. Indeed it is also the case that the complainant himself at all material times leading up to 15 October 1999

regarded himself to be a casual employee paid at a casual rate. The complainant pleads that notwithstanding the express terms of the *workplace agreements*, the circumstance of the complainant's employment by the defendant between 1 June 1998 and 15 October 1999 was such that the complainant was in fact and in law a permanent employee. Further, and in the alternative the complainant pleads that the terms of the *workplace agreement* relating to the status of the complainant are void and of no effect. He claims that to be the case by reason of the operation of *clause L* of the *workplace agreement* and also by virtue of section 14 (2) of the *Workplace Agreements Act 1993*.

The defendant says that the complainant was at all material times a casual employee as expressed in the *workplace agreement*. Further, it argues that if the *workplace agreement* fails to comply with the section 14 (2) of the Act, then the whole agreement is *void ab initio* and is of no effect. Accordingly it follows that this Court has no jurisdiction to determine the issue of whether or not the complainant is a casual.

In my view this aspect of the challenge to jurisdiction has no merit. The *workplace agreement* between the parties is registered. It is accordingly valid on its face. It is not appropriate for this Court to go behind the agreement and inquire as to whether registration was appropriate. The *Commissioner of Workplace Agreements* (the Commissioner) was required to satisfy him or herself that the agreement complied with the Act prior to its registration. Compliance is therefore presumed. It is not appropriate in the circumstances to consider extraneous evidence in order to revisit the decision of the Commissioner.

Having found that the *workplace agreement* is valid I now turn to consider its terms. It is trite law that the parties to any employment agreement cannot by the use of a label make the relationship different to what it actually is. Accordingly it is important to examine the relationship between the parties to see whether the categorisation of the complainant within the agreement as being a casual is accurate. A finding that the complainant was a permanent employee rather than a casual employee would permit the further consideration of the complainant's claims.

Whether or not the complainant was a casual employee requires a consideration of the nature of the employment contract. Was he subject to one continuing contract or was he the subject of series of separate contracts? It is important to distinguish casual contracts from continuing contracts because by definition casual contracts impose no obligation on either party to continue the relationship. Each period of hiring is distinct and severable and any continuing relationship does not mean in law a continuing contract. Rather, it would be regarded as a series of individual and isolated contracts for work. In a continuing contract the nature of the obligations on the parties is fundamentally different. The employee is promising to be at work or be available for work unless he or she gives due notice of termination. Likewise, the employer is promising to continue the employment contract subject to termination only in accordance with the contract.

The term "casual employee" does not have a recognised legal meaning (see *AMIEU v Sunland Enterprises* (1988) 24 IR 467 at 473). The term is not capable of exact definition but is more in the nature of a colloquial expression (see *Doyle v Sydney Steel Co Ltd* (1936) 36 CLR 545 at 551, 555 and 565). In Doyle's case McTiernan J. said at 565—

"Each case is to be determined on its own facts, consideration being given not only to 'the nature of the work but also the way in which the wages are paid, or the amount of the wages, the period over, which the employment extends, indeed all the facts and circumstances of the case' (Stoker v Wortham (1919) 1KB 499 at pp. 503-504). The question being one of fact, the Commission's finding should not be set aside if there is evidence".

In *Squirrel v Bibra Lakes Adventure World Pty Ltd* 64 WAIG 1834, Fielding C (as he then was) said at p. 1835—

"Thus it is possible for a 'casual employee' so defined to work for eight hours a day over a constant time of the day, seven days a week throughout a whole year. In those circumstances, it would be unlikely although not conceptually impossible, that the work was in reality done under a series of separate and distinct contracts. That is

well illustrated by Port Noarlunga Hotel v. Stewart (supra), where the award defined a "casual employee" simply by reference to hours of work being less than 40 per week. In the main, industrial awards tend to classify all those employees who are not to be entitled to the normal holiday benefits and the like as 'casual employees' whether or not their employment is to be on a truly casual basis, that is under a series of separate contracts

Whatever might have been meant by the label 'casual' on this occasion, the true nature of the relationship between the parties is that which is evidenced by all the dealings between them. That they may choose to call it one of casual employment, as I am satisfied they did, is but one of the factors to be taken into account in the circumstances of the present claim. The parties cannot, by use of a label, make the nature of the relationship something different to what it in fact is. In this respect, it is helpful to record the observations of Haese, D.P., with whom Layton and Russell D.P.P agreed, in Port Noarlunga Hotel v. Stewart (supra) at p.506—

In attempting to define on the evidence of any case whether there was one contract of service or many such contracts, it is important to keep firmly in proper perspective the classifying name attached to any given worker and mutually accepted by the parties, whether the source of such name is a relevant award or otherwise. Such name may be of some assistance. So also may be the provisions of the relevant award. But they are only indicia of the nature of the contract along with all other relevant facts. They are not, taken alone in any sense determinative of the nature of the contract."

The Full Bench of the Western Australia Industrial Relations Commission (the Full Bench) in *Serco (Australia) Pty Ltd v. John Joseph Moreno* 70 WAIG 937 at 939 said in respect of the definition of casual employee that (the parties)—

"Cannot by the use of a label render the nature of a contractual relationship something different to what it is (see Stewart v. Port Noarlunga Hotel Ltd (op cit) per Haese DPP at pages 5-6).

Certain indicia may be indicative of the nature of the contract but they are not determinative, taken alone. These may include the classifying name given to a worker and initially accepted by the parties, the provisions of the relevant award, the reasonable expectation that work would be available to him, the number of hours worked per week, whether his employment was regular, whether the employee worked in accordance with the roster published in advance, whether there was a reasonable mutual expectation of continuity of employment, whether the notice is required by an employee prior to the employee being absent on leave, whether the employer reasonably expected that work would be available, whether the employee had a consistent starting time and set finishing time, and there may be other indicia".

In *Coad & Coad v. Dalstar Pty Ltd* 79 WAIG 2676 Commissioner Cawley said at page 266 concerning the definition of casual—

"The Commission was referred to the report of the case Australian Municipal, Administrative, Clerical and Services Union v. Auscript (1998) 43 AILR 443 in support. It was said that statements by the Full Bench of the Australian Industrial Relations Commission in that matter could be considered apt in this case and, in particular, the observation that the label of 'casual' cannot be seen as true where the employee has an ongoing relationship with the employer which "was both regular and systematic, with a reasonable expectation of continuing employment". The applicants say that the employment relationships between them and the respondent can be so categorized. Accordingly, they say, the proper designation to be applied to their employment is not casual employment but permanent employment which was part time.

While noting that this case involved a federal industrial award and federal law and thereby is to be distinguished from the situation here, it can be said that with the development of employment practices in a modern industrial

society the concept of 'casual' employment said to involve serial offers and acceptances of contract well may not stand up to scrutiny of, what exists under that label. What is necessary to ascertain for the determination of the true nature of an employment relationship said to be casual is whether, in fact, it has the qualities of informality, uncertainty and irregularity".

In the recent decision of the Federal Court of Australia in *CPSU v State of Victoria* (2000) FCA 14 delivered on 14 January 2000 His Honour Marshall J was required to consider whether certain employees were casual employees, whether the award was relevant in determining the issue and whether the employer's categorisation of the positions was a relevant factor. His Honour set out at paragraphs 5 and 6 of his decision the facts relating to the employees engagement and duties—

"5. The hours worked by prison officers at the Barwon gatehouse fluctuate due to operational requirements and the availability of employees. Employees are rostered for duty on a seven day, twenty-four hours basis. Mr Windisch, an OIC, prepares the roster. The roster covers a fortnightly period commencing on a Sunday and is released on the Wednesday, which precedes the start of the roster. Mr Windisch places individual employees' names in positions on the roster. In so doing he takes into account previous roster, personal preferences of employee and his desire to ensure, as far as is possible, an even distribution of work across the pool of employees. The roster is then distributed. Some changes may be necessitated by employees giving advance notice of their unavailability for particular shifts. Sometimes changes are made on the particular day duty is to be performed. This can occur for a variety of reasons. Employees are not required to give a reason. Occasionally employees "call in sick". Some of those employees who consistently do so are viewed more skeptically when considered in respect of the "reliability" criterion, one of the four factors taken into account by OICs when an employee's performance is appraised on a yearly basis.

6. Employees also have the option of swapping shifts between themselves by private arrangement and then advising an IOC accordingly. Most employees work in excess of seventy-six hours per fortnight but two employees, Mr Watson and Ms Witana, each regularly work one eight hour shift per week. Until an extra twelve employees were engaged in July 1999 some employees were working what may be fairly considered to be excessive hours including, for some, over 100 hours per fortnight. An important feature of the work arrangement is the right of an employee to advise SESG that she or he is unavailable for any particular period of time. As long as adequate notice of such non-availability is given SESG does not hold an adverse view about it. As Mr Windisch said in his evidence, it is not a problem for him if employees do not want to accept their proposed rostered hours of work as long as reasonable notice is given".

In consideration of the matter His Honour went on to say starting at paragraph 9—

9. Whether a person is a casual employee or not is not determined by reference to the Award. The Award simply prescribes many of the terms and conditions of employment of such employees. In this matter it is contended by the applicants that the so-called casual prison officers at the Barwon gatehouse are not truly employed on a casual basis.

10. Neither is the question of whether an employee is a casual employee or not determined solely by reference to the employer's categorization of the position, although such consideration is a relevant factor in the overall determination. As is accepted by the parties, the term "casual employee" has no fixed meaning. The true nature of any employment relationship will depend on the facts and circumstances of each case. See *Doyle v. Sydney Steel Company Limited* (1936) 56 CLR 545 (at 551, 565).

11. The applicants submit that the relevant relationship is not one of casual employment. They rely on the fact that the relevant employees work hours, which are consistent, regular and equivalent to those of a full time employee pursuant to a pre-determined roster. They also assert that the relevant employees are not free to accept or reject work at will. The applicants further submitted that the employment relationship is not informal, uncertain or irregular which is characteristic of casual employment.
12. The Court rejects these contentions. First, it is not inconsistent with a casual employment relationship for employees to be engaged on a regular basis pursuant to a roster. See *Ryde-Eastwood Leagues Club Limited v. Taylor* (1994) 56 IR 385. Second, the evidence is that employees at the Barwon Gatehouse can make themselves unavailable for duty and in fact do so without employer disapproval so long as reasonable notice of a roster change is given. In addition, two employees work only two shifts per fortnight. Third, it is not necessarily the case, as *Ryde-Eastwood* shows, that casual employment will always be informal, uncertain or irregular.

There can be no doubt that this Court must carefully consider the implications of the CPSU case. In his submissions Mr McCorry for the complainant contended that the CPSU case is to be distinguished on its facts and also on account the relevant Victorian legislation considered. The principles considered by his Honour are, in my view, not constrained and have wider application. What His Honour said requires consideration and application in this matter.

The complainant argues that both in fact and in law his relationship with the defendant invites a determination that he was not a casual employee. His argument as to the legal position centers on the application of section 14 of the Act. The argument is that clause L of the workplace agreement provides that the agreement will operate for a period of 3 years. That of itself it is suggested is indicative of a single ongoing contract. That is inconsistent with the definition of casual employment, which consist of a series of separate and distinct contracts. Section 14 (2) of the Act specifically deals with casual employees employed under workplace agreements and recognises that there are separate and distinct contracts of employment. Without section 14 (2) a workplace agreement involving a casual employee would come to an end at the conclusion of the first period of employment (see section 14 (1)). In this instance the workplace agreement does not comply with section 14 (2) because its term is for a period exceeding the 12 months provided for in section 14(2). Accordingly, if it does not satisfy the requirements of section 14 (2) the agreement cannot in law be an agreement in respect to a casual employee and therefore the complainant cannot be a casual employee. The argument, in my view, carries considerable force.

Notwithstanding the application of section 14(2) of the Act, this matter can nevertheless be determined upon its facts by applying common law principles. By that process it is possible to reach the conclusion that the complainant was not a casual employee. Although Mr Lopdell is categorised in the workplace agreement as being a casual employee and therefore regarded himself to be a casual the actual operation of the contract of employment indicates that the relationship was not of a casual nature. That is so despite the fact that the complainant was paid as a casual. The complainant had regular employment and his hours were worked in such a manner that it could not be said that his contract was anything other than regular and ongoing. He only worked for the defendant. He generally started work at 7.00 am and finished at 4.30 pm. From June 1998 he usually worked five days a week or more. I say that recognising that in some weeks he worked for lesser periods. However any gaps in employment is accounted for by public holidays, leave taken and the general vagaries of building construction industry such as inclement weather and sites not being ready. Further there is no evidence in this case to show that the complainant was instructed on a daily basis. Indeed there is nothing to suggest that the complainant was engaged on a series of contracts. Although the evidence dictates that there was no guaranteed level of work there can be no doubt that the conduct between the parties suggested

ongoing employment. I am satisfied that the complainant was entitled to assume and did assume in the light of his work history that he had ongoing employment. He conducted himself as an employee working on a permanent basis. He asked for leave to go to Bali and to go to Rottneest and was granted leave. He did not refuse work and was dedicated to the defendant. The income he derived from the defendant is demonstrative of that. He earned \$42,475 for the year ended 30 June 1999. The factual circumstances evidencing the association between the parties show that there was nothing informal, uncertain or irregular about the relationship. Although informality uncertainty and irregularity are not in themselves determinative of the issue of whether or not an employee is a casual, they nevertheless form part of the indicia to be considered. Each case will turn on its own facts. In my view in light of the facts the complainant's employment in this case could not be described as casual. In my view the working relationship between the complainant and defendant demonstrably dictates that the complainant was not a casual employee, notwithstanding the labeling of him as such and his acceptance of that label.

In a case relating to a breach of an award and payment for holiday and annual leave, the Full Bench held that an employee who had been employed on a continual basis for six months and had worked ordinary hours... was not employed on a casual basis. This was so despite the fact that the employee had been paid at the casual rate (see *Metals and Engineering Workers Union WA v. Centurion Industries Ltd (1996) 40 AIRL at 13-089*). The fact that the complainant was paid at a casual rate is not determinative and does not preclude this Court from finding that the complainant was at the material times a casual employee.

I now move to consider the remaining live issues.

Was the Complainant Dismissed?

The defendant contends that the complainant resigned his employment. It is axiomatic that the complainant argues that he was dismissed.

In determining this issue I have regard to what the Full Court of the Industrial Relations Court of Australia said in *Mohazab v. Dick Smith Electronics Pty Ltd (No 2) (1995) 66 IR 200*. The Court held at 205—

That a termination at the initiative of the employer occurs when “the act of the employer results directly or consequentially in the termination of the employment”

In this case the defendant employer through Mr Riley asked the complainant to enter into a new pay structure with which the complainant did not agree. The effect of the complainant's suggestion that the complainant be paid at a level 3 (\$18.10 per hour) meant that if the complainant did not accept that he had to go or alternatively accept a lesser rate of pay. It is clear that Mr Riley was never going to compromise on the issue. Furthermore it is also clear that it was not possible for the complainant to have continued on the existing pay structure. It is obvious that the existing pay structure was to be done away with. Accordingly the complainant was left with the options of agreeing with the complainant's proposal, taking a reduction in pay rate or leaving. In reality he had little choice.

I am satisfied applying the dicta in *Mohazab* that the act of the employer resulted directly in the termination of employment. I find that the defendant terminated the complainant's employment.

Was the Dismissal Unfair?

In determining whether the dismissal was harsh oppressive or unfair I apply the dicta enunciated in *Miles and others trading as the Undercliffe Nursing Home v. FMWU 65 WAIG 385*.

In that case Kennedy J stated, at p. 387—

“The question to be investigated is not a question as to the parties respective legal rights but a question as to whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right”

In that regard I am to assess the industrial fairness of the decision of the employer based on the quality of the conduct involved and an assessment of what is just and equitable upon the substantive merits of this matter. Clearly there must not only be substantive fairness displayed to the complainant but

also procedural fairness. I am to judge according to equity and good consciousness whether the right to dismiss was exercised in a harsh or unfair manner and whether there was a “fair go all round” (see *Craigcare Hospital v. HSOA 62 WAIG 2929 at 2932*).

In my view there can be no doubt that the dismissal was unfair. As stated earlier, the complainant was in a very difficult position indeed. He could not remain on the existing pay structure and if he refused the defendant's proposal of a level 3 position he had to go. The average hourly rate earned by the complainant as calculated by Mr Riley was \$18.28 or \$18.29. However that rate was not necessarily indicative of the complainant's hourly rate at the time of dismissal. There can be no doubt from viewing exhibit 1 and having regard to Mr Lopdell's evidence that he was carrying out much more trowel work as time went on. The complainant was earning a lesser hourly rate during the earlier stages of his employment. Consequently the averaging out of the pay rate was not truly reflective of the complainant's position as at October 1999. Averaging distorted the true position. In those circumstances it is open to find and I do find that the defendant's attempt at changing the pay structure would have resulted in disadvantage to the complainant. The payment of additional rates (allowances) would not have ameliorated the complainant's disadvantage. It is self-evident from exhibit 1 that the complainant generally worked Saturdays and on some Sundays. Notwithstanding that, the payment of the additional rate of one dollar per hour would not have compensated for the loss of the \$21.00 per hour trowel rate, which at the material time formed a very significant portion of the complainant's income. Furthermore I should add that the work history of the complainant as borne out by exhibit 1 dictates that the complainant was only likely to work night shifts on very rare occasions. Accordingly the complainant was unlikely to be in a position to earn the additional night shifts rate proposed. The reality was that he was likely to be disadvantaged by accepting the level 3 rate. The complainant was in effect asked to accept a reduction in pay. The defendant was seeking to vary the terms of the *workplace agreement* to the complainant's detriment. Because the complainant would not agree to the variation his employment was terminated. In those circumstances the conduct of the defendant was unfair.

The complainant also argues that the defendant has breached section 70 (1) of the *Workplace Agreement Act 1993*. It suffices to say that the evidence does not support such a finding. There is no evidence before the Court to suggest that the complainant was dismissed because he would not enter into a new *workplace agreement*. Furthermore I reject the complainant's contention that the defendant has breached section 298K of the *Workplace Relations Act 1996* (Commonwealth). In that regard it is clear that the defendant was not dismissed because of his entitlement under the workplace agreement but rather because of his failure to agree to a variation thereof.

I find that the dismissal was unfair on the merits of the case both procedurally and also substantively. In seeking that the complainant in effect accept a reduction in his pay rate the defendant terminated the complainant's employment. In such circumstances the complainant had to accept the defendant's position or go. He was not given the opportunity to remain working pursuant to the terms of the registered of *workplace agreement*. The defendant's act was unilateral, oppressive harsh and unfair.

Is Mr Lopdell Entitled to Annual Leave?

Although by his complaint Mr Lopdell only initially took action for unfair dismissal, his claim has been expanded by virtue of the pleadings to encompass a claim for annual leave entitlements. The claim is made pursuant to the *Minimum Conditions of Employment Act 1993* (MCE Act).

Section 5 (1) of the MCE Act provides—

5 (1) *The minimum conditions of employment extend to and bind all employees and employers and are taken to be implied.*

(a) *in any workplace agreement.*

(b)

(c)

A claim for the enforcement of minimum conditions may be made pursuant to Division 1 of Part 5 of the *Workplace Agreements Act 1993* (see s7 (a) MCE Act).

The *Minimum Conditions of Employment Act 1993* provides that annual leave is not payable to a casual employee (see s23 (1)) as defined by section 3 of the MCE Act.

“Casual Employee” is defined in section 3 of the MCE Act, which provides—

- 3 “Casual Employee” means an employee who is employed on the basis that
- (a) the employment is casual, and
 - (b) there is no entitlement to paid leave;
- and who is informed of those conditions of employment before he or she is engaged”

Irrespective of what the complaint’s position might be at common law the question that remains is whether he is to be considered a casual employee for the purposes of the MCE Act. Mr McCorry for the complainant argues that Mr Lopdell does not fall within the statutory definition provided in the MCE Act because he was never told of the status of his engagement when the defendant first employed him. The evidence from Mr Lopdell supports that argument. Mr Lopdell gave evidence that his employment status and other relevant matters were not discussed when he was first engaged. His mother for not raising and discussing those issues with his employer in fact ticked him off. It is argued that given that the precondition of informing Mr Lopdell of his casual status was not met, it mattered not that he later entered into a *workplace agreement*, which contained provisions expressing that he was a casual and had no entitlement to leave. Section 5 (3) of the MCE Act provides that any provision that purports to exclude the operation of the Act has no effect. I agree with the argument. Accordingly the complainant did not with respect to his initial contract of employment from 1 June 1998 to and including 1 February 1999 come within the meaning of the MCE Act.

On 2 February 1999 the complainant’s first contract of employment came to an end a new contract of employment was entered into. The new contract of employment took the form of a *workplace agreement*, which was subsequently registered. There can be no doubt that when the complainant was employed on 2 February 1999 that—

- he was employed of the basis that his employment was to be casual, and
- the contract of employment provided that there was no entitlement to paid leave, and
- he was informed of those condition before he was engaged.

Indeed Mr Lopdell gave evidence of having taken the *workplace agreement* away, having read and considered the same before signing it. It is self-evident that all the necessary conditions to bring the complainant within the definition of “casual employee” within the meaning of MCE Act are met with respect to the registered *workplace agreement*. Accordingly the complainant must be regarded a casual employee for the purposes of the definition contained in the *Minimum Condition of Employment Act 1993* with respect to the contract of employment which commenced on 2 February 1999 and ended 15 October 1999.

The complainant also argues that the *clause K* of the *workplace agreement* by its very nature in conferring paid bereavement leave takes the complainant outside the definition of casual as provided by the MCE Act. It is argued that if an employee has entitlement to paid leave he is not by definition a casual employee. That argument is rejected. There is nothing preventing an employer from conferring unto a casual employee a benefit or entitlement. The very nature of *workplace agreements* facilitates that type of unusual arrangement.

Mr Pilgrim for the defendant submitted that section 8 of a MCE Act allows the employer and employee to agree in writing that the employee will forgo his entitlement to annual leave if the employee is given an equivalent benefit in lieu of the entitlement. It is suggested that the registered *workplace agreement* contains such provisions and by implication that the first *workplace agreement* also contained such provisions. In my view Section 8 of MCE Act has no application in this case because the section envisages an agreement in writing expressly contracting out entitlements and detailing the equivalent benefit to be paid in lieu thereof. There is no such

express provision or provisions contained within the *workplace agreement* particularly detailing the benefits in lieu. The point is, with respect to the contract of employment governed by the registered *workplace agreement*, moot in any event given my earlier finding that the complainant fits within the statutory definition of casual employee for the purposes of the MCE Act.

In conclusion on this issue, although I have found previously that the complainant is not a casual employee at common law he nevertheless fits into the statutory definition of “casual employee” for the purposes of the *Minimum Condition of Employment Act 1993* with respect to his contract of employment from 2 February 1999 until termination on 15 October 1999. For the reasons previously expressed I find that he is not within the definition of “casual employee” for the period 1 June 1998 to and including 1 February 1999. Accordingly the complainant is entitled to recover annual leave payments for that period.

Although the result may appear to be incongruous, the application of the *Minimum Condition of Employment Act 1993* to the factual circumstances of this case produces this unusual result.

Conclusion

The complainant was at all material times a permanent employee of the defendant. He was unfairly terminated by the defendant and is entitled to recover compensation. The complainant is also entitled to the payment of annual leave for the period 1 June 1998 to 1 February 1999 inclusive.

G. CICCHINI,
Industrial Magistrate.

IN THE INDUSTRIAL MAGISTRATES’
COURT HELD AT PERTH
BEFORE : Mr G. Cicchini I.M.
Complaint No. 243 of 1999
Date Heard: 29 March 2000
Date Decision Delivered: 4 May 2000
Date of Further Submissions: 18 May 2000
Date of Supplementary Reasons—
B E T W E E N —
Corey Michael Lopdell
Complainant
and
Kulin Industries Pty Ltd
Defendant.

Appearances —

Mr G. McCorry appeared as agent for the Complainant.
Mr L. Pilgrim appeared as agent for the Defendant.

Supplementary Reasons for Decision (Including Corrigendum)

The complainant has submitted that I have erred in my reasons given on 4 May 2000 and has invited me to correct the same before perfecting the orders I propose to make.

There can be no doubt that the Court has power to correct unperfected orders, that is, those pronounced in Court on the occasion of announcing a decision but before the entry of formal orders in the records of the Court (see *Westen v Union Des Assurances De Paris (No.2)* (1996) I.R. 268). The approach of the Courts from which an appeal lies is not so strict, for it may be preferable to recall an unperfected but erroneous judgement rather than allow it to stand until it is quashed (see *Re Harrison’s Share under a Settlement* (1995) 1 Ch 260 at 282-284).

The question I now need to determine is whether the interests of justice require the reopening of this matter. In *Autodesk v Dyason (No.2)* (1993) 176 CLR 300 Mason CJ said at 308:

“What must emerge, in order to enliven the exercise of jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the

relevant law and that this misapprehension cannot be attributed solely to neglect or default of the parties seeking the rehearing"

The ultimate question is whether the interests of justice require the reopening: cf. Gaudron J in *Autodesk*. Having considered the arguments on this issue there can be no doubt that the interests of justice require a reopening of this matter to rectify two difficulties that arise from my earlier reasons.

The first difficulty, which arises from my earlier reasons, relates to the statement of principle found at page 14 thereof in which I stated—

"The scope for any claim for unfair dismissal or for benefits under the Minimum Conditions of Employment Act 1993 falls away if the complainant is found to have been a casual employee."

Clearly that statement is erroneous as a statement of general principle. I had intended to qualify that statement to the particular circumstances of this case in the light of the pleadings. Regrettably that did not occur. Obviously the statement cannot continue to stand. In order to rectify the problem I will republish my earlier reasons with that statement deleted. In republishing my reasons I take the opportunity of correcting other obvious non-consequential typographical errors which have come to my attention.

The second difficulty arises from my failure to consider section 6(4) of the *Workplace Agreements Act 1993*. A consideration of that provision would have led to a clear and unequivocal conclusion that there was only one contract of employment entered into by the parties. That contract of employment came to an end on 15 October 1999. Accordingly the finding previously made that there were two separate contracts of employment with the first ending on 2 June 1999 cannot continue to stand. It is clear having regard to the aforementioned provision that the act of entering into the second *workplace agreement* did not have the effect of displacing the contract of employment entered into on or about 1 June 1998. It follows that the defendant does not come within the definition of "casual employee" for the purposes of the *Minimum Conditions of Employment Act 1993*.

In consequence I find that Mr Lopdell is entitled to payment of annual leave with respect to the entire period of his period of employment with the defendant.

G. CICCHINI,
Industrial Magistrate.

IN THE INDUSTRIAL MAGISTRATES COURT
OF WESTERN AUSTRALIA
HELD AT PERTH

Complaint No. 211 of 1999

BEFORE : Mr W.G. Tarr I.M.

Date Heard: 19 & 21 January 2000

Date Decision Delivered: 21 January 2000

BETWEEN—

Brian Gordon Moore
Complainant

and

Uniting Church in Australia Property Trust (WA)
Defendant.

APPEARANCES—

Mr A Metaxas of Counsel on behalf of the Complainant.

Ms D White of Counsel on behalf of the Defendant.

Reasons for Decision.

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by His Worship)

The action before this Court was brought by a complaint filed by the complainant, Brian Gordon Moore, complaining that he was unfairly or harshly or oppressively dismissed from

employment contrary to the provisions of section 18 of the Workplace Agreements Act 1993, where it states—

"(1) There is implied in every workplace agreement a provision that the employer must not unfairly, harshly or oppressively dismiss from employment any employee who is a party to the agreement."

There have been many cases in this jurisdiction in relation to unfair dismissals. It is not unusual for these matters to come before the Court and the law in relation to unfair dismissal is fairly well known by most who deal in this jurisdiction.

It is clear from the evidence, and it is not in dispute, that the complainant was party to a workplace agreement with the defendant in these proceedings and that as a result of incidents which occurred, his services were terminated. The termination followed the discovery that the complainant had released a document which was on a file, one of Mofflyn's files, and that document was exhibit A. The document can be, for the purpose of what I am saying now, described as a letter and I will deal with the question of whether or not it could be described as a reference shortly. On the face of it, it is a letter from the Child Migrants Trust in the UK to Miss Nova Farris, who is a director of Mofflyn.

For the purpose of my decision, I will read the letter and for the sake of anonymity, the person referred to in the letter and throughout these reasons will be described as Mr X.

"Thank you for your letter concerning a previous employee of the Trust, Mr X. I have delayed in responding to enable the Trust to seek legal advice in terms of our response.

I am able to confirm that Mr X did not leave the Trust of his own accord. The circumstances were very serious and would, we believe, have significant implications for any future prospective employer. It is therefore unfortunate that a reference was not sought at the time of his application to Mofflyn. The Trust was fully operational in Perth at the time of his application for employment with your agency. I believe a reference from the Trust would have caused Mr X some considerable concern.

You have spoken informally at some length with a senior professional officer of the Trust. Issues which informed Mr X's departure were numerous and, in our view, serious. The Trust's federal funding was suspended pending Mr X's departure from the agency. A senior Government Minister was involved, and expressed very deep concern about the performance of this worker.

It is difficult to be more specific without further direction from the Trust's lawyers, who were heavily involved in retrieving agency property from Mr X after his departure.

You may be interested to learn that serious complaints about Mr X's professional conduct were raised with the Australian Association of Social Workers by former Child Migrants.

There are many issues which we believe would be useful for you to be aware of, but we are restricted somewhat by our desire to remain within the law as it relates to employment and personnel issues. However, we are prepared to continue dialogue with you on this matter if it is at all helpful to Mofflyn, the Uniting Church or indeed Mr X's present employer."

The first claim by the complainant is that that letter, as I will describe it, could properly be described as a reference and if, as he claims, it was a reference, then under the provisions of Mofflyn's confidentiality policy he would be entitled and, in fact, I think he complained and is saying that he was almost obliged to give the employee a copy of that so-called reference.

The only reference to the word "reference" that I could find in the Shorter Oxford Dictionary, which is the one supplied in the chambers of the Industrial Magistrates Court, is—

"The name of a person given as one prepared to vouch for the character of a person seeking employment, or of goods offered for sale, etc.; the person himself; or (loosely) the testimonial given."

Now, it seems to me for that document to be described as a reference is drawing a long bow and I find it difficult to accept that someone in the complainant's position, with his

background, could honestly believe that that was a document which could be properly described as a reference and dealt with in accordance with the confidentiality policy.

Clause 3.2.4 deals with “references” and it is my view that the ordinary reading of that clause would be that the references referred to in that clause are references provided by Mofflyn. It reads—

“Written references may be provided to both current and former employees.”

Now to say that that sentence would enable a document like this to be considered a reference for the purpose of that policy, as I said, to my mind is not credible. It goes on to say that these are confidential documents and a copy is to go to the employee. The next sentence talks about a verbal reference, which supports my reading of this clause that that provision is where Mofflyn provides a reference to either a current employee or a former employee. I do not believe that there can be any other reading of that reference.

The letter itself is marked “Private and confidential.” It is clearly addressed to a director of Mofflyn and it is clearly in response to a letter from her to the Child Migrant Trust. The first sentence in the first paragraph indicates that. This letter came into the hands of Mr Moore, according to his evidence, as a result of someone in his section culling files and coming to him with Mr X’s file, an employee who had left Mofflyn some time before. The person brought Mr Moore the file. On top of the file, but within the manila folder and forming part of that file, was this letter.

Now the reaction to the letter by the other employee, who no doubt had read the letter, and by Mr Moore who no doubt read the letter and I would have thought, once having started reading the letter, it would have been read with some interest because it is that sort of letter. I do not accept that he or the other employee had a brief glance at the letter because as a result of reading that letter they were shocked and surprised, I think were the words that were used, and they are appropriate words to describe what someone’s response might be to reading this letter.

Mr Moore, being familiar with this letter and I find that he would have been familiar with the letter, would have been aware that it was addressed to Miss Farris and he would have been aware of where it was from and what the contents were and the fact that it was marked “Private and confidential” decided then to draw the attention of this letter to Mr X, telephoned him on that day, took a copy of the letter and made a point of taking this letter to Mr X and, while he was reluctant to give evidence as to the extent of the discussion with Mr X, I think it is fairly clear from what Mr X said that there was some discussion in relation to this letter. Following that, it would seem on his own initiative, he searched for the letter which was sent to the Child Migrant Trust and which resulted in this letter being sent to Miss Farris.

He then, with Mr X, arranged an appointment with the Moderator of the Church and I assume that he is the highest authority in the Church in this State. I do not think that evidence was given, but certainly he, as I understand, was the top person in the Church. They both went to that person with this letter.

It seems to me that the disclosure of this letter to Mr X would have resulted in a predictable response by Mr X and by those in Mofflyn when they found that this letter had been released. It was clear, I would have thought, from the letter that there would be hurt felt by Mr X and harm and internal stress as has been expressed by Miss Farris in relation to Mofflyn, particularly in view of the circumstances of the letter being provided.

It was provided on an undertaking that the contents of the letter would be treated in the strictest of confidence and I heard evidence that when the Child Migrant Trust found that the letter had found its way into the hands of Mr X, it was concerned and I would have thought that Mofflyn’s credibility would have been affected by the release of this letter which was written to Mofflyn, or to Miss Farris, in the strictest of confidence, in the view that it would not be divulged without further consultation with the Child Migrant Trust.

I find on the evidence that that document could not be thought to be a reference by Mr Moore and his explanation that his actions were innocent and that he was following the

confidentiality policy by just giving Mr X a copy of that reference, as he claims it to be, because the policy said a copy is to go the employee, I find that submission just untenable. Anyone looking at that letter and passing it on must have been aware that it was going to cause some concern and it could not have been an innocent action on Mr Moore’s behalf. It was clearly a damning report about Mr X and, as I said, for that to be released, the response was going to be predictable.

It seems to me that I could be forgiven for having a suspicion that there was a hidden agenda in relation to the release of that letter. If Mr Moore was acting in good faith, and it was innocent as he claims, then the appropriate thing to do would be to show the letter to Miss Farris, if he wanted to give it to an ex-employee, particularly in view of the content of the letter, and ask whether or not he could disclose it to Mr X.

My suspicion is that he did not ask Miss Farris because her response would have been predictable in relation to the release of that document. She had given an undertaking not to release that document and it is not the sort of document, I would have thought bearing in mind that the writer had sought legal advice in relation to the terms of the response, I think that would have put anyone on notice that there was something in that letter that should have been kept, as it suggests, private and confidential.

The policy objective in relation to the confidentiality policy, clause 1 is—

“The policy is to protect, where required, the interest of consumers, staff and Mofflyn through the safeguarding of information.”

Now it was clearly not protecting the employer, Mofflyn, to release this letter, and I would have thought that the release of it breached clause 1, the policy objective. There has been a suggestion that in relation to access to employee’s files, Mr Moore did not fit into any of the categories under 3.2.1, “Access to employees’ files? The list includes admin staff, it’s got “Prog manager”—“programme manager” perhaps and the director. They both have the authority to read the file in full. The admin staff have the right to place documents on the file, to check leave and contract records, and if Mr Moore does not fit into any of those then he must fall within the category of “other staff”, and that category has no access to the employees’ files.

I mention that because there was some evidence given in relation to where Mr Moore fell in the category of employees and he tried to justify his actions, I think, by saying that that did not apply to him. That deals, I think, with the complainant’s submissions in relation to (1) and (2).

In relation to submission (3), that the letter had been procured by Miss Farris in circumstances that demonstrated that it had nothing to do with Mofflyn, it was clear from the evidence of Miss Walker that Miss Farris kept her and the Board informed of what she was doing. She acted on the Board’s advice. She did not disclose all the documents she had in relation to this matter to the Board and, in particular, the one that has only recently come to light, and that was exhibit 2.

She placed exhibit A on the file and took the matter no further. She provided a number of explanations for her interest and for placing it on the file. One was so that if Mr X had applied for employment again, Mofflyn and whoever might have been involved then might be alerted to Mr X’s involvement with the Child Migrant Trust. The other explanation, she said, was that it showed some flaw in the recruiting procedures where Mr X was employed without providing any references from previous employers.

It seems to me that both of those explanations would be in Mofflyn’s interest. This is not an action that Miss Farris has taken in secrecy. As I said, she sought directions from the Board. Miss Walker said that while she wasn’t informed of the details, she certainly was informed of what Miss Farris was doing and had an indication of the general complaint and problems which had arisen by the release of this document. She said, if not in as many words, that the Board supported Miss Farris in relation to her dealings in this matter. As I said, it’s not a situation where Miss Farris had gone off on her own and had kept a secret file. She certainly had some matters which were not disclosed, but the main piece of information was placed on Mr X’s file.

The next point that has been raised on behalf of Mr Moore is that there has been a denial of natural justice because Miss Farris participated in the process of inquiry and the decision to dismiss Mr Moore, when an impartial and informed observer would have formed the opinion that she had an interest in the outcome.

Well, I suppose as a director of Mofflyn, she certainly did have an interest in the outcome, but what was being investigated by her was not Mr X but the action of Mr Moore in providing a copy of this letter from the Child Migrant Trust to Mr X. That was the breach of confidentiality which was being complained of and it was that which was being investigated.

Now, it seems to me the truth of what was in that letter had nothing to do with the dealing with Mr Moore. What went on in relation to Miss Farris' relationship with Mr X had nothing to do, as I said, with her dealing with Mr Moore as an employee over the breach of trust.

To say that Miss Farris was not impartial, based on the documents which related to her contact with Mr Thwaites and the correspondence and other discussions he said had to do with Mr X, had really nothing to do with Mr Moore. Mr Moore was not involved with Mr X or the activities that Mr X was involved in, or planning. There was no connection with Thwaites, X and Miss Farris. It was a matter that was being conducted by her and, as I said, not involving Mr Moore at all.

So it is my view that that was a separate issue. The issue before the Board, and of concern to the board, was the disclosure or release of the letter to Mr X. Miss Farris said that after she became aware that Mr Moore had released this letter causing the organisation some internal stress and some embarrassment, no doubt, in relation to Mofflyn's relationship with the Child Migrant Trust she, as I understand, made contact with the Chamber of Commerce to seek advice so that she could conduct the inquiries in relation to this action of Mr Moore in a proper manner. She followed the advice which was given which I understand was based on the provisions of the workplace agreement, and then after the process which has been described by the evidence it was a decision of the Board that Mr Moore's employment should be terminated.

It seems to me that, as I said earlier, by releasing this letter to Mr X, Mr Moore was not displaying that loyalty to his employer that would have been expected of him. It was clearly a breach of confidentiality by doing so and as I said, when I look at the evidence overall, I believe I can be excused, as I expressed before, for having a suspicion that there was a hidden agenda and that the action of Mr Moore was intended to cause harm to Miss Farris. It is fairly clear from what happened that that action backfired, and it was Mr Moore who found himself subject to complaints.

For those reasons, I conclude that Mofflyn was justified in all the circumstances in dismissing Mr Moore and I think their actions in doing so were certainly not unfair. It seems to me that his actions made his employment with Mofflyn untenable. The Board of Mofflyn, I would have thought, would have been entitled to dismiss him there and then. They gave him 5 weeks pay in lieu of notice and I think that was reasonably generous. For those reasons, I would dismiss the complaint.

W.G.TARR,
Industrial Magistrate.

IN THE INDUSTRIAL MAGISTRATES' COURT OF
WESTERN AUSTRALIA

HELD AT PERTH

Complaint Nos. 84-87 of 1999

Date Heard: 3, 4 & 17 May 2000

Date Decision Delivered: 22 June 2000

BEFORE: Mr G. Cicchini I.M.

B E T W E E N—

Deirdre Shirley Prowse

Complainant

and

Monterrey WA Pty Ltd

Defendant.

Appearances—

Mr C.R. McKerlie instructed by Messrs Colin McKerlie Lawyers appeared for the Complainant.

Mr M.E. Frichot, Mr L.E. James and Ms V. Reynolds instructed by Messrs Kott Gunning Solicitors appeared for the Defendant.

Reasons for Decision.

Background

In 1992, Deirdre Prowse and Michael Hanssen (Michael) met at Bentley TAFE. At the material time they were both undertaking a Diploma course in Hospitality and Management. Whilst studying at that place they became friendly and formed a boyfriend-girlfriend relationship.

At about that time Michael's family was in the process of building a restaurant premises for him. It was being built to facilitate his career advancement. The restaurant premise was situated in West Swan Road, Henley Brook. *Monterrey Pty Ltd as trustee for the Gerardus Hanssen Family Trust* in fact owned it. The restaurant, which opened in September 1993, was styled "*Swan Valley Oasis Restaurant*".

Prior to the opening of the restaurant, the complainant met with her boyfriend Michael and his parents concerning the running of the restaurant. The complainant testified that she was asked to work in the restaurant by running the front of the same. What was envisaged was that Michael would work in the kitchen as the restaurant's chef with his mother assisting him whilst the complainant would take care of the front of the restaurant. Her duties would entail greeting patrons, waiting upon them and performing all other necessary functions, which were not associated with kitchen duties.

When the restaurant opened on or about 22 September 1993 Michael was assisted by his mother. She in fact assisted him in the kitchen as had been agreed. However that only lasted two weeks. Thereafter she ceased all involvement and the restaurant was left to Michael and the complainant to run. Michael's father Gerardus (Gerry) Hanssen had no involvement in the running of the business. It is clear, from a very early stage, that the complainant and Michael were left to their own devices working together in a collaborative way in running the restaurant business. They ran the restaurant as a joint enterprise.

The complainant claims that she was initially engaged as an employee. I reject her contention. It appears to me that the basis of her engagement was never properly addressed or categorised. What is clear is that there was never any agreement that the complainant would work as an employee. Indeed, in her testimony, the complainant said she was asked prior to the opening of the restaurant to join them in running the same. The reality was that she joined with Michael in running the business as if it belonged to them both. Of course at that stage (22 September 1993 to 30 June 1994) the business was not in any way the complainant's nor had it been expressly represented to be. However, by their conduct, both the complainant and Michael treated it as such.

The complainant testified that Gerry Hanssen met with her and Michael at the commencement of the 1994-1995 financial year and told them that they were equal partners in the restaurant business. He told them that they could run the business as they saw fit. However, no documentation was ever prepared to reflect that arrangement.

The complainant who, at the material time, was aged only twenty-one years, was naïve and unskilled in business dealings and practices. Accordingly she did not obtain or attempt to obtain independent advice concerning Gerry Hanssen's declaration. Indeed she was totally reliant on what she had been told by Gerry Hanssen. The complainant understood that she was a half owner in the business in partnership with Michael and left it at that. She did not otherwise concern herself in any way in ensuring that all the legal requirements with respect to the partnership had been met. It appears that she trusted Gerry Hanssen to do the right thing and left everything to him. There is no dispute in the fact that Miss Prowse considered the business to comprise of the plant, equipment and stock in trade. She knew that she did not have any interest in the land upon which the restaurant premises was built.

There can be no doubt that, as from about 1 July 1994, the complainant approached her work at the restaurant on the basis that she was a partner. In reality, however, little changed in respect to her approach to working at the restaurant. In fact, she continued to work in the same way as she had previously worked prior to Gerry Hanssen's announcement as to partnership. From the outset in September 1993, she treated the business as one being carried out by her and Michael. She had the business' interest at heart. She conducted herself very much as an owner would, notwithstanding that there was no legal basis for her to conclude that she was an owner or had any legal interest in the business at that stage. As from 1 July 1994 she considered herself to be a partner. That is reflected by what she said during her examination in chief. The complainant said that, as from July 1994, she did not regard herself as being employed. Indeed, she did not keep a record of the hours that she worked at the restaurant. Over and above that she, together with Michael, made all the necessary decisions concerning the business, including the purchase of fixtures, fittings, equipment and stock in trade.

When first opened, the restaurant catered only for lunch and dinner. It catered for lunch on Wednesdays through to Saturdays inclusive and for dinner on Friday and Saturday nights. As from about mid 1995 the restaurant also catered for dinner on Sunday evenings. The restaurant was also opened on most public holidays for lunch and dinner. From time to time it catered for functions such as weddings. Functions were usually catered for on weekends or on public holidays.

The restaurant operated much in the way as was initially envisaged. The only difference being that Michael's mother only had a short-lived involvement with the restaurant. Accordingly, throughout the relevant period, Michael and the complainant worked together in the restaurant. He looked after the kitchen and she did everything else outside of the kitchen including the engagement of staff. She also attended to all other necessary administrative requirements associated with the employment of staff such as the payment of wages and the recording of time worked and wages paid. In order to cater for busy periods, casual employees were engaged. Two were employed on a regular basis to assist on Friday nights and on weekends. Other casual staff was also employed from time to time as required particularly to assist with functions.

By reference to the table booking diaries kept for the business during the relevant period, the complainant has calculated that she worked approximately 70 hours per week. It is self evident from her testimony that the basis for her calculations and the calculations themselves are inexact. The inexactness of the process is also demonstrated by a perusal of exhibits 1 to 5 inclusive. The complainant concedes that those exhibits are inaccurate and accordingly seeks to substitute the same. By using the same source documents, the complainant has calculated and therefore claims that she worked for fifteen weeks in 1993, fifty two weeks in 1994, forty eight weeks in 1995, forty weeks in 1996, 50 weeks in 1997, and forty two weeks in 1998. The defendant for its part disputes that the complainant worked those hours alleged or indeed that she worked for the periods alleged. Michael testified that the complainant overestimated the hours that she worked. He told the Court that the hours that he and the complainant worked were not at all regular. He testified that the restaurant often closed early or did not open at all. That was particularly so during the winter months when the restaurant was closed for significant periods. Holidays were usually taken at such times.

Turning to the issue of income received for her work, the complainant testified that as the business was struggling financially, particularly in its early stages, she and Michael agreed that they each would take drawings of \$100 per week. In about November 1994 the drawings each of them took were increased to \$300 per week. It is common ground that tax was deducted from the complainant's regular weekly drawings. The deductions were made on a PAYE basis. Indeed she was issued with group certificate for each of the financial years that she worked at the restaurant. The group certificates (exhibit 6) with the exception of one were issued by "*Monterrey WA Pty Ltd as trustee for the Gerardus Family Trust*". The other was issued in the name of the "*Swan Valley Oasis Resort*".

Over and above the drawings taken from the business, regular small cash withdrawals were also made. Furthermore evidence shows that the business paid for some purchases and personal debts of the complainant and Michael. Money was also drawn from the business to facilitate holidays both interstate and overseas. Spending money for the holidays was also taken from the business. It is apparent from the evidence that the complainant and Michael solely operated the business account. They treated the account as theirs. Notwithstanding that it is obvious that the account was not legally theirs but rather owned by the defendant.

The complainant testified that she repaid almost all the money she had taken by way of drawings to finance her holidays. The repayments were made because the business could not afford to sustain such drawings. The business struggled particularly early on and the injection of money into the business was necessary. Indeed, so concerned was she about the progress of the business, that she sold her car in order to invest the proceeds of \$2500 therefrom into the business. The only time she did not repay the business was in 1997 when she was told by Gerry Hanssen not to repay the money that she had taken that year to finance a holiday. She was told by him to treat it as a Director's benefit.

Over the period of the complainant's involvement with the business, any profits made were generally re-invested into capital for the business. That was so except for one instance in March of 1997 when \$15,000 of the accumulated funds of the business was appropriated towards the purchase of residential premises for the complainant and Michael. That home was purchased in the joint names of the complainant and Michael. They resided together at that home in a de facto relationship until March of 1998 when their relationship broke down. Prior to the purchase of the residence, the complainant and Michael had resided together in a bed-sit attached to the restaurant.

Both the complainant and Michael only had a rudimentary understanding of the business' financial affairs. Their financial affairs, other than the day to day requirements, were very much left to their accountant. The accountant was the same person that the defendant and Gerry Hanssen used. Essentially the complainant and Michael handed over all their books of account to Gerry Hanssen. He in turn handed them over to his accountant. Interestingly the business' financial details were accounted for in income tax returns lodged by the *Gerardus Hanssen Family Trust*. Although the complainant and Michael treated the business as their own, the reality was that the business was never legally theirs. The defendant owned it. The business was held as part of a complex arrangement by which assets were held by the defendant. Not only was the structure of the trusts complex but it was also nebulous. I say that because Gerry Hanssen was not able to explain in any satisfactory manner why the business was forced to pay "*rental*" of \$400 in cash per week to Michael's grandfather. That is particularly so when it appears that the "*rental*" was paid on account of servicing a loan taken out by the defendant for the purposes of constructing the restaurant premises. On the face of it, Michael's grand father's involvement is difficult to follow. That is so, notwithstanding Gerry Hanssen's assertions that some of the funding for the construction of the restaurant premises was provided by Michael's grandfather. Indeed, the raising of the issue by Mr McKerlie in cross-examination caused Gerry Hanssen to be quite uncomfortable. He was visibly shaken by allegations put to him by Mr McKerlie that the payments made to Michael's grandfather were so made for the purpose of hiding cash from the Australian Taxation Office. Gerry Hanssen's

response on that issue in the course of cross-examination was unconvincing. I formed the view that he was not forthright.

In March of 1998, the relationship between Ms Prowse and Michael came to an end. Michael moved out of their Middle Swan home and returned to live at the bed-sit attached to the restaurant. Notwithstanding the break up of the relationship, the complainant continued to work within the business in the same way that she had previously done. The work situation remained substantially unaltered. In October 1998 the complainant notified Michael and Gerry Hanssen that she wanted to withdraw from the partnership. Discussions were accordingly held concerning the termination of the partnership. In consequence, a stock take inventory was conducted so that the value of the plant, equipment and stock in trade could be assessed. Following that process, the complainant and Michael further met with Gerry Hanssen to discuss the termination of the partnership. Gerry Hanssen, who presided over the meeting, proposed a settlement. The terms of the proposed settlement are contained within exhibit 11. Essentially what was proposed was that the residence jointly owned by the complainant and Michael, together with the mortgage liability with respect thereto, be transferred to the complainant. In addition, the complainant was offered an *ex gratia* payment of \$10,000. The proposal also required the complainant to return to Michael a vehicle and paintings. It is obvious from the evidence that the proposal was formulated on the division of "jointly owned assets." There was no accounting for goodwill of the business. That was so because Gerry Hanssen took the view there was no goodwill in the business, given that the restaurant had failed to return a profit during its operation. It suffices to say that the complainant rejected the proposal for settlement.

The Claim

The complainant has initiated action in this jurisdiction claiming—

- (a) \$206,448 for unpaid wages.
- (b) \$11,336.90 for unpaid superannuation entitlements.
- (c) \$21,878.50 for unpaid annual leave entitlements, and
- (d) \$11,487 in unpaid holiday pay.

The complainant also claims interest on those amounts claimed. She also seeks to recover costs from the defendant.

Assessment of Witnesses

Much of the evidence before me is not in dispute. Indeed there is much common ground. The complainant concedes that, whilst working at the restaurant, she regarded herself to be a partner in the business. There is, however, a dispute as to when the partnership commenced. On the complainant's evidence, the partnership commenced on 1 July 1994 and on the evidence called by the defendant the partnership commenced upon the opening of the restaurant. There is also some conflict in the evidence on other issues. Unless otherwise specifically stated, I prefer the evidence given by the complainant to that of Michael and Gerry Hanssen on those issues in conflict. Ms Prowse answered all questions forthrightly. She made some admissions against her own interest. Michael and Gerry Hanssen on the other hand were not forthright. They prevaricated in answering questions, particularly those relating to the business dealings of the defendant. The only other person to give evidence was Ms Flux. Her evidence is uncontradicted and accepted.

The Issues

The complainant alleges that the defendant is bound by the *Restaurant, Tearoom and Catering Workers Award No. R48 of 1978*. She alleges that the defendant has breached the award by failing to pay the appropriate amount in wages, by failing to pay superannuation benefits, by failing to pay annual leave and by failing to pay for public holidays worked. In the alternative the complainant, by her pleadings, claims that if the award does not apply, that she is nevertheless entitled to the amounts sought by virtue of the provisions of the *Minimum Conditions of Employment Act 1993*.

The Law

In order to establish a breach of the award the complainant must prove the following—

1. The existence of the award.
2. That the award bound the employer.

3. That she was employed in a classification under the award, and
4. That she is an employee within the definition of section 7 (1) of the *Industrial Relations Act 1979*.

Employee is defined in Section 7 (1) as follows—

"employee" means, subject to section 7B—

- (a) any person employed by an employer to do work for hire or reward including an apprentice or industrial trainee;
- (b) any person whose usual status is that of an employee;
- (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or
- (d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee,

but does not include any person engaged in domestic service in a private home unless—

- (e) more than 6 boarders or lodgers are therein received for pay or reward; or
- (f) the person so engaged is employed by an employer, who is not the owner or occupier of the private home, but who provides that owner or occupier with the services of the person so engaged."

Section 7B provides—

"Definitions of "employer" and "employee" limited

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

It is not suggested that the relationship between the parties was governed by a workplace agreement. Accordingly the question to be decided is whether the complainant was at all material times an employee within the meaning of Section 7(1) of the *Industrial Relations Act 1979*.

In the alternative the complainant's claim is made pursuant to the *Minimum Conditions of Employment Act 1993 (MCE Act)*. The Court is therefore also required to consider and determine whether the complainant is an employee for the purpose of the *MCE Act*.

Relevantly, Section 5 of the *MCE Act* provides—

"Generally, minimum conditions apply unless conditions more favourable

5. (1) The minimum conditions of employment extend to and bind all employees and employers and are taken to be implied—

- (a) in any workplace agreement;
 - (b) in any award; or
 - (c) if a contract of employment is not governed by a workplace agreement or an award, in that contract.
- (2) A provision in, or condition of, a workplace agreement, an award or a contract of employment that is less favourable to the employee than a minimum condition of employment has no effect.
- (3) A provision in, or condition of, an agreement or arrangement that purports to exclude the operation of this Act has no effect, but without prejudice to other provisions or conditions of the agreement or arrangement.
- (4) A purported waiver of a right under this Act has no effect.
- (5) This section has effect subject to sections 8 and 9 (1)."

Employee is defined in Section 3 (1) of the *MCE Act* as follows—

"employee" means—

- (a) a person who is an employee within the meaning of the *Industrial Relations Act 1979*, but

for the purposes of this Act section 7B of that Act is to be disregarded;

- (b) a person to whom section 43 (1) of the *Workplace Agreements Act 1993* applies;

but does not include a person who belongs to a class of persons prescribed by the regulations as persons not to be treated as employees for the purposes of this Act.;"

It is not suggested that the complainant is a person who belongs to the class of persons prescribed by the *Minimum Conditions of Employment Act Regulations*.

It is obvious that the pivotal issue to be determined in this matter is whether or not the complainant was at all material times an employee of the defendant. In consideration of the issue, the first matter to be determined is whether the complainant was employed by the defendant to do work for hire or reward under a contract of service. It is axiomatic that the defendant denies the existence of an employment relationship between it and the complainant. It says that the complainant was in fact a partner in the restaurant business with Michael. The defendant maintains that it did not have any contractual relationship with the complainant.

Much of the complainant's argument has been aimed at demonstrating the non-existence of a partnership agreement. I have been asked to find that there was no partnership agreement in existence. It seems that the complainant's argument is predicated on the basis that if she was not in partnership she must have been an employee. In my view the determination of whether or not a partnership agreement existed is not my primary function. My primary function is to determine whether or not a contract of employment existed between the complainant and defendant. In my view, it would be totally inappropriate for me to attempt to finally determine the issue of whether or not a partnership agreement existed between the complainant and Michael.

The law of contract governs the employment relationship. That statement of principle is reflected in *Consolidated Press Ltd v. Thompson* (1952) 52 SR (N.S.W.) 75 at 79—

"The relationship of master and servant arises out of agreement and the general principles of the law of contract apply in considering the respective rights and obligations of employee and employer under a contract of service. There are incidents of a special nature attached to this type of contract by reason of the nature of the subject matter and the personal obligations resting upon the employee to serve and obey the employer, and upon the employer to pay for the services so rendered and to carry out any other obligation which he has assumed towards his employee"

The law holds that before any contract is enforceable, it must be formed so as to contain six elements. These are—

- "(1) There must be an 'intention' between the parties to create a legal relationship, the terms of which are enforceable.
- (2) There must be an offer by one party and its acceptance by the other.
- (3) The contract must be supported by valuable consideration.
- (4) The parties must be legally capable of making a contract.
- (5) The parties must genuinely consent to the terms of the contract.
- (6) The contract must not be entered into for any purpose which is illegal."

The first element, which is essential to the existence of a contract, is the requirement that the parties have a mutual intention to create a legally enforceable bargain. The defendant submits that there was simply no intention on the part of parties to enter into an employment relationship. Neither the complainant nor each of Michael and Gerry Hanssen proceeded on the basis that the complainant was an employee. Indeed, it is submitted that each of them proceeded on the basis that she was a partner with Michael.

A review of the facts relating to the conduct of the complainant, Michael and the defendant during the material period, reveals that none of them regarded the complainant to be an employee. In that regard, the evidence dictates that the

complainant did not record her hours of work and that she was not paid a wage. She, in fact, took drawings from the business. She also took small amounts of cash from the till. She funded holidays from the business' account over which, together with Michael, she had control. She made financial contributions to the business by the payments of money into the business. In one instance, she sold her motor vehicle and injected the proceeds therefrom into the business. She was not controlled as to how she worked. She had meetings with Michael to determine policy for the operation of and advancement of the business. There was clearly a view to the sharing of profits. When the relationship came to an end, she sought a termination of the partnership. A stock take was conducted for that purpose. It is obvious that the defendant, as distinct from Michael, did not have a part to play in the running of the business or making decisions with respect to the advancement of the same. During the entire period of her involvement in the business, the complainant clearly treated the business as a joint enterprise carried out by her and Michael.

The complainant argues that she proceeded on the basis that she was a partner by virtue of false misrepresentations made to her by Gerry Hanssen on behalf of the defendant. She claims that in reality she was never a partner. The complainant therefore argues that she was an employee working under a false premise brought about by the misrepresentations on the part of the defendant.

The complainant points to various indicia that she says demonstrates that she was an employee or at least treated as such by the defendant. They include the fact that her tax instalments were deducted using the PAYE system, as would be the case with an employee. Furthermore, that the defendant issued group certificates nominating her as an employee. She also points to the fact that superannuation payments were made by the defendant in respect to her as if she was an employee. My attention has also been drawn to the fact that the defendant's insurance policy covered her for workers' compensation. Obviously, each of those indicia point to the existence of an employment relationship. However, those indicia alone do not finally determine the issue of whether or not an employer-employee relationship existed between the parties

The determination of the issue requires a systematic analysis of the particular circumstances between the parties at the relevant time. Generally the sources of the employer-employee relationship may be identified as arising from—

- terms settled and agreed upon between the employer and employee.
- awards and industrial agreements.
- custom and practice.
- terms presumptively implied under the rules of common law, and
- terms imposed by or under legislation.

The methods whereby these sources are used to establish legal obligations in the employment contract include—

- direct agreement between the parties.
- agreement by reference to other sources.
- agreement by the principles of agency.
- acceptance in practice.
- judicial rule making whereby a term is implied by law, and
- application of statute law which a legislative provision operates to imply a term into an employment contract.

In this case the complainant argues that, by virtue of a combination of factors, including the conduct of the defendant, the terms to be implied under a common law contract of employment can be established. That is so, notwithstanding the lack of direct agreement between the parties as to the existence of any agreement or the terms thereof. It is accepted that even the most informal arrangements would normally possess the core elements of a contract of service, being that an employee agrees to work for an employer in return for wages. Thereafter the Court can by implication flesh out the terms of the agreement. However, it must be appreciated that adherence to the formal requirements of a contract is an essential precondition of the creation of a valid contract of employment and that the failure to do so can have profoundly serious

consequences. This is illustrated by the High Court decision in *Dietrich v Dare* (1980) 30 ALR 407

“Dietrich lived in Alice Springs. He was an alcoholic, and was also suffering from Huntington’s Chorea. Dare was honorary secretary of the local Chamber of Commerce, and from time to time he helped the manager of a hostel in the town to find work for unemployed residents of that hostel. In October 1975 the manager asked Dare if he could assist Dietrich. The possibility of his painting Dare’s house was raised, even though it did not really need painting at that time. It was agreed that Dietrich would ‘give it a go’, in order to see whether he could cope with the work. He was to be paid at a rate of \$2 per hour during this trial period. However this was on the understanding that the matter would be reconsidered if Dietrich could establish that he was capable of doing the job. Dare purchased the necessary materials, and on 15 October Dietrich turned up at his house to start work. He climbed a ladder to reach the guttering on the house. He overbalanced and fell to the ground, sustaining serious injuries, which incapacitated him for work. Some six months after the accident Dietrich claimed workers’ compensation.

The Workmen’s Compensation Tribunal unanimously ruled that he was not a ‘workman’ within the meaning of the Workmen’s Compensation Ordinance 1949 (N.T.). This decision was reversed by the Supreme Court of the Northern Territory ((1978) 21 A.L.R. 210). This decision was in turn reversed by the Full Court of the Federal Court ((1979) 26 A.L.R. 18). Dietrich then appealed to the High Court ((1980) 30 A.L.R. 407), where a majority (Gibbs, Mason, Wilson and Aickin JJ.; Murphy J. dissenting) took the view that the parties had not entered into any contractual relationship of any kind.

GIBBS, MASON and WILSON JJ.: [said at p. 411]

“We have no difficulty in rejecting the notion that the respondent entered into a contract for services with the appellant. The physical condition of the latter, the circumstances of the engagement, the fact that he was not a professional painter and could offer no guarantees of good workmanship together with the arrangement for a trial at an hourly rate of \$2 all contribute to deny to him the character of an independent contractor.

Nor are we persuaded that the arrangement gave rise to a contract of service. It seems to us that the arrangement lacked the element of mutuality of obligation that is essential to the formation of such a contract. A contract of service is of its nature a bilateral contract.”

As can be seen from the decision in *Dietrich*, the fact that a person “works” for another does not necessarily make that person an employee. Most people who “work” would claim that they were employed. However, the legal characterisation of a job in society will differ from function to function. There is no legal significance in asking whether or not the job is performed by someone who “works” using the expression in its ordinary meaning. History must be relied on, to identify that special relationship traditionally called master and servant. An analysis of the expression “servant” shows that employment for the purpose of the law, and in light of the history of this relationship, must connote service. In past times, aspects of servitude, of servility, of subjection to control in the performance of a job would be looked for. The same type of approach is apt today.

In this case, I am required to consider whether the relationship that existed between the complainant and the defendant can be considered or categorised to be that of an employer-employee relationship. The complainant’s argument in that regard seems to be predicated on the fact that, as no partnership existed or was legally possible, that the complainant must have been an employee. In my view, that approach carries little or no force. In my view, the complainant cannot be propelled into the status of employee by default. Many “workers” are not employees. Examples are found in teenage children working for their parents at home or in a family business, in wives working for their husbands in their husband’s business and the like. The fact that they work in such circumstances

and are not partners, does not of itself by default propel them into the classification of employee. In those situations the particular facts of the case may give rise to claims in equity based on the creation of a resulting or constructive trust. It may give rise to a claim being made based on promissory estoppel or in quantum meruit.

Much of the complainant’s argument is aimed at establishing that a partnership between the complainant and Michael was either never formed or alternatively, if formed, that it dissolved soon after formation by the operation of law. The basis of the argument is well set out in the complainant’s written submissions. I need not repeat the arguments here. With due respect to counsel for the complainant it seems to me that the argument is somewhat contorted. I say that, because at the end of the day it is not for me in this jurisdiction to determine whether or not a partnership agreement existed between the complainant and Mr Michael. My function is to determine whether at any stage during the material period, a contract of employment existed between the parties giving rise to an employer-employee relationship. As stated earlier, that relationship cannot, in my view, result by default upon a finding that a partnership did not exist. The primary requirement in any contract of employment is the intention of the parties to create a legal relationship in the form of a contract of employment. Indeed the complainant bears the onus of establishing on the balance of probabilities that there was an intention by the parties to create a legal relationship and that the relationship of employer-employee existed.

Conclusion

The complainant submits that the fact of the complainant’s employment by the defendant is beyond argument. The argument is founded on the fact that PAYE tax was deducted, that the defendant issued group certificates to the complainant and that superannuation was deducted. The complainant also points to the fact that the complainant was covered by the defendant’s workers compensation insurance. There can be no doubt that each of those matters are indicative of an employment relationship. Gerry Hanssen explained that tax deducted was so deducted because it provided the most expedient method of accounting for the complainant’s tax in respect of her drawings. Gerry Hanssen suggested that the use of the PAYE system and the provision of group certificates were simply aimed at assisting Ms Prowse with respect to her tax matters. I accept that aspect of Gerry Hanssen’s evidence. It appears to me that the use of the PAYE system and the consequent issue of group certificates by the defendant were convenient tools inappropriately used. Turning to superannuation, I find the payment of the same is not, of itself, determinative. Payment of superannuation is just as consistent with other forms of relationships as it is with an employment relationship. As to workers’ compensation insurance coverage it appears that simply happened by default. The defendant, through Gerry Hanssen, did not specifically contemplate that issue. Whether or not the defendant’s insurers were exposed to liability with respect to the complainant remains a moot point in any event.

In my view, the evidence as a whole overwhelmingly dictates that there was no intention between the complainant and the defendant to create legal relations in the form of a contract of employment. The arrangement that existed lacked a mutuality of obligation that is essential to the formation of such a contract. At all times Ms Prowse and Michael approached the running of the business as a joint venture. Any informality in that regard was removed on or about 1 July 1994 when the complainant and Michael were expressly told by Mr Gerry Hanssen that the restaurant business was theirs. The complainant thereafter proceeded on the basis that she was a partner in the business. She had the advancement of the business at heart and had little regard for the hours that she actually worked. Her concern and that of Michael was for the advancement of the business with a view to a share of the profits. No one proceeded on the basis that the complainant was an employee of the defendant. She was never under the direction of any person acting on behalf of the defendant. She made joint decisions with Michael concerning operational and structured issues relating to the business. She was never under any form of control. She had an equal say in how the business ran and importantly how she worked. The defendant did not fetter that in any way. She acted as a partner would. She took cash from the till regularly, she used the businesses’ account to pay for

personal items, she took money from the business to finance holidays and very significantly she made financial contributions by way of capital to the operation of the joint venture. In that regard, she sold her motor vehicle and injected the proceeds therefrom into the business. The complainant never recorded the hours that she worked. Prior to the institution of these proceedings, the complainant never sought to be remunerated having regard to the hours that she actually worked. None of the complainant, Gerry Hanssen or Michael, for that matter, regarded, contemplated or proceeded on the basis that the complainant was an employee. Indeed, when she decided to leave the "partnership," the complainant proceeded on the basis that a stock take should be conducted. She sought payment for her share of the assets and goodwill of the business. The complainant's conduct throughout is inconsistent with the existence of a contract of employment.

I now turn to consider the complainant's argument with respect to Section 114 (1) of the *Industrial Relations Act 1979* which provides—

"Prohibition of contracting out

114. (1) Subject to this Act, a person shall not be freed or discharged from any liability or penalty or from the obligation of any award, industrial agreement or order of the Commission by reason of any contract made or entered into by him or on his behalf, and every contract, in so far as it purports to annul or vary such award, industrial agreement or order of the Commission, shall, to that extent, be null and void without prejudice to the other provisions of the contract which shall be deemed to be severable from any provisions hereby annulled."

The complainant argues that the defendant falsely misled the complainant into believing and accepting that she was a partner in the business, when in reality she was not and was never going to be. It is suggested that the purpose of misleading the complainant into believing she was a partner was aimed at defeating the award. It is argued that Section 114 is aimed at that very circumstance.

In my view the evidence does not enable a finding to be made that the "partnership agreement" was aimed at defeating the award provisions. There is substantial doubt in any event as to whether there was any agreement. In those circumstances, it is not possible to find that Gerry Hanssen's declaration of a partnership amounted to an agreement made in contemplation of contracting out of the award. Accordingly Section 114 (1) has no application.

Finally, I am moved to say that the complainant's situation evokes a considerable degree of sympathy. I say that because the evidence dictates that she worked long hours over five years for very little reward with a view to the advancement of "her and her boyfriend's business". However, the reality was, that the legal ownership of the business remained throughout with the defendant in its capacity as trustee of the *Gerardus Hanssen Family Trust*. It appears that there was never any genuine intention on the part of Gerry Hanssen on behalf of the company to transfer ownership of the business. Indeed that did not happen. The business was accounted for in the defendant's tax returns. Furthermore it is obvious that Gerry Hanssen has structured his family's business affairs in such a way that the assets of the family held in trust are not exposed to divesture.

The complainant throughout the material period was young and naive in business matters. Regrettably she did not receive independent advice in relation to the "partnership". The consequences that flow as a result are that she may or may not be a partner. That is a matter for another Court, seized of jurisdiction, to consider and determine. It may be the case that the complainant has a valid cause of action either in law or equity. She may be able to claim the establishment of a trust and/or make claims based on promissory estoppel and/or quantum meruit. This Court, however, cannot deal with such claims. What is certain, however, is that the complainant was never an employee of the defendant.

G. CICCHINI,
Industrial Magistrate.

UNFAIR DISMISSAL/ CONTRACTUAL ENTITLEMENTS—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Anne Patricia Ahern

and

The Australian Federation of Totally and Permanently
Incapacitated Ex-Service Men and Women (Western
Australian Branch Inc).

No. 1436 of 1997.

19 June 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 this application, the Applicant seeks to recover benefits said to have been due to her under the terms of her former contract of employment with the Respondent. The Applicant filed her application as long ago as 11 August 1997. The matter came on for hearing in 1998 before the Commission differently constituted than it now is, and was dismissed. Subsequently the matter went on appeal, first to the Full Bench and then to the Industrial Appeal Court. The effect of those decisions was that the Applicant's written contract of employment is to be read literally and that she is entitled, as I understand it, to be paid as a Community Service Officer, Level 1, fifth year, for the period of her employment in accordance with the terms of a federal award known as the Local Government Officer's (Western Australia) Award 1998 as amended from time to time. As a consequence the Industrial Appeal Court remitted the matter back to the Commission to, in effect, resolve the figures if the figures could not be agreed. It is fair to say there is no agreement but no strong opposition from the Respondent.

Having heard from counsel for the Applicant and followed the various changes in the Award including the broad-banding or classification restructure that took place in or about 1994, I am satisfied on balance that the figures outlined in the schedule produced by counsel for the Applicant is a fair and accurate representation of the monies outstanding to the Applicant, in light of the determination of the various appellate courts and tribunals. Thus I indicate to the parties that I am prepared to make an order directing the Respondent to pay to the Applicant the sum of \$19,962.83 as and by way of a benefit denied to her under her contract of employment with the Respondent.

Appearances: Mr R D Farrell on behalf of the Applicant.

Mr T M Retallack on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Anne Patricia Ahern

and

The Australian Federation of Totally and Permanently
Incapacitated Ex-service Men and Women (Western
Australian Branch Inc).

No. 1436 of 1997.

19 June 2000.

Order.

HAVING heard Mr R D Farrell of Counsel on behalf of the Applicant and Mr T M Retallack 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 Respondent pay to the Applicant the sum of \$19,962.83 as and by way of benefits denied to the Applicant under her contract of employment with the Respondent within 7 days from this date.

[L.S.] (Sgd.) G. L. FIELDING,
Senior Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Anthony James Byfield

and

Olten Pty Ltd t/a MSA Security.

No. 453 of 1999.

30 June 2000.

COMMISSIONER S WOOD.

Reasons for Decision.

THE COMMISSIONER: This is an application made pursuant to section 29(1)(b)(i) and (ii) of the Industrial Relations Act, 1979 (the Act) by Mr Anthony James Byfield (the applicant). The applicant was employed by MSA Security (the respondent) as the General Manager, Sales and Marketing. The applicant was also a shareholder of the company. His duties were to manage a sales team, to handle client liaison and new tender work. He reported to Mr Dennison, the company's General Manager and Managing Director.

The evidence of the applicant is that in early 1998 he met with Mr Robins, General Manager, Operations and Mr Dennison at which time Mr Dennison spoke of the lack of sales and lack of performance of the sales team in general. He says Mr Dennison said, "Just because you own shares in this company doesn't guarantee you a job". The applicant did not believe his employment was under threat arising from this meeting or that there was any guide given as to the extent to which his performance needed to improve.

In early March 1999 Mr Byfield met with his sales team to talk about their performance and a restructure of the sales team to improve performance. Present at that meeting were Mr Keith Nazareth, Mr Alan Taylor and Mrs Cheryl Kennedy. They complained about the lack of air conditioning in their office and the strong pesticide smell. The applicant says he asked them to put their concerns in writing and he would take those to management. He attempted to deliver his report to Mr Dennison on Thursday, 11 March 1999 and as Mr Dennison was busy he handed the report to his assistant, Mrs Scully. He says that Mrs Scully became agitated and shaking the page in her hand said, "I knew something like this was going to happen". The applicant replied to Mrs Scully, "Jessie, don't shoot the messenger. I'm only reporting as to what's happening downstairs." She then said, "Well this is the straw that's broke the camel's back".

The applicant was called to a meeting later that day and in attendance was Mr Dennison and Mrs Scully. He was asked about the meaning of his memorandum. He explained the concerns of his staff and the meeting suddenly swung to why they should continue to provide jobs for a sales team that was not performing. He had no indication prior to attending that meeting as to what was going to be discussed. He was instructed to meet again with Mr Dennison at 5 o'clock that afternoon at which time Mr Dennison said he wanted to be convinced as to the need for a sales team. The applicant says he indicated that he did not believe that was fair however he agreed to meet Mr Dennison at 5 o'clock. The applicant maintains there was no indication prior to that that any of the sales team would lose their jobs.

The applicant went to lunch with his sales team and then to the meeting at 5pm. He expected the meeting to be between himself, Mr Dennison and Mrs Scully but found that it was a

full blown managers meeting. He felt intimidated that each of the managers had been given a copy of his earlier memorandum. Mr Dennison asked for the applicant's report on why their sales team should be continued. The applicant says he became very agitated and felt that he was being treated unfairly and he said to Mr Dennison that he was not prepared to be judged in front of his peers. He says Mr Dennison indicated that wasn't good enough and asked other members of the management team to express their opinion about how good or bad the sales team was. He says that individual managers gave their opinion and three of them indicated that it was necessary to have a sales team.

The applicant says that Mr Dennison indicated that he wanted to meet with the sales team the next morning and he wanted Mr Byfield to leave so he could speak to the other managers.

The next day, 12 March 1999, the applicant says Mr Dennison entered the sales team's office at 10:20am with Mr Robins. He asked to see the applicant in his office. The applicant says that Mr Dennison with Mr Robins present said; "Based on what has happened in the last 24 hours, the directors have decided to dispense with the sales team". The applicant says he was then handed a letter that stated he was being terminated.

The letter of termination marked exhibit A2 and dated 12 March 1999 indicated: "It is with regret that we hereby inform you that your services as an employee of M.S.A. Security are no longer required, effective immediately". It goes on to say the reasons for termination are—

- (i) General lack of performance, as a whole, of the Sales and Marketing operation;
- (ii) Company growth being as a result of other influences, other than Sales and Marketing division;
- (iii) Continuing conflict between the managing of the operation as whole and the direction provided by Sales and Marketing operation.
- (iv) The need for restructuring of the operation of the company, and
- (v) The general direction that the management of the company wish to pursue in the future."

The applicant says he was also handed a cheque and a termination certificate at that time. He says his termination included payment of accrued annual leave and four weeks in lieu of notice. The applicant says that Mr Dennison then proceeded into the general sales area to announce the termination of all other members of the sales team.

The applicant says his remuneration was approximately \$49,000 per annum plus the use of a fully maintained company vehicle. His salary package was broken up as \$27,000 per annum paid in fortnightly instalments and the remainder paid as allowance via the accounting firm in South Australia. He says he also received the use of a mobile phone. The fortnightly amounts paid were \$824.65 for living allowance and \$1,071.06 for salary. These amounts are referenced in exhibit A6 and at page 27 of the transcript the amounts were confirmed on behalf of the respondent. The applicant says that he also queried his non-payment of long service leave at that meeting of 12 March 1999. The applicant and all members of the sales team were escorted from the building and driven home if they required a lift.

In later correspondence in exhibits A7 and A8 there was discussion about whether the termination was for gross misconduct. This issue relates to the original sales contract, which has a restraint trade clause in it, and the applicant's desire to continue in the industry. I will address this issue further, however it is clear from the evidence and in particular the letter of termination (ie exhibit A2) that the termination was for non-performance of the applicant and the sales team. The suggestion of gross misconduct comes at a later date. The issue of the restraint of trade is not relevant to these proceedings other than to the finding of the dismissal being for non-performance of the applicant.

In cross-examination the applicant said that he was issued with a warning regarding his performance in January 1999 at the meeting with Mr Robins and Mr Dennison.

Evidence was given by Mr Keith Nazareth who was employed by the respondent from December 1996 until 12 March 1999 as a Regional Security Advisor. His duties were new

sales as well as looking after existing clients. His evidence is that he was not exactly clear why he was terminated. His evidence was consistent with the applicant's in terms of what occurred on 12 March 1999 and the concerns regarding the pesticide smell, with the exception that he says he was not asked to put in writing his concerns about the pesticide smell. He says he was aware that the sales team had to justify their continued existence, that there was anger from the sales team in relation to the respondent's response to their concerns about the pesticide smell and that he was aware that the applicant had to report to a meeting at 5pm.

The key point of difference in Mr Nazareth's evidence compared to the applicant's is that he says that Mr Byfield knew that the meeting at 5 o'clock would be in front of Mr Dennison and other managers.

Evidence was also provided by Mr Alan Taylor. Mr Taylor was terminated on 12 March 1999 as part of the sales team and he was subsequently re-employed by the respondent. Mr Taylor indicated that prior to 12 March 1999 he was not told that his job was at risk. As with Mr Nazareth he indicated that complaints regarding the work environment were verbal. He says that his employment on 12 March 1999 was terminated as a result of non-performance of the sales team. He says that Mr Byfield after meeting with Mr Dennison told the sales team that they had to justify why the sales department should continue. Mr Taylor was soon re-employed as the client liaison officer on approach from the respondent. Mr Taylor says that the similarities in his current job compared to his previous sales job are that he still handles complaints and the processes for dealing with telephone enquiries are the same. He says the differences are that he is not employed on a commission basis and that he does not cold canvass for sales.

Mr Taylor says that he believed from what he was told that the submission by Mr Byfield at 5 o'clock on 11 March 1999 was to be made to Mr Dennison. Mr Taylor also concurs with Mr Nazareth in that they were angry about the response to complaints of the odour and had basically said to Mr Byfield that the company could take their job and shove it. Mr Taylor as with Mr Nazareth says that the sales team was given full support by the respondent to do their job.

Mr Dennison gave evidence that he formally acquired the business operations of Bainbridge Pty Ltd and these became operationally effective on 1 January 1997. At the time of concluding the sales agreement between Bainbridge and Olten Pty Ltd he was asked by the then directors if he could take Mr Byfield on board. Mr Byfield at that stage being the general manager of Bainbridge. Following discussions he employed Mr Byfield as General Manager Sales and Marketing for Olten Pty Ltd. He says that part of the process was for the employees to be terminated by Bainbridge Holdings and re-employed by Olten Pty Ltd. His evidence is that towards the start of the financial year 1997-98 Mr Byfield and he commenced talking about establishing sales budgets. In September 1997 his co-director Mrs Scully and he took Mr Byfield to lunch to discuss improving sales performance and sales management. After lunch at the restaurant they put to Mr Byfield that they weren't entirely satisfied with the direction the sales team was going. Following that discussion they employed an additional sales person. In March 1998 they had another luncheon with Mr Byfield, at which stage Mr Dennison says, "... we wanted to gee him up and get him going with the full expectation that if we provided the resources that Tony would provide the drive and the leadership to get the sales that were required". Soon thereafter they appointed an additional sales person. A sales budget was struck in conjunction with the whole of the sales team and was for the financial year 1998-99. Mr Dennison says all the sales team thought the budget was quite fair and reasonable. He says that on 3 or 4 occasions he conducted a counselling session prior to a formal session he had with Mr Byfield in January 1999 at which Mr Robins was present. He says the January 1999 session was the result of a directive he received from the management team because they had expressed concerns that despite everything they had put into place the sales team wasn't performing. Mr Robins was involved towards the end of 1998 as Mr Byfield had been on paternity leave and Mr Robins had become more closely involved with the sales team in his absence. Mr Dennison says that at the January meeting he gave Mr Byfield a final warning. He says, "In effect he was told unequivocally that he would have to

shape up or ship out." He says that he also told Mr Byfield quite clearly that being a shareholder of the company bought him no insurance against being terminated for non-performance. Mr Byfield asked if Mr Dennison was interested in buying his shares and at which point Mr Robins left the meeting. Mr Dennison says that exhibit R1 was a letter confirming Mr Byfield had taken the suggestions on board and was going to knuckle down and get on with the job. The respondent took objection to Mr Byfield raising the complaints of the sales team about the pesticide odour as he says Mr Byfield was aware of actions that the respondent was taking to have the air quality tested. He objected in the sense that he believed the sales people should be out of the office selling rather than complaining about the environment of the office.

Mr Dennison gave substantial evidence in relation to the steps taken by the company to have the maintenance and servicing of the air conditioning checked. He says that in effect Mr Byfield knew through the managers meetings what steps were being taken to overcome the difficulties. The relevance of this was to reiterate that he believed Mr Byfield should have been communicating with the sales team more effectively and that the sales team should have been out on the road selling rather than complaining about the air quality in the office.

A key point of contention between the applicant and the respondent is whether Mr Byfield knew that the 5 o'clock meeting on 11 March 1999 was to include all managers. It is common ground that Mr Byfield was due to give a report. The difference is whether it was to be a managers meeting or he was simply to address Mr Dennison. Mr Dennison says that he did not advise Mr Byfield at the morning meeting that he was due to present to the management team. He says that "... it became evident during the course of the day". Mr Dennison says at the 5 o'clock meeting Mr Byfield was invited to give his presentation. He says Mr Byfield indicated that he did not think that the meeting was going to be with the other managers. Mr Dennison says he asked whether Mr Byfield had a presentation and the applicant responded, "I really haven't got a great deal to say except that every company has a sales team". Mr Dennison says that one or two managers had some words with Mr Byfield as to why a presentation wasn't done and what was he doing or questions of that nature. Mr Dennison says he then indicated to Mr Byfield that he could leave as this was an important matter that he had to discuss with the rest of the management team. Mr Dennison says that Mr Byfield stormed out of the office and slammed the door. Mr Byfield's evidence is that he shut the door firmly as he was not fully aware as to his position vis-à-vis the door.

Mr Dennison says that the agreement at the meeting was that the company over a period of years had consistently supported and expanded the sales team and given them their own resources, ie. everything they could do was done to produce a successful sales team and the figures quite clearly didn't represent that. So the managers decided they didn't need to continue to support a sales team. That there was sufficient ability within the organization to effect any sales and quotes that came in.

Mr Dennison says that MSA prepared overnight and in the morning letters of termination. Mr Dennison says that in the presence of Mr Robins and in Mr Byfield's office he told Mr Byfield that "... because of the overall lack of performance of the sales team and his lack of performance as the General Manager sales team in managing that team that the company had decided to dispense with the sales team." He then handed him a letter which contained his letter of termination and his entitlements.

For all relevant purposes there is common ground as to the events which followed, including Mr Byfield's query regarding a long service leave payment, the termination of the sales team and them being escorted from the premises. It is disputed between the parties as to whether escorting people from the premises was normal practice in the security industry.

Mr Dennison says that in the six months following the termination of the sales team the company made more sales than in the previous 12 months with the sales team. This covers the main evidence with the exception of Mrs Scully which I will come to.

I was impressed by Ms Wegglar, Mr Taylor and Mr Robins in their giving of evidence. They were all prepared both in

evidence-in-chief and cross-examination to respond promptly and plainly to the questions asked, and to explain events to the best of their recollection. Mr Taylor and Mr Robins are currently employed by the respondent. They evinced no bias toward the respondent. Mr Taylor said that he did not have any problems working with Mr Byfield and Mr Robins gave evidence that, in effect, he was friendly with Mr Byfield and had assisted Mr Byfield since he was terminated.

I consider the evidence of Mr Robins concerning the meeting of 15 January 1999, when Mr Byfield was counselled, to be the most credible and probable account of what took place.

I have also no reason to query the evidence of Mr Nazareth, Mr Coughren and Mr Berkhout, except to say that where the evidence of Mr Nazareth differs from that of Mr Taylor I prefer Mr Taylor's evidence as being a more reliable account.

With respect to the main witnesses, namely Mr Byfield, Mr Dennison and Mrs Scully I would have to say I am more circumspect about whether a full and frank account of all matters was provided in each case. Mr Byfield appeared straightforward in evidence and in cross-examination with the exception of some wavering on one issue, ie the question of why his pay arrangements operated as they did (namely whether they were organised for taxation and/or child support purposes). His evidence on whether the sales team provided their complaints about the pesticide smell in writing or verbally to him was contradicted by Mr Nazareth and Mr Taylor. This is not critical. The key point is that he handed to Mrs Scully a document outlining properly their concerns. What is much more significant is whether he expected the 5 o'clock meeting on 11 March 1999 to be with Mr Dennison or to be a meeting of the managers. His evidence is supported by Mr Taylor and Mr Robins.

Whilst I consider that he was somewhat hesitant in cross-examination, he admitted to being counselled on his performance on about 15 January 1999, albeit there is some dispute about the specifics of that counselling. I found Mr Byfield in the main to be a credible witness. In relation to the issue of warnings or counselling as I have said I accept the evidence of Mr Robins, but I also consider the evidence of Mr Byfield more credible than that of Mrs Scully or Mr Dennison.

Mrs Scully's evidence was not in my view particularly credible. Her reference at page 192 of the transcript to her being present at a meeting where Mr Byfield was told that being a shareholder didn't prevent him from being terminated for non-performance is doubtful. I do not place much reliance on her evidence concerning the counselling Mr Byfield was supposed to have received.

Mr Dennison's evidence regarding the managers attendance at the 5 o'clock meeting of 11 March 1999 was contradicted by other witnesses. However, more particularly under cross-examination he was defensive to the point of being evasive at times on the issues to do with performance and the warnings or counselling provided to Mr Byfield.

I turn to the key findings. I am convinced that Mr Byfield was warned on 15 January 2000 at a meeting involving Mr Dennison and Mr Robins. He was told that his performance and that of the sales team was not adequate and would need to improve. I am also convinced that arising from that meeting Mr Byfield knew that his employment was in jeopardy should the performance of the sales team not improve. Mr Byfield stated in his own evidence that at that meeting he was informed by Mr Dennison that, "Just because you own shares in this company doesn't guarantee you a job." Under cross-examination he agreed that he had been issued a warning at that time. It was certainly not a final warning. I do not consider that the others in the sales team, with the exception of Mr Nazareth, had been warned that their jobs were at risk prior to their termination.

I find from the weight of evidence that Mr Byfield would have been aware of the acceptable level of sales performance and that he was given appropriate support from the company with which to achieve these sales figures. The figures themselves are not part of any evidence before the Commission, other than there were agreed figures which Mr Byfield and the sales team, and I should say the management team, knew were required to be met.

I find that Mr Byfield was not given any timeframe by which he was required to achieve an improvement in performance,

ie to meet the sales targets. Mr Byfield's evidence is indirectly supported by Mr Robins' evidence under cross-examination in this regard.

I find that Mr Byfield was surprised and annoyed to find on 11 March 2000, as were the sales team, that he had to justify their continued existence at a meeting later that day. The weight of evidence is clear on this point.

What is more contested is whether Mr Byfield expected to meet at 5p.m. on 11 March 1999 with Mr Dennison or with the other managers present as well. I find that he did not expect to meet with the other managers. Mr Robins said in his evidence, "Tony was stunned as he walked into the room to see everybody sitting there." It is common ground that Mr Byfield did not give a presentation on why the sales team should be retained.

I find that Mr Dennison's sudden demand for Mr Byfield to justify the retention of the sales team was sparked by Mr Byfield handing to Mrs Scully a complaint on behalf of the sales team about the environmental conditions of the office. This is clear from the evidence, what is not is the attitude engendered from that one action of handing in the complaint. I consider that Mrs Scully's evidence provides the best insight into the respondent's attitude at that point. She said in evidence, "... and that was just par with the course of another one of Tony's demands, and, yes, I was put out by it."

It is not necessary to consider the varying accounts of what happened at the 5 o'clock meeting on 11 March 1999 other than to state that Mr Byfield having not made a presentation left the meeting and the other managers decided after discussion not to continue with the sales team. It is common ground that Mr Byfield was advised of this in his office on the morning of 12 March, 1999. Mr Dennison and Mr Robins were present. Mr Byfield was handed his letter of termination and his final payment. The sales team were then dismissed and all were then escorted from the building.

Much ground was covered during the hearing as to whether the termination of Mr Byfield was for non-performance or misconduct or redundancy. I consider that it is very clear from the evidence that Mr Byfield was dismissed for poor performance and I so find. Exhibit A2 is his letter of termination. The letter states a range of reasons, including "general lack of performance, as whole, of the Sales and Marketing operation." Mr Dennison in evidence said that he had told Mr Byfield that his services were being terminated, "... because of the overall lack of performance of the sales team and his lack of performance as the general manager sales team in managing that team." I give no weight to the subsequent correspondence following Mr Byfield's dismissal which suggested that he was dismissed for misconduct. Likewise I do not consider that the termination of the whole sales team and the manner in which it was carried out can be legitimately viewed as an exercise in redundancy. Put simply the respondent formed a view following receipt of a complaint about the office environment that he had probably had enough of the sales team and having received no effective defence of their role from Mr Byfield, then Mr Dennison in conjunction with the other managers decided to terminate their services. This decision was carried out swiftly.

There is one further issue that should be dealt with in the process of the dismissal; namely the suggestion that Mr Byfield had repudiated his employment by not having prepared a presentation as directed by Mr Dennison on why the respondent should retain the sales team. I have no doubt that failure to obey a lawful direction may cause a serious and on occasion fatal strain on the employment relationship. However, it is nonsense to suggest that Mr Byfield repudiated his contract by failing to defend at short notice the jobs of the sales team, after they had lodged a complaint about the pesticide smell, and to do this in front of an audience of managers he wasn't expecting.

It is not for the Commission to take over the role of the employer in the selection and retention of staff, except where such interference is warranted to protect an employee against harsh or unfair treatment (*Ronald David Miles, Norma Shirley Miles and Lee Gavin Miles and Rose and Crown Hiring service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous*, W.A. Branch 65 WAIG 385). There may

be grounds for a dismissal but it is still open for the Commission to examine the severity or otherwise of the step of the dismissal. Put simply was there a fair go all round.

The respondent has said in evidence that Mr Byfield was told on a number of occasions to address his poor performance. He says there were lunches, there were managers meetings, there were other comments. Whilst I am convinced on the weight of the evidence that the performance of the sales team was a real issue, I am also convinced that the only time this was made clear to the applicant in terms that his job might be in jeopardy was at the 15 January 1999 meeting. Other than that the applicant was supported in his endeavours, albeit these endeavours may not have been adequate, to achieve an appropriate level of sales. More importantly there was no timeframe given by which if reasonable levels of sales had not been achieved then more stringent action may have been taken. Instead that judgement came upon the applicant very quickly and in a context which he was rightly aggrieved. The judgement came as if in retaliation at their audacity to complain about the pesticide smell when they should have been out on the road selling. Further the manner of the terminations lacked a sense of dignity for those affected. Much was said in evidence about the common practice in the security industry to escort the dismissed employee from the building. Even if this was so, there was little said in evidence to suggest that those who were dismissed were then a threat to the respondent's business.

For these reasons I consider the applicant was unfairly dismissed. I am confident that the relationship has broken down to a point where it would be impracticable for the Commission to order reinstatement. The attitude of the parties to each other as evidenced at hearing and in correspondence exchanged since the date of dismissal has shown that an effective employment relationship could not be re-established.

I turn to the issue of compensation. The Commission is empowered to award compensation for loss or injury due to the dismissal. Mr Byfield was terminated on 12 March 1999 with immediate effect and was paid one month's salary in lieu of notice. His unchallenged evidence is that he obtained alternative employment on 10 May 1999. He continued in that employment until February 2000 and was paid \$40,000 plus a \$12,000 car allowance. He also earned a sum of \$700 for selling real estate. There appears to have then been a short break in employment; the duration is unknown but I consider that it was more probably at the applicant's instigation. He commenced in another job in early March 2000 on \$45,000 per annum plus vehicle, mobile telephone and travelling allowance. This compares with his earlier remuneration whilst employed by the respondent of approximately \$49,000 per annum plus vehicle and mobile telephone. There is nothing before the Commission as to the value of the vehicle and telephone.

The legislative cap on compensation is six months remuneration. The term remuneration being potentially more than just salary (*see James A Capewell v Cadbury Schweppes Australia Ltd 78 WAIG 299 @ 301*). The actual loss and/or injury must first be determined, as with the assessment of fair compensation (*see Ramsay Bogunovich v Bayside Western Australia Pty Ltd 79 WAIG 8*). The difficulty I have in determining the loss is that while the applicant was not afforded procedural fairness in his dismissal, he was clearly told that his performance was not adequate and to improve. The applicant in his evidence showed little regard for this point. He admits that he was given support to achieve sales; I would suggest that he was given full support. Even though it was he who was responsible for managing sales and even though he took some steps to enthrone the sales team, he did not appear to treat this with appropriate seriousness. The evidence of Mr Robins is interesting here. Mr Robins drove the applicant home after he was dismissed. He says that he mainly blamed Keith Nazareth for things getting to the state in which they did. He blamed others instead of focussing on his role as General Manager of sales. Mr Byfield should have been afforded procedural fairness and should have been given a clear indication of time and consequences for his performance to improve. However, his attitude as evidenced at hearing and the evidence leads me to the conclusion that even if he had been afforded this the result would have been the same. He would otherwise

have been terminated or alternatively made redundant after a period of review and I so find. I consider a reasonable period of review and counselling and for the applicant to remedy the situation would have been three months. I do not consider that the applicant's dismissal after such a period of review would have been unfair in the circumstances of this employment relationship. I so find.

Accordingly, based on this assessment and based on the agreed fortnightly figures of \$824.65 and \$1,071.06 the loss would be a sum of \$12,322.12. The applicant had an obligation to mitigate his loss and he re-established himself in employment on 10 May 2000. He therefore earned nothing for the first eight weeks following dismissal and for the next four weeks he earned \$9,000 per annum less than he had earned with the respondent, ie \$692.31. This figure should be deducted from the loss and gives a sum of \$11,629.81.

Mr Byfield says he felt very embarrassed by his dismissal. However, he gained subsequent employment in the industry and hence his reputation does not appear to be overly damaged, if at all. The manner of his dismissal and the attempts to portray it as misconduct after the event, and to contact other employers in the industry, were clearly harsh. It was a sudden dismissal and removal from the premises, with no regard for his position, except that his dismissal was carried out in his office, in the close vicinity of the sales team, but not in the open office. In view of these circumstances I would award the applicant a sum of \$2,000 for injury.

It was also argued on behalf of the applicant that he had a fixed term contract at the time of the purchase of the business, ie Exhibit A1. This sale contract says under clause 2.1 "Conditions Precedent" that the document is conditional upon, "Byfield entering into a contract with the Purchaser for the provision of services to the business for a period of at least 3 years commencing on the settlement date." There is no evidence of this further contract other than Mr Byfield was employed by the respondent post sale. It also stipulates at clause 34.4 "Restraint of Trade" that, "This clause will not apply if Byfield's services are terminated within 3 years from the settlement date other than for reasons of gross misconduct." These sales provisions envisage binding Mr Byfield to the respondent initially and protect Mr Byfield's ability to conduct business in the security industry should his employment be terminated. The provisions do not amount to a fixed term employment contract.

In accordance with equity, good conscience and the substantial merits of the case I consider an appropriate and fair award of compensation to be the sum of \$13,629.81 and I so order.

Appearances: Ms A Crichton-Browne of counsel on behalf of the applicant

Mr D Clarke agent for the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Anthony James Byfield
and

Oltén Pty Ltd t/a MSA Security.

No. 453 of 2000.

COMMISSIONER S WOOD.

10 July 2000.

Order.

HAVING heard Ms A Crichton-Browne of counsel on behalf of the applicant and Mr D Clarke as agent for the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

- (1) DECLARES that the above named Anthony James Byfield was harshly, oppressively or unfairly dismissed by the above named respondent on the 12th day of March 1999; and

- (2) ORDERS that the said respondent do hereby pay within seven days of the date of this order, as and by way of compensation, the amount of \$13,629.81 to the said applicant, Anthony James Byfield.

[L.S.] (Sgd.) S. WOOD,
Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Anthony James Byfield

and

Oltén Pty Ltd t/a MSA Security.

No. 453 of 1999.

COMMISSIONER S WOOD.

12 July 2000.

Correcting Order.

WHEREAS on the 10th day of July 2000 an order in this matter was deposited in the office of the Registrar; and

WHEREAS the application number has been cited incorrectly as "No. 453 of 2000";

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

THAT the application number be correctly cited as "No. 453 of 1999"

[L.S.] (Sgd.) S. WOOD,
Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Melvyn George King

and

Ludowici Mineral Processing Equipment Pty Ltd.

No. 1757 of 1999.

COMMISSIONER A.R. BEECH.

26 June 2000.

Reasons for Decision.

Mr King was employed as the State Manager of the respondent's WA sales office. The respondent is a mining equipment supplier. He was employed between August 1995 to November 1999, although part of this time was with a company known as Malco that was subsequently taken over by the respondent. He believes his dismissal by reason of redundancy was unfair because he was replaced the very next day by a new State Manager. Indeed, his evidence is that he would have regretfully accepted the fact of his redundancy if another person had not been employed the next day and basically given his position. He does not believe redundancy is the true reason for his dismissal.

The Notice of Answer and Counter Proposal cites four reasons why the respondent made Mr King redundant. Those reasons are—

1. A current decline in the Australian resources sector;
2. A significant slump in the overall performance of the company;
3. A decision by the company to redefine its scope and range of core business activity; and
4. The imminent closure of one of the company's two Perth factories.

Mr King's agent questioned him in these proceedings about the first three of these four points. Mr King's evidence is that

he acknowledges the company Australia wide was incurring losses in some States, however, WA was performing adequately. Indeed, the evidence of Mr King is that in WA there was practically no effect of any decline in the resources sector and the respondent was as active as ever it was. Mr King stated that if there was any significant slump in WA, it was only so far as manufacturing was concerned in approximately June 1999.

The evidence from the respondent's witnesses is that the decision was taken Australia-wide to redefine the scope and range of its core business activities. The respondent believed there had been a downturn in the market, particularly in the manufacturing area. It therefore decided to reduce the range of products that it supplied and looked at making particular employees responsible for particular products. For example, the company would no longer be involved with crushers, tenders to do with the supply of screens would be handled from New South Wales and reclaimers would be handled from Adelaide.

The respondent viewed Mr King's employment as being primarily the national sales manager for crushers, and also with responsibility for screens and feeders. He had minimal involvement with other products. Although in his position of State Manager he was responsible for a number of other products, his responsibility was in more of an overseeing role rather than as a person directly responsible for them. For that reason, to the extent that Mr King's position as State Manager incorporated direct responsibility for crushers and screens, that position would have to be changed. It decided that Mr King would therefore become redundant.

The evidence of the respondent's need to change its core business activities is compelling and not really challenged by Mr King. He acknowledges that some changes had already occurred which had affected the respondent's operations at Adelaide. Mr King's real challenge is the reason why he had to be dismissed.

I find on the evidence that Mr King acknowledges that 20—30% of his work was to do with the sale of crushers. Yet only one crusher had been sold in the 15 months prior to him being made redundant. Further, on the evidence before the Commission from Mr Ricketts, the National Sales Manager who is based in Queensland, the crusher was sold at a loss for the respondent. Furthermore, the majority of Mr King's time was spent in relation to screens and feeders. Therefore, the respondent's decision to no longer be involved in the sale of crushers, and the re-location to Sydney and Adelaide of the documentation and quotation for sales of screens, did significantly reduce the scope of Mr King's work. In this regard, I note that Mr King's previous employment with Malco Engineering was as National Sales Manager—Crushers. He held that title as well even when he became the WA State Manager for the respondent. I therefore accept the respondent's evidence that a significant proportion of Mr King's time was spent in the areas that were to be either discontinued or re-located by the respondent.

Furthermore, as to the fourth point raised by the respondent in its Notice of Answer and Counter Proposal the evidence is not challenged that the respondent had two factories in WA and at the time it made this decision, and made Mr King redundant, one of the two factories was closed and its staff re-located to the remaining factory. Furthermore, Mr King was one of two employees made redundant in WA, and one of 14 employees in total made redundant throughout Australia at this time. I therefore conclude that the redundancy was indeed genuine.

The issue which remains then is if his position as National Sales Manager—Crushers and State Manager for WA was to be made redundant, and in its place a new position, or re-defined position, of Sales Manager—WA, was to be created, whether that position ought to have been offered to Mr King.

The new position of Sales Manager—WA was in fact given to a person employed specifically for the position, Mr Hammacott. The respondent's evidence is that it believed that Mr Hammacott had a greater expertise regarding the selection of equipment from a technical point of view. It was believed by the respondent that Mr Hammacott would be of greater value to the respondent in the newly created position of Sales Manager—WA than would Mr King. Mr King was seen as

being too rigid about the sales of screens and crushers and not flexible enough to deal with the sale of the whole range of products sold or manufactured by the respondent. He did not fit into the range of consumables offered by the respondent whereas Mr Hammacott came from that background.

Mr King disputes the respondent's belief. However, it cannot be said that the evidence shows that Mr King has proven on the balance of probabilities that his belief is correct. Although his evidence is that he ran the Maddington factory and looked after the sales force, he acknowledges that the majority of his time involved the sale of crushers, and of screens and feeders. The respondent has decided that it will no longer sell crushers and the responsibility for screens was re-located to NSW and Adelaide. This evidence can only lead to a conclusion that the majority of the time Mr King spent would be significantly reduced by the respondent's decision. That evidence supports the conclusion that the positions of National Sales Manager—Crushers and WA State Manager were made redundant.

Further, although Mr King states that Mr Hammacott is performing "basically what I used to do", the evidence does not actually show that Mr King is correct. Mr Hammacott was not cross-examined on the full range of his duties. Without that evidence, the Commission is not able to compare the day-to-day duties and responsibilities of Mr King and Mr Hammacott. Mr King bears the onus on this point and the absence of that evidence means that he has not discharged that onus. Indeed, the evidence of Mr Hammacott is that a Mr McKerr has been appointed as a Product Manager for vibrating screens. This is a difference from Mr King's period of employment and shows the newly created position of Sales Manager does not have the direct responsibility for the sales of screens which Mr King previously had. Only part of Mr King's duties was to promote all the respondent's products. Therefore, on balance, Mr King has not shown that Mr Hammacott does basically what he used to do.

Although Mr Prendergast, who had been employed during both Mr King's and Mr Hammacott's employment, was called to give evidence, Mr Crossley did not ask him to compare the work of Mr King to the work of Mr Hammacott. Rather, he asked Mr Prendergast, essentially, whether Mr Prendergast performed the same duties for Mr Hammacott as he had performed for Mr King. That is quite a different issue. With respect to Mr Prendergast's evidence, it was really not relevant.

For all of the above, it has not been established that Mr Hammacott does "basically the same job" as Mr King had done. Therefore Mr King was made redundant and I find that the reason for his dismissal, that is, redundancy, is valid.

Nevertheless, the respondent had obligations towards Mr King once it had decided to make his position redundant. In particular, it was an implied term in his contract of employment that as soon as the respondent made the decision to make Mr King redundant, it would inform him and then hold discussions with him regarding the likely effects of the redundancy upon him and any measures that might be taken by him or the respondent to avoid redundancy or to minimise its effect. This term is implied by ss. 5 and 41 of the *Minimum Conditions of Employment Act 1993* (WA). Those discussions were not held. Mr King's redundancy happened in the following manner. Mr Ricketts flew over from the Eastern States without prior notification to Mr King. Mr Ricketts' attendance at the premises was carefully timed to coincide with the announcements of the redundancies in the various operations of the respondent throughout the rest of the country. Mr King was simply taken to one side informed he had been made redundant, was thanked for his help and asked to return immediately his motor vehicle keys, company credit cards, and company accounts and receipts. His dismissal took about one minute. He was allowed to clear his desk and was then accompanied from the premises by Mr Ricketts. The respondent had offered to supply and pay for a taxi to take Mr King home. He chose, however, to ask a friend to collect him and he and Mr Ricketts waited outside the factory gate for the friend to arrive.

The conclusive point to be made is that Mr Ricketts did not even follow the respondent's own procedure when he dismissed Mr King (exhibit C). That procedure clearly shows that there should have been comments by Mr Ricketts to Mr King which

covered the respondent's management holding back from making staff cuts for as long as it could, explanation of the poor financial performance of the respondent meaning that changes could no longer be delayed, the fact of a reduction of staffing levels in all locations except Mackay where the respondent has only two employees. Not only was this procedure itself not followed, the respondent even failed to pay Mr King the five weeks' pay in lieu of notice prescribed as his minimum entitlement under s. 170CM of the *Workplace Relations Act 1996*. Mr King was given only payment in lieu of four weeks' notice. Thus, the payment made in lieu of notice was inadequate for its purpose.

Those facts, together with the lack of any explanation to him of the respondent's decision to create the new position of Sales Manager and that he was not given the opportunity to put forward reasons why he ought be considered for that position, can lead only to the conclusion that the respondent's right to dismiss Mr King was exercised so harshly towards him as to amount to an abuse of that right. The fact that he was not told that Mr Hammacott had already been employed and would be starting the next day, and that from the respondent's point of view his duties would be significantly different from those of Mr King meant that it was inevitable that when Mr King found that Mr Hammacott had "replaced him", including having been given the very same motor vehicle and mobile telephone which Mr King had been using, Mr King's application to this Commission claiming unfair dismissal was assured. The redundancy of Mr King was ineptly handled. The Commission quite understands that from his point of view, he was made redundant without explanation or adequate explanation and his position filled the next day with the new incumbent being given his motor vehicle and his mobile telephone. It is difficult to envisage a greater perception of unfairness, a perception that could have been significantly reduced if not entirely removed by a more explanatory approach by the respondent to Mr King. Mr King's dismissal was therefore unfair by reason of the manner it was carried out.

Mr King also challenges the adequacy of the redundancy payment of approximately three weeks' wages given to him. Mr King's pay advice slip shows his "severance pay" as "114 units" and this was referred to by the parties as three weeks' wages. Mr King's agent refers to the decision of the Full Bench of this Commission in *Rogers v Leighton Contractors* (1999) 79 WAIG 3551 (referred to subsequently in these Reasons as *Rogers*) to argue that an adequate redundancy payment should be two weeks' wages per year of service. However, it is important to note that *Rogers* of itself does not set a standard scale of minimum redundancy payments to be paid to employees made redundant. *Rogers* was an appeal against a decision of the Commission which considered whether Mr Rogers' dismissal was unfair by reason of the adequacy of the redundancy payment made to him. He had been employed for over 10 years as plant foreman within the plant and machinery supply area of Leighton's Welshpool operation in this State. Its plant and machinery was used in mining contracting and civil engineering. He was made redundant in 1998 aged 55 years. His salary was \$62,000 per annum. He was paid his entitlements together with an amount which his "Termination Payment Details" referred to as "Ten weeks' pay in lieu of notice", but which was more properly to be seen as four weeks' pay in lieu of notice in accordance with his contract of employment and six weeks' redundancy pay. It was held that the package paid to Mr Rogers of 10 weeks' payment on redundancy, including as it did a necessary period of five weeks' salary to validly terminate the contract of employment, could hardly be described as adequate for an employee of 10 years' service who is aged 55 years and was in a supervisory position.

While *Rogers* does not set a standard scale of minimum redundancy payments to be paid to employees made redundant it recognises decisions across Australia that the dismissal of an employee for redundancy without the payment of a redundancy payment sufficient to compensate the employee for such matters as the employee's age, length of service, seniority, period of notice, availability of alternate employment, benefits foregone and the reason for the retrenchment, may, depending on the circumstances, be harsh upon the employee (*Rogers* adopts the decisions in *Wynn's Wine Growers* op. cit;

Leddicoat v Schiavello Commercial Interiors, Industrial Relations Court of Australia, Von Doussa J, No SI 1153 of 1995, 18/10/95; *Westen v Union des Assurances de Paris*, Industrial Relations Court of Australia, Madgwick J, 419/96, 28/8/96; *Fryar v System Services* (1996) 137 ALR 321 at 331 – the subsequent appeal against this decision was upheld but only on jurisdictional grounds: 5/9/96, unreported).

Given Mr King's positions of National Sales Manager—Crushers and WA State Manager were senior positions in that he ran the respondent's Maddington factory and his commensurate salary level of \$78,600 p.a. I have little doubt that the payment to him of effectively three weeks' wages after four years' service was inadequate to compensate him for such matters as the employee's age, length of service, seniority, period of notice, availability of alternate employment, benefits foregone and the reason for the retrenchment. I unhesitatingly reject the submission of the respondent that Mr King's service should be only his period of employment with the respondent as distinct from Malco. The evidence that Mr King's service with the respondent was held by it to be continuous is not challenged. Indeed, it is expressly conceded in the respondent's letter of reference (exhibit 4) and its separation certificate (exhibit 5).

I therefore also find that Mr King's dismissal was unfair to him by reason of the inadequacy of the redundancy payment paid to him.

It is common ground that reinstatement in the circumstances is impracticable. The Commission turns to the issue of compensation. Compensation for the unfairness of Mr King's dismissal will fall into two parts. Mr King's loss in being made redundant with an inadequate redundancy payment is the loss of what is a fair redundancy pay in his circumstances (*Rogers v Leighton Contractors*, op. cit.). That redundancy pay, for the reasons given above, should have been two weeks' pay for each year of service. Mr King should therefore have received eight weeks' redundancy pay and not three weeks' redundancy pay. Accordingly, Mr King will be paid a further five weeks' pay by way of a redundancy payment.

Mr King's further loss arises from the unfairness of the manner of the dismissal, which in the circumstances of this case where a reasonable explanation of Mr Hammacott's imminent arrival may well, on Mr King's own evidence, have meant that he would not have seen his dismissal as unfair, is a most important factor. The Commission orders that Mr King be paid a further \$2,000.00 for the loss to him arising from the lack of discussion required and the lack of opportunity to put forward reasons why he ought to have been considered for the new position. The matter is determined accordingly and a Minute of Proposed Order now issues.

Appearances: Mr T.C. Crossley on behalf of the applicant.

Mrs T.G. Spence (of counsel) on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Melvyn George King
and

Ludowici Mineral Processing Equipment Pty Ltd.

No. 1757 of 1999.

27 June 2000.

Order.

HAVING HEARD Mr T. Crossley on behalf of the applicant and Mrs T.G. Spence (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

(A) DECLARES—

1. THAT the dismissal of Melvyn George King by the Ludowici Mineral Processing Equipment Pty Ltd was unfair.
2. THAT re-instatement is impracticable.

(B) ORDERS THAT Ludowici Mineral Processing Equipment Pty Ltd forthwith pay Melvyn George King—

1. the sum equivalent to 5 weeks' wages by way of redundancy pay; and
2. the sum of \$2,000 as compensation for the manner of his dismissal.

(Sgd.) A. R. BEECH,

Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gregory Edward Mackintosh

and

Ian Sinclair and Julie Wharmby both of Crystal Waters.

No. 1511 of 1999.

COMMISSIONER P E SCOTT.

19 June 2000.

Reasons for Decision.

Extempore

THE COMMISSIONER: This is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979. The Act provides that an industrial matter may be referred to the Commission in the case of a claim by an employee, as in this case, that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of service. The issues before the Commission are the Applicant's contractual entitlements, what was established for the purposes of his contract of employment and whether he has been allowed those benefits by his employer.

The claims that he has made are—

1. that during the interviews for the position he indicated that he would accept an amount of \$30,000 per annum which equates to \$600 per week but that, for the purposes of a 3 month probationary period, he would accept \$500 per week. The Applicant was paid \$500 per week throughout his employment;
2. payment for Friday, 17 September 1999 which was a day on which the Applicant says that he was sick and is therefore entitled to be paid sick leave;
3. for one week's pay in lieu of notice. This arises because the Applicant says that he gave 2 week's notice but that it was mutually agreed that he would leave work immediately. The Respondent says that the termination was a dismissal and one week's pay in lieu of notice was paid;
4. consequential upon a finding that the Applicant is entitled to a further week's pay in lieu of notice he claims that he is entitled to an additional annual leave accrual of 3.08 hours; and
5. payment of a telephone account of approximately \$90.

The Respondent operates a business which appears to include the supply and/or installation of reticulation. The Applicant was engaged as a Design/Sales person. The terms under which the employment operated other than in respect of pay are those set out in Exhibit 1 which was provided to the Applicant during interview.

The Applicant says that during the formation of his contract of employment at the time of interview he was asked what he expected to be paid to which he responded \$30,000 per annum or \$600 per week. However, Mr Sinclair does not disagree that this question was asked and answered. The Applicant says that he was offered \$500 per week on the basis that this would be increased to \$600 per week after successful completion of probation. The Respondents' witnesses say that the offer of employment was made to the Applicant on the basis that there

was a job at \$500 per week and, subject to satisfactory completion of a 3 month probationary period, there would be permanency. They say there was no mention of \$600 per week or any other amount applying on completion of probation.

The Applicant says that on satisfactory completion of the probationary period he raised the issue of what he describes as his contractual benefit with Ms Wharmby on a number of occasions. She agrees that he raised this matter with her at least twice although she does not agree that it was a contractual entitlement previously agreed that was raised with her. In one brief conversation, the Applicant indicated to her that he was seeking a pay rise and when asked of how much, he told her \$100. There was no discussion about the basis of this amount. Ms Wharmby did not give him any response other than that she would have to discuss the matter with Mr Sinclair. Mr Sinclair says that Ms Wharmby raised the issue of the pay rise of \$100 for the Applicant with him about 6 months or so after commencement. He says that the Applicant had also mentioned a pay rise to him but denies that an amount was raised.

The Applicant and Mr Sinclair both agree that there was a discussion between them while they were travelling to a job. The Applicant says that Mr Sinclair acknowledged that there was a contractual obligation to provide the \$100 per week pay rise but that Mr Sinclair said that as it was the low season for the business it would have to wait. Mr Sinclair denies that he acknowledged any contractual obligation but acknowledges that the matter would be looked at at a later point.

The termination of employment came about following the Applicant's absence from work on Friday, 17 September 1999. It is agreed between the parties that the Applicant did not contact the Respondents to advise that he would be absent on that day, he made no contact with them at all. The Respondents attempted to contact him on a number of occasions without success although it appears from Mr Sinclair's evidence that some tentative telephone contact was made with him. In any event, the Applicant had not provided the Respondents with details of his change of address. The Applicant agrees that he provided no evidence of sickness to the Respondents in the form of a medical certificate or any other evidence.

The Respondents say that that weekend, in light of the circumstances surrounding the Applicant's absence and other matters, they decided to terminate the Applicant's employment on the Monday. The Applicant also says that over the weekend he considered his future and having considered a business opportunity, decided to resign on the Monday. The Applicant attended for work on the Monday morning and either handed a letter of resignation to Mr Sinclair or placed the letter on the desk. The letter was in a sealed envelope and the envelope was not opened in the Applicant's presence. The Applicant advised Mr Sinclair of his intention to resign and Mr Sinclair appears to have advised him that his employment was terminated and he was to leave forthwith. The Applicant's immediate departure was mutually agreed and arrangements for clearing his desk and being transported elsewhere were made.

In a claim such as this the onus is on the Applicant to prove his case. I have observed the witnesses as they gave their evidence. There is conflict in that evidence and it is necessary for the Commission to determine how to select the evidence to be preferred. Having observed the witnesses as they gave their evidence and having considered the evidence that they have given I prefer the evidence given by Mr Sinclair and Ms Wharmby. It appears that in both the issue of wages and resignation that the Applicant has taken the view that what he wanted and what he stated constituted an agreement and was accepted by the Respondent.

I find that although the Applicant may have said during the first interview, in response to a question about what he expected to receive, that he wanted \$600 per week, this was never agreed. The offer which was made to him in the second interview, and the basis upon which he commenced employment, was that he would be paid \$500 per week and on satisfactory completion of a 3 month probationary period he would be made permanent. I am satisfied from the evidence of Mr Sinclair that there was no discussion as to any pay rise which would follow on from satisfactory completion of the probationary period. There was no contract for an increase to

\$600 per week although that might have been what the Applicant wanted.

As to the question of the way in which the Applicant's employment terminated, and whether it was as a result of his resignation, I note that on arrival at work on the Monday morning, the Applicant handed over, either into Mr Sinclair's hand, or by placing on the desk in front of him, a sealed envelope which contained a letter of resignation, giving his employers two week's notice. Mr Sinclair and Ms Wharmby had already decided over the weekend to dismiss the Applicant. On presenting the sealed envelope, the Applicant advised Mr Sinclair that he was resigning. There was no indication that he told Mr Sinclair of the notice period of two weeks he proposed giving. Mr Sinclair told the Applicant that he was to be dismissed. The two agreed that the Applicant should leave immediately. There was no indication that the two week's notice proposed by the Applicant were to apply. The Respondent paid the Applicant one week's pay in lieu of notice.

There are occasions on which an employee gives notice, and during the course of the notice period, the employer brings the employment to an end. In such cases the employer is required to provide reasonable notice and is not required to await the expiration of a period of notice beyond what is reasonable to apply. To take an extreme example, if an employee gives six month's notice, yet reasonable notice in that case is one month, the employer is not required to allow the employee to remain for six months or payout six months pay in lieu of notice if the employer has good reason to terminate the employment before the notice period has expired.

In the present case, the employer was not prevented from terminating the employment prior to the expiration of the two week's notice contained in the letter which was in the unopened envelope. The Applicant resigned, but it was the dismissal which brought about the termination. There was no discussion between the parties about the notice period, rather they agreed that the Applicant would leave immediately. The Respondent later paid one week's pay in lieu of notice. The question is what amount of notice the Respondent was required to pay the Applicant.

An employer has an obligation to provide reasonable notice or pay in lieu of notice. (*Tarozzi v WA Italian Club FB (1997) 77 WAIG 2499*). The amount of notice, which would constitute reasonable notice, requires consideration of the circumstances of the employment; the length of employment, the level of the employee's position and the various other criteria. Given the Applicant's level of employment and his length of employment and other matters, I am satisfied that reasonable notice would be a period of 1 week. Accordingly, I find that no additional notice is due to the Applicant. No consequential entitlement arises for annual leave accrued in any second week of notice.

As to the claim for payment for Friday 17 September 1999, as I raised with the Respondent it would appear that any entitlement to sick leave arises from sections 19 and 22 of the Minimum Conditions of Employment Act. I note that the Commission does not have jurisdiction to enforce entitlements arising from the Minimum Conditions of Employment Act. The Industrial Relations Act 1979 provides, in section 83, that enforcement of awards and orders of the Commission is within the purview of the Industrial Magistrate's Court. I note too that section 7 of the Minimum Conditions of Employment Act provides for enforcement of the minimum conditions of employment where the condition is implied in a contract of employment, which would appear to be the case here, under section 83 of the Industrial Relations Act 1979. Accordingly, the Industrial Magistrate's Court would be the appropriate jurisdiction for enforcement of the sick leave entitlement.

Although it would appear that there is no jurisdiction in the Commission to deal with this matter, I note that section 22 of the Minimum Conditions of Employment Act provides that—

"An employee who claims an entitlement to paid leave under section 19(1) is to provide the employer with evidence that would satisfy a reasonable person of the entitlement".

In the circumstances of the Applicant's failure to attend for work, failure to notify of his inability to attend, his being uncontactable all day and his failure to provide evidence which might be reasonably acceptable that he was ill for the day, he

would not be able to demonstrate any entitlement to payment for that day.

As to the matter of the telephone account, this was not made available to the Respondent until today and the Respondent has undertaken to pay for business calls which the Applicant is to identify on his telephone account for the period of employment. Accordingly there is no need for the Commission to deal with that matter.

In all of these circumstances I find that there is no contractual benefit owed to the Applicant by the Respondent and the application is to be dismissed.

APPEARANCES: The Applicant appeared on his own behalf

Mr A R Rorrison on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gregory Edward Mackintosh

and

Ian Sinclair and Julie Wharmby both of Crystal Waters.

No. 1511 of 1999.

COMMISSIONER P E SCOTT.

19 June 2000.

Order.

HAVING heard the Applicant on his own behalf and Mr A R Rorrison on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this matter be, and is hereby dismissed.

(Sgd.) P. E. SCOTT,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Richard Malcolm

and

Mobil Exploration and Producing Australia Pty Ltd.

No.644 of 1999.

COMMISSIONER J F GREGOR.

28 June 2000.

Reasons for Decision.

THE COMMISSIONER: On 28 May 1999, Richard Malcolm (the applicant), applied to the Commission for orders pursuant to Section 29 of the *Industrial Relations Act 1979* (the Act), on the grounds that he had been unfairly dismissed from employment with Mobil Exploration & Producing Australia Pty Ltd (MEPA) and denied payment of contractual benefits which he says arise from the cessation of his employment on or about the 9th April 1999.

The allegation that there has been an unfair dismissal is based on the contention that MEPA unilaterally altered the contract of employment of the applicant. In that process he was subject to undue pressure and duress in arriving at a decision to accept a position at reduced status. He was not given sufficient information to allow him to make an informed career choice, as a result of which he was denied access to a redundancy package and was downgraded in status. This amounts

to unconscionable conduct by MEPA and means the applicant was constructively dismissed through use by MEPA of an unfair procedure which makes the termination harsh and oppressive and unfair.

The applicant is 47 years of age; he holds a Bachelor of Science degree, majoring in Geology, and a Diploma in Education. He started his career as a teacher, spent some time working in the mining industry, and in 1990 joined Woodside Offshore Petroleum where he worked for seven years as a petroleum geologist. In 1987 he was a senior petroleum geologist with Ampolex, working in Western Australia but based in Perth. He continued in that role until 1992 when he became exploration manager for Western Australia with responsibility for several exploration bases on the North West Shelf and the West Coast. These responsibilities extended in 1994 to Northern and Eastern Australia and then changed so that the applicant was team leader for Northern and Eastern Australia until early in 1996 when a reorganisation of Ampolex returned him to Perth. It was around this time that MEPA took over the operations of Ampolex; the applicant not only was Team Leader for Northern and Eastern Australia, he was assigned to oversee work in Papua New Guinea. He managed a team which consisted of a petroleum engineer, several geologists, geophysicists, draftsmen, accountants and technical assistants, all reporting to him.

When MEPA took over Ampolex its own system of salary grades was introduced. The applicant occupied a senior role at Grade 20. This defined a senior management position with substantial salary benefits and stock options, in addition to bonuses. By reference to documents in Exhibit D.I., the applicant traced the history of his employment contract at Ampolex. The Commission was also introduced to the performance review process used by MEPA. (Exhibit D.I.) The applicant described his perceptions of the performance assessments 'highly effective' and 'fully productive', this because of later events that resulted in him being what he considered to be, downgraded.

The applicant gave evidence about events in late 1998 and early 1999 relating to a restructure in MEPA. The staff were informed that as a result of the oil price decline there was going to be a significant retrenchment; in particular the applicant's work area was to be subject to budget and funding cuts. This meant there would be significant change in how the assets within his area of responsibility would be managed. There would be a drawing back from exploration activities and funding of exploration programs. The applicant contended that employees, including him, were concerned about their future from the period from December 1998 through to January 1999, but he felt that his chances of surviving were reasonably good. He thought he would not be retrenched. However, speculation grew, those concerns returned, and he believed that by early January he may well be retrenched. This caused him to become active and he made contact with a resource industry recruitment agency to find out if there were any positions vacant. He became a client of the agency some time in February.

On or about 3 February 1999, the applicant had a meeting with Mr KJ Fitzpatrick, Country Migration Team member at MEPA, who told him there would be a position for him in MEPA at senior position. He was quite relieved. He did not assume he would be in the same position that he held before, but he did not understand that he was to be demoted. At the time he told Mr Fitzpatrick that he had put his name forward as an exploration manager in another company. On 8 February he was offered a position in MEPA but at a lower salary grade Level 19. Because this was a lower grade than his existing position, he understood he would have an option to take a retrenchment package. The evidence of the applicant is that Mr Fitzpatrick indicated to him that even though he had been re-classified Level 19, the new role would be basically the same although he would not be team leader. There would not be a drop in salary. Nevertheless the applicant was disappointed because he thought that such a demotion amounted to a black mark against his name.

On 10 December 1999 the applicant had an interview with a company known as OMV. He met with the Managing Director Dr Zimmer who explained to him the detail of a position. The applicant said at the time he was analysing what these events meant to him. He had further discussion with Mr Fitzpatrick but there were unanswered questions. On Friday

12 February 1999, Mr Fitzpatrick told the applicant that he needed responses from him because MEPA needed to close out its retrenchment system arrangements. The applicant's failure to respond was holding up the process because depending on his answer, there was a cascade effect through the organization. He was told that he should give his response by the close of business on Friday or Saturday morning at the latest. That was not enough time for the applicant so a few hours later before the close of business, he told Mr Fitzpatrick that he would take the MEPA position. He contended in his evidence that his decision was under made duress, it was not a levelheaded decision; he described it as a knee-jerk decision because he felt pressured. When he spoke to Mr Fitzpatrick over the weekend he was asked whether wanted to change his mind. He said he did not; he had just needed more time to consider his options. On 15 February 1999 the applicant travelled to Cairns on MEPA business. There were meetings in Cairns all that week. Prior to leaving he signed an acknowledgement of acceptance. Nevertheless, he still felt he needed more time to consider the position.

The applicant was in Cairns until Friday 19 February. Before he returned he rang his recruiting agent and told him that he would again like to put his name forward for the OMV position from which he had withdrawn when he had decided to accept the MEPA position on the preceding Friday. Mr Andrew Charles the agent arranged a meeting on the Saturday morning after the applicant returned, at which time he had a second interview. On Monday 22nd February when applicant approached Mr Haworth, then Chairman and Managing Director of MEPA, and told them that he had now had sufficient time to consider his position: he did not see a future at MEPA. He had informed Mr Haworth that his heart was not in the role anymore and asked to be considered for a retrenchment package. Mr Haworth promised to respond later in the day, which he did, rejecting the applicant's request.

The applicant had a second interview on with OMV and an offer of employment was made to him on 3 March 1999. Between 3 and 12 March, he says there were many discussions with MEPA, about which I will comment later, and another offer was provided by OMV on 12 March in writing, which he accepted. On 12 March 1999 the applicant resigned from MEPA. The letter of termination held to be indicative of the applicant's state of mind at the time and is included as follows.

Re: Termination of Employment

As a consequence of the MEPA reorganisation that will result in a reduction in my responsibilities, diminished prospects for future advancement and reduced salary grade, I have decided to leave MEPA.

Unfortunately, the four days provided to me to accept the position of PNG JV Representative was insufficient for me to fully address and consider all the implications for my future, and as a result, my decision was premature. I believe I indicated this to you at the moment of signing my acceptance on 15 February when I stated that I needed more time, but I appreciated the timetable had been set and I had no option to defer my decision.

I now deeply regret accepting the position from both MEPA's and my perspective. For this I apologize. I indicated as much to you and Mr Dan Haworth just seven days later on my return from JV meetings in Cairns, as I wanted you both to be fully informed of my position and to allow you to prepare for my departure in the near term. I understand that as a consequence of accepting the position you offered, I have regrettably forfeited the redundancy package based on 11.5 years of service, that would otherwise have been provided to me.

I therefore now formally give notice of my termination of employment effective 10 May 1999.

I wish to emphasize that the full implications of the new position on my career had not been fully appreciated by the time of acceptance and that once I had time to consider all aspects of the new role, I made my position clear to you. I would not be considering leaving MEPA had the position offered to me been challenging and as rewarding as the role I currently enjoy.

In view of the above circumstances, I request your approval of the following proposals—

- (1) *Consideration be given to providing leave (long service) from Monday 12 April to Monday 10 May inclusive (21 days). This would allow me to assist in facilitating a smooth transition over the next four weeks (to 9 April 1999) prior to taking leave (I propose my last day in the office to be Friday 9 April 1999). It would also allow me to qualify for Ampolex options maturing on 10 May 1999.*
- (2) *Consideration be given to making application to the Board Compensation Committee on my behalf to waive the three-year service requirement for maturing of options provided to me under the Mobil Incentive Compensation Plan.*
- (3) *Consideration be given to waiving the superannuation three-year vesting period for transfer from my Ampolex benefit to the Mobil standard benefit of the MEPA Superannuation Plan.*

I trust that my contribution to MEPA through the management of the PNG assets has added value to the affiliate and that a replacement for me in the new role will not present a difficulty.

I wish to thank you for your support over the past three years and wish you and MEPA every success with the new company structure and the forthcoming Exxon-Mobil merger.

(Exhibit L2)

On 3 March the applicant was told by Mr Fitzpatrick's office and told that his grading had been changing from 'highly effective' to 'fully productive'. This he regarded as a downgrading. It was explained to him that there were too many people rated at the high end of the performance scale and MEPA wanted to normalise the curve. This meant after he reviewed the applicant's grade that Mr Haworth decided that the applicant was not performing at Level 20. The applicant said he was humiliated by this. He indicated then that he was leaving MEPA, but importantly for these Reasons for Decision he said in evidence that if he had that information when he had made the decision to stay, then that decision would have been very easy. According to his evidence he had no real option but to leave. The applicant contends that if he had known about the downgrading he would have been able to discuss it with his wife and would have looked at other options.

The applicant gave evidence that the new position with OMV was at a higher level of remuneration than with the respondent. He also gave evidence about how executive salaries are assessed in MEPA. This information was given in closed hearing and will not be summarised here.

The applicant opted not to call his recruitment agent Andrew Childs, who had been summoned. The applicant was subject to a long cross-examination by Mr Lucev, of counsel, who appeared on behalf of the respondent. There is no need to summarize that cross-examination for the purposes of these Reasons.

The applicant says what happened to him amounted to a constructive dismissal by way of demotion. The conduct of MEPA caused his employment to come to an end, because he was forced to choose between termination by redundancy or demotion. If that had not happened there would have been no termination. He did not freely accept the demotion, nor was he given adequate time or information to properly consider it. At all times he made it clear to MEPA that he needed extra time, that he was struggling with the decision and that he was unhappy with the demotion. But MEPA labelled his concern as 'holding up the entire restructuring process'. In effect, the applicant says he was asked to accept a pig in a poke. He was not provided with a written job profile. MEPA must have known that he was sensitive about the issue of his salary grade, and having a job profile would have helped him properly assess the effect. His position in the redundancy process was unique; all other employees were either offered a position on the same grade or given a redundancy. He was not. His seniority and long service reinforce the contention of harshness, oppression and unfairness. MEPA could have given him more time; they set the timetable and could have adjusted it to allow him to consider his situation. The evidence of the Human Resources Manager Mrs Linda Dawson makes this clear. There

was not enough effort by Mr Fitzpatrick to give the applicant more time, nor was there ever any free acceptance by the applicant of the demotion.

About these events it is submitted by the applicant that because he stayed for a short period after his demotion did not amount to an agreement that he accepted the new position. He was forced to make a decision on Friday 12 February, when he returned from Cairns on 20 February he told MEPA that he then did not want to accept the position and would be looking for employment elsewhere. The new position was entirely different from the previous position; it had a reduced level of status and responsibility and was simply representative with no managerial responsibilities. On these grounds it is said that there has been unfairness in that there was never a real acceptance by the applicant of a demotion to what was a significantly and substantially different position to the one he had held.

It is also argued that the dismissal was harsh, oppressive and unfair because the payments were totally inadequate, that the method of dismissal itself was particularly harsh and led to the applicant incurring a significant detriment including the loss of a redundancy payment with no real warning that the redundancy entitlements would be withdrawn. There was a failure to adequately consult with him. For instance there was no attempt in February 1999 to look outside MEPA's Perth operations for an equivalent position of equal standing that would be appropriate for the applicant.

It is also argued there has been a repudiation by MEPA of the contract in that the applicant was told his position was redundant in circumstances where MEPA failed to tell him that it was not entitled under the contract to unilaterally vary its terms in a substantial way. Nor was he told he was entitled to reasonable notice. He therefore proceeded to make decisions about his future under a false assumption. His position was entirely different from other employees; he did not accept his demotion and was entitled to accept the repudiation.

Submissions were also made about reasonable notice. It is argued by the applicant that one month was insufficient. Any realistic assessment of an appropriate period of notice should take into account that the applicant was employed by MEPA or its predecessors for 11 and a half years in a senior management position on a substantial salary package. He had tertiary education and broad experience in the industry and his job mobility was limited. It is argued that upon these criteria the notice period should be between 6 months and 18 months.

It is argued also that the applicant has a contractual right to a redundancy payment. The MEPA redundancy policy was formulated specifically for the process by which the applicant's position was made redundant. MEPA had made a decision to implement a round of redundancy by restructuring early in December 1998. All employees including the applicant were made aware of the impending round of redundancies. At that time the respondent made further submissions concerning compensation and loss, which no need be canvassed because of the conclusions I reach.

Through its witnesses, the respondent has a different version of what should be drawn from the chronology of events in this matter. The respondent says what ought to be drawn from the evidence of Mr Fitzpatrick, Mr Haworth, Miss L Dawson, Miss McKinlaw and Mr Morgan is that the applicant resigned from his employment with MEPA of his own free will, without pressure, and as a result of a considered decision made by him after first choosing to stay with MEPA as PMG-JV representative. After accepting the job, some weeks later he resigned, it appears to take up a position with another employer. A position which caused him no loss or diminution in employment emoluments at all. The applicant knew from late in 1998 that there was to be a restructure and the reasons for it, he knew of the developments both as an employee and as a manager and took part in meetings of MEPA planning the restructure. That he might be made redundant was in his mind in January 1999 when he calculated his redundancy entitlement.

The applicant's preparations for leaving MEPA continued in February 1999 when he was proactive about his redundancy. MEPA says that as early as February the applicant was all but sure that he would be retrenched. But later when he was told that there would be a position for him, he was honest enough to tell Mr Fitzpatrick that he had put forward his name as an

exploration manager with another company. At the time the applicant had no reason to think that his position at MEPA would result in a demotion yet concurrently he sent a CV to the employment agent seeking a management role with OMV located in Perth. MEPA says this a clear indication of an intention and desire to leave, even in circumstances when the position the applicant would retain at MEPA would be at the same salary level. That he was seeking a position in Perth was consistent with what he had told Mr Fitzpatrick about his intentions in that regard.

On 8 February the applicant was offered a position at MEPA. The grading was not the same as he had enjoyed before but there would be no reduction in his current salary. The applicant would continue to have the same degree of autonomy he had in the team leader's role but there would be no work performed in Papua New Guinea. When Mr Fitzpatrick offered the applicant the position he was told a decision was needed by 12 February because the outcome had an effect on related positions which would be offered to others. There were further discussions between the applicant and Mr Fitzpatrick on 10 and 11 February. On 11 February the applicant met with OMV, the proposed employer. MEPA asked that the applicant make a decision on 12 February. This request was given to him at around 10.00 in the morning. He asked for additional time to decide and was allowed until the following Saturday morning. However he told Mr Fitzpatrick on Friday evening that he accepted the position.

MEPA denies that there was duress, there is no evidence of pressure being exerted other than the requirement to meet the time frame for making a decision, something that he had been given a week to do. On the contrary the evidence indicates the applicant gave the matter thoughtful consideration, he had the benefit of discussions with a number of people during the course of the week. The meetings were against a background that the applicant had already looked at one of the options in detail early in the year when he had reviewed what he would do. He had a long discussion with Mr Fitzpatrick on Friday morning about differences in the roles. These discussions were said by Mr Fitzpatrick to be amicable and despite being given a further 24 hours to make a decision; he in fact made it within 6 hours. This does not indicate duress. On the contrary, it is indicative of thoughtful and logical thought processes. When the applicant advised Mr Fitzpatrick that he would take the position he rang his employment agent Mr Charles and withdrew from the OMV position. MEPA argues that the commitment given by the applicant on Friday 12 February was not given lightly, nor was it under duress and there is no evidence that could give rise to a finding of that nature. There were further discussions between the applicant and Mr Fitzpatrick on the Saturday 13 February when the applicant told Mr Fitzpatrick that he was 'struggling'. He was asked if he wanted to change his mind but he declined. It is suggested by MEPA that the reason for the difficulty was not because of the position with it, but because of the position with OMV. This was confirmed in the cross-examination by the applicant. The applicant was unsure that he had a position with OMV but he knew that he did have a position with MEPA. The pressure therefore, says MEPA, was self-induced and not attributable to it.

Notwithstanding this the applicant again asked for more time on Monday 15 February. MEPA admits that this time Mr Fitzpatrick told him he did not have any more time and that he would have to either take the PMG-JV representative position or redundancy. The applicant then signed an acceptance of an offer of employment. This was the third time he had accepted the position in 4 days, this time in writing. Until this point the choice of redundancy had been made available to him. He did not take it. It is clear that he recognised the consequence of the decision and made a note to that effect in his resignation given a month later, where he said he had regrettably forfeited a redundancy package that would have been otherwise available to him.

While the applicant was in Cairns, he changed his mind about accepting MEPA's position. This was a clear decision made by him, proof of which was that he advised his recruitment agent to revive his application with OMV. On the same day, he was offered a further interview with OMV on his return to Perth, and this took place. However he did not tell MEPA about his change of position until 4 days later. During

that time he had spoken to Mr Haworth, Ms Dawson and Mr Fitzpatrick about the situation. He told them he did not see a future at MEPA and that his heart was not in the role. He requested reconsideration be given to a redundancy package which after deliberation MEPA declined. MEPA contends that it is clear that the applicant accepted the PNG-JV position. That he later said his heart was not in the role and he did not see a future is not proof that he never accepted the position in the first place. The fact of the matter is that he did accept the position, subsequently decided he had no future or role, but decided to carry on until something else came along.

After 22 February until March 12, the respondent carried out the duties of the position with no apparent difficulty. However during this period he had been made an offer of employment by OMV. He accepted the offer subject to negotiating the details. He sought a series of amendments to the offer to make it more attractive to him. The language of the acceptance was clear; that the applicant was in a state of mind to accept the offer and was excited to get the opportunity. This acceptance was before the applicant was told about his re-grading, which is alleged to have been the trigger for his resignation. During 3 March to 12 March, there were offers and counter-offers and discussions between the applicant and OMV.

It was on 12 March that the applicant was told of his decrease in rating. According to MEPA, the applicant knew that performance reviews were preliminary and subject to cross-organization review. He admitted that he knew that the distribution of classification of gradings was skewed to the high end of the performance scale and would need to be normalised. MEPA says that the downgrading did not immediately precipitate the resignation as the applicant would have the Commission believe. There were a number of phone calls with his agent between when he was told about the downgrading and his resignation some hours later. Even though the applicant said he had no option but to resign, the stage that had been reached with the negotiations with OMV made his continuation with MEPA extremely doubtful and his departure was at that stage inevitable. The applicant did not do the things he said he would do; that is to have a discussion with his wife. According to MEPA it is open to conclude that the applicant had already concluded that the offer from OMV was acceptable. He received the offer on 12 March just three hours after he resigned, even though he did not formally accept it for another three days.

The respondent says that the resignation letter is an important document in the disposition of this matter. The first draft had been prepared on 22 February 1999. The applicant tried to claim that the draft was purely something he needed to have ready if required in the future. The resignation was delivered on 12 March, the day on which he had spoken a number of times to his employment agent. It was clear that he was intending to resign and had been going to do so for two to three weeks. Not only did he tell people of his plans to leave, he put his draft thoughts on paper. His timing of the resignation was purely because he believed it was appropriate. The reasons for resignation relate to other matters, not particularly the performance review outcome. The letter does not indicate any duress and it does not refer to any feelings of rancor between him and MEPA.

MEPA refute that the applicant was forced to leave. Rather than make him redundant he was offered the choice to fill another position with very similar duties that he could perform immediately. There was very little alteration to his remuneration package and nothing which would affect his day-to-day circumstances in a major way. No one would know that he had a reduction in salary grade. He admitted to Mrs Dawson that he made the wrong choice between the redundancy and the position of PNV-JV Representative. The evidence of Mrs Dawson is uncontradicted and unchallenged and ought be accepted, even though the applicant had mentioned he was disillusioned with the management and leadership of Mr Haworth and Mr Fitzpatrick it was not something he mentioned to them. The choice to leave was the applicant's to make. There was a legitimate business reorganisation resulting in the position he occupied ceasing to exist. He had been offered a position with essentially the same benefits which he accepted three times in four days. There can be no damage, nor was there, to the relationship of trust and

confidence. All of the discussions with the managers and other employees were mature and amicable. The resignation letter does not indicate damage to the relationship. Whenever there was disagreement these were not marked by rancorous exchanges.

The preceding is a sufficient scan of the evidence before the Commission. During the course of this long hearing there were many other matters addressed to the Commission but there is no need to summarise every piece of evidence or information. What needs to be done is to bring to attention those issues that are necessary to give a proper picture of the relevant events between the parties.

I need to make findings on the credit of witnesses. A significant feature of this case, particularly relevant when one comes to assessing credit of the witnesses, was the emphasis that Counsel for the applicant gave to what he said was the applicant's dismay and concern about his downgrading and the effects that had on him. I had the opportunity to see the applicant give his evidence and little of that passionate upset which one gathered from submissions of Counsel fell from the applicant. His evidence was cool, calm and precise. He knew exactly what he wanted to tell the Commission and it leads me to believe that the information that he did give had the propensity to be selective. This was clear from his cross-examination when he was able to remember a number of events that gave a different context and explanation for events that he had represented in his examination in chief quite differently. There is an air of inconsistency between the evidence in chief and the cross-examination. These traits were not present in the evidence given by any of the witnesses for the respondent. On the balance of probabilities, the evidence of the respondent's witnesses is more likely to be accurate than that presented by the applicant and where the evidence differs, I accept that of the respondent's witnesses.

For the applicant to succeed in his claim he must first establish that he was unfairly dismissed, otherwise the jurisdiction of the Commission does not arise. He has submitted a resignation which prima face indicates that there has been no dismissal. But the applicant asserts that resignation was submitted under duress and he was placed in a position where he had no option but to submit it. In essence he says that he was placed in a position where he was either pushed out of his job or there was an attempt to coerce him to resign. The law to be applied is contained in *Attorney General v Western Australian Prison Officers Union of Workers (1995) 75 WAIG 3166* where Kennedy J citing Stephenson LJ in *Southern vs Franks & Charlesley & Co. (1981) IRLR 278* said: 'did he trip or was he pushed; was it murder or was it suicide?' Ultimately the question is who really terminated the contract.

The resignation letter submitted by the applicant throws a lot of light on what occurred. Even though the applicant admits he had four days to provide an answer to the offer of employment as PNG-JV Representative, he felt this was insufficient to fully address and consider all of the implications. This letter was written at a time when the applicant was well into providing for his future with another employer, something which had been on his mind since early January when he calculated a retrenchment payout. This is a situation where the applicant was a senior executive of the respondent. He was well aware of the history of the downsizing both of Ampolex and MEPA and he knew that with the downturn in petroleum exploration and the cuts in MEPA's budget which had been communicated to him and others by Mr Haworth, that there would be retrenchments. He had been involved in planning those. At the same time he had taken advantage of outplacement provided by MEPA and was in negotiations with OMV. Around about the time that he accepted the position with MEPA he withdrew from OMV discussions. These actions are indicative of a person who is fully informed about the likelihood of retrenchment and the potential that his job might be involved.

This applicant is an experienced, sophisticated executive. He was not in the situation of a lot of ordinary employees who know nothing about their employer's plans and aspirations and become the victim of retrenchments with no or very little notice. This is a highly educated man, whose particular skills, even in a downturn, were in demand in the industry. The proof of this is that he was able to go to OMV to a highly paid position with earnings similar to his position at MEPA

before the restructure. There is no indication at all that he had difficulty in obtaining that position. OMV was basically prepared to pay him what he wanted.

The applicant expressed deep regret for accepting the position from both MEPA's and his perspective. The conclusion is open to be drawn that the reason for this is that he just did not like the new job. He was not going to get the same enjoyment and stimulation out of it as he had in the past. The downgrading in my view, of which much has been made by the applicant's counsel, is of very little significance in this matter. I conclude after having watched the applicant give his evidence that he was far less concerned about the downgrading than his Counsel appeared to be. But it is clear that the applicant knew that he had forfeited the redundancy package. He sought to recover that ground by asking for some consideration in that respect. He had asked Mr Haworth if he could get the redundancy package and he was told no, and in his resignation letter he asked for further considerations. One of these was granted and the others were not.

This is not a situation where an employee has been starved of information about his employer's intentions or was not consulted about his role in the organization, or who was not supported by MEPA by way of outplacement, or who did not have access to many peers including Mr Fitzpatrick and Ms Dawson to talk through the issues before he accepted the new position and submitted his resignation. MEPA did everything that can reasonably be expected of an employer in circumstances where a restructure takes place. No part of the contract with the applicant was repudiated. The applicant says there was duress because he was given four days to make his decision. The truth is that he knew about the potential for a retrenchment and was preparing himself for it from January 1999. He was looking to protect his future for which he cannot be criticized. But it cannot be said that ultimately his retrenchment came as a surprise to him or that when the day came to make his decision, that he was placed under so much duress that he entered into the arrangement unthinkingly so that it would be legitimate later for him to say that he was forced to do what he did by the actions of his employer. One has to bear in mind that over this period when the applicant was considering his position, MEPA was trying to come to grips with its restructure and deal with all of its other employees. Some consideration has to be given to its obligations to them as well. The applicant was a key man in that redundancy process; what he did affected everybody. MEPA had the task of balancing its obligations to the rest of the employees against giving this senior official more time to make his decision. It gave him as much latitude as it was able to in the circumstances. Later his change of mind created further difficulties for them in that it had to go through the process again as it were, by asking an employee who had been retrenched to come back and take the job which had then been vacated by the applicant in these proceedings.

For all of the reasons I have set out above there has been no dismissal in this matter. The jurisdiction contained in Section 29 can only be enlivened if there has been a dismissal. There has been no dismissal in this case and I so find, and the application will be dismissed for want of jurisdiction. It follows that each of the contractual benefits claims must also fail; orders of dismissal will be issued accordingly.

Appearances: Mr A Drake-Brockman of Counsel
Mr R Carthew of Counsel on behalf of the applicant.
Mr A D Lucev of Counsel
Mr G Smith of Counsel on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Richard Malcolm

and

Mobil Exploration and Producing Australia Pty Ltd.

No. 644 of 1999.

COMMISSIONER J.F. GREGOR.

28 June 2000.

Order.

HAVING heard Mr A Drake-Brockman of Counsel and with him Mr R Carthew of Counsel on behalf of the applicant and Mr A D Lucev of Counsel and with him Mr G Smith of Counsel on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

1. THAT the application by the applicant that he was unfairly dismissed be dismissed for want of jurisdiction.
2. THAT the claim for contractual benefits be, and is hereby, dismissed.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Domenico Mazzone

and

Transfield Fabrication Kwinana.

No. 1126 of 1999.

COMMISSIONER A.R. BEECH.

26 June 2000.

Reasons for Decision.

Mr Mazzone was made redundant by the respondent on 2 July 1999. He turned 60 years of age on 5 July 1999 and believes that he was made to retire due to his age. He disputes redundancy as a valid reason for the termination of his employment. He argues, in the alternative, that if the respondent had a genuine reason for making him redundant then his redundancy payment of 20 weeks' pay was quite inadequate given his 34 years' service. He argues that the respondent's redundancy payment amounted to less than one week's pay for each year of service. He argues that as a minimum, two weeks' pay per year of service has been recognised in this State as the minimum standard for redundancy payments.

Mr Mazzone's claim that he was made to retire at age 60, rather than merely being made redundant, arises because he says that when Mr Macri, the Manager of the Kwinana Fabrication Workshop, first spoke with Mr Mazzone about his employment ending, Mr Macri said that there was not a great deal of work around, that Mr Mazzone was getting a bit too old and not going upstairs as quickly as he used to. Mr Mazzone's evidence is supported by the letter given to him when his employment terminated. The letter is dated 1 July 1999 (exhibit 5) and states—

"As agreed in our discussions, I now confirm that your retirement from the Company will be effective from July 2nd 1999 and enclose final settlement details.

On behalf of Transfield Management I wish to express our sincere appreciation of your Dedication and Loyalty of the past 35 years. The contribution of people like you is important to the success of the Company. We will hope you enjoy good health, happiness and pleasant fulfilment in your well earned retirement."

A small ceremony was held on the last day of Mr Mazzone's employment, attended by the balance of the workforce, at which Mr Mazzone was presented with a plaque and a retirement gift from his fellow employees. Mr Mazzone's evidence is that Mr Macri also made a speech in which he wished Mr Mazzone well "in his retirement".

Mr Macri, however, is equally firm, if not defensive, in his evidence that Mr Mazzone was not forcibly retired. Rather, Mr Mazzone was made redundant together with a number of other employees of Transfield on or about that time. The letter of 1 July 1999 given to Mr Mazzone is seen by Mr Macri as an error. Indeed, he sought to rectify the error as soon as he realised the wording of the letter was wrong. Mr Macri's evidence is that the text of the letter of 1 July 1999 that he signed was prepared by the respondent's head office in Sydney and e-mailed to the Kwinana Fabrication Workshop where it was simply printed off on WA Transfield letterhead. There had been two letters, one for Mr Mazzone and one for Mr Di Tullio. They both had the same wording. He realised the wording was wrong, rang Sydney, and as a result, he organised for the wording of both letters to be changed. He then signed both letters. However, in fact only Mr Di Tullio's letter had been changed. It had been on top and Mr Macri simply signed both letters without reading them. Thus, he did not notice the difference in the wording between Mr Di Tullio's letter and Mr Mazzone's letter. I accept Mr Macri's evidence because he said that the need to change the wording in the letters caused the farewell ceremony to be delayed. This evidence accords with the evidence of Mr Di Tullio that the farewell ceremony was delayed because the paperwork was not ready. I therefore do not find that the letter given to Mr Mazzone is as conclusive as it appears on its face.

I accept therefore that Mr Macri caused a letter to be sent to Mr Mazzone requesting the return of the letter of 1 July 1999 and replacing it with a further letter dated 2 July 1999 that did not refer to retirement at all. It referred only to Mr Mazzone being "made redundant".

Mr Macri denies that he mentioned in the speech that he made that Mr Mazzone would be retiring, although he acknowledges the plaque and the presentation did happen as Mr Mazzone describes in his evidence.

In my view the evidence does not show that Mr Mazzone was indeed made to retire as he alleges. I certainly accept that from his point of view the letter left little room for doubt. However, the wording is not what Mr Macri intended. Further, the farewell ceremony was for Mr Di Tullio as well as Mr Mazzone. Mr Di Tullio received a plaque as well as Mr Mazzone. They were both treated equally on the day they left. Given that Mr Di Tullio was then 65 years of age, it is difficult to conclude the respondent was forcing Mr Mazzone to retire because he was turning 60 years of age.

Rather, on the evidence overall, Mr Mazzone was made redundant. The evidence supporting that conclusion is overwhelming. At the time that Mr Mazzone became the General Foreman, the respondent had approximately 170—180 employees. At the time Mr Mazzone's employment ceased, the number of employees had fallen to 20. The respondent still had two other foremen as well as Mr Mazzone in its employ. The respondent's work was running out. Even Mr Mazzone agreed that there was a lack of work and that existing jobs were finishing at the time. That evidence is supported by Mr Gaudier who was called by Mr Mazzone to give evidence.

Furthermore, other employees were made redundant at the time. Mr Turrets and Mr Wells were returned to Sydney. Apprentices' terms were reduced. Mr Mazzone was made redundant at the same time as Mr Di Tullio, who was also a foreman. Indeed, the Kwinana Fabrication Workshop itself eventually closed at the end of January 2000, some 6 months after Mr Mazzone left, and Mr Macri himself lost the position he held at the time of Mr Mazzone's employment being terminated. It cannot be said that Mr Mazzone's employment was terminated because of his age when he would, on this evidence, have been made redundant in any event. Indeed, the termination advice forwarded by Mr Macri to Transfield and dated 16 June 1999 gives "retrenchment" as reason for the termination. The termination advice has provision for an employee's normal or early retirement as reasons for termination

but these boxes were not ticked. Further, there is nothing in the evidence to suggest that the respondent has a policy of retiring employees when they reach 60 years of age. Indeed, Mr Di Tullio had reached 65 years of age when he too was made redundant along with Mr Mazzone. On the evidence, therefore, I find that Mr Mazzone was genuinely made redundant. Further, again on the evidence, the respondent had every justification to reduce its staff and reduce the number of foremen, including Mr Mazzone.

The finding that Mr Mazzone was made redundant and not retired, does not end the matter though because a dismissal by reason of redundancy may still, nevertheless, be harsh, oppressive or unfair. I turn to the other issues raised by Mr Mazzone.

It was a term implied into the contract of employment between Mr Mazzone and the respondent that as soon as the respondent had made its decision to make Mr Mazzone redundant it would hold discussions with him on the effect the respondent's decision would have upon him, and ways to minimise the effect upon him (*Minimum Conditions of Employment Act 1993* (WA) s.5 and s.41). To the extent that Mr Mazzone argues that those discussions were not held, the argument is not made out. The evidence shows that following the initial discussion between Mr Macri and Mr Mazzone when Mr Mazzone was advised of the respondent's decision, Mr Mazzone returned later and had a further discussion with Mr Macri. As a result of that discussion, the respondent agreed with Mr Mazzone that his date of termination would be extended by approximately four and a half weeks. Mr Macri's evidence is that this extension was requested by Mr Mazzone because of the taxation benefit that would accrue to him in the new financial year. Mr Mazzone denies this. However, even if taxation was not the reason for the discussion, the fact remains that Mr Mazzone sought, and was granted, a deferral of his termination date and in doing so, I am satisfied that he held discussions with his employer on ways to minimise the effects upon him of the decision to make him redundant.

Similarly, I am not persuaded on the evidence that there was any realistic alternative to making Mr Mazzone redundant. It is not established to the Commission's satisfaction that there was any alternative employment that was practically open to Mr Mazzone elsewhere within the respondent's operation. If the discussions which were required to be held would not have made any difference to the outcome, then the consequence of non-compliance with the *Minimum Conditions of Employment Act* upon the question of whether the dismissal is unfair, is considerably lessened.

The Commission was urged to find that Mr Mazzone should have been counselled in order to lessen the effect upon him of Mr Macri's news. However, the evidence does not, in my opinion, establish that the effect of the news upon Mr Mazzone, and the absence of any counselling is a separate reason for holding that Mr Mazzone's dismissal was unfair. I accept that Mr Mazzone was shocked, but his evidence did not take the matter beyond the fact that there must be a level of shock in every termination.

The remaining matter to be considered by the Commission is the claim by Mr Mazzone that his termination was unfair because of the inadequacy of his redundancy payment. Mr Mazzone was paid 20 weeks' pay in addition to his entitlements by way of a redundancy payment. That payment was made in accordance with the respondent's redundancy policy that was adopted in July 1997 (exhibit D). The evidence of Ms Longbottom, the respondent's General Manager Human Resources who is based in Sydney, is that a policy decision was taken by the respondent in 1997 to standardise redundancy payments. Prior to that date, the respondent had assessed redundancy payments on a case-by-case basis. Her evidence is that following the creation of a new Board for the respondent, the decision was taken that the respondent would be unable to sustain its then level of redundancy payments with its current margins. She investigated the level of redundancy payments Australia-wide and concluded that the minimum provisions prescribed in the *Employment Protection Act 1982* (NSW) were the most generous. These provisions were then adopted by the Board to be applied throughout its operations. The respondent's submission is that it needs to have a standard policy given that it had approximately 7,000 employees.

Five thousand of these are employed under awards or enterprise bargaining agreements and a further 2,000 are on staff. The policy adopted provides for a maximum redundancy payment of 20 weeks' pay for 6 or more years' service if the employee is aged 45 years or over. In the case of Mr Mazzone, he was paid the 20 weeks' pay prescribed. Under the previous policy Mr Mazzone, being more than 59 but less than 60 years of age, he would have received the maximum payment of 53 weeks' pay.

The evidence of Ms Longbottom is that 250 staff have been paid redundancy payments under this policy. There have been no deviations from this policy since 1997. Ms Longbottom's evidence about the respondent's need to reduce its costs following the changes to the respondent's structure in 1997 was not challenged and I accept it.

It was argued on behalf of Mr Mazzone that the consequence of the application of the policy is that his redundancy payment is no greater than if he had 6 years' service because the payment made to him is based upon a scale of payments which has a maximum payment based upon service of 6 years or more. He says that a payment based upon 6 years' service cannot be fair given his 34 years' service. He says that the payment he has received is equal to the redundancy payment made to Mr Gaudieri, who is also Mr Mazzone's brother-in-law, in December 1999 when he was made redundant after 19 years' service and received 20 weeks' redundancy pay. He calculates that if the respondent had made him redundant two years earlier when the previous policy of a case-by-case basis applied, his redundancy payment would have been approximately 49 weeks' pay. Mr Mazzone compares the redundancy payment paid to him with the redundancy payment made by the respondent to his brother in 1992 when the previous policy of a case-by-case basis applied. His brother, Vincenzo Mazzone, was made redundant and received a redundancy payment of 38 weeks' pay. He was then 58 years of age and had 25 years' service. Mr Mazzone argues that a redundancy payment of at least 2 weeks' pay, if not 4 weeks' pay, for each year of service is appropriate.

The respondent argues that the respondent's redundancy policy has been incorporated into the contract of service between it and Mr Mazzone. The policy position adopted in 1997 had followed structural change in the company and a need to review its overheads. In basing its policy on the NSW legislation the respondent has acted rationally and fairly. It sees the question to be answered as being whether the respondent's policy is fair. The respondent's uniform application of the policy Australia wide is a measure of its fairness. In contrast, for the respondent to potentially pay each of its employees a different payment depending upon circumstances would be unfair. It is necessary to have a maximum payment given the potentially huge payments which might be paid. The respondent finally submits that the payment made to Mr Mazzone should only be held to be inadequate if it can be assessed as "totally" inadequate.

The Commission's consideration of these submissions is as follows. The issue is not whether Mr Mazzone is entitled by virtue of an implied term in his contract of employment to the redundancy payment he has actually received. (In fact I have some reservations about whether the redundancy policy can be implied into Mr Mazzone's contract of employment given the evidence that the policy, and its predecessor case-by-case approach, was confidential and Mr Mazzone had no knowledge of either of them.) The issue is that the dismissal of an employee for redundancy without the payment of a redundancy payment sufficient to compensate the employee for such matters as the employee's age, length of service, seniority, period of notice, availability of alternate employment, benefits foregone and the reason for the retrenchment, may, depending on the circumstances, be harsh upon the employee (*Wynn's Wine Growers* op. cit.; *Leddicoat v Schiavello Commercial Interiors*, Industrial Relations Court of Australia, Von Doussa J, No SI 1153 of 1995, 18/10/95; *Westen v Union des Assurances de Paris*, Industrial Relations Court of Australia, Madgwick J, 419/96, 28/8/96; *Fryar v System Services* (1996) 137 ALR 321 at 331 – the subsequent appeal against this decision was upheld but only on jurisdictional grounds: 5/9/96, unreported). These are decisions of the Industrial Relations Court of Australia and they have been adopted in this State since at least the decision of the Full Bench of this

Commission in *Rogers v Leighton Contractors* (1999) 79 WAIG 3551 (referred to subsequently in these Reasons as *Rogers*).

The respondent's need to initiate a standard policy for redundancy payments for its operations Australia-wide is accepted. It needed to reduce its costs. Nevertheless, when a tribunal such as this Commission is asked to decide whether a particular redundancy is unfair because of the level of redundancy payment made, the fact that the redundancy payment is one consistently applied across a company's operations will be only one factor to be taken into account. It will not provide a complete answer. I have little doubt that the respondent's policy will be applicable to the vast majority of the its employees but that cannot prevent an examination by the Commission of individual circumstances upon a proper application being made.

I note that the policy set by the respondent in this matter does not take into account individual circumstances. Indeed, it appears that the respondent intends that no exceptions are to be made to it. In this State, this Commission has not been asked to establish a standard scale of minimum redundancy payments to be paid to employees made redundant. Rather, individual cases are to be assessed on a case-by-case basis. This approach, inevitably, will lead to some uncertainty regarding the adequacy of a redundancy payment made in any particular case if it is challenged. Such uncertainty is to be regretted but the setting by the Commission of a standard for redundancy payments to be made requires an application to be made to it.

Rogers of itself does not set a standard scale of minimum redundancy payments to be paid to employees made redundant. *Rogers* was an appeal against a decision of the Commission which considered whether Mr Rogers' dismissal was unfair by reason of the adequacy of the redundancy payment made to him. He had been employed for over 10 years as plant foreman within the plant and machinery supply area of Leighton's Welshpool operation in this State. Its plant and machinery was used in mining contracting and civil engineering. He was made redundant in 1998 aged 55 years. His salary was \$62,000 per annum. He was paid his entitlements together with an amount which his "Termination Payment Details" referred to as "Ten weeks' pay in lieu of notice", but which was more properly to be seen as four weeks' pay in lieu of notice in accordance with his contract of employment and six weeks' redundancy pay. It was held that the package paid to Mr Rogers of 10 weeks' payment on redundancy, including as it did a necessary period of 5 weeks' salary to validly terminate the contract of employment, could hardly be described as adequate for an employee of 10 years' service who is aged 55 years and was in a supervisory position. Sharkey P., with whom Parks C. agreed, held that on the evidence before the Commission at first instance of the examples provided, and generally, that Mr Rogers had established that he had suffered the loss, inter alia, of a fair redundancy payment, namely two weeks' wages for each year worked less six weeks' wages already paid. That was a total payment of 20 weeks' wages. I was a member of that Full Bench and came to the same conclusion having regard to the recognition in *Westen* (op. cit.) and *Jager v Australian National Hotels* (Supreme Court of Tasmania, Slicer J, 54 of 1998, 12/5/98) of two weeks' salary and four weeks' salary respectively for each year of service and the evidence of the redundancy payment made in the case of the McMahon Contractors' employee of two weeks' salary for each year of service.

While *Rogers* does not establish a standard scale of minimum redundancy payments to be paid to employees made redundant, its reasoning is quite applicable to other cases with similar circumstances. I note that the respondent argues that *Rogers* should be distinguished from the facts in this case. I do not entirely agree. It is true that the respondent in *Rogers* appeared to have no concept of the purpose and need of redundancy payments, whereas the respondent in this matter has an established policy regarding the redundancy payments to be made. However, there are certainly similarities between the respective positions, ages and salaries of Mr Mazzone and Mr Rogers. The lengths of service are significantly different. So too is the evidence in this case that the respondent would be unable to sustain its then level of redundancy payments with its current margins.

These similarities and differences need to be borne in mind when looking at Mr Mazzone's circumstances. The Commission's assessment will necessarily be an individual assessment because what may be an unfair payment in the circumstances of one employee may not be unfair in the circumstances of another. As already noted in these reasons, Mr Mazzone had 34 years' service with the respondent. He commenced his employment with the respondent in 1965 as a trade assistant. He subsequently became an apprentice and was employed by the respondent after his apprenticeship as a tradesman boiler-maker. In 1975 he became a leading hand and in 1981 a workshop foreman. He became General Foreman in 1991 and as General Foreman was in charge of the workshop. When he started his employment, his employment conditions were governed by terms of an award. After his appointment as foreman he became a salaried employee. At the time of his redundancy, his salary package was worth \$68,210.00 per annum. At the date of his termination, Mr Mazzone was effectively 60 years of age. His evidence is that it had been his intention to work until he was 65 years old. He states that it would be difficult to find alternative work at his age. I accept his evidence and there is no suggestion to the contrary in the evidence from the respondent on this matter.

The principal difficulty with the application of the policy to Mr Mazzone's circumstances is that the policy the respondent has adopted recognises a maximum payment after 6 years' service. Six years' service is quite disproportionate to Mr Mazzone's 34 years' service. It has the appearance of not being appropriate to Mr Mazzone's length of service particularly as the scale upon which it is based is a minimum. For that reason alone, the respondent should have considered whether its policy should be departed from in Mr Mazzone's case. That is not to say that the respondent is not able to have a uniform policy for redundancy payments to be made to its employees as it needs to do. The potential for huge redundancy payments, necessarily to be made at a time when the fortunes of a company may not be at its strongest, is a legitimate consideration for the respondent. It does mean, nevertheless that, unless its policy has been agreed to by its employees in advance of any redundancies occurring, in the application of its policy to any particular employee it will need to consider whether the circumstances of that employee warrant a departure from the policy. It does not go too far to suggest that this is also true when any employer is going to apply a policy to an employee. It is certainly true in the case of redundancy policies given that it is clear that the fact that a redundancy payment is made from a policy which is consistently applied across a company's operations will be only one factor to be taken into account. It will not provide a complete answer to a claim by an employee after the event that the redundancy payment is inadequate.

This is not to say that any service longer than 6 years will require a departure from the policy. After all, as *Rogers* shows, a redundancy payment of 20 weeks' pay was seen as appropriate for Mr Rogers who had 10 years' service. The test of the adequacy of any particular payment is not necessarily the application of a precise mathematical formula. However, Mr Mazzone's service is very long by any standard. The Commission does not have the information before it to compare the length of Mr Mazzone's service with the lengths of service of other employees of the respondent to whom the policy it has adopted has been applied. When that length of service is considered together with Mr Mazzone's salary level, and in particular the relatively senior General Foreman position he held, and the uncontradicted evidence that he has little prospect of finding alternative employment at his age, the Commission is driven to the conclusion that his circumstances warrant a departure from the policy applicable to all employees. Even the fact that the respondent's own workforce considered that Mr Mazzone's redundancy warranted a collection and a presentation supports this conclusion.

The test of adequacy does not require a distinction to be made between "adequate" and "totally inadequate". Although the respondent relies on the conclusion reached in *Wynns* to support its submission, the decision in *Rogers* does not itself draw that distinction, and it is *Rogers* which is binding in this jurisdiction.

I therefore find that the redundancy payment made to Mr Mazzone was not adequate and for that reason, his dismissal was unfair.

It is quite settled that where a redundancy is genuine, but the dismissal of the employee is nevertheless unfair, it is impracticable to require the reinstatement of the employee because the position from which the employee was dismissed no longer exists. That is the case here and it was not argued otherwise.

The Commission turns to consider compensation. It is also clear that in a case such as this that the loss for which compensation is to be ordered by the Commission is the loss of a fair redundancy payment: *Rogers*. In the assessment by the Commission of an adequate redundancy payment to Mr Mazzone the following considerations are relevant. The payment of 20 weeks' wages was seen in *Rogers* as fair for an employee with slightly less salary, position and age of Mr Mazzone, but with significantly shorter service. That conclusion was based upon the evidence in that case of some recognition of two weeks' pay for each year of service. That is not to say that two weeks' pay for each year of service is of itself the only fair way to calculate redundancy payments. Even Mr Vincenzo Mazzone, who was Yard Foreman and Transport Manager and was made redundant in 1992, did not receive two weeks' pay for each year of service. There is no suggestion that, at the time that payment was made to him, it was considered to be inadequate. It is not irrelevant to take into account that the case-by-case approach used by the respondent which meant that the Yard Foreman and Transport Manager with 25 years' service who was 58 years of age would receive 38 weeks' pay was the respondent's policy until only some 3 years ago. However, given the unchallenged evidence that the respondent would be unable to sustain its then level of redundancy payments with its current margins the redundancy payment to Mr Vincenzo Mazzone in 1992 can now not be used for comparison with Mr Domenico Mazzone. To hold otherwise would be to say the respondent cannot change its redundancy policy even if the economic circumstances warrant it doing so, and it is not open to the Commission to reach such a conclusion on the evidence before it.

I therefore regard the need for the respondent to reduce its costs as relevant to the Commission's consideration of a fair redundancy payment to Mr Mazzone. The payment will necessarily be less than the payment which would previously have been paid. I find that in Mr Mazzone's circumstances a fair redundancy payment of 30 weeks' pay is appropriate. That represents a margin in excess of the redundancy payments the respondent has made to all its other employees made redundant since 1997 and which recognises the circumstances which set Mr Mazzone apart from the bulk of the respondent's employees. The Commission's order will therefore require the respondent to pay to Mr Mazzone a further 10 weeks' pay.

I have not found it necessary to deal with the argument that Mr Mazzone was also not given a reasonable period of notice of the redundancy. Mr Mazzone had effectively 10 weeks' notice made up of 4½ weeks worked and 5½ weeks' payment in lieu of notice. The task of the Commission is to assess a fair redundancy payment overall and in this instance there is an overlap between a fair redundancy payment and consideration of reasonable notice. The redundancy payment decided by the Commission is assessed on the circumstances of Mr Mazzone's redundancy overall and takes into account the effective notice he received.

A Minute of Proposed Order now issues.

Appearances: Mr M. Herron (of counsel) on behalf of the applicant

Mr A. Randles on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Domenico Mazzone

and

Transfield Fabrication Kwinana.

No. 1126 of 1999.

27 June 2000.

Order.

HAVING HEARD Mr M. Herron (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—

(A) DECLARES—

1. THAT the dismissal of Domenico Mazzone by the respondent was unfair.
2. THAT re-instatement is impracticable.

(B) ORDERS THAT Transfield Fabrication Kwinana forthwith pay Domenico Mazzone 10 weeks' wages by way of redundancy payment.

(Sgd.) A. R. BEECH,

[L.S.]

Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John Maurice McLoughlin and Donald James Blackwell

and

Western Power Corporation.

Nos. 811 and 828 of 1999.

COMMISSIONER J H SMITH.

30 June 2000.

Reasons for Decision.

COMMISSIONER J H SMITH: The Applicants, John Maurice McLoughlin and Donald James Blackwell made applications under section 29 (1)(b)(i) and (ii) of the Industrial Relations Act 1979 ("the Act"). Both applications raise the same issues. The Applicants both claim that they were dismissed on 17 May 1999 when they were each received a letter of termination stating that the employment was terminated from the close of business on 2 July 1999 on grounds of redundancy. On termination both Applicants were paid 36 weeks redundancy pay. The Applicants each claim that their dismissals were harsh, oppressive and unfair as their terminations were not accompanied by a reasonable redundancy payment. They also claim the nature of the manner of dismissals was unconscionable. Further, the Applicants claim that they have been denied contractual benefits in that they were denied express contractual benefits to redundancy payments. The Applicants seek orders for compensation and payment for denied contractual benefits.

During the course of the proceedings, the Applicants' counsel informed the Commission that the Applicants sought to have their contractual benefit claims considered and determined prior to the Commission considering the unfair dismissal claims, as the claims substantially overlap.

The Applicants seek orders that the Respondent pay to each of the Applicants in each case—

- (a) An amount equal to the difference between the sum to which he was entitled under his contract of service on dismissal and the sum he in fact received;
- (b) Further compensation for loss and injury caused by the harshness, oppressiveness and unfairness of his dismissal, including—
 - (i) Any additional loss of income;
 - (ii) Loss of interest earned on the sum to which he was entitled under the contract but was not

paid in the period between his dismissal and the making of the orders sought; and

- (iii) Injury represented by shock, humiliation and distress caused by the manner of the dismissal.

Nature of Engagement

Mr McLoughlin was employed by Western Power Corporation and its predecessors SECWA and SEC from 2 May 1966 in a series of professional, technical and managerial positions until his termination of employment. At the time of termination he had been employed for over 33 years.

From 17 October 1988 to January 1997 Mr McLoughlin was employed in the position as Manager, Technical Services Branch, Generation Division. From January 1997 until he was made redundant on 2 July 1999, he was employed in the position of Manager Major Projects Branch, Generation Division.

The position of Manager Major Projects Branch, Generation Division was a senior position within Western Power. Mr McLoughlin reported to Mr Ray Kirkpatrick, General Manager Generation, who reported to Mr David Eiszzele, Managing Director of Western Power. Mr McLoughlin had responsibilities and projects such as the Collie Power Station worth \$700 million and the Tiwest Co-Generation worth \$25 million. His salary package at the time of termination was \$123,500 per annum.

At the time of termination Mr McLoughlin's terms and conditions of employment were not regulated by the terms of an award or an enterprise agreement. From 1988 he was employed on a series of consecutive fixed term contracts. The first was for five years. The second ran from 1 July 1994 for a period of three years. The third commenced on 1 July 1997 and expired on 31 December 1998.

Mr Blackwell was employed by the Respondent and its predecessors for over 38 years from 6 December 1960 until 2 July 1999. During his employment he was also employed in a series of professional, technical and managerial positions.

From October 1988 to 2 July 1999 Mr Blackwell was employed in the position of Manager Gas Turbines Branch, Generation Division. Like Mr McLoughlin his employment was regulated by a series of fixed term contracts. From 1 July 1994 his terms and conditions of employment were regulated by an employment agreement that was identical to the terms of the contract of employment entered into by Mr McLoughlin. Mr Blackwell's 1994 contract was for three years. On 1 July 1997 he entered into a further Executive Employment Agreement which was due to expire on 1 July 2000.

Mr Blackwell also reported to Mr Ray Kirkpatrick. As the Manager Gas Turbines Branch, Generation Division, Mr Blackwell had responsibility for \$180 million worth of plant, with an annual maintenance and operating (excluding fuel) budget of \$4 million to \$6 million per annum. He was on call 24 hours a day. Mr Blackwell's salary package at the time of termination was \$121,000 per annum.

Mr McLoughlin's and Mr Blackwell's 1994 and 1997 fixed term contracts were titled an "Executive Employment Agreement". The 1994 and 1997 contracts essentially contained the same terms and were comprehensive agreements that contained terms setting out the duties of the position, provision for termination of the contract of employment by the Applicants, remuneration, superannuation contributions, provision of a motor vehicle, travel expenses, accommodation, private telephone expenses, annual leave, sick leave, long service leave, prohibition on other employment, confidentiality, restraint of trade, rights in respect of intellectual property, termination on grounds of incapacity, termination on grounds of redundancy, termination on grounds of poor performance or serious misconduct, and reappointment.

The redundancy clause of Mr McLoughlin's 1994 and 1997 contracts provides—

"Western Power may terminate this Agreement for any reason specified in this clause, namely—

- 14.1 Redundancy: If the Appointee is made redundant by the Managing Director or the Board by reason of—
 - (a) a significant change in funding that affects the major operation of Western Power; or

(b) a reduction in Duties of the Manager Major Projects,

then the Appointee shall be entitled to a minimum of 6 months pay.”

The re-appointment clause of Mr McLoughlin’s 1994 and 1997 contracts provides—

“15.1 Not less than four months prior to the expiry of the Agreement, the Managing Director shall determine either that a further Agreement be offered to the Appointee without competitive advertisement of the position of Manager Major Projects or that the position of Manager Major Projects be advertised and shall notify the Appointee of that determination as soon as reasonably practicable. If the position is advertised the Appointee may apply for the position of Manager Major Projects.

15.2 If the Appointee is not re-appointed to the position of Manager Major Projects, the Appointee’s employment by Western Power will terminate at the end of the Term of this Agreement and the Appointee will be entitled to the equivalent of four months’ remuneration less the period of notice given by the Managing Director that the Appointee will not be reappointed to the position.

15.3 The Managing Director shall notify the Appointee as soon as is practicable that the Appointee will not be reappointed to the position of Manager Major Projects.”

Mr Blackwell’s 194 and 1997 contracts also contained these terms.

Background

In March 1998 the Respondent began to plan a major restructure of the Generation Division. The positions in the Generation Division were declared vacant and staff were invited to apply for the new positions. As a result of the creation of the new structure all positions in the Generation Division were abolished and new positions were created. As a result of the restructure the Generation Division workforce was planned to reduce by approximately 400.

On 16 October 1998 Mr Kirkpatrick published the new leadership team structure for the Generation Division. The new organisational structure was decided by the managers of the Division, approved by Mr Fitzpatrick and finally by Mr Eiszele. The new structure did not contain the positions held by Mr McLoughlin, Manager Major Projects and Mr Blackwell, Manager Gas Turbines. As managers, Mr McLoughlin and Mr Blackwell were intimately involved in developing the new structure and both were aware that their positions would not exist in the new structure. Both Mr McLoughlin and Mr Blackwell along with all other staff were invited to apply for positions in the new structure.

On 29 October 1998 Mr McLoughlin submitted an expression of interest in taking up an appointment to all positions in the Generation Division new management team. In a letter to Mr Kirkpatrick dated 29 October 1998 he stated—

“I would be prepared to discuss any of the management positions with you with a view to appointment, notwithstanding that my career up to this stage might predispose me to favour some over others.

In expressing my interest in these positions, I am also very conscious of my current commitment to the completion of the Collie Power Station project. It would be very much in Western Power’s interests in my view, for me to continue in this role until the project is completed, especially since some considerable difficulties are anticipated as a result of the fire, in drawing the construction contract to conclusion.”

Mr Blackwell did not express an interest in any of the positions in the new structure. As he made no application for any positions he was invited to sit on the interview panel for the management positions in the new structure.

Mr McLoughlin was not successful in his expression of interest for any of the managers positions and was advised of this by letter from Mr Kirkpatrick on 29 January 1999.

Mr McLoughlin explained that the reason why he had been offered an 18 month fixed term contract that was to expire at

the end of 1998, was because it was expected that the Collie Power Station Project would be completed by the end of 1998. The project was not however completed until the middle of 1999. By the end of December 1998 the anticipated date of completion of the Collie project was 30 June 1999. Mr Kirkpatrick said that executive contracts were usually offered for three years, but the fact that Mr McLoughlin was offered an 18 month contract was in part due to his performance and in part because of the expected duration of the Collie project. No issue in relation to Mr McLoughlin’s performance was raised with Mr McLoughlin or was raised by any other witness. For this reason and because Mr McLoughlin continued to receive performance related pay increases throughout the currency of his employment until his termination, I prefer the evidence of Mr McLoughlin to Mr Kirkpatrick on this issue. It is clear that the Respondent was not planning any other major projects after the completion of the Collie Power Station Project and that Mr McLoughlin was aware of this fact. Accordingly it was clear to all that Mr McLoughlin’s position of Manager Major Projects would come to an end at the completion of the Collie project.

For reasons that are not absolutely clear, Mr McLoughlin was not formally offered a further fixed term contract or an extension of his existing contract. However he continued to work in accordance with the terms of the 1997 contract and received a pay increase on 1 March 1999 following a favourable performance review in accordance with the express terms of the 1997 contract. Mr Kirkpatrick said in his evidence that it was the responsibility of Mr Ian Paterson, the Respondent’s Executive Officer Management and Assistant Secretary, to administer and prepare Mr McLoughlin’s contract and all other executive staff contracts. Mr Kirkpatrick said that prior to the expiration of Mr McLoughlin’s contract he had spoken to Mr Eiszele about extending Mr McLoughlin’s contract until 30 June 1999. Mr Kirkpatrick said that he followed it up with Mr Paterson in January 1999 and was advised by Mr Paterson that he would follow it up with Mr Eiszele. Mr Paterson gave conflicting evidence. He said he raised with Mr Kirkpatrick the fact that Mr McLoughlin’s contract had expired on a number of occasions and that he was told by Mr Kirkpatrick that Mr McLoughlin’s contract would come to an end once he had completed his duties associated with the construction of the new Collie Power Station. Mr Paterson said that the reason why a letter was not drawn up to formally extend Mr McLoughlin’s contract was because Mr Kirkpatrick did not wish a letter to be drawn up and that he, Mr Kirkpatrick, had discussed with Mr McLoughlin that his contract would continue until the conclusion of the Collie project. Having heard the witnesses, I prefer the evidence given by Mr Paterson to Mr Kirkpatrick on this issue.

The Respondent contended that Mr McLoughlin had advised Mr Kirkpatrick that he intended to retire after the Collie Power Station Project was complete. However, Mr McLoughlin denied that was the case. He said that after the Power Station Project was complete he had an expectation that there would be a number of options available to him including redundancy, transfer to a different role or appointment to a different position. Mr McLoughlin said he was qualified as an Engineer and that he has a Masters Degree in Business Administration. He said it was his view that there were a number of positions in any division of the Respondent’s business he was qualified for, and could undertake.

Mr McLoughlin says that he suggested to Mr Kirkpatrick that he continue with the Collie Project until its completion. Accordingly the question arises whether Mr McLoughlin’s fixed term contract was extended for a further fixed period, that is until the completion of the project. Mr McLoughlin contends that his contract was extended for an indefinite period. The Respondent contends that by his conduct in continuing to work in accordance with the terms of 1997 contract Mr McLoughlin accepted this extension.

It is common ground between the parties that the terms of Mr McLoughlin’s contract of employment consisted of the terms set out in the 1997 agreement, varied only by the deletion of any terms not capable of being applied, or deleted by necessary implication. The parties agree that clause 14 (Termination) formed part of Mr McLoughlin’s contract of employment, but that clause 15 (Re-Appointment) did not.

It is clear that Mr Blackwell's contract was wholly in writing and that his contract of employment was to expire on 30 June 2000 by effluxion of time. The evidence establishes that Mr Blackwell was planning his retirement. The dispute between the parties is whether he was planning to retire prior to the expiration of his contract, at the end of his contract, or some time later. In April 1998 he sought and obtained approval from Mr Eiszele to obtain a four wheel drive vehicle as a company vehicle for his use when he retired. Pursuant to the express terms of his contract, Mr Blackwell was entitled to purchase his company vehicle at the end of the Respondent's lease. Mr Blackwell said that he informed Mr Paterson that he intended to purchase the four wheel drive vehicle at the end of the lease which was two years or 40,000 kilometres. Mr Kirkpatrick said that Mr Blackwell had informed him he intended to retire in October 1999. Mr Blackwell denied that he specified a retirement date. In light of the fact that Mr Blackwell did not apply for any positions in the new management structure of the generation division and the fact that he sought and obtained a four wheel drive vehicle to use in his retirement, I have concluded that Mr Blackwell was planning his retirement and intended to retire sometime in 1999 or at the latest, when his contract was to expire in June 2000.

Mr McLoughlin gave evidence that in late March 1999 he discussed with Mr Kirkpatrick that he was agreeable to terminating his employment as a redundant employee on the basis that he would be offered a reasonable redundancy payment. Mr McLoughlin advised Mr Kirkpatrick that 2 July 1999 would be a suitable date for his departure as the Collie power project would be complete and July was the beginning of the financial year. At about the same time, Mr Blackwell had a similar conversation with Mr Kirkpatrick, although his proposed date of departure was unrelated to the completion of the Collie power project. I gather from the evidence given by Mr McLoughlin and Mr Blackwell that taxation advantages would be available to them if they were to receive their severance pay and payment for accrued leave in early July 1999. Mr Kirkpatrick did not negotiate with Mr McLoughlin or Mr Blackwell on behalf of the Respondent, however he did advise Mr Eiszele that Mr McLoughlin and Mr Blackwell wished to depart on 2 July 1999. After seeking advice, Mr Eiszele without discussing with either of the Applicants the amount of severance pay to be paid, decided that the Applicants should be paid 9 months salary. The Applicants were in fact paid 36 weeks salary.

In Mr Eiszele's witness statement, tendered as his evidence in chief he says—

- "28. In about early May 1999, I discussed with Ray Kirkpatrick the amount of redundancy pay which Don Blackwell and John McLoughlin were entitled to. In respect of Blackwell and McLoughlin, I remember Ray Kirkpatrick saying to me words to the effect of if you pay them a year they'll both be happy.
29. In deciding on the amount of redundancy pay which Don Blackwell and John McLoughlin should receive I took a number of matters into consideration. I considered that their contracts of employment stated that they were entitled to a minimum of 6 months' salary in the event of redundancy. I considered that Don Blackwell intended to retire in any event. I considered that John McLoughlin's contract had expired and that he had been told that his contract was not being renewed. I considered that both Don Blackwell and John McLoughlin had given long service to Western Power in senior positions.
30. I decided on 9 months' salary for both of them. I decided that taking all matters into account they should receive the same redundancy payment. I decided that 9 months' salary was appropriate having regard to their long period of service with Western Power."

In his oral evidence, Mr Eiszele said that the conversation set out in paragraph 28 of his witness statement occurred in April 1999, or in early May 1999.

Redundancy Pay

On 18 April 1997 the Respondent, and the Australian Municipal, Administrative, Clerical and Services Union and the Communications, Electrical, Electronic, Energy, Information,

Postal, Plumbing and Allied Services Union entered into an Agreement titled "Western Power Corporation Redeployment, Retraining and Selective Voluntary Redundancy Agreement ("the RRR scheme"). The RRR scheme provided for options and processes for redeployment, retraining and redundancy. The RRR scheme provided for a voluntary severance scheme whereby employees who accepted a Western Power offer of redundancy were eligible for the following payments on termination—

- "1. Twelve (12) weeks pay in lieu of notice where employees terminate within one (1) month of being offered and accepting a redundancy offer.
2. Two weeks pay for each completed year of continuous service, served by the employee within Western Power (also taking into account previous continuous State Government service) to a maximum of forty six (46) weeks.
3. The maximum amount of payment in lieu of notice and redundancy payment is not to exceed the amount of fifty eight (58) weeks."

The RRR scheme applied to award wages and salary employees and not to salaried staff on management contracts. Prior to the RRR scheme there was a similar scheme in place.

Because of the large number of surplus employees and the reduced number of new positions in the Generation Division and because the RRR scheme was a voluntary scheme, the Respondent obtained approval from the Government to offer an enhanced voluntary redundancy scheme to encourage employees of the Generation Division to leave the Respondent's business within a short space of time.

In a memorandum to all General Managers on 25 March 1999 Mr Eiszele outlined the proposed accelerated voluntary redundancy scheme ("the AVR scheme") as follows—

- "1. Employees whose positions are genuinely redundant and leave the company—
 - between 1st April 1999 and 30th September 1999 will be paid a redundancy payment of 12 weeks pay in lieu of notice + 4 weeks pay for each completed year of service, uncapped.
2. Employees leaving the company—
 - between 1st October 1999 and 30th April 2000 will be paid a redundancy payment of 12 weeks pay in lieu of notice + 3 weeks pay for each completed year of service, uncapped.
3. Up until 31st January 2000, General Managers may nominate people as "transitional employees". These are employees whose positions will become genuinely redundant in the future but who are required by management to undertake transitional duties.
4. With the approval of the General Manager Human Resources, transitional employees may be offered an extension of their current employment conditions which will include a departure date and a redundancy package. The redundancy package will be—
 - 12 weeks pay in lieu of notice + 3 weeks pay for each completed year of service, uncapped.
 - In each case, the departure date will not be later than 31st December 2000.
5. After the 30th April 2000, the only redundancy scheme available will be the current voluntary redundancy scheme, which is—
 - 12 weeks pay in lieu of notice + 2 weeks pay for each completed year of service, capped at a maximum of 58 weeks.
6. In the case of contract employees, the redundancy provisions specified in each contract will apply."

Approval to offer the AVR scheme in the terms set out above was obtained and all employees were advised of the terms of the AVR scheme by memorandum on 30 March 1999. The AVR scheme was also outlined in a memorandum to A & B HR Administrators on 8 April 1999 from Bruce Knox, Acting Manager Employee Services. The second page of that document stated—

"The AVR scheme applies to award employees and employees on either Clause 44 Contracts or AWA's. It is not

available to those on executive or technical/professional contracts or for those employees who submit their formal notice of resignation or retirement or who retire on the grounds of health.”

It was established that both Mr McLoughlin and Mr Blackwell saw copies of the memorandum dated 8 April 1999. They both gave evidence that when the RRR and AVR schemes were announced they understood that those schemes would not apply to them. It is agreed by the parties that in contrast to the RRR and AVR schemes that the Respondent was entitled to involuntarily terminate the employment of Mr McLoughlin and Mr Blackwell on grounds of redundancy pursuant to clause 14.1 of the contracts of employment.

Payments made to award Employees

Evidence was given by Mr Gillies that after the AVR scheme came into effect on 1 April 1999, five employees who left Western Power were paid severance payments calculated under the RRR scheme, as they had applied for and accepted an offer of redundancy under the RRR scheme.

Mr Gillies also gave evidence that after the AVR scheme came into effect 334 wages employees and 227 salaried employees accepted an offer of redundancy under the AVR scheme. Of these 201 were wages employees and 132 were salaried employees employed in the Generation Division.

Mr Gillies gave evidence of severance payments made under the RRR scheme to ten, level 9 and level 10 employees. Mr Gillies said that the maximum annual salary for a level 10 pursuant to the highest increment in the Enterprise Bargaining Agreement was \$73,057. All of the level 9 and 10 employees received severance payments that in general, substantially exceeded the amounts paid to Mr McLoughlin and Mr Blackwell. One of these employees was a Mr Colvin. Mr Gillies said Mr Colvin had been employed on a technical professional contract to carry out work for the Strategic Automation project at Kwinana. When that work was completed he reverted back to an award position and was offered and accepted a severance payment under the AVR scheme. Mr Kirkpatrick gave evidence that Mr Colvin's was a level 9 Engineer who was not on a management contract but a special contract to carry out work at Kwinana power station for two years. Mr Kirkpatrick said that it was a condition of his contract that he would revert back to his previous award classification at the end of the contract.

Other Management Employees

Mr Kirkpatrick was asked whether he informed Mr Eiszele that if Mr McLoughlin and Mr Blackwell were paid 12 months salary they would be both happy. Mr Kirkpatrick replied that he was not sure whether he had said that, but that he recalled that in his view, a precedent had been set sometime between 1991 and 1994. He said that the scheme in place at that time for award employees was a payment of 12 weeks salary up front and two weeks salary for each year of service. He said, two managers were offered 12 months salary or two weeks salary for every year of service. His recollection was not clear but he thought that the Board approved an offer to the managers who were contract employees of two weeks salary for each year of service.

Mr Paterson gave evidence that a Ms Lloyd the Manager of Organisation Development of the Generation Division was employed on a three year contract which was terminated on grounds of redundancy. Her employment contract contained the same terms as clause 14.1 of Mr McLoughlin's and Mr Blackwell's contracts. Mr Paterson's evidence established that Ms Lloyd had less than three years service at the time of termination and she was paid the minimum payment under clause 14.1, that is six months salary.

The Contractual Benefits Claim

The issues for determination in relation of both applications are—

1. What is the meaning of the express terms of clause 14.1 of the Contract of Employment?
2. Are there any terms that are to be implied in the Contracts of Employment in respect of redundancy?
3. Whether the terms of the AVR scheme or RRR scheme have been incorporated into the contract?

In the further and better particulars provided to the Respondent on behalf of Mr McLoughlin on 15 July 1999 which were

provided “without prejudice”, it is stated that the express contractual rights are—

- “(b) With the terms and conditions being both written and oral as per—
- (i) Written Executive Employment Agreement as from 1 July 1994 to 30 June 1997.
 - (ii) Written Executive Employment Agreement as from 1 July 1997 to 31 December 1998.
 - (iii) Respondents policies (in respect to redeployment, retraining and redundancy) which became express provisions of contract. These provisions include and are not limited to—
 - (A) Western Power Corporation Redeployment, Retraining and Selective Voluntary Redundancy Agreement April 1997.
 - (B) Generation Division Business Transformation Information Package March 1999.
 - (C) The 1999/2000 Accelerated Voluntary Redundancy Scheme as announced by Mr Gary Gilles, General Manager Human Resources in newsletter ‘Message to Employees’ on 30 March 1999.
 - (D) Statements made by the Minister for Energy Mr Colin Barnett and Mr David Eizle, Managing Director in March 1999 in a press release that redundancies would be on a voluntary redundancy basis only.
 - (E) Oral undertakings by Mr Ray Kirkpatrick, General Manager, Generation to various groups of employee on various occasions in 1998 and 1999 that “all employees would be treated equitably”.
 - (F) Written undertakings to employees in ‘Generation Updates’ throughout 1998 that employees would be treated equitably.”

In relation to Mr Blackwell, the written and oral conditions were particularised as the same in respect of (iii) (A) to (F) above and in relation to (i) and (ii) it is stated—

- “(i) The applicable salaried officers award from 17 October 1988 to 30 June 1994.
- (ii) Written Executive Employment Agreements from 1 July 1994 to the date of termination.”

During the course of the proceedings, the Applicants also relied upon the Minimum Standards for Employee Management in respect of redundancy which were made by the Electricity Corporation Board, after consultation with the Commissioner for Public Sector Standards pursuant to the Board's statutory obligations under s.16 of the *Electricity Corporation Act 1994*. In particular the Applicants relied upon the minimum standard for redundancy which provides—

“intent: Redundant positions relate to the equitable treatment of employees who's positions become redundant.”

The Applicant argued that the written contracts of employment did not purport to contain all of the terms of the employment contract. To illustrate their argument, the Applicants say it is expressly contemplated that their contractual rights and obligations of the party would be governed by policies of the Respondent. The Applicants contend that in construing clause 14.1 of the written contract, the term is obviously not complete and that the Commission must supply the missing term to give effect to the parties presumed intention by “reading in” the missing words. The Applicants contend the missing terms are an entitlement to a reasonable redundancy payment. As I understand the Applicants' argument, it is contended that a reasonable redundancy is a payment calculated in accordance with the AVR scheme. Further it is argued that the terms of the AVR scheme should be incorporated into the contract as it should be implied into the contract that the Respondent is to treat all employees equitably.

Legal Principles

Courts will be reluctant to imply terms in a contract particularly where, as in this case, parties appeared to have given attention to the essential elements of the contract including a specific agreement in relation to payment to be made in the event the Applicants were made redundant. *Mason J in Codelfa Construction Pty Ltd v. State Rail Authority of NSW* (1982) 149 CLR 337 at 346, held—

“The implication of a term is to be compared, and at the same time contrasted, with rectification of the contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that with rectification the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it – it is not a term that they have actually agreed upon. Thus, in the case of the implied term, the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it. Rectification ensures that the contract gives effect to the parties’ actual intention; the implication of a term is designed to give effect to the parties’ presumed intention.

For obvious reasons the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract, the less ground there is for supposing that the parties have failed to address their minds to the question at issue. And then there is the difficulty of identifying with any degree of certainty the term which the parties would have settled upon had they considered the question.

Accordingly, the courts have been at pains to emphasise that it is not enough that it is reasonable to imply a term; it must be necessary to do so to give business efficacy to the contract.”

In *BP Refinery (Westport) Pty Ltd v. Hastings Shire Council* (1977) 52 ALJR 20, in a passage adopted with approval in *Codelfa* the majority of the High Court summarised the conditions necessary to ground the implication of a term in a contract as follows—

- “(1) it must be reasonable and equitable;
- (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- (3) it must be so obvious that ‘it goes without saying’;
- (4) it must be capable of clear expression;
- (5) it must not contradict any express term of the contract.”

In the absence of Clause 14.1 the law is clear that there should be implied in a contract of employment that there is an obligation to make a reasonable payment in the event of redundancy (*Rogers v. Leighton Contractors* (1999) 79 WAIG 3551 at 3553; *Coles Myer v. Sweeting* (1993) 73 WAIG 225 at 230-231; *v. Sweeting* (1993) 73 WAIG 225 at 230-231; *Lawson v. Joyce Australia Pty Ltd* (1995) 76 WAIG). The Full Bench in *Coles Myer v. Sweeting* at 229 specifically distinguished where parties have attempted to set out all of the terms of the contract. (See also *Lawson v. Joyce Australia Pty Ltd* at 23).

This is not a case where the principles in respect of rectification have any application. Rectification is raised where the parties show that a mistake of fact is made contrary to the intention of the parties. (See *Lloyd v. Stanley* [1971] 1 WLR 535).

In my view, it is not necessary to imply a term into Clause 14.1 as the contract is effective without it. Further, it is my view that the term “reasonable redundancy payment” sought to be implied, contradicts an express term of the employment contracts, that is in the event of the redundancy, the Applicants shall be entitled to a minimum of six months pay.

The term “...shall be entitled to a minimum of” is a well known phrase in industrial and employment law. Awards and

industrial agreements often provide for rights and obligations such as “shall be entitled to a minimum meal break of 30 minutes ‘or’ shall be entitled to a minimum wage of \$500”. Such obligations are commonly understood to be satisfied if the minimum is paid.

The use of the words in Clause 14.1 “shall be entitled to a minimum of” are plain and unambiguous and do not raise an entitlement to more than the minimum. In other words, in the event of the redundancy, the Respondent at law was obliged to pay each Applicant not less than six months pay. As the Respondent’s counsel, Mr Le Meire QC, pointed out in opening, “the word minimum” means that Western Power could determine to pay a higher amount. By entering into the contracts, Mr McLoughlin and Mr Blackwell each agreed that the Respondent was obliged to pay six months pay and that the Respondent could unilaterally determine to pay more.

Mr McLoughlin argued when he was provided with the 1994 Executive Employment Agreement he distinctly remembered raising the question of severance payments in the event of redundancy with Mr Kirkpatrick. In particular, he says in reference to the minimum six months redundancy provision that Mr Kirkpatrick re-assured him the words along with the lines—

“You needn’t worry about that; that is the minimum entitlement.”

Although Mr Kirkpatrick gave evidence that he had no authority to give advice or negotiate with Mr McLoughlin or Mr Blackwell about the terms of the contracts, he said that he did not recall making such a statement, but he could have done so. Even if Mr Kirkpatrick made such a statement to Mr McLoughlin, this evidence does not assist. The learned authors of *Chitty on Contracts General Principles*, Sweet & Maxwell 27th Edition, (1994), at para 12-060, observe—

“It is not open to the court to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them into line with what the court may think the parties really intended or ought to have intended. But if, by any reasonable construction, the intention of the parties can clearly be arrived at from the document itself, then the court will give effect to that intention even though this involves departing from or qualifying particular words used. ...”

The principles that apply to the Commission’s function under s.29(1)(b)(ii) of the Act were recently set out in the reasons for decision of the President in *Ahern v. The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* 79 WAIG 1867 at 1869—

- “1. In an application under s.29(1)(b)(ii) of the Act, the Commission must determine whether the claim is one for a benefit to which the appellant is entitled under her contract of service.
2. The Commission must make a finding as to what the benefits for which the contract prescribes an entitlement (see *Perth Finishing College Pty Ltd v. Watts* 69 WAIG 2307 at 2313 (FB)).
3. The jurisdiction of the Commission, pursuant to s.29(1)(b)(ii) of the Act is judicial. It is limited to the ascertainment of existing rights by a determination of whether or not an employee has been denied a benefit to which the employee is entitled to under her/his contract of service (see *Simons v. Business Computers International Pty Ltd* 65 WAIG 2039 (FB)).
4. S.29(1)(b)(ii) of the Act provides for a remedy under the Act. Once a claim is made and is within jurisdiction, the Commission is required to exercise that jurisdiction in accordance with s.26 of the Act (see *Perth Finishing College Pty Ltd v. Watts* (FB)(op cit) at 2315-2316).
5. Once it was the (Applicants’) appellant’s case and there was evidence as to the existence of a contract of employment, it was the duty of the Commission to make a finding as to what the contract was.
6. It is then necessary to make a finding of what benefits the appellant was entitled to under the contract, and, if there was such an entitlement, whether they have been paid.”

The evidence establishes that Mr Eiszele had delegated authority from the Board of the Respondent to make decisions in respect of severance payments to the Applicants. Although the Applicants were each paid a severance payment of 36 weeks salary, as set out in a letter to each of the Applicants dated 7 July 1999 and signed by Mr Eiszele, Mr Eiszele was emphatic that he determined that the Applicants should each be paid nine months salary. Nine months is 39 weeks. In light on Mr Eiszele's unequivocal evidence on this point, I find that each Applicant has not been allowed a benefit to which he is entitled under his contract of employment, namely three weeks salary. It is agreed by the parties that Mr McLoughlin gross salary per annum was \$98,800.00 per annum or \$1,900.00 per week. Thirty-nine weeks salary at \$1,900 is \$74,100.00. He was paid \$68,137.92. He is owed \$5,962.08. Mr Blackwell's gross salary was \$96,800.00 per annum or \$1,861.54 per week. Thirty-nine weeks salary at \$1,861.54 is \$72,600.06. He was paid \$66,758.76. He is owed \$5,841.30.

In light of the findings set out above, it is not necessary to consider the parties arguments in relation to whether clause 14.1 provides for a payment in lieu of notice, as well as a severance payment. However, this is an issue that is relevant to the unfair dismissal claims.

Claim for Interest in Outstanding Contractual Entitlements

The Applicants contend that the Commission has jurisdiction to make an award of interest on outstanding contractual entitlements, pursuant to s.32(1) of the Supreme Court Act 1935.

Section 32(1) of the Supreme Court Act provides—

"In any proceedings for the recovery of any money (including any debt or damages or the value of any goods), the Court may order that there shall be included, in the sum for which judgment is given, interest at such rate as it thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date when the judgment takes effect."

Section 4(1) of the Supreme Court Act provides—

"In this Act, unless the context otherwise requires: ...

"Court" means the Supreme Court of Western Australia"

The parties agree that recent authorities of the Full Bench and the Industrial Appeal Court have resolved the issue whether the Commission is a Court (See *Helm v Hansley Holdings Pty Ltd* 79 WAIG 1459).

The Applicants contend that s.32(1) empowers the Commission to make an award of interest for outstanding contractual benefits as s.34 of the Supreme Court Act extends the operation of s.32(1) to all proceedings for the recovery of any money in all State courts. Sections 32(1) and 34 are contained in Part III of the Supreme Court Act, under heading "(3) – Miscellaneous Rules of Law". Section 34 provides—

"The several rules of law enacted and declared by this Act shall be in force and take effect in all courts whatsoever in Western Australia so far as the matters to which such rules relate shall be respectively cognisable by such courts."

The Respondent submits that the words in s.34 "matters to which such rules relate" must be cognisable by the Commission. "Cognisance of the court" is defined in Butterworths Legal Dictionary to mean "the ambit of a court's right to deal with matters judicially". It is argued that as the Act does not make any provision for the awarding of interest, the requirements of s.32(1) in respect of interest is not cognisable by the Commission. The Respondent says it follows therefore, that s.34 of the Supreme Court Act does not extend s.32(1) to the jurisdiction of the Commission to make an award in respect of a sum claimed as an outstanding contractual entitlement. It is my view that the Respondent's submission is right. This is revealed clearly when other provisions in Division 3 of Part III of the Supreme Court Act are examined. For example, s.25(9) provides that mandamus or injunction may be granted or a receiver appointed, by an interlocutory order of the Court. Clearly the operation of s.s.34 and 25(9) of the Supreme Court Act does not confer jurisdiction on the Commission.

Unfair Dismissal Claims

The Applicants both claim in their applications that their dismissal on the 17 May 1999 was harsh, oppressive and unfair on a number of grounds, including—

- the dismissal was in breach of the Respondent's policy on redundancy;
- the dismissal was in breach of express contractual rights;
- the manner and nature of the dismissal was unconscionable, particularly considering the Applicants' position and length of service.

In closing submissions, counsel for the Applicants, Mr Farrell did not rely upon ground (b) and put the Applicants' cases in a different way. He submitted that if the Commission finds that there was not a contractual entitlement to reasonable redundancy pay, the failure to make such a payment is an abuse of a contractual right.

In *Ronald David Miles, Norman Shirley Miles, Gavin Lee Miles v. Rose & Crown Hiring Service trading as the Undercliffe Nursing Home* (1985) 65 WAIG 385 ("Undercliffe case"), the Industrial Appeal Court set out the principles by which the Commission should be guided in determining whether a dismissal is unfair. Brinsden J (at 386) cited Walsh J in *North West Council v. Dunn* (1971) 129 CLR 427 at 263—

"... the question to be investigated is not a question as to the respective legal rights of the employer and the employee but a question whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right."

The onus of proof in the Commission rests on the Applicants to prove on the balance of probabilities that the Respondent acted harshly in dismissing them.

A termination on grounds of redundancy which is not accompanied by a reasonable redundancy payment is harsh, unjust and unreasonable (*Rogers v. Leighton* 79 WAIG 3551 at 3552 and the cases cited therein).

The Applicants argue that a reasonable redundancy payment is a combined payment in lieu of notice and of severance pay.

Some authorities express the view that the purpose of a redundancy or severance payment is different to payment of a sum in lieu of notice. In *Black v. Brimbank City Council* [1998] 74 FCA Justice Moore observed—

"A period of notice is give an employee the opportunity to adjust to the change in circumstance which is to occur and to seek other employment; Mathews v Coles Myer Ltd (1993) 47 IR 229. The period may be worked out, as s 170 DB allows, and it often is, as it is recognised that the employee's prospects of obtaining other employment may be better if the search is undertaken while the employees remain in employment: see for example Sinclair v Anthony Smith & Associates Pty Ltd (IRC of A von Doussa J, 1 December 1995, unreported at 8).

A severance payment however, is intended to provided (sic) as payment for compensation for the loss of non-transferable credits and entitlements that have been built up through length of service such as sick leave and long leave, and for inconvenience and hardship imposed by the termination of employment through no fault of the employee: Termination, Change in the Redundancy Case (1984) 8 IR 34 at 62,73. The inconvenience and hardship includes the disruption to the employees routine and social contacts and the competitive disability to long term employees arising from the opportunities forgone in the continuous service of the employer: Food Preservers Union of Australia v Wattie Pict Ltd (1975) 172 CAR 227. Such a payment is taxed in the favourable terms which apply to an eligible termination payment. It is quite inconsistent with the nature and purpose of the payment, and the taxation regime, that the severance entitlement should be worked out as if the number of weeks used to calculate the entitlement were weeks of notice."

Madgwick J made similar observations in *Westen v. Union des assurances de Paris* (unreported IRCA del: 28 August 1996). Other authorities have however expressed the view that some of the same factors are covered by the requirement to

give notice and the payment of redundancy. Accordingly, the two can overlap and there should be no double counting (see *Bruce Caulfield v. Broken Hill City Council* [1995] NSW IRC 33 del: 24 March 1995).

In this matter it was submitted on behalf of the Applicants in the context of the submissions made in respect of the contractual benefits claims that a reasonable redundancy payment is a combined payment in lieu of notice and severance pay. This matter, in my view, is relevant to the question whether the redundancy payments to the Applicants were in the circumstances harsh, oppressive or unfair.

The parties agree that in relation to the Commission's powers to award compensation for redundancy pay, because of the nature of the payment, no duty arises in respect of mitigation of loss.

It is argued on behalf of the Applicants that a reasonable payment is a payment calculated by reference to the AVR scheme. The Applicants rely upon the Respondent's assurances to all its employees and its obligations under the employment standards to treat their employees equitably. In addition, it is argued on behalf of the Applicants that it is recognised at law that salaried employees should be entitled to more generous redundancy payments than wages employees. Whilst this may often be the case, in fact, no authority was referred to on behalf of the Applicants to establish this proposition.

As to what constitutes a reasonable redundancy payment, the length or duration of the Applicants' fixed term contracts are irrelevant, as it continuous service that is relevant. In light of the fact that Mr Eiszele took into account the length of service of both Applicants before determining the amount that was to be paid under clause 14.1 of the contracts, whether the term of Mr McLoughlin's contract was extended only until 30 June 1999, or was for an indefinite term, is in my view irrelevant. If Mr McLoughlin's contract expired on that date then the Respondent would not have been obliged to pay Mr McLoughlin a severance payment as his contract would have expired by effluxion of time. Further, the fact that Mr Blackwell's contract of employment was to expire by effluxion of time on 30 June 2000 was, in the circumstances, also immaterial. Although much time was taken in the hearing in relation to whether Mr Blackwell had expressed a view that he intended to retire earlier than the expiration of his contract, this factual issue is also in the end immaterial. It was not suggested by the Respondent that a redundancy payment should be fixed by only having regard to the duration of the last fixed term contract, although Mr Eiszele when determining that Mr Blackwell should be paid nine months salary he took into account that Mr Blackwell's intended to retire.

It was submitted that if the terms of the AVR scheme were applied Mr McLoughlin, given his 32 years of service, his severance payment would be an amount equal to 144 weeks pay, less seven weeks actual notice given from 17 May 1999 until 2 July 1999. It is submitted that the total remuneration he should have been paid is 137 weeks or \$260,300.00. Mr McLoughlin was paid a redundancy payment of \$68,137.92 on termination. This was for approximately 36 weeks pay. It is agreed by the parties that the Commission's power to compensate for all heads of loss or injury arising out of an unfair termination is limited by s.23A(4) of the Act to six months compensation. Further, it is agreed by the parties that in Mr McLoughlin's case six months remuneration, being half of his annual total employment cost is \$61,750.

In relation to Mr Blackwell he was paid a redundancy payment of \$66,758.76. It is contended that if Mr Blackwell was paid a redundancy payment calculated according to the AVR scheme (less seven weeks notice) he should have been paid 157 weeks pay or \$225,502.76. It is agreed that six months remuneration in his case is an amount of \$60,500, being half of his total employment cost.

In finding that the Respondent's decision to pay nine months salary as a severance payment did not constitute a breach of contract, it is clear that no breach of an express contractual right arises in respect of the unfair dismissal claims. However, the question arises whether Western Power has unfairly exercised its legal right to pay the Applicants nine months salary as redundancy pay.

The first question is what does the obligation to treat employees whose positions become redundant equitably, mean.

The Applicants essentially contend that to be treated equitably they must be treated equally which they submit is to be provided with the same terms of redundancy pay that was provided to the award employees of the Respondent who were made voluntarily redundant.

As a general proposition equitable treatment does not necessarily mean that all employees in an organization are entitled to, or should be accorded, the same terms and conditions of employment. However the question arises whether in the circumstances of this case that the Applicants have not been treated equitably.

This raises a difficult issue. It is clear the terms and conditions of employment for the managers was quite different to award employees. Not only are the managers remuneration packages substantially higher than award employees, other conditions differ. For example, evidence was given that the wages employees work a nine day fortnight whereas the management employees worked a ten day fortnight.

In *Baker v. National Distribution Services Limited* [1993] NSW IR 70 ("Baker's case") the Full Court Industrial Court of New South Wales considered an appeal from a decision of Cahill DCJ in which an application had been made for orders that a contract of employment made between parties should be varied either, on the grounds that the contract was unfair, or was harsh and unconscionable, or was against the public interest. In particular it was claimed that the contract of employment should be varied so as to make provision for a redundancy payment to the Appellant (Applicant) on terms no less favourable than the redundancy payment made to the Respondent's weekly or non staff employees.

The Appellant was employed by the Respondent as a monthly employee as a Branch Manager. The Appellant and several hundred employees were retrenched by the Respondent. The Appellant at the time of retrenchment had completed more than 26 years of employment with the company and its predecessor. The Respondent made redundancy payments to two categories of staff, weekly employees and monthly employees. The monthly employees were paid a redundancy payment according to a pre-existing policy in respect of redundancy. The weekly employees were paid a more favourable benefit than the Respondent's policy because of the intervention of the New South Wales branches of the National Union of Workers and Transport Workers Union of Australia who negotiated a much more favourable redundancy Agreement. The redundancy agreement provided for four weeks pay per year of service pro-rata, severance pay of three weeks in lieu of notice and an allowance for employees 45 years of age and over of 10%. Further benefits were provided for in respect of sick leave credits and other superannuation entitlements.

The monthly employees were paid in accordance with the policy which was two months service pay, plus one month salary in lieu of notice for those with less than five years service; and five months service pay, plus one month salary in lieu of notice for those with over five years of service. Due to a misunderstanding the Appellant in fact received six months pay instead of five months allowed for in the policy. At first instance Cahill DCJ dismissed the Appellant's claim. The Full Court upheld the Appeal. At page 38 of the reasons for decision of the Full Court they observed—

"whilst in some cases of wholesale retrenchment, as his Honour found, it may be entirely fair and reasonable for a redundancy payment policy to differ as between monthly (staff) and weekly employees, this is not in our view such a case. Each case must necessarily be seen in terms of its own particular circumstances."

The Full Court found that the employment arrangement afforded to the Appellant was unfair. In particular they found that the Respondent had engaged in a litany of conduct which demonstrated in a comprehensive way the quality of unfairness. This conduct was—

- (a) The Respondent was willing to concede very favourable redundancy payments to the weekly employees for reasons of commercial expediency due to fears of their apparent industrial strength;

- (b) The Respondent deliberately kept the likelihood of retrenchment secret and had sent a memorandum to all its managers days before the retrenchments were announced implying that retrenchments were neither intended nor pending;
- (c) The Respondent failed to provide the Appellant with an opportunity to discuss a redundancy payment;
- (d) The Respondent unilaterally imposed the pre-existing company policy on redundancy on monthly employees;
- (e) The Appellant deliberately refused to advise of his redundancy arrangement until the day before he was summarily retrenched;
- (f) The Respondent required the Appellant to continue employment for a period of about three weeks to ensure the orderly closure of a branch office;
- (g) The Respondent provided a more favourable redundancy condition to the weekly employees compared to the monthly employees; and
- (h) The Respondent failed to review the monthly employees arrangements in terms of fairness or at all.

Whilst it is the case that these applications have in common with the Baker case the fact that extraordinarily generous severance payments were made to lower paid employees and the reason why such payments were made were because of commercial expediency, in my view Baker's case is distinguishable.

Leaving aside the fact that the statutory scheme for considering unfairness is different in relation to employment conditions in New South Wales, the relevant circumstances that require consideration in determining whether the Respondent has unfairly exercised its contractual rights are—

- (a) Both Applicants were intimately involved in developing the new restructure of the Generation Division.
- (b) By 16 October 1998 the new management structure was finalised. Accordingly both Applicants had over eight months notice that their positions were redundant. Although this is not to say that they had knowledge that their contracts of employment would be terminated.
- (c) Mr Blackwell made a decision not to apply for positions in the new structure and Mr McLoughlin received notice on 29 January 1999 that he was unsuccessful in his application for a position in the new structure.
- (d) In late March 1999 or in early April 1999 both the Applicants nominated a termination date of 2 July 1999. This date was accepted by the Respondent.
- (e) Unlike the Appellant in Baker's case, both Applicants had entered into an express contractual arrangement to provide for severance pay in the event of redundancy. In particular the time they entered into the 1997 contracts, the RRR scheme was in place. Accordingly they should have been aware that their entitlement to severance pay was different to award employees. In particular, given their length of service, Clause 14.1 of the Contracts of Employment provided for the Respondent to make a lesser payment to the Applicants in the event of redundancy than the RRR scheme.

When regard to the matters set out above and in particular to the fact that the Applicants were given eight months notice that their positions were to be abolished, I am unable to conclude that Mr Eiszele in determining that the Applicants should be paid nine months salary as a severance payment constituted an abuse of a contractual right. Further for the reasons set out above, it is clear that the Applicants' terminations were not in breach of the Respondent's policy on redundancy.

The Applicants' claim that the manner and nature of their dismissal was unconscionable particularly considering the Applicants' position and length of service. The factual basis of the Applicants' claims are that the Respondent did not discuss or directly negotiate with the Applicants about the amount the Respondent proposed to pay the Applicants as a severance payment. The Applicants also contend that the Respondent without warning made the Applicants involuntarily redundant.

Both Applicants received a letter dated 7 May 1999 from Mr Eiszele on 17 May 1999 stating—

"I wish to advise that pursuant to Section 14 of your Executive Employment Agreement the position of manager major projects will be made redundant effective from the close of business on 2 July 1999. The provisions of the agreement provide for a minimum of twenty-six weeks' redundancy pay. However, recognising your long period of continuous service, you will be paid thirty six weeks' redundancy pay plus your annual and long service leave entitlements."

The Applicants complain about the manner the Respondent's decision was communicated in that—

- (a) There was a lengthy delay between the date of the letters recording the decision and the delivery of the letters in disregard of its great significance to each of the Applicants;
- (b) The letters were delivered in an impersonal manner in that they were simply in an envelope on the Applicants' desks; and
- (c) Mr Eiszele refused to meet with the Applicants to discuss the severance payments.

Evidence was adduced in the proceedings that prior to receipt of the letters both Applicants had known Mr Eiszele for a very long time and that they had from time to time seen each other socially.

Although I reject the Applicant's contention that they were made involuntarily redundant without warning, I am satisfied that the manner of the termination of the employment of the Applicants was harsh oppressive and unfair. In making this finding I have had regard to all the circumstances, in particular, the following matters—

- (a) Both Applicants were part of the Respondent's senior management structure and were well known to Mr Eiszele.
- (b) The Applicants' contractual entitlements to redundancy pay were substantially different to award employees.
- (c) Both Applicants had worked for the Respondent for most, if not all, of their professional careers.

In the circumstances Mr Eiszele as Managing Director should have personally met with the Applicants or otherwise accorded them procedural fairness by hearing any submission that they may make as to a payment under Clause 14.1 of the contracts, prior to making the decision to pay the Applicants nine months salary as a severance payment. Alternatively he should have at least discussed his decision with each of them in person.

Both Applicants gave evidence that they suffered shock, humiliation and distress as a result of the manner in which the Respondent handled the dismissals.

In particular they gave evidence of hurt feelings, loss of sleep and weight loss. It appears however that they have not sought medical or any other assistance.

The authorities established a certain level of shock and distress on the part of an employee is to be anticipated in any dismissal. To ensure compensation is confined within reasonable limits, restraint is required *Burazin v. Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144. Further there must be an extraordinary level of shock or exacerbating circumstances *Coms 21 Limited v. Liu* unreported AIRC (FB) Print S357 del 25 February 2000: See also *Rogers v. Leighton Contractors* (1999) 80 WAIG 3551.

Having regard to the evidence and the particular circumstances of these matters I am satisfied in each case that the Applicants have suffered injury within the meaning of s.23A(i)(ba) of the Act. Both Applicants gave evidence that their hurt feelings and loss of sleep were ongoing and had not abated at the time of the hearing. I award each Applicant \$5,000 each as compensation. Whilst \$5,000 may ordinarily be seen as a high amount in such a case, I am of the view that the unique circumstances of these matters justify an award in each case of this amount.

Appearances: Mr R D Farrell of counsel and Mr I Johnstone on behalf of the Applicant.

Mr R L Le Miere QC and Ms J Lee both of counsel on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Donald James Blackwell

and

Western Power Corporation.

No. 828 of 1999.

COMMISSIONER J H SMITH.

3 July 2000.

Order.

Having heard Mr Farrell (of counsel) and Mr Johnstone on behalf of the Applicant and Mr Le Miere QC and Ms Lee (both of counsel) on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby orders—

1. Declares that the manner of dismissal on 2 July 1999 by the Respondent of the Applicant was harsh, oppressive and unfair and orders that the Respondent pay the Applicant within 14 Days of the date of this order \$5000 as compensation for injury caused by the dismissal.
2. Declares that the Applicant has not been allowed by the Respondent a benefit, not being a benefit to which he is entitled under an award or order, to which he is entitled under Clause 14.1 of his contract of service, namely 3 weeks salary and orders that the Respondent pay to the Applicant within 14 days of the date of this Order \$5,841.30.

(Sgd.) J. H. SMITH,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John Maurice McLoughlin

and

Western Power Corporation.

No. 811 of 1999.

COMMISSIONER J H SMITH.

3 July 2000.

Order.

Having heard Mr Farrell (of counsel) and Mr Johnstone on behalf of the Applicant and Mr Le Miere QC and Ms Lee (both of counsel) on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby orders—

1. Declares that the manner of dismissal on 2 July 1999 by the Respondent of the Applicant was harsh, oppressive and unfair and orders that the Respondent pay the Applicant within 14 Days of the date of this order \$5000 as compensation for injury caused by the dismissal.
2. Declares that the Applicant has not been allowed by the Respondent a benefit, not being a benefit to which he is entitled under an award or order, to which he is entitled under Clause 14.1 of his contract of service, namely 3 weeks salary and orders that the Respondent pay to the Applicant within 14 days of the date of this Order \$5,962.08.

(Sgd.) J. H. SMITH,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Micah Ortin

and

George Weston Foods Ltd t/a Tip Top Bakeries.

No. 1125 of 1999.

COMMISSIONER A.R. BEECH.

12 June 2000.

Reasons for Decision.

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

In dealing with the matters that have been raised by Mr Graham, it seems to me that there are two matters that need to be looked at separately. The first is the consequence of Mr Ortin's non-appearance this morning, which leads ultimately to the submission of Mr Graham that the application be dismissed for want of prosecution.

I have already indicated at the beginning of the transcript this morning the fact of the posting of the Notice of Hearing to Mr Ortin. I can add to it the fact that no mail has been returned from the address to which it was posted, and I am sufficiently satisfied that Mr Ortin was aware of the proceedings this morning by that reason, and that pursuant to s.27(1)(d) of the *Industrial Relations Act 1979* I have the ability to proceed and deal with this matter in the absence of a party to whom due notice has been given.

It is not unknown in this jurisdiction where a party, often an applicant who is unrepresented, but often also a respondent who is unrepresented, fails to attend on a particular day, and on occasions that is due to inadvertence. The Commission does extend some leniency, if that's the right word, in adjourning matters and re-listing them, merely because it can be understood that parties who don't regularly come to the Commission, or who may not have been associated with unfair dismissal or denied contractual benefits claims, for the very best of reasons, don't seem to be able to get their act together, so to speak.

However, each case must be looked at on its merits, and it does seem to me that the history of this matter does give good reason for the Commission to consider dismissing this matter for want of prosecution. As Mr Graham has referred to earlier, when the conference in this matter was held, now some considerable time ago, Mr Ortin did not attend, and when the matter came last before the Commission, which was 3 May 2000, Mr Ortin did not attend.

When I take into account also that on the occasion when Mr McIntosh has appeared for Mr Ortin, Mr McIntosh has been frank enough to indicate that he has had difficulties getting hold of Mr Ortin sufficient to obtain instructions, then it does lead me to conclude that although Mr Ortin has, on the examples that I've been given, three opportunities to appear himself in the Commission to press his case, he hasn't done so. That leads me to conclude that he does not intend to appear before this Commission, and, in particular because of the matters that Mr Graham has raised relating to the information from Centurion Garage Doors, it is a reasonable conclusion that Mr Ortin has no intention of appearing.

For those reasons an order will issue that dismisses this matter for want of prosecution.

The second issue that is raised then is the issue of costs. The Commission has the power to order costs. It is, however, a power that's exercised sparingly, and, indeed, on the authorities of this Commission the circumstances have to be extremel before an order for costs is made (*Brailey v. Mendex Pty Ltd t/a Mair & Co.* (1992) 72 WAIG 26). The issue then is whether these circumstances meet that test.

If it had been simply a case of an applicant not attending on two occasions when the matter is listed for hearing, I am not sure that of itself an order for costs would issue because I am not sure that those circumstances of themselves would be something that would meet the test. What has been presented this morning, however, is prima facie evidence, particularly from Centurion Garage Doors that the medical certificate

which Mr Ortin caused to be given to Mr McIntosh for presentation to the Commission does not explain why Mr Ortin did not attend the Commission, and, indeed, leads me to the suspicion that the medical certificate, whilst perhaps not intending to mislead, seems to be an attempt to either persuade the Commission that there was a genuine reason for Mr Ortin not to attend, or to play on the sympathies of the Commission because he had received a workplace injury.

On the limited information that was presented to Mr McIntosh, and he in good faith presented to the Commission, it appears that Mr Ortin did not receive or did not suffer any injury, and from the timesheets that are presented it appears that Mr Ortin was at work on Tuesday, 2 May 2000 prior to the hearing, on the Wednesday, 3 May 2000 which was the day of the hearing, and on the following Thursday, 4 May 2000.

That suggests to me that if he was at work then he did not suffer the injury that he apparently indicated that he had suffered, and, furthermore, given that he was working afternoon shift, there would not appear to have been any reason why he would not have been able to attend the hearing here. Admittedly, if Mr Ortin was a shift worker there can be a degree of inconvenience, but given the amount of notice that he had of the hearing, that ought to have been something that he could simply have made accommodation for and attended.

Without having the alibity to think about it, other than the brief time I have had this morning, it certainly is disquieting that an applicant to the Commission would seek to present such a false picture of his circumstances to the very body that he comes to ask for equity and fairness to be judged in relation to what he claims to have been the unfairness of his dismissal.

His conduct in that regard, in my view, does mean that this case is extreme. Indeed, I cannot readily recall a circumstance where I have had material presented to me that shows, on the face of it, what is a deception. I add that this is no reflection on Mr McIntosh who has acted in good faith on the instructions given to him. Indeed, Mr McIntosh has endeavoured to act in the best interests of his client in difficult circumstances. His courtesy to this Commission is appreciated.

I therefore find that it is an appropriate circumstance where the test as set down by the Full Bench of this Commission is met, and an order for costs will issue.

Appearances: No appearance on behalf of the applicant.

Mr D. Graham appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Micah Ortin

and

George Weston Foods Ltd t/a Tip Top Bakeries.

No 1125 of 1999.

13 June 2000.

Order.

HAVING HEARD Mr D. Graham on behalf of the respondent and there being no appearance on behalf of the applicant, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

- (A) THAT the application be dismissed for want of prosecution.
- (B) THAT there be liberty to the respondent to apply within 7 days of the date of this Order for an Order for costs.

[L.S.]

(Sgd.) A.R. BEECH,
Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John Arthur Richards

and

Total Fencing.

No. 1057 of 1999.

Nedjeliko Duratovic

and

Stephen Denis Mant and Loretta Kaye Mant in
Partnership trading as Total Fencing.

No. 1119 of 1999.

COMMISSIONER P E SCOTT.

14 April 2000.

Reasons for Decision.

THE COMMISSIONER: These applications are claims for contractual benefits said to arise from the contracts of employment between the Applicants and the Respondents. The Respondents are in fact Stephen Dennis Mant and Loretta Kaye Mant trading as Total Fencing. This small business has operated for more than 20 years manufacturing and distributing different types of fencing. In late 1998, the Respondents decided that it was necessary to improve the business's exposure, initially south of the river, and then north of the river, due to changes in the way fencing was purchased.

The issue for determination at this point is the nature of the relationship between the parties. The Applicants say that each was engaged in an employer/employee relationship with the Respondents whilst the Respondents say that the nature of the relationship was one of subcontractor and principal. The Commission has heard evidence from the Applicants, from Loretta Kaye Mant, Stephen Dennis Mant and Steven Ross Nankiville.

The Applicants' evidence is that they each applied for positions advertised in the employment section of the West Australian newspaper, in the case of Mr Duratovic in early November 1998 and in the case of Mr Richards, in mid January 1999. Mr Duratovic says that an interview was arranged and he attended this on 16 November 1998. The first half hour of the interview was undertaken between himself and Mr Nankiville as Mr Mant, who had intended to be present, was engaged on a telephone call. Mr Mant joined them and the discussion including Mr Mant merely reiterated what had been discussed with Mr Nankiville. Mr Duratovic says that at the end of his interview he was told that other people were to be interviewed and that he would be advised of the outcome. Some days later, he was told that he had been successful and commencement was arranged.

Mr Richards gave evidence that his interview was in late February and he was interviewed only by Mr Nankiville. Mr Richards says that at the end of the interview with Mr Nankiville, Mr Nankiville shook his hand and congratulated him on being successful in obtaining the position.

Both Applicants gave evidence that during their interviews the discussion regarding the relationship between the parties did not include any mention of a contractual arrangement other than that of employer and employee. They said that they each were advised that they would receive a car allowance of \$300.00 per week and 5 per cent commission on the sale of all materials. In Mr Richards' case he says that he was advised that the \$300.00 per week was to cover the cost of running his motor vehicle and mobile phone. They each say that there was no mention of any other conditions relating to insurance, superannuation, taxation, holidays or leave, their conditions of employment or hours of work. Each says that there was no discussion about a different rate of commission applying to Hardi fence from that applying to all other products. It was not until some time after commencement that they were told that the 5 per cent commission on all other products did not apply to Hardi fence – that they were to receive a flat rate per sheet sold.

For the first few weeks, Mr Duratovic was paid \$300.00 per week, which he understood to be his car allowance, and he believed he was due 5% commission on sales in addition to

this. He says that approximately ten days after he commenced work, he had a discussion with Mr Mant to clarify the car allowance and commission. He says that Mr Mant very firmly told him that the \$300.00 was a safety net, not a car allowance or to cover expenses. He explained that if Mr Duratovic did not earn \$300.00 per week in commission, he would still be paid \$300.00. If commissions earned exceeded \$300.00, he would be paid commissions only, not \$300.00 plus commissions. Mr Duratovic says that he was shocked by this, but because it had taken him two to three months to get the job, that he would stay there, and he says he decided to accept it.

Mr Duratovic says that he was told by Mr Nankiville some seven to ten days into his employment to calculate his own commissions so he did this on his own computer and created a format by which he kept a record of sales made by him and submitted this for payment each week. He was paid each week except at the commencement of his employment when he had to specifically request payment. He was paid by cheque, with no statement attached. For the first few weeks he was paid \$300.00 per week, and when his commissions exceeded \$300.00 per week, the amount of the cheque was in accordance with the document he had prepared and submitted which set out his sales made and commissions earned.

Mr Richards did not submit sheets of sales for calculation of his pay. He was simply paid \$300.00 per week. According to Mrs Mant, Mr Richards was the only person to be paid fortnightly—everyone else was paid weekly.

Both Applicants gave evidence that there were sales staff meetings and at one meeting it was decided that the sales staff should man the telephones in the office and a roster was created. Each was allocated a particular morning to be on duty to answer the phones and to make note of any leads which came in as a result. Mr Duratovic says that he allocated to himself those leads which were relevant to the area he was working in, and both Applicants say that allocations were made by them in accordance with directions given by their employer. They also gave evidence that Mr Richards in particular had indicated a desire to have more training to develop his product knowledge and that there was some discussion about when this was to be held. In the end, it was decided by Mr Mant that it would be held on a Saturday because that was when he would make himself available.

Mr Duratovic gave evidence that he had a motor vehicle accident in January 1999 and had to hire a motor vehicle for three weeks while his car was being repaired. He was advised by his insurance company that he needed a letter from his employer to say that he needed a car on a daily basis so that he could claim the cost of the vehicle hire from the insurance company. He asked Mr Mant to write this letter, and Mr Mant wrote a letter indicating that Mr Duratovic was an employee of the company engaged on a full-time basis and needed a car for his work (Exhibit 5).

Both Applicants also gave evidence that just before Easter there was a meeting where it was discussed that sales were declining and Mr Nankiville produced a schedule setting out land developments and areas each member of the sales staff was to visit and drop off leaflets over the Easter period. Each Applicant said that this was basically an order from their employer.

Mr Duratovic gave evidence that he had asked for and been given a half day off.

Each of the Applicants says that at around 20 April 1999 they were given a letter by Mr Nankiville which they were supposed to sign. It was a document which would have placed them in a position of subcontractor and not employee. They each indicated that they were not prepared to sign this document. The evidence is that the document was handed out at a meeting, at which Mr Richards asked whether this meant that he was not covered by worker's compensation and he was told that he was not. He says that he had always believed that he was covered by worker's compensation and he became very angry. There were raised voices and Mr Richards stormed out of the meeting telling the Mr Mant that he could "stick his job". After Mr Richards had stormed out, Mr Duratovic spoke with Mr Mant and told him that he was not happy with the contractual arrangement proposed and with at least two of the clauses of the document handed to him. At some point that day, it was agreed that he would go home and think about the

situation and if there were any problems with the agreement he and Mr Mant could discuss it. Over the next few days, Mr Duratovic decided that he would not sign the document and he brought his employment to an end also.

The Respondents' position is quite different to that of the Applicants. The evidence of Mr Mant and Mr Nankiville is that during the interviews attended by them that both Applicants were told in clear terms that they would be conducting their own "business within a business", that they would receive a \$300.00 per week "safety net" to allow them to cover their costs while they were learning about the fencing industry and to enable them to get to a point of earning a good living. The Respondents say that the differing rates of commission applicable to Hardi-fence compared to the other 5 per cent commission was explained at each of the interviews. They deny emphatically that there was any reference to a car allowance.

Mr Nankiville says that in his interview with Mr Duratovic he told Mr Duratovic how he goes about paying his own tax and that Mr Duratovic would be responsible for his own tax. He says that they discussed insurances generally associated with working for oneself as a contractor but did not specifically discuss worker's compensation. He says that Mr Duratovic would have left the room understanding that he would have to meet his own expenses and insurances as a contractor.

Mr Nankiville says that in the interview with Mr Richards, Mr Richards was concerned about whether he would earn a reasonable income from the business and he discussed with Mr Richards the income he had received in recent times.

Both Mr Nankiville and Mr Mant gave evidence that the training and the telephone roster were devised by agreement between all of the sales people and were not established by way of instruction by the employer. Mr Nankiville said that his relationship as sales manager with the sales representatives was one of a "helper" and of "friendship", he provided suggestions and education to enable them to earn commissions. His relationship did not involve giving directions. He is not in a position to give them directions. Furthermore, he does not give days off—it is up to the sales representatives as to when they work. He recalls that Mr Duratovic mentioned to him once that he was doing some interpreting for Centrelink but he did not know that he was doing this on a regular basis, and he does not particularly recall Mr Duratovic asking him for half a day off.

As to the allocation of leads, both Mr Mant and Mr Nankiville said that leads were generally allocated on a basis of a north or south of the river distribution according to where people lived. However, if there was extra work available for someone who was not occupied then this may be allocated to that person. If someone was not available to fill his rostered time on the telephone then that person would re-arrange that allocation with another sales representative. It was not a matter of the employer approving such a change, rather it was a mutual re-arrangement by the sales representatives. Mr Nankiville said that he would have accepted the situation if any of the sales representatives did not wish to participate in the roster – it was not a requirement of them—they were free to participate if they wished and they did so choose. It was the sales representatives who had requested to be provided with training and that was done to assist them.

Mr Nankiville says that the document which set out land developments provided to the sales representatives soon before Easter was also designed to assist them, with a suggestion that they might wish to take it up rather than a direction that they undertake this work. They were asked to provide feedback on what they were doing on the basis that there would be some record kept so that there was no wasted effort, or doubling up of work.

The Respondents provided brochures, catalogues and business cards to the sales representatives, which provided a space for them to insert their own names and mobile phone numbers.

The question to be determined at this point is the nature of the relationships between the Applicants and the Respondents. A number of authorities set out the tests to be applied.

The law with regard to determining the proper relationship between the parties is well known. In the analysis of the

relationship between the parties there are a number of tests to be applied, but as noted by Mason J. in *Stevens v Brodribb Sawmilling Co. Pty Ltd* (1985-86) 160 CLR 16 at 29 “it is the totality of the relationship between the parties” which is used to distinguish between a contract of service and a contract for services. The issue of whether the employer had ultimate authority over the person in the performance of his work, so that he was subject to the employer’s rights to exercise control, is a significant indicia. The decision in *Zuijs v Wirth Bros Pty Ltd* (1995) 93 CLR at page 571 notes that the control test refers to the right to control, so far as there is scope for it, even if that is “only in incidental or collateral matters.” Having noted the importance of the control test, it is also worth noting that in *Queensland Stations Pty Ltd v Federal Commissioner of Taxations* (1945) 70 CLR 539 at 552 Dixon J. observed that the reservation of the right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract. In *Stevens v Brodribb* (op cit) Mason J. noted that the control test is not the sole criterion to be applied, but is merely one of a number of indicia. “Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee” (page 24).

I also note the decisions of the Industrial Relations Court of Australia in *Curran and Tarbook* (Lee J.) (unreported) and Moore J in *Jackson and Wilson v Monadelphous Engineering Associates Pty Ltd*. In the latter decision Moore J observed—

“To be considered with the characterisation of the relationship in the written agreement signed on 9 November 1992 are the indicia referred to by both Mason J and Wilson and Dawson JJ in *Stevens*. While it has not traditionally been put in these terms, it may be approached on the basis that the terms and character of the contract are to be gleaned not only from the terms of any express contract itself but also the way in which the parties conducted themselves under it: see *Spunwill Pty Ltd v BAB Pty Ltd* (1994) 36 NSWLR 290.

Counsel for Monadelphous referred to the judgement of Lee J in *Gurran v Tarbook Pty Ltd* (unreported, Industrial Relations Court of Australia, 13 September 1996) and the following observations of his Honour—

“Indicia developed by the common law to determine whether a person is an employee or an independent contractor such as the degree of control exercised by a party for whom the services are rendered or the degree of integration of the contractors services in the business for which the services are provided are less apt to identify the true nature of the employment relationships in the context of modern employment practices. It is necessary to consider the terms of the contract made between the parties, the relative strengths of the contracting parties and whether there are sound commercial reasons on both sides that give reality to a contract to provide services where normally a contract of service would form the expected employment relationship...”

“In many cases the manner of provision of services under a contract for services may, on analysis, differ inconsequentially from the manner of performance of a contract of service. The distinction will be found in the terms of the contract that has been formed between the provider of the work and the recipient of those services.”

I do not consider, however, that these observations do anything more than repeat, perhaps with different emphasis, what his Honour earlier in said *Glyburn*. Indeed his Honour referred to *Glyburn* in *Gurran*. Nonetheless, the written terms of the contract and the indicia of employment not dealt with by the express terms of the contract itself must be considered.”

It has also been said in *Australian Mutual Provident Society v Allan and Another* (1978) 52 ALJR 407 at 409 (PC) where the Privy Council affirmed what Lord Denning MR said in

Massey v Crown Life Insurance Co [1978] 2 All ER 576 at 579 (CA) that—

“The law, as I see it, is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it.”

(77 WAIG 6)

I also note the decision of the Commissioner of Taxation of the Commonwealth of Australia in *Barrett and Others* (1973) 129 CLR 395 as this decision relates to sales representatives paid on a commission basis and I note that His Honour Stephen J. made comment about sales representatives or salesmen in that case being paid commissions, and that in that case the employer was not concerned with questions of the hours work or leave taken or generally with time gainfully employed, but was concerned with performance.

I have considered all of the evidence in this matter. I have observed the witnesses as they gave their evidence and the witness who impressed me most with his recollection and credibility was Mr Mant. Mr Nankiville’s evidence was at times confused and he readily acknowledged a lack of memory on some issues. However, he was very clear and quite adamant about other matters. I formed the view that at times he was unable to distinguish between the two interviews he undertook with the Applicants. His evidence on a number of matters was equivocal. As to the evidence of the Applicants, Mr Richards was defensive and gave a very clear impression that he had decided on the terminology he would use to describe, for example, being “directed” or “instructed” about certain matters, because he believed those words reflected well on his position and were of assistance to his case. The evidence of the two Applicants was contradictory in some areas.

Having weighed all of the evidence, I draw the following conclusions as to the facts—

1. The Applicants each applied for positions as sales representatives which the Respondents had advertised in the Employment section of the “West Australian” newspaper, and each was interviewed.
 2. The Applicants were each advised in their interviews, perhaps not in as clear terms as might be appropriate, that they would be paid \$300.00 per week, that they would be responsible for determining their own income by the amount of work they put in and that the Respondent would provide them with assistance. It is not clear whether they were told that they would be responsible for their own taxation arrangements and other expenses.
- I note at this point that I have reached no conclusions regarding the basis of or reasons for the \$300.00 per week payment, whether it was to be for a limited duration or an ongoing entitlement. That is a matter which may require further evidence and/or submissions from the parties depending on the outcome of this preliminary matter of the nature of the relationship between the parties.
3. No taxation was deducted from payments made to the Applicants. Mr Duratovic raised this matter with Mr Nankiville soon after commencing work and was told he should make his own arrangements.
 4. The Applicants were not directed to work certain days of the week or certain hours of the day.
 5. The Applicants were required to have access to a motor vehicle and mobile phone.
 6. The Applicants attended staff meetings with Mr Mant and Mr Nankiville.
 7. There was a general allocation of work according to which side of the river the Applicants worked, and based on this general allocation the Applicants were able to allocate particular leads to themselves and to others.
 8. By mutual agreement, the Applicants participated in a roster to man the telephone, and arranged amongst themselves for alterations to the roster.
 9. Following a request for product training by Mr Richards, Mr Mant established some training sessions for those who wished to participate.

10. At a staff meeting prior to Easter, Mr Nankiville distributed a list of land developments which the Applicants were encouraged to call on to promote the business. They undertook some of this work and provided a record of calls made so that there would be no overlap or doubling up of efforts.
11. Mr Duratovic was paid weekly, by cheque, following his submitting a schedule of sales he had made. Payment was made by cheque, and no statement was attached to the cheque. At the point where he commenced earning more than \$300.00 per week in commissions, the amount of the cheque would reflect the amount contained in his schedule. He developed and generated his own schedule of sales on his home computer. He prepared a promotional brochure which was taken up by other sales representatives.
It took Mr Duratovic a relatively short time before he was generating sales which brought him commissions of more than \$300 per week.
12. Mr Duratovic requested Mr Mant to write a letter to his insurance company after Mr Duratovic had had a motor vehicle accident and was seeking provision of a hire car through his insurance company. Mr Mant wrote that Mr Duratovic was "a full time employee" of the Respondents.
13. Mr Richards was paid fortnightly by cheque. He did not submit a schedule of sales he had made, and did not reach a point during his work for the Respondents where he earned more than \$300.00 per week in commissions.
14. The Applicants were not directed or controlled in the way they undertook their work.

Having reached these conclusions, it is necessary to assess them in light of the nature of the work the Applicants undertook. The Applicants were sales representatives. With the exception of attending sales staff meetings, attending to the telephone roster and submitting sales information and claims for payment, their work was not reliant upon attendance at the office, nor was it to be performed within particular hours of the day or days of the week. Although it may have been Mr Mant's ultimate intention to have the Applicants conduct their own businesses within a business, they were inexperienced in this field of work. They were unfamiliar with the products. The relationships were conducted in many ways reflective of employment relationships; there were staff meetings; there were training sessions; and the Applicants were involved in a roster to man the telephone. These arrangements, combined with the Applicants having applied for positions advertised in the Employment section of the "West Australian" newspaper and the initial payment of an amount of \$300.00 per week are all inimical to an independent contract relationship. The purpose of this \$300.00 per week payment is in dispute. Whether the payment was a "safety net", an advance against commissions, or an allowance to cover expenses such as motor vehicle and/or telephone costs is not to the point at this stage. What is significant is that this is quite contradictory to the normal arrangement one could anticipate with an independent contract relationship. If the Applicants were independent contractors then one would anticipate that the Respondents, in responsibly conducting a business, would have ensured that prescribed payment systems ("PPS") arrangements were put in place however, they were not. No tax was deducted. Even though the Respondent might say that these things are the responsibility of the Applicants, businesses today in dealing with independent contractors have obligations to make arrangements regarding taxation through the PPS. The Respondents were aware of this as they engaged subcontractor installers for whom they made PPS taxation deductions.

I also note the documentation submitted to the Applicants at the meeting which brought about Mr Richards' departure. No written contractual documents had been prepared prior to this and although the Respondents say they were simply seeking to reflect in a formal document the terms of an existing independent contract, they gave to the Applicants documents which do not make the situation clearer at all. Exhibit 9 which is headed "Agreement For The Contract of Sales Representatives" sets out "Terms of Employment". Point 4 of those "Terms

of Employment" says that "should employment cease" certain things are said to be agreed. Point 5 purports to make the sales representative responsible for all insurances. When Mr Duratovic was arranging to pick up his final pay, he was asked to sign a document (Exhibit 8) headed "Cease of Employment". This terminology does not clarify that the relationship was one of independent contractor and principal.

Therefore, although I conclude that the Respondents did not direct the Applicants in the way they did their work and that a number of work related practices were resolved by agreement between the parties, given the nature of the work, and the totality of the relationship, I am not satisfied that this lack of control or direction is determinative or even indicative of the nature of the relationships.

As to whether the Applicants were conducting a "business within a business", it appears that although they may have had some opportunity for "profit" from commissions earned and some risk of "loss" in that they were incurring expenses relating to maintaining their motor vehicles and usage of mobile phones as part of their work, they mostly operated out of the Respondents' premises, received leads directly through that business via the Respondents' telephone, were supplied with promotional material, order books and business cards and were given training. Their risk of loss was significantly mitigated by the \$300.00 per week payments made to them. They were selling products for the Respondents in circumstances in which one would normally anticipate employees doing such work. That is not to say that independent contractors might not do the same work but it is unlikely that independent contractors would do such work in the circumstances described above.

It may have been, as I have noted earlier, that it was intended by the Respondents that the situation would mature into one where the Applicants were conducting their own businesses. However, in light of the nature of the work and the circumstances under which it was conducted, I conclude that at the point of termination the Applicants were employees of the Respondents.

APPEARANCES: Mr M Richardson on behalf of the Applicant.

Mr N Patterson on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John Arthur Richards

and

Total Fencing.

No. 1057 of 1999.

COMMISSIONER P E SCOTT.

27 June 2000.

Order.

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS on the 31st day of August 1999 the Commission convened a conference for the purpose of conciliating between the parties, however, agreement was not reached; and

WHEREAS on the 14th day of April 2000 the Commission issued Reasons for Decision dealing with a challenge to the Commission's jurisdiction, deciding that the Commission had jurisdiction to deal with the matter; and

WHEREAS on the 9th day of June 2000 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at that conference the parties reached an agreement in principle in relation to the application; and

WHEREAS on the 23rd day of June 2000 the Applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby dismissed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Nedjeljko Duratovic

and

Stephen Dennis Mant and Loretta Kaye Mant in partnership
trading as Total Fencing.

No. 1119 of 1999.

COMMISSIONER P E SCOTT.

27 June 2000.

Order.

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS on the 31st day of August 1999 the Commission convened a conference for the purpose of conciliating between the parties, however, agreement was not reached; and

WHEREAS on the 14th day of April 2000 the Commission issued Reasons for Decision dealing with a challenge to the Commission's jurisdiction, deciding that the Commission had jurisdiction to deal with the matter; and

WHEREAS on the 9th day of June 2000 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at that conference the parties reached an agreement in principle in relation to the application; and

WHEREAS on the 23rd day of June 2000 the Applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby dismissed.

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

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Michael John Ryan

and

Radiant Nominees Pty Ltd t/a Trees Need Tree Surgeons.

No. 1814 of 1999.

COMMISSIONER A.R. BEECH.

23 June 2000.

Reasons for Decision.

It is a matter of record that Mr Ryan forwarded a request the day before the hearing of this matter that it be adjourned. He indicated that he had recently engaged counsel, and for that reason counsel needed an adjournment. I asked my Associate to contact Mr Pilgrim for the respondent's response and I formed the opinion firstly that Mr Ryan has had ample opportunity to secure representation instead of leaving it to the day before the hearing and that that was not a sufficient reason to

adjourn the matter, given that Mr Pilgrim informed the Commission that the arrangements made by the respondent would involve it in some cost if the hearing were now adjourned. Balancing those two positions, I decided that the adjournment would not be granted.

Mr Ryan had been employed as a Machine Operator and Truck Driver from 2 December 1998 until 1 November 1999. He claims that he was dismissed and that his dismissal was unfair.

The respondent argues that Mr Ryan was a casual employee in the true sense. That is, that Mr Ryan was not a full-time employee who was paid a casual rate. Rather, Mr Ryan was an employee whose employment was characterised by whether the employer had sufficient work available for him and that Mr Ryan was available to do the work. For his part, Mr Ryan substantially agrees with the respondent on this point. In particular, he acknowledges that during this period of his employment with the respondent he worked on mine sites for two brief periods, and then returned to work for the respondent when work was available. Mr Ryan agrees that he was paid at a casual rate and had no entitlement to annual leave or paid sick leave or payment for public holidays not worked.

Given that Mr Ryan does not argue that he was not a casual employee, I accept that he was a true casual employee. The consequence of this finding is that the respondent says that Mr Ryan was not dismissed. Rather, the respondent decided not to offer him further work. The decision not to offer further work to Mr Ryan is not a "dismissal" and therefore Mr Ryan cannot bring this claim to the Commission. However, in the circumstances of this case, the point is a fine point. It is a fine point because a true casual can still be dismissed. There is not the evidence to show that Mr Ryan was hired on a daily basis. The work upon which he was engaged in Thelma Street was, apparently, part of ongoing work. Further, as Mr Anderson, the Managing Director of the respondent, states himself in evidence, he did decide that Mr Ryan would be "terminated" as a result of an incident which had occurred on the preceding Friday. I therefore propose to deal with Mr Ryan's application on the basis that there has been a dismissal.

The Commission heard evidence from Mr Ryan. Mr Ryan then called as a witness Mr Grove who had been his assistant on the preceding Friday. The respondent called evidence from Mr Anderson and from Mr Henley who was the outside manager. The respondent is in the business of pruning trees for local councils or private concerns. The respondent was pruning trees in an area which included Thelma Street, South Perth and on the preceding Friday, Mr Ryan was part of a team of employees and contractors performing this work. Mr Ryan drove the truck to which was attached a chipper. Mr Grove accompanied him in the truck and operated the chipper. As the Commission understands it, work proceeds by the cutters doing their cutting, they are followed by the truck and the chipper for the clearing up and removal of the debris. Mr Ryan says that between 11:00am and 11:30am he had an argument with a fellow employee, Mr Peter Hickey. After the argument Mr Ryan continued working, dumped the truck contents and as he was returning found that Mr Hickey was walking off the job without explanation.

By this stage Mr Ryan's knee was sore (due to a non-work related issue) and he sat in the truck for between 10 and 20 minutes to attempt to recover. He then attempted to work a little more but eventually spoke to all of the employees and said he was going home and he would discuss the matter the next day. He says that he went with Mr Grove to Mr Grove's car to use Mr Grove's mobile telephone to contact Mr Henley to inform him of this. He was unable to do so, despite trying on three occasions. He then took the truck and chipper and drove home, he says at approximately 1:30pm. He says that in the normal course of events, finishing time on the job is between 12 noon and 1:00pm in any event.

From the evidence of the other witnesses however, a slightly different picture emerges. For example, although Mr Ryan says that the reason he went home was his sore knee, Mr Grove does not recall Mr Ryan mentioning his sore knee. Rather, Mr Grove merely says that Mr Ryan said he was feeling sick. Mr Anderson says he was later told by the other employees that Mr Ryan had said that he had had a headache and that he was not feeling well. In my view, in the end very little terms upon

whether Mr Ryan had a sore knee or was feeling sick. The essential issue is that he decided he was too ill to remain at work and he left the job by driving the truck and the chipper.

What is of more significance, however, is that Mr Ryan says that he left the job at approximately 1:30pm and that it was the end of the shift anyway. I do not accept Mr Ryan's evidence. Even his own witness, Mr Grove, says that Mr Ryan left the job at a time more like 12 noon. Mr Anderson says he received a telephone call between 11:30am and 12noon from the other employees at the job complaining that Mr Ryan had left with the truck. Indeed, Mr Anderson's evidence is that at about 1:00pm he went to the job site and met with the other employees at the job site. The evidence of Mr Henley is that about 1:00pm Mr Anderson called him to advise that Mr Ryan had left the job. Accordingly, I accept the evidence of Mr Grove, indeed Mr Ryan can hardly complain at me doing so because it was he who called Mr Grove as a witness, and find that Mr Ryan in fact left the job at 12 noon. Mr Groves' evidence is amply supported by the evidence of Mr Anderson and Mr Henley.

The time Mr Ryan left the job is significant. Mr Ryan says that normal knock off time was between 12 noon and 1:00pm. However, on the evidence I am quite satisfied that normal finishing time is closer to 3:30pm than 1:00pm. Other evidence before me does not show that employees would have left the job at approximately 12 noon. Even Mr Grove's evidence suggests that the hours of work were up to and including 3:30pm. Mr Ryan says his departure at approximately 1:30pm is insignificant because there was only approximately 10 minutes more work left in Thelma Street. The balance of the evidence clearly shows that he is wrong. There was approximately 2 hours work yet to do with the truck and the chipper in Thelma Street. I accept the evidence of Mr Grove that it took until smoko the next day to clear the work not finished because of Mr Ryan's early departure. Further, because of Mr Ryan leaving the job, the rest of the employees at the job were only paid until approximately 1:30pm that day and not until 3:30pm. Furthermore, the respondent had to employ extra staff the next day in order to assist with the additional work to be done clearing Thelma Street as well as the next day's scheduled programme. I am quite satisfied that by Mr Ryan leaving the job with the truck and the chipper he caused considerable disruption and cost to his employer.

I am also not satisfied that Mr Ryan left the job because his knee was causing him so much discomfort that he could not continue working. The evidence suggests that it is far more likely that Mr Ryan left the job because of the argument with Mr Hickey. I find on the evidence that the argument that had occurred between Mr Ryan and Mr Hickey occurred far closer to the time that Mr Ryan decided to leave the job than Mr Ryan would have it. Furthermore, although Mr Ryan gives his sore knee as the reason for him leaving the job, and that he mentioned this to Mr Grove, according to Mr Grove he did not mention his sore knee. The evidence is quite clear that if Mr Ryan had contacted the respondent to say that he was sick and wanted to go home, Mr Anderson would have found some transport available to take him home in such a way that the truck and chipper would remain on the job. I accept Mr Anderson's evidence in this regard. I am unable to find that Mr Ryan's only alternative was to go home via the truck and chipper.

I am prepared to accept that Mr Ryan attempted to ring Mr Henley on Mr Henley's mobile phone but that Mr Henley was not able to answer the phone because he was at that stage in a cherry picker. While Mr Grove is unable to recollect any of the events surrounding the mobile phone, I do not believe that Mr Ryan would have invented the story. Rather, Mr Ryan is likely to have exaggerated his efforts to contact Mr Henley rather than inventing them. Nevertheless, on the evidence, even if Mr Ryan was feeling unwell, there was no reason why he could not have contacted Mr Anderson. I do not accept that an instruction was given to employees that Mr Anderson was only to be contacted if money matters were involved. On the evidence, for example, another employee of the crew contacted Mr Anderson when Mr Ryan left with the truck and chipper.

Furthermore, even if Mr Ryan's need to leave the job was urgent, there is no reason why he could not have contacted the respondent when he reached his own home. He did not do so and there is no explanation for his failure to do so.

The consequence of Mr Ryan leaving the job without permission, and in a manner that meant that the respondent incurred the losses which it did, is serious. Also, the respondent did not have Mr Ryan's home telephone number, and did not have any means of contacting Mr Ryan or securing the return of the truck and the chipper.

As a consequence of the above, Mr Anderson decided that Mr Ryan would no longer be offered further work, that is, that he would be terminated. He directed Mr Henley to speak to Mr Ryan for that purpose when Mr Ryan returned the following Monday. On the following Monday Mr Ryan approached Mr Henley and began to inform him regarding the argument with Mr Hickey. I am satisfied from Mr Henley's evidence that Mr Ryan was given an opportunity to at least explain his side of the story, although I suspect that there would be very little that Mr Ryan could have said that would have changed Mr Anderson's mind. Mr Henley effectively dismissed Mr Ryan.

What then of Mr Ryan's claim that he was dismissed and that it was unfair? Mr Ryan caused his employer a loss when it was not necessary for him to do so. If Mr Ryan was indeed in charge of the remaining crew, as Mr Ryan asserts but the respondent denies, his actions in leaving were still serious. His removal of the truck and chipper for reasons relating to the argument he had with Mr Hickey are difficult to excuse. Given the nature of Mr Ryan's employment it cannot be said that he has shown that the respondent's decision was unfair towards him. It is not clear that Mr Ryan was not feeling well as he suggested. Rather, I find that his absence from work is likely to have had more to do with the argument with Mr Hickey than Mr Ryan admits. Even if Mr Ryan had been feeling unwell, there were alternatives to him other than leaving the job with the truck and chipper. In my view, Mr Ryan's actions are such that it was entirely reasonable for the respondent to decide that it no longer wished to have him in its employ. Accordingly, Mr Ryan's application will be dismissed.

Order accordingly.

Appearances: Mr M. J. Ryan appeared on his own behalf as the applicant.

Mr L.H. Pilgrim appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Michael John Ryan

and

Radiant Nominees Pty Ltd t/a Trees Need Tree Surgeons.

No. 1814 of 1999.

23 June 2000.

Order.

HAVING HEARD Mr M.J. Ryan on his own behalf as the applicant and Mr L.H. Pilgrim on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the application be dismissed.

(Sgd.) A. R. BEECH,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

David Saab

and

HotCopper Australia Ltd.

No.774 of 1999.

COMMISSIONER J F GREGOR.

15 June 2000.

Reasons for Decision.

THE COMMISSIONER: On 8 June 1999, David Saab (the applicant), applied to the Commission for an order pursuant to Section 29 (1)(b)(i) and (ii) of the *Industrial Relations Act 1979* (the Act), on the grounds that he had been unfairly dismissed from employment with HotCopper Australia Ltd (the respondent) on 21 May 1999. He seeks reinstatement to the position of Chief Executive Officer and contractual benefits which are detailed hereunder.

The applicant is 27 years of age, he arrived in Australia in 1978 and has held various jobs since completing secondary school at Ocean Reef Senior High School in 1990. From 1993 he has worked variously as a bar attendant, competition organizer, a sales person selling menswear and motor vehicles. For two years, with some breaks, he was a student at Curtin University. In 1997 he says he conceived an idea in relation to the Internet using a distributor network. Over a period of five months he researched the idea and prepared a business plan. (*Exhibit L5*) The plan was produced in August 1997, contained revenue statements for the years ended 31 January 1999, and 2000 projecting a possible sales revenue of \$599,000, leaving an after tax net profit of \$200,000. In November 1997, together with business partner Mr Simon Hookway, he registered an Internet Service Provider (ISP). The intention of the two men was to build the ISP with little or no capital using an innovative marketing strategy which relied on the distributor network and the analysis of the needs of end users. A partnership was set up which traded under the names of SwiftLink Communications and DNS Communications. Although these two businesses were ISP's, SwiftLink Communications was to be for a commercial ISP, targeting business consumers while DNS Communications was to target residential consumers. SwiftLink Communications was initially planned to be the flagship ISP. It was to be marketed as a premium product at an appropriate market price. DNS Communications was to offer a product to a 'cost conscious' market which would be satisfied with slower response times.

SwiftLink Communications came on line in February 1998; DNS about four or six weeks later. This was the end result of activities of the applicant and Mr Hookway involved with setting up the business which commenced in November 1997. DNS achieved a small market presence immediately and SwiftLink Communications was used for commercial clients only when their needs were very high and different to the standard user. The two businesses traded as a partnership until 30 June 1998 from premises in Morley. These, according to the applicant, were modest offices, located close to the Telstra network facility. The businesses were able to operate rent free for the first 4 months with an appropriately small rental thereafter. After a few months trading the two partners sought advice from Mr Carlo Bordi from Poli & Associates. Mr Bordi became their accountant. They told Mr Bordi that they estimated the profits of the business to be in the region of hundreds of thousands of dollars. They took his advice to incorporate the two businesses to limit personal liability. For tax purposes they were advised not to draw more than \$38,000 per annum in wages. SwiftLink Communications became SwiftLink Industries Pty Ltd (SwiftLink) and resulted in the transformation of the partnership into a corporate entity. SwiftLink comprised two businesses, SwiftLink Communications and DNS Communications. Both the applicant and Mr Hookway were Directors of SwiftLink as well as shareholders. The applicant's role was as Managing Director, responsible for overall management, including sales and marketing. Mr Hookway was the hardware engineer whose duties were to assume the technical role and be responsible for network equipment.

On 4 February 1999 an email arrived at SwiftLink in the following terms—

"To Whom it may Concern

HotCopper Australia is seeking to purchase Internet Service Providers. We have no preference for demographics or financial position. In other words, we are prepared to look at any situation on an as it comes basis. If your business is for sale, or you know of an ISP that is for sale, please contact me on the above phone number, or the below email address."

(Exhibit L7)

According to the evidence of the applicant, the email was authorized by Mr Ron Gully, the Managing Director of, HotCopper Australia Ltd (HotCopper) and gave Mr Gully's return email address. In the few months before receiving the email, the applicant says he had spoken to people interested in buying the business and had suggested the starting figure of \$500,000 to them. The applicant responded to Mr Gully, who advised the applicant he would send him an information memorandum. This document was duly received on 6 February 1999.

The applicant spoke with Mr Gully after receiving the information memorandum. Mr Gully told him HotCopper was interested in acquiring a number of ISP's. In response the applicant told him that ISP's were expensive and that SwiftLink had received inquiries from people looking to acquire the business. The applicant says he asked Mr Gully about the inquiries in order to gauge the seriousness of the inquiry. According to the applicant Mr Gully told him he had a million dollars and therefore the ability to buy the business and was serious about it. In the applicant's mind the SwiftLink business was worth approximately \$300,000 but he was prepared to sell for some other reasonable figure. He had made inquiries about the real cost and had ascertained that an ISP could be valued at about \$200 per customer. Mr Hookway and the applicant had a bottom line figure of \$200,000. Mr Gully had asked the applicant about the client base. He declined to give a definite figure at that stage, except that he was prepared to say that these were between 1,500 to 1,600 clients. This information was based on conversations with Mr Hookway.

The applicant says that Mr Gully said that HotCopper would be prepared to pay about \$500,000 to buy the business, without asking the applicant anything about his employment history or background, how long the business had traded, or how much the business was making. There was no estimate given by the applicant to Mr Gully on profits, nor was any financial information requested.

There were discussions between the applicant and Mr Gully about employment of both the applicant and Mr Hookway. Mr Gully expressed the intention of acquiring the management of the company, which to the applicant's mind meant him and Mr Hookway. They would be guaranteed jobs at around about \$100,000 per annum each, to be paid out of the purchase price. This was unacceptable to the applicant. At the end of the conversation Mr Gully told the applicant he would get in touch with a fellow director of HotCopper, Mr Ross Arancini, to make contact and to take the matter further. During the conversation Mr Gully mentioned due diligence and mentioned that Mr Arancini was an accountant. He also asked whether he could prepare SwiftLink's books. In response the applicant says he told Mr Gully there were no management accounts or other financial figures. Due to the short period of trading, the only documents available showed that SwiftLink had made a small profit of \$170 in the financial year 1997/1998. If books were required it would take a couple of months because they needed to be prepared by accountants and there was no initiating documentation. Later the applicant spoke to Mr Arancini about ISP's. Mr Arancini mentioned he was doing due diligence on other ISP's HotCopper was considering. He told the applicant he had found that although the ISP's make little or no profit, the businesses have a value based on their customer base which does not reflect profitability. This made the worth of the businesses very hard to evaluate. It was agreed between the two men that Mr Arancini would visit SwiftLink premises on 11 February 1999.

On 11 February 1999, Mr Arancini arrived at SwiftLink premises in Morley in company with Mr Tony Cunningham,

who was introduced as a technical person. The meeting was a general discussion of the Internet industry and the use of portals but there was no in-depth discussion about SwiftLink. Mr Arancini had said to the applicant he was excited about SwiftLink, it seemed to be an entity HotCopper would want to purchase and he would report the meeting to Mr Gully. In response to various questions asked by Mr Arancini during the meeting, he was told there were no books available and by that, the applicant says he meant there were no financial statements for the company as the business had only been going since 1 July 1998 for less than one financial year. He reiterated that it would take a few months to prepare appropriate books but estimates could be provided in the meantime. At the meeting, which lasted for two hours, the applicant drew attention to a Business Plan which was given to Mr Cunningham who perused it and raised various technical questions. Mr Arancini passed comments as he read through the management profiles of Mr Hookway and the applicant. At the end of the meeting Mr Arancini said he would arrange for Mr Gully to attend a meeting in Perth. This was arranged for the next weekend.

The meeting was duly confirmed by Mr Arancini, in the meantime, the applicant had a discussion with Mr Hookway and told him he was not keen to work for HotCopper as it only had a technical vacancy to which he was not suited. They agreed that their priorities for negotiations with HotCopper would be the sale of the business, then Mr Hookway's position and finally the applicant's own position with HotCopper. That would avoid problems with conflict of interest between the applicant's role as Managing Director of SwiftLink and a person about to enter negotiations with HotCopper concerning employment. The applicant says he had reason to be happy about the potential outcome of the meetings because of the reaction of Mr Arancini who had said he was happy with both the applicant and Mr Hookway and envisaged a board level position for the applicant. Mr Arancini and the applicant discussed a purchase price and agreed that \$50,000 of \$500,000 would be paid as a non refundable deposit and the balance paid on a successful listing. This is before any due diligence on the SwiftLink operation.

On the 14 February 1999, the applicant met representatives of HotCopper at a restaurant. The meeting lasted about two hours. Mr Gully had come straight to the restaurant from the airport. There was a discussion about the price and it was confirmed that \$50,000 would be paid as a deposit and the balance (\$450,000) would be payable on the successful listing.

On the 12 February 1999 the applicant took advice from Counsel who advised him he should ask for a controlling interest in shares of HotCopper. On 16 February 1999, Mr Arancini offered the applicant \$100,000 basic salary. He made various counter proposals which included an incremental salary starting at \$100,000, a car of the applicant's choice and about 30% of all shares in HotCopper, as well as options over shares. There were lengthy discussions about remuneration levels and an in principle package was agreed.

The applicant received advice from a Partner of a well known commercial legal firm. The statement of Mr Paul Gwyn Evans, of Counsel, indicates that on instructions from the applicant he commenced negotiations with the aim of achieving a Business Sales Agreement and a contract of employment for the applicant. On the 17 February 1999, Mr Evans, after conversations with Mr Arancini received a document from the applicant of the terms which he (the applicant) said were agreed. Mr Evans said the documents, which he believed had been prepared by Mr Arancini, briefly set out the terms for the acquisition of SwiftLink and information relating to services of the applicant. Mr Evans produced a preliminary draft on the 18 February 1999. On further instructions from the applicant, on 21 February 1999, Mr Evans sent a draft employment contract to Mr Arancini and to Poli & Associates, the SwiftLink accountant. There were discussions with the applicant and Mr Bordi and a number of amendments were made. These were advised to Mr Arancini. This activity resulted in an employment contract being executed between the parties on the 9 March 1999.

The employment contract of the applicant has provisions which are relevant to the disposition of this application. They are as follows—

1. *Commencement date*

Your employment will be deemed to have commenced on 17 February 1999.

2.

3. *Salary and benefits*

Your commencing salary will be \$100,000 per year. Following the first to occur of the completion of the first 6 months of your employment and the date of admission of HotCopper to the official list of ASX, your salary will increase to \$150,000 per year, and will then increase to \$200,000 per year on completion of a further 6 months employment, and then increase to \$250,000 per year on completion of a further six months employment.

During your employment with HotCopper, you will be provided with a fully maintained vehicle. Any fringe benefits tax payable in respect of the provision of the vehicle will be paid by HotCopper and there will be no reduction in your salary in respect of any such fringe benefits tax. You will have the option to acquire the vehicle in the event that you leave HotCopper's employment. In that event the vehicle may be purchased for an amount equal to its then written down book value, assuming depreciation calculated at 22.5% per annum (on the diminishing value) from the date of acquisition of the vehicle.

HotCopper will pay an amount equal to 7% of your salary in Superannuation. This amount will be paid directly on your behalf to the fund nominated by you.

If you are required to relocate to fulfill your duties, you will be paid \$10,000 to cover the costs of relocating your household effects and cars.

4. *Shares and share options*

On commencement of your employment, you will be issued with 3,500,000 fully paid ordinary shares in the capital of HotCopper at an issue price of \$0.0001 per share. These shares will be the subject of a call option in favour of Mr Ron Gully. The option will expire 16 February 2003. The option may only be exercised if there is a unanimous resolution of the Board that, in the reasonable opinion of the Board, you have been negligent and incompetent in your employment as Chief Executive Officer of HotCopper.

Within 5 business days of your acceptance of the terms and conditions of this letter you will also be issued with the following options to purchase fully paid ordinary shares in the capital of HotCopper.

<i>Number of Options</i>	<i>Exercise Price</i>	<i>Exercise Period</i>
<i>1,000,000</i>	<i>\$0.75</i>	<i>4 years</i>
<i>1,000,000</i>	<i>\$0.75</i>	<i>4 years</i>
<i>1,000,000</i>	<i>\$1.50</i>	<i>4 years</i>
<i>1,000,000</i>	<i>\$1.50</i>	<i>4 years</i>
<i>1,000,000</i>	<i>\$2.00</i>	<i>4 years</i>
<i>1,000,000</i>	<i>\$2.00</i>	<i>4 years</i>

5. *Hours of work*

You are expected to work the hours necessary to achieve the required performance of your job.

6. *Annual leave*

You are entitled to be paid annual leave of four (4) weeks per year, to be taken at a time agreed between you and the Board.

7. *Sick leave*

You are entitled to be paid sick leave of ten (10) days per year.

Sick leave shall accumulate from year to year.

You are not entitled to be paid sick leave for any period in respect of which you are entitled to workers compensation payments.

8. *Bereavement leave*

You are entitled to be paid absence of two days for compassionate leave in the unfortunate event of a death of a member of your immediate family.

9.

10. *Termination of employment*

The initial term of your employment will be for three years from and including 17 February 1999.

You may terminate your employment at any time after the initial term by giving at least three month's notice to the Company, in which case your employment will terminate on expiry of that notice.

The Company may terminate your employment at any time after the initial term either by giving you three month's written notice, or by payment in lieu of that notice.

In any circumstance where you are paid in lieu of notice, your employment will cease immediately.

In the event of serious misconduct, your employment may be terminated without notice.

11. *Employment policies, procedures and directions*

It is a term and condition of your employment that you abide by the policies and procedures of HotCopper as updated or issued from time to time and by any directions given to you by the Board in the course of your employment.

12. *Appointment as Executive Director*

Immediately following the admission of HotCopper to the official list of ASX, you will be appointed an executive director of HotCopper, if not already so appointed.

13. *Confidentiality agreement*

You must maintain the confidentiality of all information gained in the course of your employment.

14. *Legal costs*

HotCopper will pay your legal costs of negotiating and preparing this letter of employment on presentation of an invoice from your lawyers.

15. *Acceptance*

If you have any questions on any of these terms and conditions of employment or the attachments, please contact (name).(sig.)

Please confirm your formal acceptance of the position on these terms and conditions by signing the copy of this letter in the place indicated and return it within seven (7) days of the above date to (who).

(Emphasis in Original)

(Exhibit S11)

The applicant says that the contract was deemed to commence on the 17 February, 1999. He was to receive an initial salary of \$100,000 increasing to \$150,000 per year on the first occurrence of either the completion of 6 months of employment or the date of listing of the respondent. His salary was to increase \$200,000 in the next 6 months with a final increase to \$250,000 six months later. The contract also provides for a fully expensed vehicle with payment of fringe benefits tax and 7% for superannuation. The applicant claims that the contract should be read so that it provides that the respondent would issue him with three and a half million fully paid ordinary shares in respondent's capital at an issue price of 0.0001 cents per share subject to a call option in favour of Mr Gully, exercisable only if there was a unanimous resolution of the Board that the applicant had been negligent or incompetent in his employment as Chief Executive Officer. There was also a right for a further six million options over shares at varying exercise prices. The contract provided that the shares be issued on the commencement of his employment and the options within 5 business days after he had accepted the contract. The applicant says in evidence that the issue price of the three and a half million fully paid ordinary shares, i.e. \$350 was paid on his behalf by Mr Arancini. The contract, according to the applicant, provides for a fixed term of three years from the 17 February 1999 and only after that three years is the employment terminable by 3 months notice.

There is a provision for summary termination in the event of serious misconduct. The applicant says that he thought a three year fixed term was restrictive but after conversations with both Mr Arancini and Mr Gully who insisted upon a 3 year fixed term, he accepted it.

The employment of the applicant with the respondent was deemed to have commenced on the 17 February 1999. To look after the SwiftLink operation in the meantime, Mr Dean Grigg was appointed as General Manager. As far as the applicant was aware the respondent did not carry out any due diligence on SwiftLink prior to employing him nor did it carry out any reference checks on himself or Mr Hookway. None of the directors requested references prior to offering employment.

On or about the 13 May 1999 the applicant was summoned to a meeting of the Directors of the respondent, which was attended by their solicitor. The applicant was not represented. It was put to the applicant that there were concerns about some issues and three allegations were raised. These allegations were that on 11 February 1999, at SwiftLink premises the applicant orally represented to Mr Arancini and Mr Cunningham that—

- He estimated the profits of SwiftLink were \$200,000 a year and could be more than that and he was embarrassed about how much money the company was making, and
- The applicant and Mr Simon Hookway had drawn wages of \$37,500 each to date, out of the company, and could have drawn more, and
- SwiftLink had 1,700 clients or maybe more.

The applicant says this was the first time he had been aware of or received notice of the allegations. At conclusion of the meeting he was instructed to attend a meeting of the Board at 5pm on Friday 14 May 1999. He requested more time to consider the allegations, this was refused. On advice from his solicitor the applicant requested that allegations be put in writing and extension of time be given. The extension was also refused. The meeting took place as scheduled. According to the applicant the respondent purported to rely on financial statements prepared by Poli & Associates that SwiftLink had made an operating loss of \$20,000 for the financial year, ending 31 March 1999. The applicant did not agree with the financial statements and identified errors in the documentation.

During his evidence the applicant provided other general information to the Commission. The respondent has alleged that the applicant represented that he had a degree in Business or Commerce from Curtin University. This representation was said to be made to Mr Arancini, Mr Cunningham or a Director Mr O'Malley. The applicant denied he ever made such representations, he claims he made it clear to the General Manager of the respondent that he had no degree and specifically, when asked by Mr Peter Gall, the General Manager, had answered in the negative. This happened on several occasions and the applicant believed it was common knowledge that he was not a graduate. There were complaints about an absence from duty on the 6 and 7 May 1999. These days he was sick and produced appropriate proof. It is also alleged that he made allegations that Mr Gully had conducted fraudulent operations. An apology by the applicant to Mr Gully for offence were in the applicant's mind sufficient to resolve the matter and in fact did. It is the applicant's evidence that the Directors agreed that if he stood by Mr Gully the respondent would remove the call option on his shares in favour of Mr Gully and appoint another director to the Board. However, there were no minutes of such an undertaking.

In the applicant's opinion there was a lack of management experience on the respondent's Board. This did not exclude himself but he had tried to remedy the situation by appointment of appropriate people in the management team. For a successful float there needed to be someone who had management experience. These concerns were confirmed when discussing the Business Plan for the float with a broker, he was told that the respondent's Board management experience was not great. The applicant raised these opinions with Mr Arancini and he agreed. It was conceded by the applicant that he had very little management experience but this would be remedied, he said, by the grant of shares and options which would give him an opportunity to prove himself. Mr Gully

admitted to the applicant that he thought the respondent had paid more than SwiftLink was worth, but it was still a good deal from his point of view. It was the applicant's allegation that the purchase price for SwiftLink was to distract him from the employment contract which, as far as the market place was concerned, offered a modest salary and benefits.

As for the shares and options, the applicant says in sworn evidence he made regular inquiries with Mr Arancini about the shares and the issue price of 0.0001 cents. There was an amount of \$350.00 to be paid for the 3.5 million shares. The applicant says Mr Arancini had various excuses about not getting around to making the issue, but in early May Mr Arancini said the shares had been transferred. Mr Arancini told the applicant that the \$350 had been paid by him on the applicants behalf and the shares would be issued. The applicant assumed the matter had been resolved and he would receive the shares and options, but it transpired they were never issued or transferred to him.

Meetings took place on 13 and 14 May 1999 which lead to the dismissal of the applicant. It is agreed that the minutes of the meetings (*Exhibit S7 and S8*) are a correct record of the events. At the end of the meeting the applicant was instructed to provide the Board with corrected financial statements at his own cost by noon Thursday, 20 May 1999. Mr O'Malley and Mr Cunningham escorted him to his office and instructed him to hand over property required to be returned to the respondent. The applicant claims he was surprised and shocked by both the decision to suspend and that he return all company property including the motor vehicle. When asked to surrender his laptop computer, dictation machine, mobile phone and keys he was hurt and humiliated. This hurt was compounded when he was escorted into the basement of the building where under supervision he removed all his personal items from the motor vehicle. He was then left to make his own arrangements to get home.

Since the termination of employment the applicant says he has received no income. A project he worked on failed to materialize. Other work was performed unpaid as Managing Director of SwiftLink which was prepared for sale to Tower.Net in October 1999. The proceeds of the sale was \$50,000 net after payment of outstanding creditors but not including capital gains tax. The applicant says he has made many applications for work and has attended interviews. Currently he is unemployed.

The applicant claims that he suffered the following losses based on a fixed three year term of employment he suffered losses, in the following sums—

- (a) Salary \$600,000;
- (b) Superannuation \$42,000;
- (c) Unpaid expenses in the amount as set out in a schedule of expenses presented to Mr O'Malley in April 1999;
- (d) Fully expensed Saab 93SE Convertible 99 of approximately \$85,325.00 which includes an amount for fringe benefits tax of \$14,300.00 per annum;
- (e) 3.5 million shares (which the applicant valued at between \$1.75 million and \$2.24 million dollars);
- (f) 6 million options over shares exercisable over a four year period until 9 March 2003 at different exercise prices;
- (g) Amounts which will need to be deducted for salary and other benefits received during the period 17 February 1999 to 21 May 1999.

The respondent admits that it employed the applicant as its Chief Executive Officer from 17 February 1999 to 21 May 1999, a period of approximately 4 months. The respondent was incorporated in January 1999 to acquire the HotCopper website from Mr Ronald Gully who created the original website in 1995. According to the Prospectus dated 3 May 1999 and lodged with the ASIC on 4 November 1999, over the past 4 years, via information posted by members and brokers, the website has evolved into a specialist information service providing a forum for investors to interact, facilitating the dissemination and collection of share market information. It is stated in the Prospectus that the website has a well-recognized place in the Internet space and currently averages over 2 million hits per month. It was the 60th most popular website

visited by Australians during July 1999. The strategy of the respondent is to leverage the website by providing added-services and products to members of the community and offering clients and other suppliers a channel to address the website community. Its primary goal is to become a premium source of information for those with an interest in increasing personal wealth and acquisition and sales of shares and investments.

(Exhibit L4)

In its draft business plan dated the 21 May 1999, (*Exhibit S4*) the mission statement of the respondent is described as follows—

"HotCopper is focused on delivering a comprehensive range of solutions for the Information Technology and Telecommunications markets. These solutions are designed to add value for all our customers, whether they are advertisers, other Internet Service Providers I.S.P.s (Internet Service Providers), householders, or business and corporate clients."

The corporate objectives are—

- *Portal development with certain objectives pertaining to profitability and market share.*
- *To build a premium nationwide Internet Protocol based network, to support dial-in access throughout Australia by November 1st 1999.*
- *To become a Tier 1 bandwidth wholesaler by 30th June 2000.*
- *To gain 5 per cent of all I.S.P.s within Australia as clients by 30th November 2001.*
- *To implement marketing and sales strategies for our primary range of products for small to medium enterprises by 30 April 2000.*
- *To achieve revenues derived from this primary range of small to medium enterprise products of approximately \$4,000,000 by 30 June 2001.*
- *To implement marketing and sales strategies for our secondary range of medium to large enterprise products by 28 February 2001.*
- *To achieve medium to large enterprise revenues of approximately \$2,000,000 by 28 February 2002, rising to approximately \$10,000,000 by 28 February 2003.*

The draft business plan of 30 April 1999, describes the applicant as follows—

"Mr David Saab holds the dual posts of Director and Managing Director of I-Effect. The latter as a direct result of his outstanding accomplishments as proprietor and joint founder of SwiftLink Industries Pty Ltd., one of the most successful Internet Service Providers in Western Australia. His major responsibilities include the instigation, negotiation and delivery of critical alliances and acquisitions, the appointment and development of the key management team and overseeing the construction and implementation of a state of the art, national backbone Internet protocol Telecommunications network.

Prior to this Mr Saab was a founding partner of Sunchase Enterprises trading as Power Advertising, which commercialized a unique marketing concept, developed by Mr Saab, and achieved significant market penetration. Accomplishments include the signing of an agreement which welcomes I-Effect as an Ericsson Approved Partner (an Internationally accredited relationship) and the selection and appointment of a skilled Executive Management Team."

The origins of the respondent are as explained in the draft business plan. In January 1999 it operated a forum on the Internet where people who wanted to buy and sell shares exchanged information. Ultimately it intended to list on the Stock Exchange. As part of those plans it wanted to purchase ISP's and turn them into profitable making business ventures. For this purpose it was seeking people to assist in developing a profitable ISP model. At January 1999 the organization consisted of its founder Mr Ron Gully and Mr Arancini. Mr Mark O'Malley was a non working director who played no active role in the company until March 1999. Mr Tony Cunningham, an employee of D J Carmichael & Co, was a consultant to the

respondent for the listing, raising capital and developing its business plan.

The respondent concedes that the first contact between it and the applicant was a result of an email posted on the Internet. (*Exhibit L7*). The applicant says the notice came to his email address, whereas the respondent says there was a general email. It is conceded that a meeting took place at the applicant's business premises in Morley on the 11 February 1999 and at that time, according to the respondent, the applicant made misrepresentations regarding his business SwiftLink. These misrepresentations are that the applicant said to Mr Arancini and Mr Cunningham that the estimated profitability of SwiftLink was \$200,000 for the period 1 July 1998 to 30 June 1999. Second he claimed that both he and Mr Hookway had drawn \$37,500 in wages and more had been directed back into the company to build up its asset base. The third misrepresentation is that the applicant said that SwiftLink had approximately 1,700 clients. After the meeting there were further communications between the parties and on 17 February 1999 the applicant on the basis of an oral contract of employment commenced employment as a CEO. On 9 March 1999, a written contract of employment was executed. On or about the 5 May 1999, the applicant's accountant Mr Carlo Bordi completed financial statements of SwiftLink which demonstrated a loss of \$22,760. The respondent organized a meeting with the applicant on 13 May 1999 and expressed its concerns regarding the representations made on 11 February 1999. The applicant was told termination of his employment was a possibility. The respondent had not listed on the ASX at that time. Later the applicant, at the respondent's request, provided a second set of financial statements prepared by Mr Bordi which stated accumulated losses as \$12,659. There was a further meeting on 21 May 1999 which resulted in the summary dismissal of the applicant on the basis that he misled the respondent or made representations without reasonable basis. This was said by the respondent to constitute serious misconduct pursuant to the applicant's terms of employment.

Before I proceed with my analysis of the submissions and evidence before the Commission I need to make findings of witness credibility. I had the opportunity of observing the applicant in the witness box for a considerable period, there was nothing in his evidence which would indicate to me that he has not told the Commission the truth from his best recollection.

There is though, some controversy concerning the admissibility of evidence from the applicant which relates to statements he says were made to him by Mr Gully. It is a submission of the respondent that this evidence, contained in both the applicant's witness statement and his *viva voce* evidence, is inadmissible because it is hearsay. It is clear to me that the statements that Mr Gully made, are part of the event occurrence or situation, that is, the discussions between Mr Gully and the applicant which, Mr Arancini evidenced, resulted in him being employed. There was a close connection in time with the event and situation in issue and the statements were relevant to the event occurrence or situation. They are in that sense a part of the *res gestae*. The applicant says that the discussions between him and Mr Gully were intertwined and any representations allegedly made by him to Mr Gully and by Mr Gully to him which resulted in him being employed are relevant. This is important, more so in this case, because the dismissal is admitted to be summary and the respondent bears the evidentiary onus to establish the facts justifying the dismissal. (*The Federated Miscellaneous Workers' Union of Australia, WA Branch -v- Cat Welfare Society Incorporated* (1991) 71 WAIG 2014).

If the submissions of the respondent are correct and the evidence of the applicant relating to his conversation with Mr Gully is hearsay, then it is hard to see how any case which is mounted by any applicant might be successful because all a respondent would have to do to have evidence of such dealings excluded as hearsay is not call any evidence in rebuttal. That clearly cannot be right. In my view the evidence of the applicant relating to his conversations with Mr Gully is not hearsay, and even if it is, it would be contrary to good conscience and equity not to admit it. In the context of the consideration of the evidence given by the applicant, his evidence relating to the conversation with Mr Gully will be given the same weight as his other evidence. I find no reason to

draw any adverse conclusions about the quality of the evidence given by the applicant in this matter. The evidence was consistent and logical. He did not demur from the evidence lead in examination in chief in a lengthy and vigorous cross-examination by Counsel for the respondent. Evidence was also taken from Mr Simon Hookway and Mr Paul G Evans on behalf of the applicant. I see no reason to draw any conclusion other than that they gave the Commission a truthful recollection of the events as they occurred.

The respondent called evidence from Mr M O'Malley, Mr R Arancini, Mr J Cunningham and Mr D Grigg. I have some doubts about the quality of evidence of both Mr Arancini and Mr Cunningham, particularly as that evidence relates to the actions taken by them to check the assertions made by the applicant concerning the operations of SwiftLink. I gathered the impression that they wanted the Commission to accept that they had done more to check his *bona fides* than they really had. I will make further comments about this later in these Reasons for Decision, but a doubt about the quality of their evidence has been created in my mind. I have no similar problems in the evidence of Mr O'Malley or Mr Grigg, but where the evidence of Mr Arancini and Mr Cunningham differ from that of the applicant in the matters to which I have referred then I accept the evidence of the applicant in preference to that of Mr Arancini and Mr Cunningham.

The Commission is to apply the tests which are set out in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia* (1985) 65 WAIG 385, but in the case of summary dismissal the rule is: "if an employee's is to be summarily dismissed, he or she must be so seriously in breach of the contract but by standards and justice, the employer should not be bound to continue with it." (*North v Television Corporation* (1976) 11 ALR 599) It is clear that the current dismissal is summary in nature. The applicant was told of his dismissal at the Board meeting on 14 May 1999. The reasons given to him were that he had alleged to have made representations to both Mr Arancini and Mr Cunningham on 11 February 1999, that the profit of SwiftLink was \$200,000 or even more, he and Mr Hookway had each drawn wages of \$37,500 to date and SwiftLink had 1,700 clients or more. The respondent says, that it relied on those representations in deciding to employ the applicant.

The respondent says that these alleged misrepresentations are exemplars of conduct upon which it can rely to justify dismissal in the pre-employment context. (*Edward David Baxter v Burswood Resort Management Limited* (1992) 72 WAIG 82). *Baxter's* case dealt with the misrepresentation of a medical condition about which an employee gave false answers, pre-employment. It is argued that if a respondent is induced into a contract by misrepresentation which is actionable at law, the contract is voidable at the option of the misled party and that is what happened in this case. A misrepresentation is a representation which is not true, or which leads the representee into error, which also happened in this case. The respondent was capable of having produced in its mind a misunderstanding and that misunderstanding was one of the reasons which induced it to enter the contract. It had no duty to check that misrepresentation. Whether the person providing the information has exercised sufficient care in the circumstances is a question of fact and if the person did not qualify a statement made, or couple it with a warning, the failure to do so can create an exposure to liability.

The applicant has a fundamental difference with the respondent in this respect.

It is argued that the applicant was not an employee at the time when the alleged misrepresentations were made, but even if he was, they were made in relation to the purchase of the business of SwiftLink and not in the capacity of employee or possible future employee. Subsequent to an oral contract on which the applicant was originally engaged, a written contract was executed. This superceded the earlier oral contract and the respondent cannot rely on serious misconduct under an earlier oral contract to terminate the later written contract. In any event the allegations were not made out in the evidence, particularly relating to the reliance placed on them by the respondent in making its decision to employ the applicant.

Dealing with these assertions it is clear on the evidence that Mr Gully made the decision to employ the applicant and there

is nothing before the Commission which indicates that any misrepresentations, which were said to be made on 11 February 1999 to Mr Arancini, were known to him. If one accepts the evidence of the conversations the applicant had with Mr Gully, and I do, he was employed to maintain management continuity within SwiftLink and because of his 'potential ability and vision'. It is fair to say that, Mr Gully had developed a concept which was, in his mind, of the same genre as that offered by the applicant. For that reason Mr Gully was disposed to offer him a contract of employment. This happened soon after the visit to the Morley office of the applicant. When Mr Gully was told of the meeting by Mr Arancini, he moved quickly to come to Perth and have a discussion with the applicant. It is passing strange, that the respondent did not call Mr Gully to give evidence. There is nothing before the Commission to support the contention that Mr Gully relied on the so-called misrepresentations.

It appears that what has happened, and I so find is that, meetings took place between the applicant and Mr Gully and his colleagues. This had followed the response that the applicant had made to an email from Mr Gully which I find was addressed to the applicant. I mention that because it appears that it was not the applicant who solicited the approach by the respondent at all, rather it was the other way around. The representatives of the respondent visited the applicant at his modest premises in Morley.

The representatives must have observed that the applicant was a young man. He was unable to supply them information immediately concerning the financial position of his operation. However, they still went ahead and continued their dealings with him. I will say more later in these Reasons about the obligations for due diligence in such circumstances. It is clear that a set of discussions developed between the parties which dealt with two separate relationships. The evidence of Mr Evans makes this clear. It supports the contentions of the applicant that there was to be two relationships. I accept the evidence of the applicant that he and Mr Hookway went into the discussions, held in Fremantle, on the basis that the first aim was to sell SwiftLink and to make a financial return out of that, then to deal with Mr Hookway's employment, the final objective was to deal with the employment of the applicant.

The applicant met with Mr Evans on the 24 February 1999 and gave instructions which included details to be incorporated in a business sale agreement. Mr Evans had been told that Mr Arancini was authorized to negotiate on behalf of the respondent and that he should deal with Mr Arancini to agree the details. This occurred. There were two issues, namely the acquisition of DNS Communications and the employment contracts for the applicant and Mr Hookway. It was made clear to Mr Evans by Mr Arancini, that the respondent wanted to complete the matters immediately, rather than after listing on the ASX. This is important when one considers the provisions in the contract of employment relating to the share allocations to the applicant. It is clear from the submissions that subsequent listing, such a share allocation could not have been made without compliance with ASX rules.

On 19 February 1999, a draft employment contract was prepared by Mr Evans and sent to Mr Arancini. A copy was also sent to Mr Carlo Bordi for his comments. Later a number of amendments were made. Hand written changes made by Mr Arancini together with comments by Mr Evans on the changes requested by Mr Arancini were sent to the applicant. The parties finally reached an agreement on or about the 26 February 1999. An offer was formally presented to the applicant on 9 March 1999 and accepted by him on that day. The commencement of the contract was deemed to be the 17 February 1999. Parallel discussions were going on between Mr Evans and the applicant regarding the business sales agreement. On 20 April 1999 a further draft agreement was sent to the applicant and Mr Grigg. It appears the business sales agreement was never executed, at least there is no evidence before the Commission that it was, but became the subject of discussions in the meeting of 13 May 1999 between the applicant and the Board of Directors.

These events clearly establish that there were two procedures underway but also that when negotiating the employment contract with Mr Evans, there is no indication at all that Mr Arancini sought legal advice. This is surprising, given that he

was dealing with a highly experienced commercial lawyer from a leading commercial practice. The result is an employment contract which is written in terms which are outstandingly favourable to the applicant. I will deal more with those terms of contract later.

The applicant says that submissions by the respondent that there was a misrepresentation related to the employment contract so attracting the authority in *Baxter* (*ibid*), is incorrect. This contention is based on the authority of the decision of Smithers and Evatt JJ in *North v Television Corporation Ltd* (1976) 11 ALR 599, where it is said: "Until the terms of contract are known and identified it is impossible to say whether or not any particular conduct is in breach thereof, or is a breach of such gravity or importance as to indicate a rejection or repudiation of the contract.....". It is also necessary to ascertain what particular obligations the parties agreed upon as important or even vital.

In my view *Baxter* (*ibid*) is not relevant in this situation. *Baxter* and the citations from Cheshire and Fifoot's Law of Contract (1997) relied upon by the respondent relate to misrepresentations which are made in direct relevance to the contract of employment, that is, they deal with misrepresentation of medical condition or skills or qualifications in an employment interview or an application form. That is not the situation here. The reason that Mr Gully wanted to employ the applicant was to maintain continuity of management and for his 'vision' and understanding of the concepts that Mr Gully espoused. There is not a scintilla of evidence to say that Mr Gully relied upon the statements that the applicant is alleged to have made to Mr Arancini and Mr Cunningham about the profitability, the amount of drawings and the potential sales value of SwiftLink.

The respondent was required by the authority of *Miskiewicz v City of Belmont* (1995) 75 WAIG 1811, to prove that the summary dismissal was justified as an evidential burden. In other words it was required to show that the circumstances existed to warrant a summary dismissal. It has not done so in this case, it has focused on the conduct of the applicant, which it says constitutes misrepresentations in its dealings relating to the purchase by the respondent of the applicant's company SwiftLink. It has failed to make good allegations of serious misconduct it has relied on as a basis for the summary dismissal.

This is not to say that the respondent may not have had the right to properly bring the contract of employment between it and the applicant to an end if it had discovered that representations he made in relation to the sale of SwiftLink were such that it lost confidence in him as an employee. It could have well developed a view that it had lost confidence and then could have bought the contract to an end in accordance with its terms.

The terms of this contract are quite unique. I have cited clause 10 'Termination of Employment' earlier in these Reasons. Clearly the term of the contract is for 3 years. It is a fixed term contract of the nature described in *Perth Finishing College v Wats* (1969) 69 WAIG 2307. It was to be for 3 years from and including the 17 February 1999. It was not terminable during that 3 years but after the initial term, three months notice was required. There are specific provisions relating to the respondent's right to terminate after the initial term by giving the applicant 3 months notice and in particular, there is a provision that if a serious misconduct is committed by the applicant, then his employment could be terminated without notice. These provisions are specific and clear, they do not raise ambiguity which would require an implication of a term as set out by any of tests in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363. This is a contract written by a skilled draftsman to secure the best possible circumstances for his client and that is what has occurred. If the respondent had wished to terminate the employment of the applicant in the circumstances I have described earlier, it would have had to pay him for the balance of 3 years.

In reaching the conclusions that I have, I accept the evidence of the applicant concerning his intentions about the employment contract and the outcome that was negotiated for him by Mr Evans. This evidence was not challenged in cross-examination and should be accepted by the Commission (see *Ducasse v Aitken & TWU* (1995) 75 WAIG 856 and *Tranchita*

v Wavemaster International Pty Ltd (199) 79 WAIG 1886). In any event the evidence of Mr Arancini was that he admitted that there was a 3 year term and it was negotiated at the respondent's initiative.

As I mentioned previously, the applicant was not in a position to seriously misconduct himself at a time when he was not the employee. He can only do so if he is in that relationship. In *Laws v London Chronicle (Indicating Newspapers) Ltd* (1959) 2 ALL ER 284, the fundamental test is "...whether the conduct complained of is such as to show the servant of disregarded the essential conditions of the contract of service." If the conduct complained of is not related to matters which were agreed between the parties and which contribute to the conditions of service of the contract, there can be no repudiation that can be accepted by the respondent to treat the contract at an end. There was no conduct inconsistent with the fulfillment of the express or implied terms of service (*North*). The matters complained about by the respondent relate to its business relationship with the applicant which is severable. For the reasons I have set out the applicant was unfairly dismissed by summary termination of contract of employment.

In the event that I am wrong concerning the above finding, I need to examine the grounds of dismissal. It can be deduced from the evidence that the respondent was keen to purchase ISP's with "...no preference for demographics or financial position". (*Exhibit L7*)

The questions which arise from the applicant's claim about the potential profits of SwiftLink can be answered when one looks at the approach that the applicant made to assessing the potentiality. Given the applicant's lack of business experience and given the events that occurred in 1999, it is not unreasonable to conclude that he could reach the conclusion that SwiftLink would run at a profit. Mr Hookway said the figures seemed fairly reasonable. It is true that this estimate about profitability was subsequently proved to be erroneous but making an error does not constitute misconduct. The allegations about the number of clients and the alleged overestimation of those by the applicant need to be examined. The applicant had told Mr Gully an estimate of 1,600 clients but also that this would have to be checked. This was before the respondent allegedly relied upon a representation said to be made on 11 February 1999, that there were 1,700 clients. The plain fact of the matter is before the arrangement was consummated, the respondent failed to ask for or institute any check on the number of clients. This failure to check and the haste in getting arrangements concluded with the applicant raised questions of the failure to conduct any substantial due diligence.

In contemporary business dealings it is accepted that due diligence is an important corporate and individual responsibility tool. It is a generic term that has different meanings in different contexts and in practice translates to different requirements for companies depending on their size and industry. Essentially though, preventative due diligence is based on the concept that prevention is better than cure. The exercise of due diligence combines both of these and although it might not supply complete protection, the fact that due diligence has been undertaken may provide a partial or even absolute defence of a failing that can be pleaded to reduce the penalty to which a company or person involved would be otherwise exposed. What the purchaser in the circumstance of this case is required to do, is apply a reasonable degree of care and diligence. If this had been done, without the undue haste that occurred in this case, different answers may have fallen for the respondent to consider.

In dealings with the applicant, Mr Cunningham, Mr Arancini and Mr Gully did mention due diligence, but they would need to show that due diligence was undertaken properly and systematically and that careful documentation was made of the process. That did not occur. There should have been warning bells ringing when the respondent commenced its dealings with the applicant. The applicant who is a person, in his short working life, has mainly been occupied as a salesperson, he attended university but had not graduated, yet in (*Exhibit S2*) the draft business plan of HotCopper he is described as follows—

"Mr David Saab holds a dual post of CEO a Managing Director of I-Effect. The latter as a direct result of his

outstanding accomplishments as proprietor and joint founder of SwiftLink Industries Pty Ltd, one of the most successful Internet Service Providers in Western Australia. His major responsibilities include the instigation, negotiation and delivery of critical alliances and acquisitions, the appointment and development of the key management team and overseeing the construction and implementation of a state of the art, national backbone Internet protocol Telecommunications network.

Prior to this Mr Saab was a founding partner of Sunchase Enterprises trading as Power Advertising, which commercialized a unique marketing concept, developed by Mr Saab, and achieved significant market penetration. Accomplishments include the signing of an agreement which welcomes I-Effect as an Ericsson Approved Partner (an Internationally accredited relationship) and the selection and appointment of a skilled Executive Management Team.

One could be forgiven for concluding that the description in the draft business plan was not of the applicant at the least it paints a very generous picture of his background. The point is that the respondent took no business like, or prudential steps to check in a timely fashion what the applicant told them, before they entered into a relationship with him. It is open to conclude and I do that his representations were made on his best guess of the situation and were honestly held beliefs by him.

In these circumstances, his dismissal because he made the representations, would be unfair and I so find.

I need to consider the question of remedy. The primary remedy is reinstatement which is required be done unless it is impracticable (*Gilmore v Cecil Bros* (1996) 76 WAIG 4434). There has been no evidence that reinstatement is impracticable. There was no examination of the applicant to establish impracticability along those lines. This is an onus the respondent bears (*Tranchita* (*Ibid*)). As currently informed I have no grounds upon which to form a conclusion that reinstatement would be impracticable and it will be ordered with all benefits payable under the contract. Orders will issue that the applicant will be paid as if the contract was in force since the time of his dismissal to the date of reinstatement which will be fourteen (14) days after a final order is issued by the Commission.

There remains a contractual claim relating to shares that I need to address.

The respondent submits that the Commission has no power to order the respondent to issue the applicant with either 3.5 million shares or 6 million options because of the effect of ASX Listing Rule 10.11 which provides that an issue of shares or options to a Director can only be made if 75% of the shareholders vote for it at a specially convened meeting. The constitution of the respondent compels it to comply with LR10.11 under the pain of suspension if it does not. According to the respondent the evidence of Mr Evans confirms that the applicant knew that shareholder approval was required, yet he chose to take up his employment and remain employed for several months during which time neither the shares or the options were issued. There is another process by which the shares could be delivered but that involves the use of Section 216 of the Corporations Law, which provides a Court Order may take precedence over Section 208, however, the respondent says that this Commission is not a Court for the purposes of Corporations Law. Therefore, the shares and options provisions in the employment contract are void and neither damages or compensation can be awarded for the void provisions.

In response the applicant says that at the time the employment contract was executed the respondent was not a listed company on the ASX. Clause 24.1 of its Constitution only applied if it was admitted to the official lists of the ASX. It was not at the time the employment contract was executed and therefore, Clause 24.1 had no operation. The respondent's submissions are incorrect, according to the applicant, because the applicant was not a Director of the respondent until the 18 March 1999. Accordingly Clause 3.5 of the Constitution did not apply to him at the time the employment contract was made. Notwithstanding this, nothing in Clause 3.5 prevents an agreement being made to issue shares or

options to a person and this is consistent with Listing Rule 10.12. The applicant submits that there is error in Counsel for the respondent's assertion that the shares and options provisions in the applicant's contract are void.

It is further submitted that the assertion by Counsel for the respondent that the employment contract confirms the applicant knew share holder approval was required is incorrect. It is clear from the evidence of Mr Evans that the parties believed the amendments made to the contract would likely avoid the requirement for shareholder approval. The contract of employment was executed on 9 March 1999, and it contemplated the appointment of the applicant as a Director immediately following the admission of the respondent to the official list of ASX. Therefore, there was a period during which the applicant would not be a Director, hence any shares or options issued to him prior to becoming a Director would not have required shareholder approval, but even if it was, there was an understanding that entitlement would be granted or that Mr Aracini and the other directors were confident the approval would be forthcoming.

Finally the evidence of a call option in favour of Mr Gully is irrelevant to whether the applicant is entitled to be awarded damages or other compensation as distinct from the quantum. The applicant says that by reason of Clause 3.5 of the respondent's Constitution and given that shareholder approval had not been obtained for share issues and options sought by the applicant, there are grounds that ought lead to a refusal to grant specific performance of the shares and options provisions in the employment contract. Not to do so would compel the respondent to issue shares and options in breach of it's Constitution and the Rules of the ASX. However, the applicable provisions of the contract were not at the relevant time in contravention of the respondent's constitution, Section 208 of the Corporations Law or the listing rules, but even if they were, they are not rendered void or otherwise unenforceable. This does not mean that there should not be an award of damages or other compensation made to the applicant. The other matter upon which comment should be made is the suggestion by Counsel for the respondent that the Commission is not a Court for the purposes of the Corporations Law. These matters have been discussed before the Industrial Appeal Court in *Helm v Hansley Holdings Pty Ltd in liquidation* (1999) 79 WAIG 1860, which concluded the Commission is a Court for those purposes.

I find that the evidence of Mr Evans establishes that Mr Aracini agreed to changes to the employment contract relating to the issue of shares so that they became available immediately the employment contract had been signed and the options would be issued five (5) days thereafter. This was done in the full knowledge that the Rules would not apply as the shares and options be issued prior to the respondent being listed. There was no cross-examination on this point and there is the evidence of the applicant, which I accept, that he had raised the issue with Mr Aracini on a number of occasions. Mr Aracini told him he had paid \$350 on his behalf and not to worry about the shares. The applicant took that to mean, any doubt about his entitlement to options and shares had been resolved in his favour.

On this matter I accept the submissions on behalf of the applicant. I agree with both Counsel for applicant and respondent that the Commission is unable to order that the shares and options provisions in the contract be issued. The applicant is entitled to the benefit of his contract, however nothing has been put which would enable me to assess what that benefit should be, nor have I received any argument about whether the Commission has power to make an award of damages if the specific terms of a contract cannot be ordered as in a case like this.

An Order for reinstatement in the terms precisely described will issue. In view of my comments concerning the shares and options the order will provide for liberty apply in respect of that matter. The proceedings will be divided pursuant to the powers vested in the Commission under Section 27(s) of the Act, to enable the application to remain alive to deal with any application which might be made to exercise the liberty. The divided application will be identified as No. 774(A) of 1999.

Appearances: Mr A D Lucev (of Counsel) and with him Mr D Heldsinger (of Counsel) on behalf of applicant

Mr A Smetana (of Counsel) appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

David Saab

and

HotCopper.

No. 774 of 1999.

COMMISSIONER J F GREGOR.

15 June 2000.

Order.

HAVING heard Mr A D Lucev (of Counsel) and with him Mr D Heldsinger (of Counsel) on behalf of the Applicant and Mr A Smetana (of Counsel) on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby—

1. Declares that the applicant was unfairly dismissed from employment with the Respondent on or about the 14 May 1999.
2. Orders that upon the Applicant presenting himself for work no later than the start of business on 20 June 2000 he be reinstated in his former employment with the Respondent with effect on and from 6 June 2000 without loss of earnings and benefits as if he had not been dismissed.
3. Orders that the proceeding be divided and grants liberty to the applicant to apply in respect of shares and options.

(Sgd.) J. F. GREGOR,

[L.S.]

Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mark Robert Vaughan

and

WA Access Pty Ltd.

No.1394 of 1999.

COMMISSIONER J F GREGOR.

23 June 2000.

Reasons for Decision.

THE COMMISSIONER: On 9 September 1999, Mark Robert Vaughan (the applicant), applied to the Commission for an order pursuant to Section 29 (1)(b)(i) of the *Industrial Relations Act 1979* (the Act), on the grounds that he had been unfairly terminated from employment with WA Access Pty Ltd (the respondent) on or about the 12 August 1999.

The applicant had commenced employment at the respondent's premises on 9 November 1999, having responded to an advertisement in the West Australian for a full-time spray painter. He had undergone a series of interviews and was employed on a month's probation.

The respondent operates a business which involves sales and maintenance of elevating work platforms (EWP's). At the same premises there is a workshop operated by WA Forktrucks which is an associated company. The applicant performed work for both companies. The reason he was employed was to use

his skills as a spray painter to perform upkeep on hire plant, mainly of scissor lifts, boom lifts and cherry pickers. He was also to paint other machines which come into the premises from time to time for repair and resale. On occasion he also worked on equipment owned by clients.

There was one spray painting booth for use of both of the companies. See (*Exhibit S4*). The booth was 30 metres long and it was separated in the center by a curtain divider. The applicant worked in one part of the booth while another spray painter operated in the other side. It is the evidence of the respondent that the fork truck side of the business was the major occupation. The respondent had some small scissor lifts in its fleet and was able to paint them in one side of the bay, but when boom lifts were painted the whole of the paint bay was required. It was the need to paint large EWP equipment which lead to difficulties in the relationship between the parties.

These difficulties were manifest in five major episodes during the course of the applicant's employment. The first of these was in April 1994 when Worksafe placed an improvement notice on the spray booth. This caused the Occupational Health & Safety Manager of the respondent to issue an instruction to the workforce, including the applicant, that under no circumstances was spray painting to be carried out in a spray booth unless the booth doors were shut. This was because Worksafe had registered concern about the release of flammable overspray and fumes. The fumes were required to be contained within the booth and released to atmosphere via a filtering system which system could not operate with the doors open. There was also a necessity for respirators to be worn. The Occupational Health & Safety Manager directed that white dust masks did not provide suitable protection and were not to be used. The second incident occurred over a disagreement around about 20 May 1999. The applicant was concerned while working on a scissor lift painting job, that he was not supplied with what he said was "...a requisite independent air supply with a mask". Instead he was supplied a cartridge respirator. In his view this respirator provided insufficient protection because of the chemicals he was using. Ultimately, it was his insistence upon being supplied with what he considered to be the proper respirator, which the applicant argues lead to the respondent contracting work out of the shop and so making a respirator with an independent air supply unnecessary.

In July 1999, the applicant suffered a practical joke perpetrated by a workmate who locked and chained the spray booth doors while he was inside. This incident was unsafe and left the applicant exposed to danger had there been an explosion or fire while he was working. On the 10 August 1999, a workmate of the applicant had some material lodged in his eye. There were no appropriate eye washers available and the worker eventually left the premises to go to a chemist. This lead to a conversation between the applicant and the management the following day, that among other things canvassed how the applicant and the other spray painter could share the spray booth.

The applicant told the Commission there was ongoing friction between him and the other spray painter over their working conditions. To an extent this was focused on the problem created by having a curtain divider in the spray booth. When the divider was in position the applicant could not bring EWP booms wholly within the booth and therefore, meet the requirement to spray with the doors closed. He raised these issues and he was told to do the best he could and spray with the doors partially open. This concerned the applicant because he thought the work, to be done safely and effectively, should have been rostered to use the full spray booth. This was never done. How this work should be done became the subject of ongoing discussions. The applicant says he tried to do the best he could with the equipment supplied to him, even though he was only allowed to use half of the spray booth.

There was a large piece of equipment from Hamersley Iron which needed to be painted. It was a large HaulPak scissor lift. The machine was stripped down and required a lot of preparation work. The job was large and had a deadline of 4 to 6 weeks. The primers to be applied were epoxy and resin based. These are difficult components to use because of the chemical product of their mixing. There was a smell and fumes.

The applicant had experienced difficulty with the safety masks and he asked for an air fed mask. The respondent did not supply it, even though there was a compressor which could have provided air feed. This compressor was 150 meters away from the workshop. It was a suitable compressor, with dryer, filter, well separator and filter separator. Ultimately the respondent was not prepared to pay the cost of installing an air line to get the clean air 150 metres to the spray booth. The end result is that, when the applicant tried to do the job he suffered dizziness and headaches.

There are other problems in the area with other workers using grinders which have propensity to produce sparks and were very noisy. The applicant related how he felt when he was locked into the spray booth by another worker. He reported the incident, but ultimately there was no effective disciplinary action taken against the worker. It was after the incident when the other painter in the spray booth had a foreign body lodged in his eye and that there was a meeting with the Manager Mike De Jong. Mr De Jong had said to him words to the effect "*what the hell's going on in the spray booth?....I could close the whole operation down and replace you with a bunch of street kids*". The applicant claims Mr De Jong then told him that he was concerned about the liability of the respondent if there had been an accident when an employee who did not have authority to leave the site was driving to the chemist with a foreign body in his eye. There were some suggestions later given by both the applicant and his workmate about how the problems in the spray booth could be resolved. They suggested a range of solutions including shift work. The applicant thought that he was doing reasonably well at work and newsletters put out by the respondent supported his contention. (*Exhibit S18/S19*).

On or about the 12 August 1999, the applicant was addressed on the PA system and asked to come to Mr De Jong's office. He took his supervisor with him. In the office Mr De Jong told him that a structural change had been made within the respondent which was going to make the applicant's position redundant because all of the painting work of WA Access was to be contracted out. This meant there was no work left for him. The applicant then asked if there would be any other position he could fill within the two companies and he was bluntly told there was not. He asked about his holiday pay and sick leave loadings. Mr De Jong responded he had not thought about loadings but decided to recalculate the payout cheque which he already had in his possession. These events brought the applicant's contract of employment to a close. He gave further evidence about what he had done to seek work and the attempts by the applicant in April 1999, to obtain spray painters. The applicant had worked in various positions during the time since his dismissal and the date of the hearing but the work had not been consistent.

The respondent says the applicant was employed to fill a new position. Previous to this time, the work had been let out to contract. It was confirmed by Mr Douglas Kingsley Rawlings, who gave evidence on behalf of the respondent that Worksafe had visited the premises. He thought at the invitation of the Safety Officer, and as a result there were instructions issued by Worksafe concerning non conformance in the spray booth. Spray painting was not to be performed in the paint bay without the doors being closed and this particularly applied to EWP booms. The management had discussed ways of painting machines in the spray booth. The applicant was involved in those talks. There were questions for the management to address. For instance did they extend the spray booth, if it was extended were the costs absorbable. After discussions it was decided it was too expensive to either build a new paint bay or extend the existing one. The respondent decided the solution was that a contractor, Kim Riseborough Painting, would be asked to do the work. There was various meetings between senior management trying to resolve the problem.

Mr Rawlings related the efforts he had undertaken to resolve the problem with the fumes associated with the Hamersley Iron Haul Park scissor lift job. It was confirmed that the applicant had drawn to attention the suitability of an air compressor on the WA Forklift side of the building. The problems confronting Mr Rawlings included whether to relocate the compressor or to run an air line under the carpark. A quotation was sought for a contractor to do that work. The quoted price was in the vicinity of \$2000. It was decided that

the cost to run the air line plus buy an air feed respirator was too much, particularly when it was to be charged against a one-off job, such as the Hamersley job was, so it was decided not to do that. The applicant was asked to finish an undercoat then because the machine could not be safely painted in the workshop it was sent out to a painting contractor. The end result was that the respondent lost money on the job. When a review was made it was decided that if the job had gone straight to a contractor costs would have been saved.

After the review the respondent reconsidered the use of the spray booth. It was decided because the forktruck side produced 80% of the profit that it was uneconomical to take up the room in the spray booth with the big booms on the EWP's. When this was done the forktrucks could not be painted and if the big booms were contracted out, this would leave the whole of the spray booth to do work on the forktrucks. This was decided to be in the best interests of the respondent. It was not possible to work two shifts because of the supervisory costs involved.

It was Mr Rawlings evidence that the respondent had taken every action it could to try and resolve the problem. It was unable to do so within a reasonable capital cost. Eventually the respondent reached the stage where it was not painting any big booms in the workshop, it was doing the smaller plant and the bigger work was being contracted to Kim Riseborough Painting. It was decided that there was not enough work for the applicant to continue to paint what could be fitted in to the paint bay and Mr De Jong decided that his services would be terminated. Mr Rawlings knew when he attended the meeting with the applicant that he was to be dismissed but he did not wish to pre-empt Mr De Jong so did not mention it to him, even though the applicant had asked him whether he would be finished up.

According to Mr Rawlings Mr De Jong explained to the applicant that the respondent had decided it could not paint the big booms, and there was not enough work on the smaller machines. He asked the applicant whether there was some other way the issue could be handled. Mr De Jong had then said to him words to the effect that "...unless a bigger spray painting booth was built there seemed to be no solution". The applicant had asked to stay on for a couple of months to ensure he achieved 12 months' total service but Mr De Jong declined, but he was prepared to deem him to have qualified for the purposes of assessment of annual leave loading. He emphasized to the applicant that he was a good painter and the reason for the decision to dismiss was purely because there was no work left on EWPs.

The preceding recitation is a sufficient scan of the evidence before the Commission.

I have had the opportunity of watching the applicant give his evidence. There is nothing in his evidence in chief or his cross examination which would lead me to conclude that there is any shadow of doubt that he had told the truth to the Commission. He presented as a sincere and honest man and told the Commission his story without embellishment or exaggeration. The Commission also heard evidence on behalf of the respondent from Mr D K Rawlings. Mr Rawling's evidence was similarly given in a truthful manner. This is a case, as occurs often, where the Commission when receiving evidence of a similar nature is required to examine whether the inference the parties draw from those same events were open to them, that is, whose interpretation of what occurred is on the balance of probabilities more likely to be right.

The Commission is to apply the rules as set out in *Undercliff Nursing Home -v- Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385* that rule is the Commission should not interfere with a decision to terminate unless that decision is harsh or unfair and in examining the events between the parties the Commission is to ensure in reaching its decision that there has been a fair go all round. The Commission is not to place itself in the position of surrogate manager and decide the matter on the basis that is. What it is required to do is objectively examine what occurred between the parties and decide in the context of normal commercial dealings whether there has been any unfairness to the applicant in the circumstances.

What has happened here is that the applicant was employed to do work undertaken by the respondent which had

previously been done by contractors. The physical layout of the factory where the work took place meant that the applicant had to share a spray booth with another spray painter who was painting equipment for a related firm. That equipment was of such a size that it fitted into the half of the spray booth that had been allocated to the other spray painter. Difficulties arose when the applicant was required to work on EWP's which did not fit into his spray booth and on occasions through no fault of his he had to work with the spray door open. This caused fumes and overspray so that inspections from Worksafe resulted in improvement notices being issued upon the respondent.

The respondent decided that he could not continue to operate in a way he had been, that is, it had to comply with the improvement notices. It examined how that could best be done. The conclusion it reached, was that, if it continued to do the work on EWP's it would have to have extensions made to the spray booth. This would have cost in the vicinity of \$30,000. It was not prepared to spend that money.

There were also problems with the use of two pack paint systems. These paints require special respiratory gear. The applicant was asked to work on a large job for Hamersley Iron using such paints, and he was not supplied with the correct respirator. He suffered dizziness and headaches as a result. He raised the problems with his supervisor and again the respondent investigated whether it could deal with the problem. It found that to do what the applicant wanted, which was in accordance with the Australian Standards, it would have to spend around about \$2,000 to extend a clean air line from an adjacent factory into the spray booth. It was not prepared to do this.

There was an incident between the applicant and a fellow worker where the worker had left the site because of a foreign body in his eye, contrary to company rules. The applicant was seen by the respondent to be somehow involved in that and was warned about this by the General Manager, Mr De Jong.

The respondent says that in all of these events it consulted as much as it could with the applicant and the other workers. It was inclusive in involving them to try and resolve the issues that they raised. It saw them as being the professionals in the area and looked for their input to try and resolve the problem. They could not and the management had to. What it did, was decide that the work it was asking the applicant to do could be best done in the way it had been previous to his employment and it decided to sub-contract the EWP work to a painter who was more properly equipped to do it. Insofar as the using the two pack paints was concerned it had the applicant finish that work off without supplying him the proper respirator then similarly had that work removed to be done by a private contractor.

After doing so it decided it did not have a job for the applicant and told him he was redundant. He had been employed for less than 12 months. He was paid two weeks pay and told to leave. There was no question relating to his performance, he was rated by Mr Rawlings as being a very good operator, so much so, in later employment he has worked spraying luxurious motor vehicles. There was no question of his ability.

It is true that the Commission cannot interfere with the way that an employer manages his business and will only become involved if the end result of how the employer goes about doing so is unfair. Here is a situation where the applicant was engaged to do work that the employer required to be done. He did that work well, to the best of his ability. The employer was reticent it seems to provide him with the proper protective equipment. It was also, at least in the early stages, prepared to let him work in less than ideal circumstances, in a spray booth which was not big enough for the work. Eventually to resolve the problem created by its own management decisions, it was decided to contract the work out and the applicant was left with no work to do. In my opinion, such an act in the circumstances of this case, is clearly unfair to the employee. That is not to say that the respondent has not the right to do what it did, it certainly has, but it must do that in a fair way and industrial justice required it to properly compensate the applicant when it made changes to his detriment. The dismissal is in that sense unfair. The applicant was made redundant, he should have been provided with a more adequate monetary compensation by the employer for redundancy in

those circumstances. (*Roberts v Leighton Contractors. (1999) 79 WAIG 3551*) That the employer did not do so is unfair in itself. On two counts the respondent has not treated the applicant fairly and the dismissal is tainted and is therefore, unfair.

Orders will issue that the dismissal was unfair.

The Commission by section 23 of the Act is required to effect reinstatement unless that would be unavailing. In this case much time has passed between the date of dismissal and the date of this determination. The applicant in the meantime, has obtained work. In any event I accept that the respondent no longer does the work in which he was engaged, even though it appears to employed a spray painter later. For all of these reasons, reinstatement is not available and the Commission will award the applicant compensation.

I am required to follow the ratio in *Boganovich v Bayside Western Australia Pty Ltd (1999) 79 WAIG 8* and compensate the applicant for the full extent of his loss. Reinstatement is not an option in the circumstances as I have described previously. The applicant submits that his total loss is 17 weeks, this takes into account periods in which he worked following his dismissal. There is no submission made for injury. In the circumstances I accept that the loss sought by the applicant and established by him is equivalent to 17 weeks wages and an order will issue that the respondent pay the applicant a sum assessed on the basis of 17 weeks earnings gross which according to figures applied to the Commission is \$14.67 per hour for a 38 week, producing a sum of \$9477.00.

Appearances: Mr B Stokes appeared on behalf of the applicant

Mr J Beedham appeared on behalf of the respondent

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mark Robert Vaughan

and

WA Access Pty Ltd.

No. 1394 of 1999.

COMMISSIONER J.F. GREGOR.

26 June 2000.

Order.

HAVING heard Mr B Stokes on behalf of the applicant and Mr J Beedham of behalf of the respondent, the Commission pursuant to the powers vested on it under the *Industrial Relations Act, 1979*, hereby orders—

- THAT (1) The Respondent unfairly dismissed the applicant on or about 12 August 1999;
- (2) Reinstatement would be unavailing and compensation will be fixed;
- (3) The respondent shall pay the applicant the sum of \$9477.00 in compensation for unfair dismissal, within 14 days of the date hereof.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

2000 WAIRC 00003

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES: OLYA ALEXEEVNA WARIN V ACEDALE
HOLDING PTY LTD

HEARD: COMMISSIONER P SCOTT

DELIVERED: TUESDAY, 4 JULY 2000

FILE NO/S: APPLICATION 330 OF 2000

Result:

Application filed within time:

Representation:

Applicant/Appellant: Ms S Gethin appeared on behalf of the Applicant

Respondent: Mr D Gerace and with him Mr Spark appeared on behalf of the Respondent.

REASONS FOR DECISION (EXTEMPORE)

1 This is an application made pursuant to s.29(1)(b)(i) of the Industrial Relations Act 1979, by which the Applicant claims that she has been harshly, oppressively or unfairly dismissed from her employment with the Respondent.

2 The purpose of this hearing is to deal with the preliminary matter raised by the Respondent that the application is out of time. The Notice of Application was filed with the Office of the Registrar on 7 March 2000. Section 29(2) of the Industrial Relations Act 1979 says—

“A referral by an employee under sub-section (1)(b)(i) cannot be made more than 28 days after the day on which the employee’s employment terminated.”

3 The uncontested facts before the Commission are that—

- (a) on 4 February 2000, the Respondent delivered to the Applicant at her home address the notice of termination of employment; and
- (b) because the Applicant was away at the time of delivery, it was received by her on 7 February 2000.

4 I note the reference to section 61(1)(e) of the Interpretation Act 1984, to which Mr Gethan has referred. I also refer to Cairns “Australian Civil Procedure” Third Edition at page 448, which says in respect of “Time”—

“Certain Days Not Reckoned.

If a short period is set for taking a step, then days, falling within the period when the court office is closed are excluded from the computation of the time.

When the time for doing an act falls on a day on which the court office is closed, the step is taken in time if it is done on the next day the office is open...

In cases where a particular number of days, not expressed to be clear days, is prescribed by the rules the period is reckoned by excluding the first day, but by including the last day of the period. This rule especially applies when a step is required to be taken within a stated period. As a matter of construction, the day from which the period is calculated is excluded, but the last day is included.”

5 On that basis, I note then that if the termination is taken to be 4 February 2000, in accordance with authorities referred to in Cairns, (supra) the first day for computation of 28 days would be 7 February. Computing from there, this would take the last day available for filing the Notice of Application to Monday, 6 March, which was a public holiday. According to Cairns, again, because the Monday was a public holiday and the Office of the Registrar was closed, Tuesday, 7 March is the last day for filing.

6 If the notice of termination was in fact received on 7 February, and that is the date of termination for computation purposes, then taking account of the public holiday, 7 March 2000 would still be the last date for filing.

7 In either instance, because of the public holiday, the application is within time. So, on that basis there is no impediment to the application proceeding. The matter shall be set down for a conference for the purpose of conciliation between the parties.

CONFERENCES— Matters arising out of—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Western Australian Prison Officers
Union of Workers

and

Hon Attorney General.

No. C121 of 2000.

COMMISSIONER J F GREGOR.

27 June 2000.

Order.

WHEREAS on 8 May 2000, The Western Australian Prison Officers Union of Workers (WAPU) applied to the Commission for a conference pursuant to Section 44 of the *Industrial Relations Act 1979* on the grounds that it was in dispute with the Attorney General over the operation of Clause 11 Prepaid hours/shifts of the Gaol Officers Award 1998 (the Award) and over the achievement of an enterprise bargaining agreement; and

WHEREAS the parties met before the Commission on 25 April 2000, at which time they discussed various solutions to the dispute; and

WHEREAS the Commission made a number of suggestions to the parties including that they should continue to examine the potential of achieving an enterprise bargaining agreement within a framework which would also allow them to resolve any problem between them regarding the prepaid hours provisions and to this end the parties were to meet on 26 May 2000; and

WHEREAS on the 26 June 2000 the parties jointly advised the Commission that agreement had been reached in respect to a number of amendments to the Award which would allow the whole of the issues to be processed by way of consent between the parties in due course. Amongst other things, this agreement involved consultation with members of the WAPU through their branches, at authorised meetings of a proposed course of action and amendments to remove prepaid hours provisions and install penalty rate provisions into the award; and

WHEREAS the parties now advise that they have reached an interim agreement concerning prepaid hours and penalty rate provisions which they wish to have in operation on and from 1 July 2000; and

WHEREAS this would require that the Award be amended in the form of the schedule that the parties submitted to the Commission, and

WHEREAS pursuant to Section 44 (6a) of the *Industrial Relations Act 1979*, the Commission may at or in relation to a conference under 44, vary the operation of an existing award in respect of the parties to the conference; and

WHEREAS the Commission has concluded that the Award ought to be varied as an aide to the resolution of the dispute between the parties completely by way of the issue of an enterprise bargaining agreement; and

WHEREAS the Commission has decided that in view of the progress the parties have made in the matter that it is appropriate that an order of the type described in the preceding citation should now issue.

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

THAT the operation of the Gaol Officers Award 1998 be varied with effect from 1 July 2000, by—

1. Deleting the arrangement in Clause “3—Arrangement” and inserting the following new arrangement—

“1. Title

2A. Statement of Principles—November 1997

2B. Minimum Adult Award Wage

3. Arrangement

4. Term
5. Scope
6. Definitions
7. Part Time Employment
8. Public Holidays
9. Duty Roster
10. Hours of Duty
11. Out of Hours Work
12. Deleted
13. Deleted
14. Management of Peak Musters
15. Secondments and Vacancies
16. Annual Leave
17. Travel Concessions Annual Leave Broome and Roebourne Prisons
18. Long Service Leave
19. Family Carer’s Leave
20. Sick Leave
21. Trade Union Training Leave
22. Leave to Attend Union Business
23. Bereavement Leave
24. Parental Leave
25. Higher Duties
26. Dog Handlers Allowance
27. Travelling, Relieving and Transfer Allowances
28. Property Allowance
29. Uniforms
30. Civilian Clothing Allowance
31. Special Provisions
32. Transfers
33. Probationary Officers in Training
34. Board of Reference
35. Introduction of Change
36. Establishment of Consultative Mechanisms
37. Award Modernisation
38. Dispute Settlement Procedure
39. Effect of 38 Hour Week
40. Payment of Wages
41. Annualised Salaries
42. Reengagement in Employment
43. Salary Packaging
 - Schedule A—Rates of Pay
 - Schedule B—Memorandum of Agreement
 - Schedule C—Memorandum of Agreement”

2. Amending Clause “7.—Part Time Employment”, subclause (5), by deleting the words “Clause 11.—Prepaid Hours/Shifts, Clause 12 Special Hours/Shifts, Clause 13 Exceptional and Emergency Hours/Shifts”; and inserting the words: “Clause 12.—Out of Hours Work”.

3. Deleting Clause “11.—Prepaid Hours/Shifts” and inserting the following new Clause—

“11—Out of Hours Work

- (1) For the purposes of this Clause, the following terms shall have the following meanings—
 - (a) “Out of hours work” means all work performed at the direction of the Superintendent or a duly authorised officer outside the officer’s rostered hours of duty.
 - (b) “Major Emergency Duty” shall be duty outside the officer’s rostered hours of duty on a major emergency as determined by the Minister, or the Director General, or the General Manager Prison Services.
- (2) All Officers are required to be available to work reasonable out of hours work in addition to their rostered hours of duty. Arrangements in respect of such availability will be agreed to ensure that the routine operations of each prison are maintained.
 - (c) Where it is necessary to maintain routine prison functions, and only when sufficient officers are not available on a voluntary basis, the Superintendent may roster officers for out of hours work.
 - (d) Officers rostered for out of hours work in accordance with paragraph (a) above may arrange to swap with other Officers, subject to the approval of their Superintendent.

- (e) If an Officer agrees to take over another Officer's rostered out of hours work, that Officer is then responsible for attending for duty for that rostered work.
- (3) A prison officer, having been directed in accordance with this clause, will on each occasion that he/she undertakes out of hours work for a period of 15 minutes or more in excess of their rostered hours of duty, be entitled to payment in accordance with subclause (4) of this clause.
- (4) Payment for Excess Hours
- (a) Payment for all out of hours work, other than that set out in paragraph (b) of this subclause, will be calculated at the rate of time and a half the officer's annualised rate of pay for all excess time worked.
- (b) Any Officer who is called in for "Major Emergency Duty" shall be paid at the rate of double time the officer's annualised rate of pay for all hours worked outside the officer's rostered hours of duty on that major emergency.
- (5) Minimum Periods for Return to Duty
- (a) A prison officer who is required to return to duty for out of hours work shall be entitled to payment at the rate in accordance with subclause (4) of this clause for a minimum period of three hours.
- (b) Where an officer is required to return to duty more than once, each duty period will stand alone in respect to the application of minimum period payment except where the second or subsequent return to duty is within any such minimum period.
- (6) Excess hours at a place other than usual headquarters
- (a) When a prison officer is directed to work excess hours at a place other than usual headquarters and the time spent in travelling to and from that place is in excess of the time which a prison officer would ordinarily spend in travelling to and from usual headquarters, and provided such travel is undertaken on the same day as the overtime is worked, then such excess time will be deemed to form part of the time worked.
- (b) When a prison officer has volunteered to work excess hours at a place other than usual headquarters, the time spent in travelling to and from that place will not form part of the time worked.
- (7) The handover time existing as at September 1, 1985 between Officers for the purpose of effecting the customary rotation of shifts shall be conducted in an Officer's own time without any payment in addition to the Officer's base salary.
- (8) An officer who is required to report for, return to, or remain on duty for out of hours work shall be entitled to have at least 10 hours off duty between the hours of successive rostered shifts.
- (a) An Officer who works so much out of hours work between the termination of his/her ordinary shift and the commencement of his/her next ordinary shift so that he/she has not had at least ten consecutive hours off duty between such shifts, shall subject to this subclause, be released after completion of such out of hours work until he/she has had ten consecutive hours off duty without loss of pay for ordinary working time occurring such absences. If on the instructions of his/her Superintendent, such Officer resumes or continues work without having had ten consecutive hours off duty he/she shall be granted time off in lieu for the hours worked until he/she has had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absences.
- (b) No Officer shall, or shall be required to, work more than two full consecutive shifts, including out of hours work, except in the case of a major emergency as defined in subclause (1)(b).
- (9) If the Superintendent determines that the number of staff on duty or available for duty has fallen below a staffing level which will ensure the maintenance of routine prison functions including the security and welfare of prisoners and the safety of staff at the prison, he/she shall—
- (a) determine the number of officers required to return to duty, and/or
- (b) what changes are required to be made to routine prison functions.
- (10) If the Union Branch of the prison believes that the number of staff available for duty has fallen below a staffing level which will ensure the maintenance of routine prison functions including the security and welfare of prisoners and the safety of staff at the prison, they shall advise the Superintendent, who may then take action in accordance with subclause (9).
- (a) If the Superintendent does not agree that any action is necessary in accordance with subclause (9), he/she shall advise the Union Branch of his/her decision and the reasons for that decision.
- (b) If the Union Branch does not agree with the Superintendent's decision, any dispute that arises shall be resolved in accordance with Clause 38—Dispute Settlement Procedure.
- (11) Subject to the provisions of this clause, Officers may be given advance or immediate notice to report for, return to, or remain on duty to perform out of hours work.
- (12) Where possible, Officers will be called out to cover positions at the same level as their own, however if no such Officers are available, any available Officer will be called out.
- (13) An Officer must not unreasonably fail to attend duty for out of hours work.
- (14) The Union or an Officer or Officers covered by this award, shall not in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the working of out of hours duties, in accordance with requirements of this clause.
4. Deleting Clause "12.—Special Hours/Shifts" and inserting the following new Clause—
"12.—Deleted"
5. Deleting Clause "13.—Exceptional and Emergency Hours/Shifts" and inserting the following new Clause—
"13.—Deleted"
6. Amending Clause "14.—Management of Peak Musters"—
in subclause (1) by deleting the words "Minister undertakes to use his" and inserting the words "General Manager Prison services undertakes to use his/her".
and deleting subclause (2)
7. Amending Clause "15.—Secondments and Vacancies" by—
deleting subclause (1)
and in subclause (2) by deleting the words "Director Prison Management" and inserting the words "relevant Director"
and in subclauses (3), (4) and (5) by deleting the word "Minister" and inserting the word "Ministry"
8. Amending Clause "20.—Sick Leave" —
in subclause (10) by deleting the number "37" and inserting the number "38"; and
by deleting subclause (7) and renumbering the following subclauses accordingly

9. Amending Clause “33.—Probationary Officers in Training”—

in subclause (1), by deleting the words: “or special shifts”; and

in subclause (3) by deleting the words—

“Clause 11.—Prepaid Hours/Shifts, Clause 12 Special Hours/Shifts, Clause 13 Exceptional and Emergency Hours/Shifts”;

and inserting the words—

“Clause 12.—Out of Hours Work”.

10. Amending Clause “41.—Annualised Salaries”, subclause (1) by deleting the words: “and overtime”

11. Deleting the table in “Schedule A—Rates of Pay” and inserting the following table—

Title/Rank	Annual Rate	Weekly Rate
(a) Probationary Prison Officer (Training School)	26525	508.47
(b) (i) Prison Officers		
Mon-Fri		
1st year	30484	584.36
2nd Year	31709	607.84
3-7 Year	33252	637.41
Thereafter	34159	654.80
Shift		
1st Year	37,775	724.14
2nd Year	39,391	755.11
3-7 Years	41,354	792.74
Thereafter	42,515	815.00
Shift—No Additional Shift Component		
1st Year	37793	724.46
2nd Year	39405	755.37
3-7 Year	41366	792.96
Thereafter	42526	815.20
(ii) First Class Prison Officers		
Mon-Fri	35088	672.61
Shift	43,611	836.01
(iii) Senior Officers		
Mon-Fri		
1st Year	36313	696.10
2nd Year	37221	713.50
3rd Year	38128	730.88
Thereafter	39058	748.71
Shift		
1st Year	45,003	862.69
2nd Year	46,251	886.61
3rd Year	47,401	908.66
Thereafter	48,553	930.74
Security Albany and Canning Vale Prisons		
1st Year	42,741	819.33
2nd Year	43,828	840.17
3rd Year	44,917	861.03
Thereafter	46,005	881.89
Reception Canning Vale Prison and CW Campbell Remand Centre		
1st Year	40,834	782.77
2nd Year	41,870	802.64
3rd Year	42,936	823.07
Thereafter	43,947	842.45
Senior Officer Training		
1st Year	45010	862.82
2nd Year	46257	886.72
3rd Year	47405	908.72
Thereafter	48555	930.77
(c) Industrial		
Drivers—Casuarina		
1st Year	36,668	702.92
2nd Year	38,154	731.39
3-7 Year	40,010	766.98
Thereafter	41,125	788.34

Drivers—CW Campbell Remand Centre

1st Year	33,972	651.22
2nd Year	35,344	677.53
3-7 Year	37,057	710.36
Thereafter	38,086	730.10

Alternate Weekends

1st year	35233	675.39
2nd Year	36800	705.44
3-7 Year	38482	737.67
Thereafter	39508	757.35

Alternate Weekends with Relief

1st Year	34,983	670.60
2nd Year	36,396	697.70
3-7 Year	38,1656	731.62
Thereafter	39,225	751.93

Industrial Officer Group 1

Mon-Fri	35088	672.61
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Mon-Fri + Public

Holidays	36092	691.85
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Alternate Weekends	40407	774.57
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Alternate Weekends with

Relief	40,286	772.27
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Bunbury/Casuarina

Canteen	39434	755.92
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Canning Vale Prison

Canteen	38097	730.30
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Wooroloo Canteen	37094	711.06
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Metropolitan Security

Unit—Dog Unit	42,850	821.42
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Albany Activities	38598	739.90
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Bandyup Activities	42079	806.62
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Bunbury Activities	41105	787.96
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Eastern Goldfields

Activities	42608	816.77
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Greenough Activities	43253	829.14
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Karnet Activities	42940	823.14
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Wooroloo Activities	42124	807.48
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Canning Vale Prison

Reception	38,780	743.40
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CW Campbell Remand

Centre—Reception	40,286	772.27
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Industrial Officer Group 2

Mon-Fri

1st Year	36313	696.10
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2nd Year	37221	713.50
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3rd Year	38128	730.88
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Thereafter	39058	748.71
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Mon-Fri + Public Holidays

1st Year	37352	716.02
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2nd Year	38297	734.13
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3rd Year	39243	752.26
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Thereafter	40189	770.39
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Alternate Weekends

1st Year	42044	805.96
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2nd Year	43071	825.64
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3rd Year	44127	845.88
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Thereafter	45216	866.76
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Alternate Weekends + Self Relief

1st Year	41,701	799.38
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2nd Year	42,761	819.72
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3rd Year	43,822	840.06
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Thereafter	44,882	860.38
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East Perth Lock Up

1st Year	39,100	749.52
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2nd Year	40,092	768.55
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3rd Year	41,084	787.56
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Thereafter	42,075	806.57
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Metropolitan Security Unit—Dog Unit

1st Year	44,358	850.33
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2nd Year	45,488	871.99
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3rd Year	46,621	893.70
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Thereafter	47,751	915.36
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Bunbury Cook Instructors		
1st Year	43,867	840.92
2nd Year	44,985	862.34
3rd Year	46,102	883.76
Thereafter	47,221	905.20
Kitchen—Canning Vale Prison		
1st Year	39,533	757.83
2nd Year	40,536	777.06
3rd Year	41,540	796.30
Thereafter	42,544	815.55
Hospital Officers		
1st Year	52,817	1,012.48
2nd Year	53,992	1,035.00
Thereafter	55,551	1,064.89
Senior Hospital Officer	53314	1022.00

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.
Western Australian Prison Officers
Union of Workers
and
The Hon Attorney General.
No. C130 of 2000.
COMMISSIONER J.F. GREGOR.

June 2000.

Direction.

WHEREAS on 12 June 2000, the Commission conducted a conference between the parties to discuss a series of allegations by the Western Australian Prison Officers' Union that there have been a succession of pay errors by the Ministry of Justice including, but not isolated to—

- Non payment of salaries on due date;
- Incorrect payment of salaries and allowances;
- Non payment of overtime within a reasonable period, or incorrect payment of overtime; and

WHEREAS Officers who appeared on behalf of the Attorney told the Commission that there are and have been continuing difficulties with the preparation of pay, these are a result of staffing and information technology problems; and

WHEREAS the Commission was also told that the pay process was not adequately resourced, notwithstanding the best efforts of Ministry of Justice officers to remedy the position; and

WHEREAS the Commission told the conference that the Ministry of Justice had obligations at law to comply with the Gaol Officers' Award. It's failure to do so put it seriously in risk of punitive orders issued by an Industrial Magistrate and industrial repercussions which could interrupt the smooth flow of the Ministry's work; and

WHEREAS the Commission was of the opinion that the situation has existed now for an extended period of time should not be allowed to continue and has decided to direct the respondent to take such action as is necessary to remedy the deficiencies which are causing the errors—

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

1. THAT the respondent takes such steps as are necessary to provide adequate resources to address the deficiencies in the pay system which have lead to continuing errors in payment.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Rail, Tram and Bus Industry Union of
Employees, West Australian Branch

and

Western Australian Government Railways Commission.

No. C 335 of 1999.

COMMISSIONER A.R. BEECH.

15 June 2000.

Reasons for Decision.

The union seeks an order from the Commission cancelling the order of 16 December 1999. In general terms, the order of 16 December 1999 required a return to work and required the parties to continue to observe the terms of the enterprise bargaining agreement AG 21 of 1996 subject to some conditions, including the payment of a \$15.00 wage increase and a requirement that the parties enter into negotiations for the purposes of concluding another enterprise bargaining agreement. An earlier application by the union to have the order of 16 December 1999 cancelled was rejected by the Commission (order dated 11 April 2000). The principal reason for rejecting the union's application was that the parties were at the concluding stages of negotiations on a new enterprise bargaining agreement. The Commission considered at least that it was premature to give consideration to cancelling the order of 16 December 1999 at such a critical point in time.

The union has now renewed its application. It has informed the Commission that the ballot of its membership overwhelmingly, by 229 votes to 28 votes, rejected the Framework Agreement which had been agreed to in principle by the union and Westrail. The Commission was informed by the union that not only had the ballot overwhelmingly rejected the proposed Framework Agreement, industrial relations between the parties had deteriorated further such that the union believes there is now no likelihood of any negotiations between it and Westrail resulting in a further enterprise bargaining agreement. The union advised the Commission that there are no negotiations currently between the parties and none likely to be held in the near future.

The union once again referred to the failure of Westrail to put submissions to a Full Bench of this Commission in support of Westrail's position that AG 21 of 1996 continued to exist notwithstanding that the union had retired from it. The union states that Westrail's conduct, together with the overwhelming opposition of its members to the wages and conditions payable under AG 21 of 1996, an opposition not lessened by the \$15.00 per week increase prescribed by the order of 16 December 1999, is the cause of much discontent amongst its members. It referred extensively to wage rates payable to locomotive drivers in rail networks in other States to show the wage rate prescribed for locomotive drivers in AG 21 of 1996 as being inferior. The union reiterates the right it has pursuant to s.41(7) of the *Industrial Relations Act 1979* to retire from the industrial agreement AG 21 of 1996. On the retirement of the union from the agreement, it ceases to have effect and the work of locomotive drivers will be prescribed by the *Government Railways Locomotive Enginemen's Award 1973—1990*. That is actively sought by the union. The union states that its members have made a considered and thoughtful decision that they will be no worse off under the award and they wish now to return to it. The union states that Westrail has had since December 1999 to prepare for this eventuality. It is able to use contractors to meet the required increase demand for locomotive drivers. Any safety issues are able to be addressed by rostering staff more effectively. The union is still prepared to negotiate with Westrail on a new award in accordance with the union's draft sent to it at the end of September 1999 despite its view that Westrail has refused to negotiate on that document. Finally, the union refers to the news that the Government has decided to sell the freight arm of Westrail and it accuses Westrail of delaying tactics to do with the programming of the sale.

Westrail rejects the union's submissions. It recognises that the order of 16 December 1999 is interim in nature and is able

to be reviewed when negotiations are completed. Westrail acknowledges that there are no negotiations currently between the parties. However, Westrail believes that the union and its members do not fully understand the consequences of returning to the award on their wages and conditions. In Westrail's view, a return to award conditions will disadvantage locomotive drivers. For Westrail's part, it does not wish to see its locomotive drivers worse off than they are currently. Westrail points out that to the extent that the union says that it is seeking wages rates comparable to the rates payable in the Eastern States rail networks, a return to the award will not achieve that end. There will inevitably need to be further discussions between the parties.

Furthermore, Westrail expressed the view that the contracts of employment of locomotive drivers were changed significantly in 1996 to a wider range of duties than are prescribed in the award and it has doubts that the award is directly applicable to locomotive drivers, particularly following their reclassification to "Locomotive Operator". It believes therefore that an attempt to return to the award may increase uncertainty and disputation between the parties. It refers to locomotive drivers who have been employed since AG 21 of 1996 came into operation and who have never been employed under the award. It says that the Commission should anticipate any forthcoming dispute between the parties, particularly if it is to result in industrial action. It refers to Westrail's business as being critical for the wheat, grain, alumina and nickel industries which are in turn critical to the economy of the State. A return to the award may mean that it can run only 60% of its required services and the Commission should not permit disputation to occur which might damage the economy of the State. It urges the Commission to ensure an orderly transition takes place if the order is cancelled given the effect it will have upon Westrail's employees, its business, and its client's business. Indeed, it sees the union's position as bizarre.

Conclusion

The context of the order of 16 December 1999 was set out in the earlier Reasons for Decision in this matter. It is sufficient to repeat them only to the extent of highlighting that the order of 16 December 1999 issued in circumstances where the effect of the union's withdrawal from the industrial agreement was to be clarified and the parties were to meet and negotiate a new enterprise bargaining agreement. It imposed interim arrangements together with a requirement for a return to work while those objectives were pursued. Both those objectives have now past. It is now beyond argument that the industrial agreement AG 21 of 1996 no longer exists. The negotiations between the parties have failed and both sides indicate that further negotiations are not likely to occur in the short term. In those circumstances there is simply no warrant for a continuation of AG 21 of 1996. This conclusion is for the following reasons—

- (1) The *Industrial Relations Act 1979* permits a party to withdraw from an industrial agreement with one month's notice to the other party. Thus, the legislation recognises that an industrial agreement may cease to exist at the option of one of the parties to that agreement. The current wage fixing system envisages the award as the safety net. It is up to the parties, and not the Commission, to decide whether they wish to negotiate and reach an agreement to record wage rates and conditions of employment different from those prescribed in the award (cf. *Asahi Diamond v AFMEU* (1995) 37 AILR ¶3-040).

It follows therefore that it is not appropriate other than for an interim period to prevent the deterioration of industrial relations, or until conciliation or arbitration has resolved the matter, for the Commission to require parties to continue to observe the terms and conditions of an industrial agreement when one party has exercised the legislative right it has to retire from that agreement.

- (2) However, once that interim period is past the reasons for the Commission requiring the parties to continue to observe the terms of an industrial agreement after it has expired no longer exist.

- (3) It is also not appropriate for the Commission to perpetuate its requirement that the parties continue to observe the terms and conditions of an industrial agreement when those terms and conditions are a source of unhappiness and discontent. The submissions of the union make it plain that the terms and conditions of AG 21 of 1996 are a source of discontent amongst its members.
- (4) An argument that a return to the award will lead to uncertainty and disputation cannot provide a valid reason in the above circumstances to not cancel the order of 16 December 1999. To hold otherwise is to argue that the right of a party to withdraw from an enterprise bargaining agreement given to it by the legislation will be overridden if the other party submits that the cessation of the industrial agreement will lead to uncertainty or disputation. Section 41 does not impose a condition upon the right of a party to an enterprise agreement to give notice of its retirement from the agreement. Neither is it for the Commission to effectively re-write the Act.

Rather, any fears that uncertainty and disputation will occur arise not from the cancellation of the order of 16 December of itself but from differing perceptions of the parties of how the award is now able to be observed. That is an entirely separate issue. It is an issue primarily for the parties themselves. It arises as a direct consequence of them having agreed in 1996 to the industrial agreement. It is timely to remind parties who choose to enter into an agreement under s.41 that it will cease to have effect after its term has expired and a party retires from it. The consequence of that occurrence is as much their responsibility now as it was when the industrial agreement was made.

If they are unable to now deal with the issues which arise following the union's retirement from it, particularly if their inability does affect Westrail's ability to maintain its services to those industries critical to the State's economy, those issues will be able to be addressed by the Commission as and when the need arises. The position in which the union and Westrail now find themselves is not unique. The Commission's powers to assist parties by conciliation, and arbitration, remain available.

For those reasons the order of 16 December 1999 will be cancelled. Although the union requests that the order be cancelled as from the date of hearing I assess that it is appropriate that the parties have notice of one full pay period before the cancellation takes effect. That period is seen by the Commission as appropriate in circumstances where Westrail has been unable to deny since the hearing before the Full Bench on 29 March 2000 that AG 21 of 1996 has not been in force since the union's retirement from it on 13 December 1999 and the foreshadowing by the Commission in the earlier Reasons for Decision in this matter on 11 April 2000 of the likelihood that the order would be cancelled. Accordingly, the order to issue will take effect from the end of the next complete pay period.

A minute of the proposed order now issues.

Appearances: Mr R. Wells and with him Mr W. Curran on behalf of The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch.

Mr D. Johnston on behalf of the Western Australian Government Railways Commission.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Rail, Tram and Bus Industry Union of
Employees, West Australian Branch

and

Western Australian Government Railways Commission.

No. C 335 of 1999.

COMMISSIONER A.R. BEECH.

20 June 2000.

Reasons For Decision—Speaking To The Minutes

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

In relation to the submissions that have been made I accept that the date at which the Commission's proposed order would take effect was uncertain. In part that uncertainty was due to the Commission not being aware of the detail of the pay cycle and also not being aware of the need for the pay cycle to coincide with roster periods. The Commission was not aware that there is a difference at times between the two and I believe that it is valid that the roster cycle and the pay cycle coincide because the concern of the Commission as expressed in the Reasons for Decision is that the cancellation of the order of 16 December 1999 presents as little as possible extra administrative work to both Westrail and also the locomotive engine drivers concerned arising from the change to their employment conditions which will necessarily follow.

The intention of the Commission in giving one full pay period's notice was to allow that concern to be met. It was not for the purpose of giving time to Westrail or to prolong the Chief Commissioner's order in some artificial way. It is important that the pay periods and the rosters coincide. I take into account the fact that the Commission's Reasons for Decision were known on 15 June 2000 and it is therefore consistent with my reasoning for the order that I now issue to take effect on 2 July 2000 and the order will reflect that.

I desire to say the following in addition. The imminent cancellation of the order of 16 December 1999 marks the end of a period of industrial regulation by the way of the parties' enterprise bargaining agreement. It also marks the commencement of a new period of industrial regulation. What will be the terms and conditions of employment of locomotive engine drivers in this section of Westrail's operations is entirely a matter for Westrail and the union. The wage system that operates in this State focuses on parties reaching an agreement as to wages and conditions. The fact that you have not succeeded in doing so in the last six months does not mean that you should not continue to try to do so and succeed in doing so. Not only is it the Commission's expectation and requirement that you do so, it does not overstate the situation to say that it is in the interests of the State, it is in the interests of the employees concerned, it is in the interests of Westrail and its customers and the public good that you do so. The obligation that rests upon you is that serious. The Commission remains available to assist you, but it does not run Westrail nor make its decisions for it, nor does it run the union and make its decisions for it.

Order accordingly.

Appearances Mr R. Wells and with him Mr B.J. Curran on behalf of The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch.

Mr D. Johnston on behalf of the Western Australian Government Railways Commission.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Rail, Tram and Bus Industry Union of
Employees, West Australian Branch

and

Western Australian Government Railways Commission.

No. C 335 of 1999.

20 June 2000.

Order.

HAVING HEARD Mr R. Wells and with him Mr B.J. Curran on behalf of the Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch and Mr D. Johnston on behalf of Western Australian Government Railways Commission, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

- (1) THAT the Order in this application dated 16 December 1999 be and is hereby cancelled.
- (2) THAT this Order take effect on and from 2 July 2000.

(Sgd.) A.R. BEECH,

[L.S.]

Commissioner.

CONFERENCES— Matters referred—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Australian Municipal, Administrative, Clerical and Services
Union of Employees, Western Australian Clerical and
Administrative Branch

and

MSA Management Services Pty Ltd.

No. CR 333 of 1999.

16 June 2000.

COMMISSIONER S WOOD.

Reasons for Decision.

THE COMMISSIONER: This is an application made pursuant to s44 of the Industrial Relations Act, 1979 (the Act) by the applicant union on behalf of Ms Lisa Jane Trotman. The matter having not been settled in conference was referred for hearing and determination for alleged unfair dismissal and non payment of contractual benefits.

The claim and answers are as follows—

CLAIM—

The applicant union—

- a. *claims that Ms L Trotman was unfairly terminated from her employment on 2 November 1999;*
- b. *asserts that Ms Trotman has been denied contractual benefits in the form of—*
 - *The payments accrued under an incentive scheme which forms part of her contract of employment in the amount of \$1189.19;*
 - *Payment for the appropriate notice period in the amount of \$2,221.15*
- c. *seeks an order that Ms Trotman be reinstated or re-employed to her position or a comparable position or compensation equivalent to six months remuneration;*
- d. *seeks an order that Ms Trotman be paid the alleged contractual benefits owed to her.*

ANSWER—

That Ms Trotman voluntarily resigned from her employment and hence was not dismissed and therefore the circumstance of the termination does not arouse the jurisdiction of the Commission; and

The Commission does not have the jurisdiction to act judicially and enforce a payment of alleged contractual benefits pursuant to s44 of the Industrial Relations Act, 1979.

At hearing the applicant union sought not to pursue the element of claim for contractual benefits and foreshadowed that pursuant to s29 it would file a separate application for denied contractual benefits. Following argument both parties consented to delete the second paragraph of the answer.

Ms Lisa Trotman was employed by Mr John Dennison, Managing Director and Chief Executive Officer of MSA Management Services on 27 April 1999. She was employed as the Administrator of Alpha Personnel. Alpha Personnel was a recruitment agency for the placement of temporary and permanent receptionists, secretaries, data clerks, etc. Her terms and conditions of employment are set out in a letter marked Exhibit A1. She was paid \$35,000 per annum plus commissions for placements and expenses for motor vehicle, mobile and home telephone. She was the sole operator of the business and responsible for generating all new business. She reported to Mr Dennison. As is clear from the contract she was on a three month probation period at the beginning of the contract and although the parties are wide apart on the fairness of extending the probationary period, it is common ground that the probationary period was extended both on 6 August 1999 and 26 October 1999.

It is clear from the evidence of both parties that Ms Trotman spoke to a Mr Adrian Sommerville on 22 October 1999 regarding the performance of the company and performance of Ms Trotman. I should note that the situation was that Ms Trotman being a sole operator of the company meant that the performance of the company and her performance were inextricably linked. A meeting followed on 26 October 1999 between Mr John Dennison, Ms Jessie Scully, Mr Lawrence Berkhout and Ms Trotman when the issue of extending her probation for a further period was raised, as was a suggestion that she undergo further training. Ms Trotman, on her evidence, at that time had just received a bill for \$750.00 for the installation of a security alarm at her home by another branch of the MSA companies. She believed the charge for the alarm to be inaccurate and unfair. The sequence of events, again on Ms Trotman's evidence, affected her attitude to the company.

It is common ground that Ms Trotman was asked to attend a management meeting the next day, ie 27 October 1999. She did not attend and in fact later that day proceeded on sick leave. She was then off work on sick leave the following two days, they being Thursday and Friday and returned to work on the Monday, ie 1 November 1999. Ms Trotman says that whilst on sick leave she was telephoned unnecessarily by staff of the respondent. On the morning of 1 November 1999 Mr Dennison spoke to Ms Trotman regarding her absence and not being contactable. Later that day Ms Trotman handed to Mr Dennison a letter of resignation giving one month's notice. Mr Dennison subsequently terminated Ms Trotman's employment on 2 November 1999 paying her one week's salary in lieu of notice.

The applicant union says the circumstances surrounding Ms Trotman's termination was such that she was constructively dismissed. They reference her letter of resignation (ie Exhibit A4) where she indicates "I also feel that I am being forced to resign". In her evidence Ms Trotman says that her reason for resigning was: "I didn't want to put up with the continually bullying and intimidation so I decided my only option was to leave. I suspected they were trying to get me to leave. I just didn't want to subject myself to any more."

In the alternative, the applicant union says that if the Commission does not accept that proposition, then the evidence shows that the employer terminated the contract of employment on 2 November 1999 and they would say this was done in a manner that was harsh and unfair. On that day Ms Trotman says that she was called in to Mr Dennison's office and told by him that he would like her to leave immediately, that they had decided to accept her resignation and that her pay had

been made up. She then advised Lawrence Berkhout as to progress with work matters and was escorted from the building. She says that until that point she had fully expected to be able to work out the month's notice. The applicant union says that, if the Commission so finds, given all the circumstances of the dismissal, Ms Trotman is entitled to be paid the balance of her notice period plus two weeks pay for injury.

Mr Dennison says that Ms Trotman's initial three month probationary period was extended as the development of the business had not progressed to any reasonable degree at that point in time. He says the probationary period was again extended after another three months as the agreed targets for the business had not been reached. There was a lack of clarity in the evidence about the authorship of the document containing the key targets (ie Exhibit R1). However, on cross-examination it was clear Ms Trotman was aware of the targets and their purpose. It is clear also from Ms Trotman's and Mr Dennison's evidence that these targets were not fully reached in several months prior to Ms Trotman's termination.

Mr Dennison says that he thought Ms Trotman might have needed some more assistance by way of training and development and that he sought additional information from her. Mr Dennison's evidence is that he also spoke to her on 1 November 1999 as he says "it was immense concern to me that she wasn't responding to the telephone calls, wasn't assisting the company in any way". This was during the period Ms Trotman was away ill. It was following that meeting, about an hour later, on Mr Dennison's evidence that Ms Trotman handed in her resignation. The next day Mr Dennison terminated Ms Trotman's services and paid her for one week in lieu of notice.

The decision to terminate Ms Trotman was taken on the Monday. Mr Dennison says that he took the decision as he considered Ms Trotman was not happy with the company and that he didn't want to prolong the agony.

I initially found the evidence of Ms Trotman to be credible, but she was less convincing and quite defensive in cross-examination, particularly in relation to the performance of the company, whether she had met the key targets and in relation to her non-attendance at the managers' meeting. I accept Mr Dennison's evidence on these points as more specific and reliable. Similarly I accept the evidence of Mr Robbins in preference to Ms Trotman in respect of the cost and installation of the security system. He was clear in his evidence and I consider his version of what transpired as more probable.

The evidence of Mr Adrian Sommerville does not assist the respondent's case. He says in evidence in chief "I did state to Lisa that her probationary period was coming to an end and that there would be decisions made as to how she would fit within the organisation or whether she would be continued beyond the date of her probationary period" and again "should her employment continue her probationary period would need to be extended because of the history of her work within the organisation, I also did state to her that if her employment was terminated then she would find it hard within the industry because of her track record with the company" and again "I told her that her position was up for review, her probationary period was up for review that there were two avenues. One was to continue her employment, and we discussed continuing the employment in the terms I have just said or they would terminate her employment."

It is clear from Ms Trotman's evidence and Mr Sommerville's evidence that neither person was familiar to the other person prior to the date of interview, ie 22 October 1999. In cross-examination Mr Sommerville says that the meeting was not acrimonious. I do not consider this evidence to be plausible and I accept Ms Trotman's evidence that the meeting was indeed upsetting. Mr Sommerville paints the meeting in somewhat of a matter of fact way which is hardly credible, given the impact that this could have had on Ms Trotman's employment and given she had never met this person previously.

It is clear from the evidence that Ms Trotman was not constructively dismissed. Ms Trotman after an upsetting meeting with Mr Sommerville, was spoken to by Mr Dennison and others and her probation was again extended. I accept the evidence of Mr Dennison that the extension of the probation was due to the underperformance of the company. Ms Trotman

was solely responsible for that performance. It may be unusual for the probation or trial period to be again extended, however, I find nothing unfair in the respondent having done so given the particular circumstance, of this new business with a sole operator. The respondent made a judgement that the performance of the company had not improved sufficiently and that they would give Ms Trotman more time and some further development to see whether the required standard could be reached. Whilst I may understand why Ms Trotman was aggrieved about the approach of the respondent, and whilst she may have considered she had little other option, she tacitly accepted the decision of the respondent, which they were entitled to make. The alternative was in fact to end the trial period of employment at that point in time. The respondent did not decide to do this.

Constructive dismissal is such that the conduct of an employer must be so fundamental as to amount to a significant breach going to the root of the contract which would entitle an employee to accept that the breach has left them with only the option of walking away from the employment (*see Dameyon William Bronson -v- Ivory Investments Pty Ltd T/A "Dome" Mandurah 79 WAIG 567 @ 569; see also Cargill Australia Limited, Leslie Salt Division -v- The Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch 72 WAIG 1495 & The Attorney General -v- Western Australian Prison Officers' Union of Workers 75 WAIG 3166*). This is not the case in this matter. The set of circumstances led Ms Trotman to be fundamentally unhappy with her employment and she resigned. The conditions for her continued employment may have been distressing for her, namely extension of the probation, meeting the performance standards, undergoing training and attending the managers' meetings at which performance would be discussed. These conditions and the circumstances at the time do not amount in my view to Ms Trotman being effectively pushed from her employment. Additionally, even though it is clear from the evidence for the respondent that Ms Trotman's employment was threatened by Mr Sommerville, it was made clear by the respondent that her employment would be continued and subject to conditions.

Was Ms Trotman otherwise dismissed? Clearly she was. The date of effect of the termination of employment was to be a month from 1 November 1999. Mr Dennison brought the employment to an earlier conclusion. He says that he merely accepted her resignation when in fact he terminated her with one week's notice in lieu. This amounts to a dismissal. The issue is whether the dismissal in this context was unfair or otherwise. I find that Ms Trotman was not unfairly dismissed. Ms Trotman had clearly signalled her desire to end the employment relationship, whilst still on probation, by giving one month's notice. The respondent was entitled to end what was still in effect a trial period of employment, at any time (*see Charles William Westheaffer -v- Marriage Guidance Council of WA 65 WAIG 2311*).

If I am wrong on this then consideration has to be given to the fairness of the earlier termination, i.e. within the one month's notice which was given. The length of notice Ms Trotman says was part of her contract. The respondent disagrees with this. The written contract is silent on this issue. There is no evidence before the Commission, except the differing oral evidence of both parties, to clarify this point and I find the notice period as claimed by the applicant to be not proven. I find there was nothing unfair in the respondent terminating Ms Trotman earlier than she intended. The circumstances leading to her resignation and the fact that Mr Dennison did not persuade Ms Trotman to stay does not, in my view, amount to her having received less than "a fair go all round" (*see Undercliffe Nursing Home -v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch 65 WAIG 385*). If in fact that was what she was entitled to as part of her probationary employment. Ms Trotman by her actions had signalled that she was not intending to fulfil the conditions for her continued employment and did not want to work for the respondent any longer. The respondent was entitled to consider that the performance he had required from the business and from Ms Trotman would not be achieved and call the employment relationship to a close, for these reasons I find that Ms Trotman was not unfairly dismissed and I would dismiss that part of the application.

Turning to the contractual benefits part of the application, I note that the matter has been dealt with in evidence by Ms Trotman and not treated in cross-examination or in evidence by the respondent with the exception of reference to the performance targets (see Exhibit R1). The essential evidence which details the amounts that are allegedly owing is contained in Exhibit A7. However, Exhibits A1, A3, A4, A5 and A6 also have some bearing. Given that I have found that Ms Trotman did not meet fully the performance standards, and I have accepted the evidence of the respondent in this regard, I consider the case for payment of commissions has not been made out. Similarly, I have found that the case for there being a one month notice period for resignation has not been made out. Therefore I would not award the amount claimed in Exhibit A7 for Notice Period. However, there is credible documentation in the form of the doctor's certificate to cover the absence on 27 October 1999. The respondent had not paid Ms Trotman for work on 2 November 1999 due to this earlier absence (see Exhibit A6). There is also credible documentation for telephone and motor vehicle expenses which appear consistent with the contract at Exhibit A1. I would accept Ms Trotman's uncontradicted evidence on these later points and on the shortfall in pay referenced in Exhibit A7. Accordingly, I would award Ms Trotman \$489.40 in outstanding contractual entitlements.

There are two further matters to consider. The applicant made an oral application to have waived the \$750 cost of the security alarm. There does not appear to be anything in the contract either direct or implied which addresses this issue. Irrespective I have accepted the evidence of Mr Robbins regarding the installation and cost of this device and hence I would reject the application.

The respondent made an oral application for costs and characterised the application as frivolous and vexatious. The application is clearly neither frivolous nor vexatious and I would reject the request for costs. There is certainly nothing exceptional in this matter to warrant the awarding of costs (*see Brailey v Mendex t/a Mair & Co Maylands 73 WAIG 26*).

Ordered Accordingly

Appearances: Mr S Bibby on behalf of the applicant.

Mr D Clarke as agent for the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Australian Municipal, Administrative, Clerical and Services
Union of Employees, Western Australian Clerical and
Administrative Branch

and

MSA Management Services Pty Ltd.

No. CR 333 of 1999.

COMMISSIONER S WOOD.

26 June 2000.

Order.

HAVING heard Mr S Bibby on behalf of the applicant and Mr D Clarke as agent for the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

- (1) THAT MSA Management Services Pty Ltd pay Ms Lisa Trotman contractual benefits in the sum of \$489.40; and
- (2) THAT the application alleging unfair dismissal be and is hereby dismissed.

(Sgd.) S. WOOD,

[L.S.]

Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Workers Union West Australian Branch
Industrial Union of Workers

and

Iluka Resources Ltd.

No. CR 240 of 1999.

COMMISSIONER S J KENNER.

27 June 2000.

Reasons for Decision.

THE COMMISSIONER: This matter has been referred for hearing and determination pursuant to s 44(9) of the Industrial Relations Act 1979 ("the Act"). By it, the applicant union claims that its member Mr I Delgado, who was allegedly employed by Iluka Resources Ltd ("the respondent") as a trainee operator, was harshly, oppressively and unfairly dismissed on 30 July 1999. The applicant seeks an order from the Commission that the respondent without loss of entitlements or benefits reinstate Mr Delgado.

The respondent denies the claim and opposes the order as sought.

The Commission was asked, and agreed, to determine a preliminary issue going to the Commission's jurisdiction to entertain the claim, based upon the respondent's contention that Mr Delgado was a party to a workplace agreement ("the Agreement") which, it was common ground, was in force under the Workplace Agreements Act 1993 ("WPA") as at 24 September 1999, thereby depriving the Commission of jurisdiction to determine this matter by reason of Part IA of the Act.

The applicant was represented by Mr M Llewellyn and the respondent by Mr A Cameron.

Facts

The parties initially provided to the Commission an agreed statement of facts as follows—

1. Mr Ian Delgado (Delgado) commenced permanent employment with RGC Mineral Sands Limited (RGC) in or about January 1996.
2. RGC and Delgado entered into an individual Workplace Agreement numbered 98/10047.004 which was registered by the Commissioner of Workplace Agreements on 20 August 1998 (the Workplace Agreement).
3. The Workplace Agreement has a term of five years.
4. The Workplace Agreement provides for claims of unfair dismissal from employment to be referred to the Industrial Magistrates Court.
5. In 1999 RGC's operations merged with the operations of Westralian Sands Limited with the resulting combined entity being known as Iluka Resources Limited (Iluka), with the merger being such that there was a transmission or succession of business.
6. The work performed by, and the conditions of employment of, Delgado were unaltered by virtue of the transmission or succession of business.
7. Following the transmission or succession of business Iluka terminated Delgado's contract of employment on or about 30 July 1999.
8. The applicant contends that an individual Workplace Agreement is incapable of being binding on an employer that is a successor or transferee of a business, thus there was no binding Workplace Agreement in force at the time of Delgado's termination of employment and thus the Commission has jurisdiction to determine this application.
9. The respondent contends that individual Workplace Agreements are binding on a successor or transferee of a business, thus there was a binding Workplace Agreement in force at the time of Delgado's termination of employment and thus the Commission has no jurisdiction to determine this application.

10. The Commission is requested to determine which of the two foregoing positions is correct."

As a result of issues raised by the Commission during the course of the proceedings to determine the jurisdictional issue, the parties provided a further statement of agreed facts as follows—

1. Westralian Sands Limited (WSL) and RGC Limited (RGC) merged their operations pursuant to a merger Implementation Agreement dated 24th July 1998.
2. A copy of the Merger Implementation Agreement is set out in the attached Information Memorandum at pages 273 to 299.
3. Pursuant to this agreement RGC shares were transferred to WSL with RGC shareholders receiving 0.6556249 of a WSL share for each RGC share so transferred (see ORDINARY SCHEME at page 278 of the Information Memorandum and the definition of Ordinary Scheme Member at page 293).
4. During the period between the Merger Implementation Agreement being entered into and it taking effect RGC and its subsidiaries were to "carry on their respective businesses in the usual, regular and ordinary course in substantially that same manner as conducted until now..." (see Merger Implementation Agreement 6.1(i) Conduct of business by RGC at page 281 of the Information Memorandum and the definition of Effective Date at page 293).
5. The merger proceeded as agreed and on the 14th December 1998 RGC and other group companies became subsidiaries of WSL.
6. On 24th May 1999 WSL changed its name to Iluka Resources Limited. Its Australian Company Number did not change (see attached Certificate of Registration of name change).
7. On 24th June 1999 RGC Mineral Sands Limited changed its name to Iluka Midwest Limited. Its Australian Company Number did not change (see attached Certificate of Registration of name change).
8. The effect of the merger was that the assets of RGC became the assets of WSL (see Information Memorandum pages 29 3.7(b) (iii), page 101 Transaction Effect, page 186 WSL the new major producer and also page 195 Post Merger Structure).
9. The executive employees will either be offered redundancy or employment with WSL (see Information Memorandum page 92 at 8).
10. In late November and early December Iluka Resources Limited had the employees sign new workplace agreements.
11. At no time did Mr Delgado enter into a new written employment contract or workplace agreement. At all times he remained employed pursuant to the terms of his original written contract with RGC Mineral Sands Ltd.
12. The Union is of the view Iluka Resources was the employer of Mr Delgado on the basis that—
 - a. all correspondence received by employees is on the letterhead of Iluka Resources Limited, including salary reviews;
 - b. the termination letter is also on the letterhead of Iluka Resources Limited, and;
 - c. this has led the employees to believe that they work for Iluka Resources Limited.
13. The Company is of the view that Iluka Midwest Limited was the employer of Mr Delgado on the basis that—
 - a. he had been employed by RGC Mineral Sands Ltd;
 - b. this company became a subsidiary of WSL;
 - c. this company changed its name to Iluka Midwest Limited;
 - d. no new contract or agreement was entered into by Mr Delgado, and;
 - e. the workplace agreements were only of relevance to those who entered into them."

The Commission is indebted to the parties for their assistance in reaching agreement on these issues.

Relevant Provisions of the WPA

In considering this matter, it is necessary to set out the relevant provisions of the WPA that are for present purposes, ss 12, 13 and 14, which I do as follows—

“12. Persons bound by workplace agreement—

- (1) A workplace agreement is binding on—
 - (a) the parties to the agreement, but subject to sections 14 (1) and 32;
 - (b) an employer that is a successor, assignee or transferee, whether immediate or not, to or of the whole or part of the business of an employer that is a party to the agreement; and
 - (c) an organization that gives an undertaking under section 11, to the extent of that undertaking.
- (2) Where an employer becomes bound by a workplace agreement as mentioned in subsection (1) (b) any right or entitlement accrued to an employee under the agreement before the succession, assignment or transmission is binding on, and enforceable against, the employer to the extent that it is not enforced against the previous employer.
- (3) A workplace agreement entered into by a person who is under 18 years of age binds the person as if he or she were of full age.

13. Disposition etc. of business

- (1) An employer who becomes bound by a workplace agreement by operation of section 12 (1) (b) is to be taken to be a party to every contract of employment that it governs.
- (2) A disposition or transmission of the whole or part of a business of an employer does not affect the continuation in force of a relevant workplace agreement to which that employer is a party if another employer becomes bound by that workplace agreement under section 12 (1) (b).

14. Termination of contract of employment

- (1) Where a contract of employment of an employee comes to an end, a workplace agreement that governs that contract no longer applies to that person except where an agreement under subsection (2) provides otherwise.
- (2) An employer and a person who is employed by the employer may agree in writing that a specified workplace agreement is to apply to that person as an employee of that employer during a specified period, not exceeding 12 months, regardless of the number of separate contracts of employment between them that come into existence during that period.
- (3) Subsection (1) does not affect rights or obligations under a workplace agreement that are to take effect after termination of employment.”

Contentions of the Parties

Mr Llewellyn in short, argued that having regard to ss 12 and 14 of the WPA, in circumstances where there is not an ongoing contract of employment, then despite the transmission of business provisions contained in s 12 of the WPA, any workplace agreement that previously regulated the parties to the former contract of employment, no longer has any application. In the circumstances of the present claim, it was submitted that as a result of the merger between RGC Mineral Sands Pty Ltd (“RGC”) and Westralian Sands Ltd (“WSL”) there was in effect, a break in Mr Delgado employment contract as a consequence of the merger, and therefore as at the termination of his employment, by operation of these provisions of the WPA, the Agreement no longer had any application to him.

On the other hand, Mr Cameron for the respondent argued that the answer to the question presently posed was a matter

of interpretation of the terms of the WPA. It was submitted that the transmission of business provisions contained in s 12 of the WPA are clear and unambiguous and mean that as at the termination of his employment, Mr Delgado was bound by the Agreement, therefore ousting the jurisdiction of the Commission.

I have attempted to summarise the parties contentions in a short form, without I trust, in any way doing an injustice to the careful arguments advanced by both the applicant and the respondent.

Consideration

As noted above, it was common ground that the effect of the merger, which was by way of a scheme of arrangement under Part 5.1 of the Corporations Law, was that the mineral sands business previously undertaken by RGC, was transferred to WSL such that WSL (now Iluka Resources Ltd (“IRL”)) was the successor, assignee or transferee of the business of RGC. That is, the merged business of the two entities was to be carried on by WSL, as subsequently re-named IRL.

It is trite to observe that at common law, contracts for personal services, such as contracts of employment, are not assignable without the consent of the parties to them: *Nokes v Doncaster Amalgamated Collieries Ltd* (1940) 3 All ER 549. This common law principle would now appear to be subject to the statutory power of a court of competent jurisdiction to transfer the benefit of contracts that would not otherwise be assignable by the act of the parties: s 413 Corporations Law. There was nothing before me in this matter to suggest that such an order was made in relation to the merger transaction. However, and in any event, for the reasons that I set out below, in my view, the answer to the question of jurisdiction posed is to be determined by a construction of the relevant provisions of the WPA.

For the present purposes, it was common ground that subsequent to the merger agreement taking effect between RGC and WSL employees except it appears Mr Delgado, were offered and presumably accepted, new workplace agreements with IRL. Subject to what I say further below, that this step was apparently necessary was no doubt by reason of the fact that it was an effect of the merger transaction contemplated, that employees formerly employed by RGC would be subsequently offered employment by WSL (IRL) by fresh offers of employment, presumably because of the inability of such contracts of employment to be assigned at common law.

As noted above, as agreed between the parties, at no time did Mr Delgado enter into a fresh contract of employment or workplace agreement with WSL and he remained employed in accordance with the terms of his original contract of employment with RGC. It is also relevant to observe at this stage, that RGC (now Iluka Midwest Ltd (“IML”)) continued as a corporate entity and became, in effect, a wholly owned subsidiary of WSL.

Therefore, at least for the purposes of the common law, the question might arise as to how Mr Delgado could have been dismissed by IRL, pursuant to a letter dated 30 July 1999 tendered as exhibit A2 in the proceedings? In my opinion, the answer to that question becomes apparent when one considers the relevant terms of the WPA that I now turn to.

By s 12(1)(a) of the WPA, as at the time immediately prior to the merger, the Agreement was binding on Mr Delgado and RGC. Notably, the qualification in s 12(1)(a) providing “but subject to ss 14(1) and 32;” is restricted only to s 12(1)(a). The same words of qualification do not appear in s 12(1)(b).

By the terms of s 14(1) of the WPA, it is clear that when a contract of employment of an employee terminates, a relevant workplace agreement that previously had application no longer applies. This is subject to the proviso in s 14(2), to the effect that there may be a written agreement specifying that a workplace agreement will apply to an employer and an employee, for the period specified, despite more than one contract of employment coming into existence during that period. However, from the plain language of s 14(2), such an arrangement is clearly intended to have application between an employee and one and the same employer during such a specified period. It has no application to the present circumstances in my view.

As at the effective date of the merger, the relevant business or part of the business of RGC was transmitted to WSL. On

that event, the terms of s 12(1)(b) had operation. That is, as a result of the transmission, WSL became bound by the Agreement. On and from that time, by reason of s 12(2) of the WPA, any right or entitlement accrued to Mr Delgado under the Agreement before the merger, became enforceable against WSL.

The terms of s 13 of the WPA become important at this point in the process. By s 13(1), an employer, in this case WSL, which became bound by the Agreement, was taken to be a party to every contract of employment that the Agreement governed, as at the event of succession, assignment or transmission. The effect of this provision of the WPA would appear to be that despite the common law position that a contract of employment may not be assigned without consent, WSL became a party to Mr Delgado's contract of employment. This is in substance, appears to be a deeming provision which creates, by a statutory fiction, a contractual relationship between an employee and an employer that is a successor, assignee or transmittee to or of the whole or part of the business of an employer that was formerly bound by the relevant workplace agreement.

This statutory scheme seems to be made clearer by the terms of s 13(2) of the WPA. This provides that a transmission of business in these circumstances does not alter the continued operation of a relevant workplace agreement if s 12(1)(b) has application.

The effect of these statutory provisions when read as a whole, suggests an intention by the legislature, that the operation of a relevant workplace agreement and a contract of employment that it governs, are not to be "interrupted" as a result of a bona fide transmission of business. Moreover, the terms of s 13(1) of the WPA would suggest that in a transmission of business situation, an omission to enter into fresh contracts of employment with the transmittee employer, may not of itself, be fatal to the continuance of the relevant workplace agreement and its binding effect on that employer, at least for the purposes of the WPA and in turn, the Act.

For the present purposes, I therefore am of the view that the construction of the relevant provisions of the WPA as contended for by the respondent, is to be preferred to that submitted by the applicant. If the construction of these provisions submitted by the applicant was correct, it may well render the transmission of business provisions of the WPA in many cases, completely unworkable, and lead to an absurd or unjust result. As a principle of interpretation, such results are to be avoided: *Bisticic v Rokov* (1976) 11 ALR 129 at 136; *Hall v Jones* (1942) 42 SR (NSW) 203 at 208; *Ingham v Hie Lee* (1912) 15 CLR 267. Furthermore, it is clear that the terms of s 14(1) only have work to do in circumstances where a contract of employment of an employee comes to an end. In the present case, Mr Delgado's contract of employment has not come to an end as a result of the merger however, by the operation of s 13(1) WSL, subsequently IRL, has become a party to it.

In the alternative, if it could be said that there is a conflict within the WPA between ss 12, 13 and 14, given that ss 12(1)(b) and 13 deal specifically with the circumstance of a transmission of business, the statutory interpretation principle of *specialibus non-derogant* would arguably have application, such that the specific provisions dealing with transmission of business would prevail over the general provision dealing with termination of employment: see *Statutory Interpretation Australia* (4th Ed) Pearce and Geddes at para 4.24.

Conclusion

In my opinion therefore, based upon the reasons that I have outlined above, as at the date of the dismissal of Mr Delgado he was, by reason of the operation of the WPA, employed under a contract of employment with IRL and a party to a workplace agreement in force between himself and IRL, thus depriving the Commission of jurisdiction to entertain his claim.

For these reasons the application is dismissed.

APPEARANCES: Mr M Llewellyn appeared on behalf of the applicant.

Mr A Cameron as agent appeared on behalf of the respondent.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Workers Union West Australian Branch
Industrial Union of Workers

and

Iluka Resources Ltd.

No. CR 240 of 1999.

COMMISSIONER S J KENNER.

27 June 2000.

Order:

HAVING heard Mr M Llewellyn on behalf of the applicant and Mr A Cameron as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Workers' Union, West Australian Branch,
Industrial Union of Workers

and

Temkara Pty Ltd t/a Economic Pest Control.

No. CR 11 of 2000.

COMMISSIONER J H SMITH.

7 July 2000.

Order:

Having heard Mr Llewellyn on behalf of the Applicant and Mr Evans on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby—

1. Declares that Todd York was harshly, oppressively and unfairly dismissed by the Respondent.
2. Orders that the Respondent pay Todd York within 7 days of the date of this Order \$1,350.

(Sgd.) J. H. SMITH,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Cooks Construction Pty Ltd.

No. CR 179 of 1999.

COMMISSIONER S J KENNER.

22 June 2000.

Reasons for Decision.

THE COMMISSIONER: This matter comes before the Commission pursuant to s 44 of the Industrial Relations Act 1979 ("the Act") by which the applicant union alleges that it is member Mr Daniel Kevin Mouat was unfairly dismissed from his employment as a serviceman by the respondent on or about

23 June 1999. The applicant seeks an order from the Commission that the respondent without loss of entitlements or benefits reinstate Mr Mouat.

The respondent denies the applicant's claim and opposes any order being issued by the Commission.

Mr G Sturman represented the applicant. Mr S Heathcote appeared as agent for the respondent.

Both the applicant and the respondent in the course of the proceedings led a considerable amount of evidence. Mr Mouat gave evidence. On behalf of the respondent, evidence was led from Mr Cook, a relief supervisor, Mr Donaldson a maintenance supervisor, Mr Palmer a serviceman at the respondent's Dalgaranga site, Ms Sherar one of the respondent's site clerks and Mr Thobaven a leading hand.

In determining this matter, I have carefully considered all of the evidence and the submissions of both the applicant and the respondent. However, for the purposes of determining the matter, I propose to deal with the several specific incidents that the respondent said were sufficient to justify its dismissing Mr Mouat and upon which the respondent relied in doing so. Additionally, I observe at this point that as there were some inconsistencies and recall difficulties apparent in the evidence of Mr Mouat and witnesses for the respondent, this is not a case where I have a clear preference for the evidence of one over the other.

The factual background is as follows. Mr Mouat commenced employment with the respondent on 29 March 1999 as a mechanical serviceman. He was employed initially on a probationary basis for one month, which period expired on 29 April 1999 and his employment continued thereafter. Mr Mouat was employed at two of the respondent's work sites, initially at the Dalgaranga site and subsequently at the Western Queen site. Mr Mouat was an experienced A grade mechanic and it appears on the evidence, that at least initially, he was well regarded by the respondent. It is subsequent events that from the respondent's point of view, led to Mr Mouat's dismissal on 22 June 1999. Whilst it appeared that Mr Mouat was paid monies in lieu of notice, his dismissal was effectively summary in that he was directed to leave the respondent's site immediately. I turn now to consider the evidence in relation to the specific incidents relied upon by the respondent.

Personnel Carrier

Mr Mouat said that at approximately 2.00am on 1 May 1999 he was required to assist in the unloading of a Toyota personnel carrier from the back of a transport truck. He said that the truck driver was in charge of the unloading and he acted in accordance with the truck driver's directions. At the time, no loading ramps or other adequate equipment was made available, according to Mr Mouat. A forklift was used to unload the personnel carrier, which the truck driver told Mr Mouat was the method used to load it before it being transported to site. Mr Mouat said that that night, there was no other method available to unload it.

Mr Mouat was instructed by the truck driver to do a trial lift. This involved placing blocks under the vehicle under which the forklift was located. Mr Mouat said that the use of the blocks in this way was at the truck driver's direction. The trial lift was conducted and during this lift the vehicle slipped off the blocks resulting in some panel damage to the vehicle's left door and apparently, a bent tail shaft.

Subsequently, both Mr Mouat and the truck driver then proceeded to the Western Queen site in order to obtain a larger forklift that was then used to successfully remove the personnel carrier from the truck. Mr Mouat said that he reported the damage to the vehicle to Mr Cook on his return to the Dalgaranga site. It was Mr Mouat's evidence that Mr Cook indicated to him not to worry about the matter. Apparently, one of the respondent's supervisors, a Mr Timms, was requested to find out what happened. Neither Mr Timms nor the truck driver was called to give evidence. Furthermore, it was not apparent on the evidence that the truck driver's version of the events was ever obtained by the respondent.

Mr Cook said that an instruction was given to Mr Timms to arrange for the unloading of the personnel carrier. This instruction must have then been passed on to Mr Mouat. There was no evidence before the Commission that Mr Timms instructed Mr Mouat as to the particular method that he wished

to be used. After the event, Mr Cook said that he spoke to both Mr Mouat and Mr Timms but could recall little as to what was said. He relied upon what Mr Timms told him, apparently. To the extent he could recall what was said, Mr Cook said that Mr Mouat admitted that there had been some damage to the vehicle but denied that he told Mr Mouat not to worry about it.

Mr Cook contacted the respondent's Perth office and he was advised to give Mr Mouat a warning. He told Mr Mouat that it was to be a verbal warning but confirmed in writing. The warning was in the form of a formal reprimand document dated 1 May 1999 and was exhibit R5. Mr Mouat said that when he received this document he did not wish to sign it because he was told it was to be only verbal. He printed his name on the document instead. The reprimand document refers to "misconduct" and "equipment damage" and a box is ticked as being "employee warning No 1".

There are a number of matters of concern about this incident. Firstly, it appears on the evidence that at no time was there a proper investigation of the incident in terms of obtaining the version of events of the relevant truck driver. In the absence of evidence from the truck driver and Mr Timms, I am obliged to accept Mr Mouat's evidence on this issue unless I consider it to be completely improbable or implausible, which I do not. There was nothing to suggest on the evidence that Mr Mouat acted in a deliberately negligent fashion. I accept his evidence that he proceeded in good faith, to attempt to unload the personnel carrier using the method that was the method used to load it, as told to him by the truck driver. On the evidence, whilst Mr Mouat appeared to have some reservations about the technique proposed by the truck driver, it is far from the case that it could be said that the consequent damage to the vehicle was Mr Mouat's fault. At best, it could be characterised as an unfortunate accident but not one that was the result of negligence by Mr Mouat.

Also, it appeared on the evidence that a decision was taken from the respondent's Perth head office, without proper inquiry as to all of the circumstances, to issue Mr Mouat with a formal warning. I consider that Mr Mouat was treated somewhat harshly in respect of this matter. It was also apparent that to this time, there had been no other concerns as to Mr Mouat's work performance indeed; Mr Cook's evidence was that in the respondent's view, at least initially, Mr Mouat's performance was good. I note also that as at 1 May 1999, Mr Mouat had just completed the probationary period of employment, apparently on the evidence, without incident.

Service Truck Incident

The next matter relied upon by the respondent was the alleged misconduct committed by Mr Mouat in relation to getting the respondent's service truck bogged in the pit location. This incident occurred on night shift on 2 June 1999. It was Mr Mouat's evidence that up until this time, he had diligently performed his duties on site and said that there was no indication that there were any difficulties with his work performance and on the contrary, Mr Mouat said that his impression was that by reason of his experience, he was given additional duties to perform without complaint.

On the night shift of 2 June 1999, Mr Mouat was working a shift at the Western Queen mine site where for the first time apparently, he had occasion to drive the respondent's service truck. He said that on driving it for a short distance, he smelt burning in the vehicle's clutch. He spoke to a site fitter, a Mr Schultz, as to whether this was normal or not. Mr Mouat was told that the clutch had been like that for some time and that no adjustments or repairs had been planned. It was Mr Mouat's view that the clutch did need replacing, but he said that the respondent had formerly notified all staff that no mechanical parts were to be ordered for any vehicle unless the vehicle was completely unserviceable. He said that notices to this effect, had been posted on noticeboards at both sites in the week ending 22 May 1999.

It was Mr Mouat's evidence that between 2 June and 3 June 1999 the weather conditions at the Western Queen site were, by reason of heavy rain, unsuitable for mining operations. As a result of the weather, he said that all trucks in the pit made ditches in the ground and that transport routes were impassable for smaller service vehicles. On 4 June 1999 Mr Mouat commenced night shift at Western Queen. He drove the

respondent's service truck into the pit to service a digger and completed the required service. He said that whilst he was servicing this piece of equipment, another digger had driven on the same track creating a "windrow" higher than the tyres of the service truck. Mr Mouat said that he attempted to drive the service truck out of the pit and had to exercise care, because of the "windrow" that had been created. He said that the service truck became bogged. He tried to get the service truck out of the bog without damage to the vehicle but his evidence was that despite his efforts, he could not do so.

As he could not move the service truck, he called the shift leading hand on the radio, a Mr Thobaven. Mr Mouat testified that the leading hand in turn notified the grader driver who unsuccessfully attempted to move the service truck. Apparently, the grader did not have with it the proper chains required for towing. Mr Thobaven instructed Mr Mouat to return to camp, as it was the end of the shift and for the following shift to resolve the situation. By this time it was approximately 5.30am the next morning.

Mr Mouat said that at approximately 6.00pm that evening when he got to work a person known only to him as "Steve" who was the Western Queen site supervisor met him. "Steve" who on the evidence was Mr Van Feggelen the respondent's maintenance supervisor at the Western Queen site, told Mr Mouat that he was in "serious trouble" and was called into the office. He told Mr Mouat that due to serious implications for the respondent caused by the service truck being bogged, he was to be dismissed. Mr Mouat protested against this and said that he had done everything he could to resolve the situation, to the best of his knowledge and control. It was Mr Mouat's evidence that at this point, Mr Van Feggelen referred to the previous written warning and told him that he would be given a written warning rather than being dismissed, due to his positive attitude and approach. Mr Mouat said that he signed this warning under duress and said that he did not believe that this incident warranted a formal reprimand.

Mr Van Feggelen was not called by the respondent to give evidence.

Mr Thobaven said that at about 5.00am to 5.30am on 4 June 1999 he entered the Western Queen pit to undertake a routine inspection of a piece of equipment. He said that whilst working on one of the diggers he received a call on the radio from Mr Mouat advising that he had bogged the service truck. Mr Thobaven was about 60 metres from where Mr Mouat was located so he went to his assistance. He testified that when he arrived at the location Mr Mouat was standing outside of the vehicle. Mr Mouat then got back into the truck and attempted to reverse it out. Mr Thobaven said the wheels started to spin so he directed Mr Mouat to stop. It was Mr Thobaven's evidence in cross-examination that when he arrived at the scene he could not smell any burning of the clutch at the time. The service truck was subsequently towed out on the next shift.

Later that evening, Mr Mouat approached Mr Thobaven and asked whether he could attend with him at an interview with Mr Van Feggelen that was about to occur. The evidence was that Mr Van Feggelen had not discussed the incident with him, apart from asking at some time earlier in the day whether he was aware that there was a problem with the clutch in the service truck. He was not. Mr Thobaven said that in the interview, Mr Van Feggelen said that he would be giving Mr Mouat a warning because of the incident and because the clutch in the vehicle had been seriously damaged. Importantly, whilst Mr Thobaven did not recall Mr Van Feggelen saying that he was going to dismiss Mr Mouat, he did say that Mr Van Feggelen advised Mr Mouat that he could have been dismissed but he was going to issue a warning instead. Mr Mouat protested at the warning and said that he had taken all reasonable steps to recover the service truck and denied that he had seriously damaged the clutch in the service truck because the clutch was already faulty.

I am not satisfied on the evidence and I find, that it was solely Mr Mouat's conduct of itself that led to the clutch damage in the vehicle. I accept Mr Mouat's evidence that the clutch on the vehicle may have already been in need of some repair or adjustment. To that extent, some care no doubt was required in driving the vehicle. The evidence was that Mr Mouat took appropriate steps to have the service truck removed from the pit by contacting Mr Thobaven for assistance. There was also

nothing in Mr Thobaven's evidence to suggest that Mr Mouat had abused the vehicle when he arrived at the scene. Perhaps however, in hindsight, it was an error of judgement by Mr Mouat to have taken the service truck into the pit in the prevailing conditions at that time.

Importantly however, the evidence also suggests, and I find, that Mr Van Feggelen did not properly investigate the incident. It was clear on the evidence that Mr Van Feggelen had, by the time the meeting took place with Mr Mouat, already decided that a warning, if not dismissal, would follow the event. There was no evidence that Mr Van Feggelen had obtained a report of the events from those persons directly concerned, from which an assessment of all the circumstances could be made. Mr Van Feggelen had clearly made up his mind as to his response to the matter. There was also evidence from Mr Palmer that he had also bogged vehicles in the past and did not receive a formal reprimand.

In my view, having regard to all of the circumstances, Mr Mouat was treated harshly in relation to this matter. Given the circumstances, it may well have been justified for the respondent to counsel Mr Mouat as to his error of judgement in taking the service truck into the pit in the prevailing conditions however, this is a different matter as to the ultimate outcome of the incident, which clearly was a significant matter taken into account by the respondent in its final decision to dismiss Mr Mouat. The written warning was exhibit R6 and referred to "misconduct" and "equipment damage".

Utility Incident

In relation to this matter, Mr Mouat said that at the end of night shift on 2 June 1999, the regular personnel carrier to take employees from the Dalgaranga site to the camp for breakfast was not available. He spoke to Mr Palmer, who he thought was the leading hand serviceman for the day shift, to take the workshop utility to the camp, accompanied by another fitter. He said that when he arrived at work for the following night shift on 11 June, he was approached by Mr Cook and was to be given a written warning for the unauthorised use of the workshop utility to return to the camp. Mr Mouat told Mr Cook that he thought that this was permissible because of his discussion with Mr Palmer and that he was not aware of any other means of getting to the camp.

Mr Cook said that because of the unavailability of the normal personnel carrier on this occasion, he had arranged with another employee to transport employees back to the camp from Dalgaranga. However, this advice was not given to Mr Mouat and the other servicemen prior to the morning in question. It was also Mr Cook's evidence that the normal departure time from site was approximately 6.05am to 6.10am and that if employees are not back at the camp promptly there is a risk that they will miss out on breakfast. Importantly, when this matter was raised with Mr Cook in evidence-in-chief, he described the absence of the utility as a "nuisance". It was also Mr Mouat's evidence that if there had been an urgent need for the utility that morning, contact could have been made with him by radio in the vehicle.

Despite Mr Palmer's denial that he gave Mr Mouat permission to use the utility, and there may well have been some misunderstanding on this issue, I do not consider, particularly in view of Mr Cook's evidence about the matter being merely inconvenient and a nuisance, that this incident warranted any form of written reprimand in the terms of exhibit R7. Again, regrettably, this formal reprimand described the incident as "misconduct" and again, was clearly used subsequently, as a chain in a series of events justifying Mr Mouat's dismissal. I find accordingly.

Fuel Screens

The next substantive incident that led to the dismissal of Mr Mouat was two occasions on which he had left a fuel screen out of two items of equipment whilst he was servicing them. The first occasion occurred on the night shift of 18 June where, according to Mr Mouat, he left a fuel screen out of haul truck number 113. He testified that this would not cause any immediate damage, as there were two filters in the fuel line. The next shift on 19 June, Mr Mouat was required to service an excavator at the Dalgaranga pit. He commenced servicing the excavator at approximately 7.00pm. At approximately 8.30pm a siren sounded in the pit, leading to the removal of personnel from the pit for safety reasons. Mr Mouat testified that at this

point he noted on the service sheet for the machine, that major items needed to be attended to before the service could be completed. During the subsequent night shift on 20 June, Mr Cook approached Mr Mouat and told him that he had left a fuel screen in the cleaning bath during a service. It was Mr Mouat's evidence that this surprised him and he apologised immediately for it, telling Mr Cook that it was unusual for him to make that kind of mistake. Subsequently, on 22 June 1999, Mr Cook told Mr Mouat that he was to be dismissed because he had failed to clean the fuel screens in the digger on 19 June.

Mr Palmer also gave some evidence about this matter to the effect that he discovered that fuel screens had not been completed in the relevant vehicle.

As to this issue, Mr Cook gave evidence that when he was made aware of this matter, he decided to dismiss Mr Mouat, as it was "the straw that broke the camel's back". He said that Mr Mouat was dismissed because of this particular incident and conceded that at no time was there a warning to Mr Mouat that he may be dismissed. It was also clear on the evidence that Mr Cook took the unilateral decision to dismiss Mr Mouat, without first discussing the fuel screen incident with him and hearing his version of the events.

In relation to this matter, there was some controversy between the parties as to the status of the lubrication service checklist for excavator 071, the machine that was serviced by Mr Mouat on 16 June. The original document was tendered as A2, at the bottom of which is a notation to the effect that "fuel screens to be cleaned before signing off". It was this entry that Mr Mouat said he made on the service checklist at the time that he was required to leave the pit that evening. As against this, was exhibit R12, a photocopy of apparently the same document, produced by the respondent that did not contain such a notation.

Subsequent to the conclusion of these proceedings, an application was made and granted to re-open the case to enable the parties to adduce further evidence in relation to this matter that had not come to light earlier. This was largely in response to observations from the Commission during the proceedings as to the absence of any evidence that Mr Mouat actually completed the service in question on the night shift on 19 June and therefore, whether someone else may have been involved in the servicing of excavator 071.

From the bar table without objection, Mr Sturman tendered as exhibit A8, a document known as a "fitter's maintenance log" which showed that on 19 June, Mr Mouat attended to the servicing of excavator 071 for approximately three hours, with the remaining nine hours of the shift being spent on other servicing duties. There was no direct evidence that Mr Mouat went back into the pit after the siren sounded. However, it is to be noted that there is some discrepancy between his evidence on this point and exhibit A8, in terms of there being an interval of about one and a half hours unaccounted for. This could be explainable on the basis of inaccurate assessments by Mr Mouat of the time spent in the pit prior to the siren sounding and the entry in exhibit A8.

Mr Palmer was also recalled to give some evidence on this point. He said that on 20 June 1999 he got involved on the servicing of excavator 071. He noticed that the fuel screens had not been cleaned and he did them. He recalled not seeing the notation by Mr Mouat on exhibit A2 when he saw it. Mr Palmer then returned to work on the machine on 21 June and noted that the service sheet was not where it should have been. The next he saw of a service sheet was exhibit R12, the copy document, which he said was present on Wednesday 23 June 1999, which was apparently the day that Mr Mouat left the site.

As to this issue, the respondent submitted that the only inference to be drawn from the evidence was that Mr Mouat had deliberately falsified the service sheet to support his version of the events that occurred on 16 June. It was also submitted that despite this, Mr Mouat had ticked the service sheet in relation to the fuel screen cleaning which had not been done.

Mr Mouat admitted that he had left the fuel screen out of truck 113 on 15 June. This was a mistake and one for which the respondent was entitled to take issue with. The circumstances surrounding the excavator 071 incident are more troubling however, and critically, formed the immediate basis

upon which the respondent dismissed Mr Mouat. There is a direct conflict between the evidence of Mr Mouat and that of Mr Palmer on this issue. I have had some difficulty reconciling that conflict.

Firstly, if, as the respondent submits, Mr Mouat deliberately falsified exhibit A2 and left a copy of the unamended service sheet in the respondent's files, it is hard to conceive of a more obvious basis upon which his deception could be uncovered, simply by a comparison of the two documents. One would have thought that if deception were the intention, a copy of the altered document would have been left behind. Secondly, a close examination of exhibit A2, which is the original, reveals that dirt and grease markings appear on top of the third line of printing. These markings are consistent with the state of the rest of the document and are completely consistent with a document being used and notated in a workshop environment. Thirdly, the handwriting and appearance of the entry, at least from the face of the document, appear to support the entries being made at approximately the same time. Fourthly, there is no independent evidence as to when the copy document was made or how it came into existence, apart from Mr Palmer saying that he saw a copy of it in the respondent's file. For example, if it were made for some undisclosed reason prior to the events of 16 June, the document would of itself not be inconsistent with Mr Mouat's version of the events that evening. Finally, it must be noted that Mr Palmer's evidence on this matter was well after the event and was not a matter that he gave evidence about in the earlier proceedings.

Having considered these issues, I am of the opinion that the original document exhibit A2, is the more reliable indicator of what occurred that evening. I accept that Mr Mouat did note on the service sheet that certain work did need to be completed on excavator 071, including the cleaning of the fuel screens. Additionally, it needs to be noted that if it was Mr Mouat's intention to disguise his steps for that night shift, it is unlikely that there would be the differential in time between his evidence as to the time spent in the pit prior to the siren sounding, and the terms of exhibit A8, indicating three hours of work on the machine. The state of the evidence on these matters is more consistent with natural errors in the estimation of times. I find accordingly.

Conclusions

It is well settled in matters such as these that the test as to whether a dismissal is harsh, oppressive or unfair is whether the right of the employer to dismiss an employee has been exercised so harshly or oppressively such as to constitute an abuse of that right: *Miles v Federated Miscellaneous Workers Union of Australia WA Branch* (1985) 65 WAIG 385.

When determining a claim such as the present, the Commission's role is not to adopt the position of the manager of the employer, but rather to assess the circumstances of the termination of employment objectively and in accordance with the injunction imposed on the Commission under ss 26(1)(a) and 26(1)(c) of the Act. In doing so, the practical realities of the workplace are to be considered and as has been observed on a number of occasions, the statutory provisions should be considered in a commonsense fashion: *Gibson v Bosmac* (1995) 60 IR 1. Furthermore, a lack of procedural fairness can be a significant factor in the Commission determining whether a dismissal is unfair or not, but this matter is not of itself decisive: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. However, contemporary standards of industrial fairness require that an employee be given fair warning that he or she may be dismissed if a course of work performance or conduct is maintained.

In the present case, apart from the deficiencies in relation to the various incidents that I have referred to above, Mr Mouat was never put on notice on the evidence that his employment was in jeopardy. As I have noted already, there were occasions where the respondent's actions were not warranted and the consequences for Mr Mouat were harsh, when objectively viewed. Alternatively, if I am incorrect in relation to the merits of these matters, the manner in which steps were undertaken in relation to many of them was tainted with unfairness. In all the circumstances I consider that Mr Mouat's dismissal was harsh and unfair.

As to relief, by the terms of s 23A of the Act, it is clear that reinstatement is the primary remedy in the event of a finding

by the Commission that an employee has been harshly, oppressively or unfairly dismissed. Compensation is only payable in the event that the Commission is satisfied that reinstatement is impracticable or that the employer has agreed to pay compensation, instead of reinstating an unfairly dismissed employee.

In this matter, as I have noted above, Mr Mouat seeks reinstatement. Whether or not reinstatement is impracticable for the purposes of s 23A of the Act, requires the Commission to consider all of the circumstances of the particular matter and to evaluate the practicability of a reinstatement order in a commonsense fashion: *Nicholson v Heaven and Earth Gallery Pty Limited* (1994) 126 ALR 233; *Liddell v Lembke* (1995) 127 ALR 342; *Gilmore v Cecil Brothers FDR Pty Limited* (1996) 76 WAIG 4434.

Having considered the evidence in this case, in my opinion, reinstatement would be impracticable. I accept the evidence of the respondent that not long after Mr Mouat's dismissal the operations of the respondent at one of its operations would down. Furthermore, the evidence suggests that the working relationship between the parties had become strained and, in my opinion, a reinstatement order would be likely to impose unacceptable problems or even effect harmony within the respondent's business: *Nicholson (supra)*.

I therefore consider the issue of compensation. I adopt and apply the principles set out in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8. for the purposes of assessing compensation in this matter.

The applicant tendered without objection, a schedule of loss as exhibit A5. This disclosed that Mr Mouat had suffered loss of income to 30 August 1999, when he obtained other employment, in the sum of \$13,690.00 gross. Additionally, he claimed an ongoing loss in respect of the difference between his earnings with the respondent and with his then employment. I note however that it appeared at the conclusion of the re-opened proceedings that Mr Mouat had obtained other employment at a significantly higher income. In all the circumstances, I do not consider that the employment would have continued beyond about one month of the actual dismissal, in view of the changes to the respondent's operations and the deterioration in the relationship between the parties. Accordingly, I find that Mr Mouat's loss would be in the region of \$7,200.00 and I consider this to be an appropriate award of compensation.

Minutes of proposed order now issue.

APPEARANCES: Mr G Sturman appeared on behalf of the applicant.

Mr S Heathcote as agent appeared on behalf of the respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Cooks Construction Pty Ltd.

No. CR 179 of 1999.

COMMISSIONER S J KENNER.

28 June 2000.

Order.

HAVING heard Mr G Sturman on behalf of the applicant and Mr S Heathcote as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

- (1) DECLARES that Mr K Mouat was harshly, oppressively and unfairly dismissed from his employment by the respondent on or about 23 June 1999;
- (2) DECLARES that reinstatement of Mr Mouat is impracticable;

- (3) ORDERS the respondent to pay to Mr Mouat within 21 days of the date of this order the sum of \$7,200.00 less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid.

[L.S.]

(Sgd.) S. J. KENNER,
Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

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

and

Goldfields Contractors Pty Ltd.

No. CR 211 of 1999.

COMMISSIONER S J KENNER.

30 June 2000.

Amending Order.

HAVING heard Mr M Golesworthy on behalf of the applicant and Mr M Jensen as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

DECLARES that Mr B Ward was harshly, oppressively and unfairly dismissed from his employment by the respondent on or about 8 June 1999.

[L.S.]

(Sgd.) S. J. KENNER,
Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia
Incorporated

and

Director General, Ministry of Justice.

No. PSACR 55 of 1999.

COMMISSIONER J F GREGOR.

20 June 2000.

Order.

WHEREAS on 9 March 2000, The Civil Service Association of Western Australia applied to the Commission for an order pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS on 10 April 2000, the Commission referred the matter for hearing and determination to be listed on 15 June 2000; and

WHEREAS on the 7 June 2000 the Commission was advised by the applicant that the matters had been settled and the Commission decided to discontinue the proceedings;

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

THAT the application be, and is hereby, discontinued.

[L.S.]

(Sgd.) J. F. GREGOR,
Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia
Incorporated

and

The Chief Executive Officer,
Fire & Emergency Services Authority.

No. PSACR 36 of 1999.

6 June 2000.

Reasons for Decision.

(Given extemporaneously at the conclusion of the submissions, taken from the transcript as edited by the Senior Commissioner)

SENIOR COMMISSIONER: Amongst the members of the Applicant are four persons who are employed by the Respondent. They were initially employed as Fire and Emergency Service Education Assistants Level 1. In 1993 or thereabouts they made representations to their Supervisor for the posts they occupied to be reclassified, essentially on the grounds that they were performing additional tasks principally, the preparation and presentation of lectures. They say that their representations were successful and that their posts were reclassified on an interim basis approximately three months later. In any event, it is common ground that by October 1994 the Job Description Forms for the posts in question had been amended to reflect the additional duties being performed by the Applicants and the posts reclassified to Level 2 on an "interim basis". At about the same time it appears that the posts were "advertised internally" to the employees in the relevant departmental section. They were advertised as attracting "higher duties to Level 2 effective 1/10/94". Apparently expressions of interest were received only from those employees already performing the tasks in question. Accordingly, they continued to perform the tasks but were paid a higher duties allowance to the relevant Level 2 increment. Some years later there was an argument as to the proper incremental level payable but it is common ground that that argument was resolved by allowing the employees to progress through all the relevant increments. Early in 1999 the Respondent caused the posts to be reviewed. New posts were created with essentially the same duties and responsibilities which were unqualifiedly classified at Level 2. In accordance with the Respondent's policy introduced late in 1998, the new posts were advertised as being vacant. Each of the four employees the subject of these proceedings applied for appointment to the new posts but none of them were successful. Thereafter each of the four employees were returned to their "substantive" Level 1 classification and paid accordingly, although to varying degrees they have been given the opportunity since then to act in Level 2 positions.

By these proceedings the Applicant seeks an order that the salary of each of the four employees be maintained at their current level (i.e. Level 2.5) until their "substantive pay" reaches that level. The claim is made essentially on the grounds that the employees have been treated as and paid at Level 2 since 1994. It is also said that at least until 1998 it had been the Respondent's policy to reclassify individuals along with the posts they were occupying so long as the occupants had performed the tasks for 12 months or thereabouts. In this case, as each of the employees has occupied the posts which were effectively reclassified for more than four years, it is said to be unjust that they should now face the prospect of receiving a significant reduction in salary because of a late change in the Respondent's policy.

The Respondent, for its part, opposes the making of such an order as is now sought, principally on the grounds that each of the employees was paid a higher duties allowance for the period in question. The Respondent says that it is not consistent with public sector practice or public sector requirements to maintain the payment of higher duties allowances when the higher duties are no longer being performed, irrespective of the length of the time that the allowance may have been paid in the past and the duties performed previously. In addition, the Respondent argues that it was always the case that Chief Executive Officers of public sector agencies had a discretion

as to whether or not individuals should be reclassified when the posts they were occupying were reclassified without the post being declared vacant. Furthermore, the Respondent argues that the employees are not now performing the Level 2 work on a permanent basis and hence should not, consistent with the State Wage Fixing Principles, be entitled to receive a higher salary.

Thankfully, there is not a significant conflict in the evidence adduced in these proceedings. In particular I accept the testimony of Mrs Fitzgerald that the positions she and the others occupied were classified to Level 2, albeit on an interim or temporary basis. What she has said in that respect was supported by Mr Rushen, the Respondent's former establishments officer. Likewise, I accept the evidence of Mr Gornick that these posts were reviewed in 1999 and new posts created in their place. I also accept that the new posts were advertised in accordance with public sector standards.

I accept the evidence of Mrs Fitzgerald and that of Mr Rushen that the original posts were reclassified on an interim or temporary basis because at the time there was talk of an organisational restructure. Nonetheless the posts were reclassified. Indeed that is self evident from the Job Description Form registered on 24 October 1994. It indicates that the "Rank" for posts is Level 2, albeit that immediately under the title "Job Description Form" are the words "Interim JDF". In my view, the call for expressions of interest on the basis of the payment of a Level 1 salary with a higher duties allowance to Level 2 was in the circumstances, to say the least, anomalous. An interim reclassification is by definition a reclassification, albeit a qualified one. It was not a case of the employees in question being required to do additional duties beyond those specified in the old Level 1 Job Description Form. Instead, as the evidence quite clearly indicates, that Job Description Form was amended to put in the extra duties and give it a new classification, albeit on an interim basis. In those circumstances I would have thought that the employees were entitled by virtue of the Award to be paid the rate of pay for the classification specified in the newly registered Job Description Form. The employees were at all material times in a post clearly classified at Level 2 albeit, as I have said, apparently on an interim basis. They thereby ceased to be "substantive" Level 1 officers so called, and, using the parlance which the Respondent seems to adopt, became Level 2 officers. In this context it is important to remember that it is not the employees who are classified but rather the position they occupy.

In the circumstances I consider that these employees could fairly claim, as indeed they do claim, that they occupied posts which were classified at Level 2, at least since October of 1994. Since that time and until the creation of the new substantive posts, as is common ground, each has performed the full range of duties in the new Job Description Form and apparently did so to the satisfaction of the Respondent. Furthermore, in that time they were paid through the full range of increments prescribed for Level 2. In those circumstances, in my view, the Respondent ought not now be heard to say that the employees were and still are Level 1 officers. Certainly, in my view it would be industrially unfair and inequitable for the Respondent now to be heard to say that these people ought to be treated and paid as if they were substantive Level 1 officers. While I do not criticise the Respondent for its recent review of the posts in question, nor its decision to create the new posts, nor its decision to advertise the new posts as being vacant, nonetheless having regard to the history of the posts formerly occupied by the employees they ought in fairness be treated as if they were occupants of Level 2 posts which have now been abolished. Hence they ought to continue to receive remuneration at Level 2 in accordance with what I understand to be established public sector practice of salary maintenance in such circumstances. There is no question of such an arrangement being in conflict with the State Wage Fixing Principles. As I find the employees were performing work which was properly assessed at Level 2, as indeed appears to have been verified by the Respondent's subsequent assessment of the new posts in 1999, which posts were for all intents and purposes, substitutes for the posts occupied by these employees since 1994 or thereabouts. Moreover, the issue in these proceedings is not so much a question of work value but a question of industrial fairness or equity as the agent for the Respondent rightly acknowledged

in his opening remarks. The Applicants ought to be entitled to salary maintenance at Level 2 essentially on the basis that they were occupying Level 2 positions which have since been abolished.

Appearances: Mr E P Rea on behalf of the Applicant

Mr D J Ferguson and with him Mr E A Barlow on behalf of the Respondent.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Civil Service Association of Western Australia
Incorporated

and

The Chief Executive Officer,
Fire & Emergency Services Authority.

No. PSACR 36 of 1999.

6 June 2000.

Amended Order.

HAVING heard Mr E P Rea on behalf of the Applicant and Mr D J Ferguson and with him Mr E A Barlow on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT, effective from the 16th day of July 1999, the salaries payable to Jillian Fitzgerald (L1.9), Denise Davies (L1.9), Allan Grose (L2.2) and John Hall (L2.2) be maintained at a salary equivalent to the current Level 2.5 rate of \$35,057 per annum until such time as the substantive salary payable to them reaches \$35,057 per annum.

[L.S.] (Sgd.) G. L. FIELDING,
Senior Commissioner/Public
Service Arbitrator.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Rail, Tram and Bus Industry Union of
Employees, West Australian Branch

and

Western Australian Government Railways Commission.

No. CR76(1) of 2000.

COMMISSIONER A.R. BEECH.

29 June 2000.

Reasons for Decision.

The matter referred for hearing and determination is the claim by the union that Westrail has not fully observed the terms of the Order in CR2 of 1999 of 30 March 1999 which is as follows—

“THAT Westrail make special arrangements, including the option of transfer, for any locomotive engine driver who has a medical reason or genuine cosmetic reason for wearing a beard, and who has worn a beard for a period of time, which pre-dates the WMC requirement.”

The union claims that the words “special arrangements” should be interpreted to mean that the four remaining locomotive engine drivers affected by the Order in CR2 of 1999 who remain at Kalgoorlie should now be transferred to the depot of their choice.

Westrail objects to and opposes the claim. In addition, Westrail argues that it is beyond the jurisdiction of the Commission to order Westrail to transfer an employee or to deal with matters arising out of the transfer, or non-transfer or an employee. It seeks the dismissal of the claim.

When the matter came on for hearing, the union indicated that the claim is brought on behalf of four employees. Westrail, however, makes the point that of those four nominated employees, only one is covered by the terms of the Order in CR2 of 1999. In this regard, Westrail is clearly correct. The Order in CR2 of 1999 arose out of circumstances where Westrail required locomotive engine drivers at Kalgoorlie on the roster for the nickel smelter to be clean-shaven in accordance with WMC’s requirements for personnel on its smelter site to meet the relevant Australian Standard for the wearing of the issued respirator. The Commission decided that Westrail could not require any locomotive engine driver who wore a beard for a medical, or genuine cosmetic, reason to shave. That is the circumstance of one of the four nominated employees in this matter, Mr Glenn. The other three employees referred to by the union in this matter are persons who, on the Commission’s limited understanding, are persons who Westrail subsequently discovered could not be compelled to wear the relevant respirator due to an issue such as asthma. Those locomotive engine drivers who had a pre-existing medical condition which affected their ability to wear a respirator were not part of the matter before the Commission in CR2 of 1999 and are not covered by its order. If necessary, the circumstances of those employees will need to be addressed by way of a separate application. For the purposes of this Decision, the Commission considers the application as relating only to Mr Glenn.

The union’s claim is that Westrail has not made special arrangements for the transfer of Mr Glenn from Kalgoorlie. In general terms, the union observed that the maintenance by Westrail in Kalgoorlie of a roster in which Mr Glenn was not able to fully participate created difficulties for Mr Glenn and the other locomotive engine drivers. Furthermore, the union submitted that Mr Glenn had a legitimate expectation that he would be transferred because Westrail at least asked him where he would like to be transferred. The union maintains that Westrail has a number of locations where locomotive engine driver positions are vacant. It complains that Westrail has not advertised those positions and locomotive engine drivers at Kalgoorlie have not been able to apply for them. Given that Westrail has not advertised those positions, the union claims that the “special arrangements” referred to in the order in CR2 of 1999 should mean that Mr Glenn is now transferred to a depot of his choice. The union does not see this position as unreasonable because, in the case of Mr Glenn, it would mean that a particular depot would be one over-strength and he has been waiting now for some 13 months for the transfer to come about.

The union refers to other circumstances in Westrail’s history when transfers or relocations had been done by agreement between the parties due to the need for shunters and ground staff to be transferred.

The union called evidence from Mr Brian Curran, the Locomotive Division Secretary of the union in WA. Mr Curran confirmed that the fact that Mr Glenn, and the other locomotive engine drivers referred to by the union, could not perform the full range of duties on the roster in Kalgoorlie has disrupted the roster and caused animosity amongst the locomotive engine drivers. Mr Glenn and the locomotive engine drivers feel aggrieved because of the 12 hour shifts and night shifts which are of necessity performed by them in such a way if there is no equalisation in the roster. Mr Curran advised the Commission that Mr Glenn would prefer to be transferred to Collie. His understanding is that at the time Mr Glenn was interviewed by Westrail, there were no vacancies at Collie. Mr Curran’s evidence is, however, that approximately three or four months after Mr Glenn was interviewed, a locomotive engine driver at Collie retired and has not been replaced, and the position not advertised. Mr Curran’s evidence is therefore that there is a vacancy currently at Collie.

Westrail argues that the words “special arrangements” in CR2 of 1999 cannot be interpreted to mean that employees should now be transferred to the depot of their choice. Even the union itself, when the beards issue was being negotiated, did not request that employees should be transferred to the depot of their choice. Indeed, transfer was seen as being only one of the options which Westrail was obliged to consider. Each case would need to be decided on a case-by-case basis.

Westrail states that although the union complains that Westrail has not advertised what the union terms as vacancies in some depots, that does not mean that Westrail must according to the terms of the order in CR2 of 1999 transfer a person who wishes to go to a particular depot to that depot. Westrail has a responsibility to manage its locomotive operator resources as best it can to meet the tasks required of the business. Earlier this year, Westrail advised Mr Glenn that he was being transferred from Kalgoorlie to Avon. Although Avon is not Mr Glenn's depot of choice, Avon is the depot where Westrail has significant shortages of locomotive engine drivers. Locomotive engine drivers at Avon are currently having to perform extra work over and above what they would normally be rostered to do in order to meet the demands of that depot and it is a sensible and prudent arrangement for Westrail to transfer locomotive engine drivers who are unable to work at their current depot in order to relieve the pressure on the locomotive engine drivers at Avon. The situation at Avon is in marked contrast to the situation at other depots so that even though other depots might be down on numbers, that is of far less a significance than the situation at Avon.

Further, in deciding to transfer Mr Glenn to Avon, Westrail has in fact done something different because he has "jumped the queue" to be transferred out of Kalgoorlie. That is not the usual process in Westrail. The usual process is that the positions are advertised and Westrail's policies would apply on merit to each candidate who applied for the position. The fact that Mr Glenn has been told he will now be transferred is a direct response to Mr Glenn's circumstances of not being able to perform all of the work required on the Kalgoorlie roster and also takes into account Westrail's requirement to increase the numbers of locomotive engine drivers at Avon. Thus, the arrangements made for Mr Glenn are "special arrangements" in that they are not the sorts of arrangements which would have been made in the normal course of events by Westrail.

Conclusion as to merit

The context of this application is the need for those locomotive engine drivers who were the subject of the Commission's Order in CR2 of 1999 to have special arrangements made for them, including the option of transfer. The context also is the Commission's understanding from its involvement in other proceedings that there are a number of locomotive engine drivers who have applied to be transferred out of Kalgoorlie. However, Westrail has a requirement for locomotive engine drivers at Kalgoorlie and in the absence of applications by locomotive engine drivers to be transferred to Kalgoorlie, Westrail finds it difficult to transfer locomotive engine drivers out of Kalgoorlie. The Order in CR2 of 1999 required Westrail to make special arrangements, including the option of transfer. That means arrangements that are special such that if transfer is the appropriate option, then those employees with beards who were unable to be accommodated on the roster would be able to be transferred out of Kalgoorlie. However, it was not the case before the Commission in CR2 of 1999, nor part of the Commission's decision in that matter, that those employees would be able to be transferred to the depot of their choice. As the union admits, Westrail's problem is that they have extreme difficulty in getting locomotive engine drivers to go to Kalgoorlie.

The union argues that "special arrangements" means something different to the normal transfer position. The union argues that, at least in the case of Mr Glenn, if not the other three locomotive engine drivers, Westrail asked Mr Glenn to which depot he wished to be transferred. However, I accept that Westrail is obliged to ask that question in order to take Mr Glenn's preferences into account. There is nothing in the evidence of the fact that the question was asked that indicates that Westrail undertook to transfer Mr Glenn to the depot of his choice. However, the fact that, on the evidence, Westrail has caused Mr Glenn to "jump the queue" to transfer out of Kalgoorlie is a special arrangement from the usual transfer arrangements observed by Westrail. It is a matter of some regret that Mr Glenn's transfer did not occur more promptly following the decision in CR2 of 1999. Nevertheless, it has now occurred and on the evidence is indeed a special arrangement for Mr Glenn.

The issue of the place to which Mr Glenn should be transferred is a second step. As already noted, that was not part of the union's original position and therefore not a part of the

Commission's decision in CR2 of 1999. The Commission is obliged to take into account the evidence before it that the shortage of locomotive engine drivers at Westrail's depots is more severe at Avon than it is elsewhere. The issue then becomes whether the circumstances in which Mr Glenn found himself as a result of not being able to fully perform the range of duties on the Kalgoorlie roster means that the uncontradicted evidence that Westrail needs his services most at Avon should be overridden by the Commission. It cannot be said that the evidence gives an affirmative answer to that question. This is because the evidence regarding the need at Avon is proven in the absence of any contradictory evidence. There is no evidence that Mr Glenn's circumstances mean that he should be required to go to the depot of his choice, as distinct from him merely preferring to go to the depot of his choice.

For those reasons, the union's claim that an Order issue that Mr Glenn be transferred to the depot of his choice is not made out.

It remains to refer only to the issue of jurisdiction, although that is now not a central issue. Westrail refers to s.23(2a) of the *Industrial Relations Act 1979* to argue that the Commission would not have the jurisdiction in any event to make an order in the union's favour because it would be dealing with Westrail's right to transfer employees. That right is a matter about which Standards under the *Public Sector Management Act 1994* exist. Westrail argues, therefore, that s.23(2a) of the Act means the Commission does not have the jurisdiction to issue an order as the union requests.

The evidence before the Commission of the difficulties of the operation of Westrail's transfer system, and the issues regarding transfer which have been brought to the Commission in the past, make it appropriate that at least the following comments are made for future reference. Section 23(2a) does not prevent the Commission from dealing with any matter regarding transfers. It merely prevents the Commission from dealing with those matters regarding transfer to which the Public Sector Standard is applicable (*Southwest Metropolitan College of TAFE v. CSA* (1999) 80 WAIG 7). Therefore, if the complaint of Mr Glenn brought by the union is against Westrail's decision to transfer Mr Glenn to Avon, it is not able to bring that complaint to this Commission if any of the reasons for the complaint are reasons covered by the Public Sector Standard. However, if, for example, in support of a claim that an employee should be transferred to the depot of his or her choice a union brought evidence to the Commission that an express undertaking had been given by the employer to the employee from which it would be inequitable to allow the employer to resile, and that undertaking was not embraced by the Public Sector Standard, s.23(2a) would not operate to remove the jurisdiction of the Commission to deal with such a claim.

Nevertheless, for the reasons which have been set out earlier, an Order will not issue in the union's favour and this application will be dismissed.

Appearances: Mr R. Wells and with him Mr B.J. Curran on behalf of The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch.

Mr D. Johnston on behalf of the Western Australian Government Railways Commission.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

The Australian Rail, Tram and Bus Industry Union of
Employees, West Australian Branch

and

Western Australian Government Railways Commission.

No. CR76(1) of 2000.

29 June 2000.

Order.

HAVING HEARD Mr R. Wells and with him Mr B.J. Curran on behalf of the Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch and Mr D. Johnston

on behalf of Western Australian Government Railways Commission, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:
 THAT the application be dismissed.

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

WESTERN AUSTRALIAN
 INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Peter Why
 and

Chesterton International (WA) Pty Ltd t/a Chesterton
 International.

No. CR 364 of 1999.

COMMISSIONER A.R. BEECH.

28 June 2000.

Reasons For Decision—Jurisdiction.

In this matter Mr Why claims that he was an employee of the respondent from April 1988 to August 1999. He claims that he is entitled, pursuant to s.8 of the *Long Service Leave Act 1958* to payment for long service leave entitlements accrued over a quarter of his employment amounting to approximately \$14,639.00. The respondent rejects the claim. The respondent argues that Mr Why was not an employee. It also raises an issue as to whether or not there was an agreement that as a Unit Trust Holder, he would not claim long service leave. The parties were unable to reach an agreement at the conference. The matter was therefore referred for hearing and determination pursuant to s.44(9) of the *Industrial Relations Act 1979* and both parties expressly agreed that the Commission could decide the issue on the basis of the written submissions of the parties.

Does the Commission have jurisdiction?

The respondent submits that the Commission's jurisdiction to deal with industrial matters is limited to those matters where, at the time of the application is made, the relationship of employer/employee exists, or is expected to come into existence in the future, or did exist and is expected to be restored in the future. It submits that this application was made by Mr Why after he ceased being an employee and the employer/employee relationship is not expected to be restored in the future.

Mr Why brings his application pursuant to s.44(7)(a)(iii) of the Act. By that section the Commission may summon any person to attend, at a time and place specified in the summons, at a conference before the Commission. The power of the Commission may be exercised on the application of an employee in respect of a dispute relating to his entitlement to long service leave. The application brought by Mr Why is a dispute relating to his entitlement to long service leave. In this case, it is an entitlement to long service leave which Mr Why says arises out of the provision of the *Long Service Leave Act 1958*.

By s.7(1a) of the Act a matter relating to the refusal or failure of an employer to allow an employee a benefit under his contract of service is and remains an industrial matter for the purposes of this Act even though their relationship as employee and employer has ended. However, on the information before the Commission, Mr Why did not have any written terms of employment. If that is accepted, then Mr Why did not have an express term of his contract of employment that he would be entitled to long service leave and s.7(1a) does not apply.

This brings into focus an issue which has not been the subject of submissions from the parties and it goes to the issue of jurisdiction. It arises as follows. It appears to be common ground that Mr Why claims his entitlement to long service

leave under the *Long Service Leave Act 1958*. Section 11 of part IV of that Act provides as follows—

Part IV—Enforcement of the provisions of the act

11. Industrial magistrate's courts

- (1) An industrial magistrate's court has jurisdiction to hear and determine all questions and disputes in relation to rights and liabilities under this Act, including without limiting the generality of the foregoing, questions and disputes—
- (a) as to whether a person is or is not an employee, or an employer, to whom this Act applies;
 - (b) whether and when and to what extent an employee is or has become entitled to long service leave, or payment in lieu of long service leave;
 - (c) as to the ordinary rate of pay of an employee;
 - (d) as to whether the employment of the employee was or was not ended by an employer in order to avoid or to attempt to avoid liability for long service leave; and
 - (e) with respect to a benefit in lieu of long service leave under an agreement made under section 5.
- (2) Jurisdiction granted under subsection (1) is exclusive of any other court except where an appeal lies to that other court.

The written submissions of the parties reveal that the issues between Mr Why and the respondent fall precisely within ss.11(a) and (c). By s.11(2) the jurisdiction of the Industrial Magistrate's court is exclusive of any other court. I have little doubt that for the purposes of s.11 the Commission is a court (see *Helm v Hansley Holdings* (1999) 79 WAIG 1860 at 1861). It follows that a question whether a person has an entitlement to long service leave under the *Long Service Leave Act 1958* is to be determined by an Industrial Magistrate, and not the Commission. A claimed entitlement to long service leave that arises from the terms of the contract of employment, or possibly the Long Service Leave General Order, would not seem to encounter the same difficulties when brought to the Commission.

This point is not one raised directly by either party. It does, however, indirectly arise from the issue of jurisdiction raised by the respondent in its written submissions.

The Commission now requests the parties to examine the issue and adjourns this application for that purpose. The parties are requested to advise the Commission of their respective positions by 30 July 2000.

Appearances (by way of written submissions)—

Mr R. Carthew (of counsel) on behalf of the applicant.

Mr A. Randles on behalf of the respondent.

PROCEDURAL DIRECTIONS AND ORDERS—

WESTERN AUSTRALIAN
 INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Mario De Silva Antonio

and

Ursula Frayne Catholic College.

Application No. 2272 of 1998.

CHIEF COMMISSIONER W. S. COLEMAN.

30 June 2000.

Order.

HAVING HEARD Mr Kucera (of counsel) on behalf of the applicant and Ms Britto on behalf of the respondent on the

application for an adjournment for the hearing and determination of the matter lodged pursuant to section 29(1)(b)(i) of the Act and the application made in response to that for the matter to be dismissed under section 27(1)(a) of the Act.

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby determines that both the applications be dismissed and that the matter be set down for hearing and determination.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Nicola Tracey Edwards

and

Jeanswest Corporation Pty Ltd.

No. 1079 of 1999.

COMMISSIONER J H SMITH.

7 July 2000.

Order.

Having heard Ms M Wolstenholme of counsel on behalf of the applicant and Ms Sue La Ferla as agent for the respondent on 6 July 2000, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

- (1) THAT the applicant shall give discovery on affidavit of the documents listed in a Schedule within her possession custody or power by 20 July 2000 and state a time and place at which the documents may be inspected and copied.
- (2) THAT the respondent shall give discovery on affidavit of the documents listed in a Schedule within its possession custody or power by 20 July 2000, and state a time and a place at which the documents may be inspected and copied, except that if an affidavit cannot be sworn by 20 July 2000, the respondent is to provide discovery by an unsworn affidavit by aforementioned date and to serve the applicant with a sworn copy of the affidavit as soon as possible.

(Sgd.) J. H. SMITH,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Lewis John Dilkes

and

Evans Deakins Engineering Pty Ltd.

T/A Vaughan Castings.

No. 1287 of 1999.

COMMISSIONER J F GREGOR.

20 June 2000.

Order.

WHEREAS on 20 August 1999, Lewis John Dilkes applied to the Commission for an order pursuant to Section 29 of the *Industrial Relations Act 1979*; and

WHEREAS on 2 December 1999, the Commission conducted conciliation proceedings involving the parties and following the matter was listed for hearing and determination for 17 May 2000; and

WHEREAS on the 12 May 2000 the Commission was advised that the matters were being settled and that a Notice of Discontinuance may be filed within 21 days; and

WHEREAS by 16 June 2000 no Notice of Discontinuance had been filed and the Commission decided to discontinue the proceedings;

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

THAT the application be, and is hereby, discontinued.

(Sgd.) J. F. GREGOR,

Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Lewis John Dilkes

and

Evans Deakin Engineering Pty Ltd T/A Vaughan Castings.

No. 1287 of 1999.

COMMISSIONER J F GREGOR.

27 June 2000.

Order.

WHEREAS on 20 June 2000, the Commission issued an order discontinuing this application; and

WHEREAS the said order was issued contrary to the provisions of Section 35 and is therefore a nullity; and

WHEREAS the Commission has decided to issue an order retiring the order of 20 June 2000

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

THAT the order issued on 20 June 2000 discontinuing the application be, and is hereby, cancelled.

(Sgd.) J. F. GREGOR,

Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Kapsanis Emmanuel

and

Goldspace Pty Ltd t/a Paraburdoo Inn

(No. 1465 of 1999)

COMMISSIONER J F GREGOR.

27th June 2000.

Order.

WHEREAS by this application Goldspace Pty Ltd t/a Paraburdoo Inn has applied to the Commission for further and better discovery of documents relating to the claim by Kapsanis Emmanuel dated 15 June 2000; and

WHEREAS on 16 June 2000 the solicitor's for the applicant gave a verbal undertaking to provide the requested documentation by 23 June 2000; and

WHEREAS by 23 June no documentation had been provided by the applicant and on 26 June 2000 the respondent sought in writing formal orders and the Commission decided to issue an order *ex parte*; and

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

THAT the applicant provide to the respondent the following documentation within 2 days of the date of this order—

1. documentation relating to the applicant's income following the cessation of his employment with the respondent
2. all employment applications made by the applicant following the cessation of his employment with the respondent
3. the responses received by the applicant to any employment applications he has made since the cessation of this employment with the respondent.

(Sgd.) J.F. GREGOR,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Gina A Alex
and

Graphique Nominees Pty Ltd t/a Adlink.

No. 47 of 2000.

COMMISSIONER J F GREGOR.

14 June 2000.

Order.

WHEREAS on 2 June 2000, the Commission conducted a conference to deal with an application for production of documents pursuant to regulation 80(i) of the *Industrial Relations Commissions Regulations 1985*; and

WHEREAS after hearing Mr Glen Bartlett of Counsel, on behalf of the applicant and Mr Rob Ioppolo 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—

THAT the respondent provide to the applicant, within 14 days, copies of all material, documents and records, in whatever form, that are in the respondent's possession or under the respondent's control that relate to—

- (a) The dismissal of the applicant;
- (b) The reduction of the applicant's salary by \$10,000.00;
- (c) Offers of employment to employees of the respondent by Formidable Pty Ltd trading as Adlink JLS; and
- (d) Minutes of Board Meetings and other documents relating to the merger of Graphique Nominees Pty Ltd with JLS Pty Ltd insofar as they relate to staffing issues, or the proposed date of the merger, or both.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Iain Macgregor Hepburn
and

Rimtec Pty Ltd.

No. 63 of 2000.

COMMISSIONER J H SMITH.

30 June 1999.

Order.

Having heard Mr D Schapper of counsel on behalf of the applicant and Mr J Long of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders by consent—

1. Each party give informal discovery by serving any further list of documents by 14 July 2000
2. Inspection of documents shall be completed by 21 July 2000.
3. The parties shall exchange witness statements, annexing any documents to be tendered, in relation to any evidence on which they propose to rely no later than 7 days prior to the hearing.
4. This matter is listed for 5 days on a date to be fixed in September 2000.

(Sgd.) J. H. SMITH,

[L.S.]

Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Robyn Lynette Keddie
and

Consolidated Business Media Pty Ltd.

No. 85 of 2000.

COMMISSIONER J H SMITH.

7 July 2000.

Order.

Having heard Mr G Ferguson on behalf of the applicant and Mr G Millar 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 provide to the Applicant by 14 July 2000, further and better particulars of claim.

1. A list of all stands sold by the Applicant by stand number and company name.
2. Provide details of the two stands where legal action is pending, such detail should include—
 - (a) The number of the stand and company name
 - (b) Cost of the stand
 - (c) Amount paid by company for stand
 - (d) Amount owing

(Sgd.) J. H. SMITH,

[L.S.]

Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Alan P Gilbride

and

Fast Net Publishers Group

No. 94 of 2000.

Sharyn Hamilton and
Insurance Inventory Solutions

and

Fast Net Publishers

No. 177 of 2000.

Tim Smith

and

Fastnet Publishers Group

No. 231 of 2000.

Karina Smith

and

Fast Net Group.

No. 232 of 2000.

COMMISSIONER P E SCOTT.

3 July 2000.

Order.

HAVING heard the Applicants on their own behalves and there being no appearance on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the name of the Respondent in each application shall be amended to read, "Neil Tucker and Adrian Scott Thompson trading as Fastnet Publishers".

(Sgd.) P. E. SCOTT,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Sandra Violet Dehaan

and

Golden Hill Nominees Pty Ltd trustee for the Dehaan
Family Trust.

No. 104 of 2000.

COMMISSIONER J H SMITH.

21 June 2000.

Order.

HAVING heard Ms Victoria Bladen of counsel for the Applicant and the Respondent on his own behalf the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

- (1) THAT the Respondent shall give discovery on affidavit of the documents listed in paragraph (2) within his possession custody or power within 7 days of the date of this Order, and state a time and place at which the documents may be inspected and copied;
- (2) (a) Time and wages records relating to the Applicant's employment between 23 August 1999 to 27 December 1999, including any reconstructed ledger of cash payments made to the Applicant as wages;
- (b) Books of the Respondent's business including any computer records, between 23 August and 7 March 2000;

(c) Sale purchase agreement including a guarantee agreement signed by the Applicant;

(d) Any documents that relate to the takeover of the Respondent's business by the franchisors;

(Sgd.) J. H. SMITH,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Craig O'Keeffe

and

Flight Centre Limited ACN 003 377 188.

No. 150 of 2000.

COMMISSIONER J H SMITH.

27 June 2000.

Order.

Having heard Mr G Bartlett of counsel on behalf of the applicant and Mr J Beedham as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. The respondent within 7 days of the date of this order file in the Commission and serve on the applicant further and better particulars of its notice of answer and counter proposal;
2. The applicant and the respondent file and serve witness statements by no later than 10 July 2000;
3. The applicant and the respondent provide an informal list of discoverable documents by no later than 3 July 2000 and allow inspection of those discoverable documents from 5 July 2000; and
4. The applicant and the respondent advise each other by close of business on 12 July 2000 which witnesses they require to be available for cross-examination.

(Sgd.) J. H. SMITH,
Commissioner.

[L.S.]

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Zora Banovic

and

4 Australia Pty Ltd t/a.

The Wheatfield Bakehouse.

No. 189 of 2000.

COMMISSIONER J F GREGOR.

5 July 2000.

Order.

WHEREAS the applicant in this matter has applied to the Commission for production of documents in relation to the claim; and

WHEREAS on 4 July 2000 the Commission has decided that an order for production of documents will now issue.

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

THAT the respondent supply to the applicant the following information—

- (1) Documentation supporting the comments of Mr Richard Sciano in a letter of WAIRC dated 3 March 2000.

- (2) A copy of the Bakery lease with Ray White, as per the letter of Anthony Spirella, Property Manager with Ray White Commercial, dated 24 March 2000.
- (3) A Copy of the account and receipt for the advertisement, as found in The West Australian Newspaper, dated Saturday 10 and 17 July 1999, advertising the bakery shop for sale.
- (4) The aforementioned original extracts are to be delivered by 10:00am on Friday 21 July 2000 to the Registry of this Commission and such extracts allowed to be sighted and photocopied by the applicant.

[L.S.]

(Sgd.) J. F. GREGOR,
Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

John Phillip Arbuckle

and

Eon Pty Ltd.

No. 498(1) of 2000.

16 June 2000.

Order.

WHEREAS an application was lodged in the Commission pursuant to section 29 of the *Industrial Relations Act, 1979*;

AND WHEREAS both parties agreed that the name of the respondent should be amended to reflect the true employer of the applicant, that is, Eon Pty Ltd;

AND HAVING HEARD Mr J. Arbuckle on behalf of himself as the applicant and Mr W. Medford on behalf of Avanti Group Pty Ltd and Eon Pty Ltd;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, and by consent, hereby order—

THAT Eon Pty Ltd be substituted for Avanti Group Pty Ltd as the respondent in this application.

[L.S.]

(Sgd.) A. R. BEECH,
Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Kelly Ann Baker

and

Raunchy Promotions.

No. 575 of 2000.

19 June 2000.

Interlocutory Order.

HAVING heard Ms K A Baker on her own behalf and Mr S Zielinski 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 name of the Respondent be and is hereby amended to "Tussle Pty Ltd as trustee for the Tussle Unit Trust trading as Raunchy Promotions".
2. THAT the Applicant file duly completed a Declaration of Service (Form 2) within seven (7) days from this date verifying service of the Notice of Application upon the Respondent failing which further proceedings are to be stayed until further order.

[L.S.]

(Sgd.) G. L. FIELDING,
Senior Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Antonio Piomalli

and

Skyglow Holdings Pty Ltd.

As Trustee For The Computerworld Trust
Trading As PCU Home & Business Computer Centre.

No. 579 of 2000.

COMMISSIONER P E SCOTT.

20 June 2000.

Order.

HAVING heard Mr B Walker on behalf of the Applicant and Ms N Epis, 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 Notice of Application, filed on the 20th day of April 2000, be amended on Form 1 by deleting the words "Unfair Dismissal" and inserting the words "denied contractual benefits".

[L.S.]

(Sgd.) P. E. SCOTT,
Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Jennifer Gay Strickland

and

Uniting Church Australia—Trinity Church.

No. 590 of 2000.

COMMISSIONER J F GREGOR.

27th June 2000.

Order.

WHEREAS by this application Uniting Church Australia—Trinity Church applied to the Commission for further and better particulars of the claim by Jennifer Gay Strickland, dated 23 May 2000; and

WHEREAS on 27 June 2000 the respondent sought orders from the Commission for those further and better particulars and the Commission decided to issue an order *ex parte*; and

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

THAT the applicant provide to the respondent the following further and better particulars within 7 days of the date of this order—

1. Describe every fact, matter or thing that supports your allegation that you were harshly, oppressively and unfairly dismissed
2. Provide details of the remedy/remedies you seek

[L.S.]

(Sgd.) J. F. GREGOR,
Commissioner.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Industrial Relations Act 1979.

Western Australian Government Railways Commission

and

Western Australian Rail, Tram and Bus Industry
Union of Employees, Western Australia Branch.

No. C 147 of 2000.

COMMISSIONER J H SMITH.

22 June 2000.

Order.

Having heard Mr Johnson on behalf of the Applicant and Mr Wells on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby orders that—

- (1) Inspections by the Commission and the parties of shunting operations at Narngulu, Kwinana and West Merriidan are to take place on 4 July 2000 and 24 July 2000;
- (2) The Applicant and Respondent to provide mutual discovery of all relevant documents within their possession, custody or power by close of business 3 July 2000;
- (3) The Applicant to file and serve on the Respondent witness statements of its evidence in chief by 4 August 2000;
- (4) The Respondent to file and serve on the Applicant witness statements of its evidence in chief by 11 August 2000;
- (5) The matters referred to in the Schedule attached to the memorandum for hearing and determination made by the Commission on 22 June 2000 be listed for hearing on 16 and 17 August 2000.

(Sgd.) J. H. SMITH,
Commissioner.

[L.S.]

NOTICES— Appointments—

APPOINTMENT

PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(1) of the Industrial Relations Act, 1979, hereby appoint, subject to the provisions of that Act, Senior Commissioner G. L. Fielding to be the Public Service Arbitrator for a period of two years from the 31st day of May 2000.

Dated the 31st day of May 2000.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

APPOINTMENT

PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(6) of the Industrial Relations Act, 1979, hereby terminate the appointment of Commissioner J.F. Gregor as Public Service Arbitrator made under section 80D(1) of the Act with effect from the 31st day of May 2000,

and appoint Commissioner J.F. Gregor to be an additional Public Service Arbitrator under section 80D(2) of the Act for a period of six months from 1st June 2000.

Dated the 31st day of May 2000.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

APPOINTMENT

RAILWAY CLASSIFICATION BOARD

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to section 80O(3) of the Industrial Relations Act, 1979, having consulted with the Minister and the Union, hereby terminate the appointment of Commissioner A.R. Beech and pursuant to section 80N(2) appoint Commissioner J.H. Smith to be Chairperson for a period of two years with effect from the 2nd day of June, 2000.

Dated the 1st day of June, 2000.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

[L.S.]

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the Industrial Relations Act, 1979, hereby appoint, subject to the provisions of that Act, Commissioner S. J. Kenner to be an additional Public Service Arbitrator for a period of one year from the 31st day of May 2000.

Dated the 31st day of May 2000.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

The Industrial Relations Act 1979.

I, the undersigned, the HONOURABLE JUSTICE GEOFFREY ALEXANDER KENNEDY AO, Acting Chief Justice of Western Australia, in exercise of the powers conferred on me by s 85(6) of the *Industrial Relations Act 1979* (WA), DO HEREBY NOMINATE THE HONOURABLE NICHOLAS PAUL HASLUCK, a Judge of the Supreme Court of Western Australia, to be an Acting Ordinary Member of the Western Australian Industrial Appeal Court from 1 August 2000 to 31 August 2000 or until the completion of the hearing and determination of any proceedings his Honour may be participating in at the expiration of that period.

As witness my hand this (9th) day of June 2000.

(Sgd.) G. KENNEDY,

[L.S.] Acting Chief Justice of Western Australia.